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SYMPOSIUM ON JULIAN NYARKO, "GIVING THE TREATY A PURPOSE: COMPARING THE DURABILITY OF TREATIES AND EXECUTIVE AGREEMENTS"

SENATE TREATMENT OF SELECT INTERNATIONAL AGREEMENTS, 2013–2018

*Margaret L. Taylor**

When I finished reading Julian Nyarko's "Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements," I found my mind wandering through memories of the more than five years I spent working on Capitol Hill as Counsel for the Senate Foreign Relations Committee (SFRC)—a role that often required me to figure out how best to preserve the constitutional prerogatives of Congress in the face of the various types of international agreements the executive branch produced. This essay recounts my impressions of how the Senate handled different agreements in the 2013–2018 timeframe—Article II treaties, the Paris Climate Agreement, and the Iran Nuclear Agreement. Unlike Professor Nyarko's ambitious and impressive work to categorize and statistically analyze the durability of Article II treaties and executive agreements—which I applaud and find useful—this essay is modest in purpose. I contend that how Congress handles different types of agreements is largely a product of specific political dynamics—including political ownership, policy entrepreneurism, and electoral risk—that can be unpredictable. Because of these dynamics, the differences that Nyarko reveals regarding the durability of Article II treaties and executive agreements are unlikely to produce a significant change in official practice.

Article II Treaties

Even before I showed up in the offices of the SFRC in February 2013, a toxic stage had been set for Senate consideration of treaties. Just a few months before, former Senator Bob Dole had been wheeled onto the floor of the United States Senate to witness a victorious vote—or so he thought—to consent to ratification of the UN Convention on the Rights of Persons with Disabilities. It did not happen. The treaty went down to defeat by a vote of 61–38, well short of the sixty-seven votes needed. The defeat was a shock. Committee Chairman John Kerry had anticipated quick passage because the treaty was much less controversial than the UN Convention on the Law of the Sea, which he had unsuccessfully attempted to get through the Senate earlier in the Congress.

Why did the Disabilities Convention fail? All Democratic and Independent Senators voted in favor of the treaty. But an intense campaign from outside interest groups opposed to the treaty, most notably a homeschooling advocacy association, was able to exert enough pressure that several Republican Senators who had signaled their support changed their minds at the last minute. The principal argument against the treaty was that it would interfere with parents' ability to homeschool their children. The treaty has no such impact, but

* *Senior Editor,* Lawfare *and Fellow in Governance Studies, the Brookings Institution; Deputy Chief Counsel for the Senate Foreign Relations Committee (2013–15); and Chief Counsel and Deputy Staff Director for the Democratic side of the Committee (2015–18).*

these outside activists saw an opportunity to make the treaty into a "wedge" issue.[1] Other arguments against the treaty were advanced as well, including that it would infringe on U.S. sovereignty. Finally, in the background was the view among some conservatives that the United States should generally not pursue participation in human rights treaties.

When I began working for the SFRC at the start of the 113th Congress, there was a question of whether it was even worth taking up another major treaty or giving up altogether in the toxic political environment. Then-Secretary of State John Kerry asked the new chairman to take another run at Senate approval—perhaps it would be possible to put the opposing arguments to rest by addressing them squarely in the resolution of advice and consent. We launched another all-out campaign to persuade reluctant Republican Senators to vote yes. The committee held two hearings featuring thirteen witnesses. Secretary of State John Kerry testified. A resolution of advice and consent containing three reservations, eight understandings, and two declarations was carefully drafted to satisfy the arguments in opposition to the treaty.

It was not enough. Although the committee was able to put to rest the homeschool issue, a raft of other strained arguments against ratification now saw their day in the sun. Although the treaty could pass committee it could not garner enough votes on the floor of the Senate. The United States Senate would not be providing advice and consent to any major treaties any time soon.

More obscure treaties were a different matter. The attitude among committee staff was that we wanted to do everything possible to "keep the dream alive"—the dream being the viability of treaties going forward. We had success with a modest number of treaties that we judged could pass the Senate unanimously (meaning the majority leader did not have to commit floor time to their consideration). These treaties numbered seventeen in total—four in the 113th Congress, seven in the 114th Congress, and six in the 115th Congress. They addressed various narrowly drawn issues like bilateral extradition, mutual legal assistance, maritime boundaries, management of fisheries on the high seas, illegal fishing, access to printed works, management of plant genetics, and business-oriented private international law matters. One other treaty was considered on the Senate floor during this time period—the treaty approving Montenegro's accession to the North Atlantic Treaty Organization, which passed the Senate in March 2017 by a vote of 97–2.

The amount of effort and political capital it took to push these treaties through the Senate should not go unstated. Both the Chairman and the Ranking Member of the committee had to agree to prioritize passage of these treaties—and they did. It took considerable time, effort, and genuine dedication of committee staff members on both sides of the political aisle to push them through. We did all we could to see that these treaties flew below the political radar of outside groups so they would not become a "wedge" issue. These accomplishments may seem modest in the long view of history, but we were proud of what we accomplished in a poisonous, partisan atmosphere in the Senate.

Executive Agreement: The Paris Climate Agreement

There was a rather striking lack of action on the part of Congress with respect to the Paris Agreement, which the Obama Administration had negotiated with 195 other countries under the auspices of the UN Framework Convention on Climate Change. Although a group of ten Democratic Senators attended a portion of the Conference of the Parties in Paris to show their support for the negotiations,[2] Congress took no contemporaneous

[1] Michael Farris, who led the homeschoolers' advocacy in opposition, called the treaty an "ideal 'wedge issue' for future political campaigns." *See* Michael Kranish, *A Lesson for Bob Dole: Old Rules No Longer Apply*, Boston Globe (Mar. 24, 2013).

[2] *See* Timothy Cama, *Senate Dems Go to the Paris Climate Talks*, The Hill (Dec. 4, 2015).

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legislative action regarding the Paris Agreement negotiations. No serious consideration was given by the leadership of the SFRC to taking up the Agreement in the full committee.[3]

Ahead of the negotiations, there were some hints of interest in asserting congressional institutional prerogatives. Republican members of the Senate Environment & Public Works Committee indicated they would scrutinize any deal struck in Paris and warned they would block President Obama's 2016 budget request for US$3 billion pledged to the UN Green Climate Fund.[4] But neither happened. There was one SFRC subcommittee hearing five weeks prior to the finalization of the text of the agreement, at which the chairman stated that "any deal negotiators reach at the talks in Paris in December needs to go through Senate ratification."[5] That never happened.

Why did Congress end up institutionally uninterested in a major multilateral instrument that involved 196 countries?

Part of the answer is that the Obama Administration successfully designed the process and substance of the agreement to preclude any role for Congress. The Administration had internalized the lessons of the Law of the Sea Convention and the Disabilities Convention as well as the Kyoto Protocol, which the Senate rejected principally because it set binding emissions targets for wealthy countries, including the United States. The text of the Paris Agreement was negotiated to avoid any significant, substantive binding legal commitments that would have arguably required Senate approval.

Politically speaking, the Paris Agreement was a mixed bag. While Republicans generally opposed the talks and the final agreement, there was no strong lobbying constituency advocating for its demise. In addition, some members from states likely to be impacted by climate change, like Florida, could have suffered in their next election if their party were blamed for tanking the agreement. It was much easier for those concerned with these issues to take action on the Clean Power Plan,[6] which was a related but separate Obama Administration policy announced in June 2014 aimed at combating climate change by lowering the carbon dioxide emitted by power generators. Acting on the Clean Power Plan resonated more with constituencies favoring fossil fuel production than did criticizing the Paris Agreement.

For all of these reasons, there was never any strong substantive, political, or institutional impetus for the Senate to require review or oversight of the Paris Agreement. Democrats in the Senate all supported the Paris Agreement substantively and saw no upside to giving opponents a platform to undermine it. Republicans could oppose it individually with whatever intensity suited them and avoid blame for undermining it.

Non-Legally-Binding Political Commitment: The Iran Agreement

The most high-profile agreement the Senate considered during my time there was not, technically, an "agreement" but, rather, a set of nonbinding political commitments. The Obama Administration's Joint Comprehensive

[3] Because the Senate Foreign Relations Committee has traditionally operated on the basis of comity, in which the Chairman obtains the agreement of the Ranking Member before taking up an item at a business meeting, highly partisan issues on which there is unlikely to be space for agreement—like climate change—tend not to be addressed legislatively in committee.

[4] *Examining the International Climate Negotiations: Hearing Before the S. Comm. on Env't & Public Works*, 114th Cong. (2015) (majority statement).

[5] *2015 Paris International Climate Negotiations: Examining the Economic and Environmental Impacts: Hearing Before the Subcomm. on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy of the S. Comm. on Foreign Rel.*, 114th Cong. (2015).

[6] The Clean Power Plan was one component of the plan to meet the United States' nationally determined contribution in the Paris Agreement. The Senate passed two resolutions seeking to block parts of the Plan. President Obama promised to veto the resolutions, but they never made it to his desk. *See* Carol Davenport, *Senate Votes to Block Obama's Climate Change Rules*, N.Y. Times (Nov. 17, 2015).

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Plan of Action (JCPOA) with Iran, the United Kingdom, France, Russia, China, and Germany was considered President Obama's flagship accomplishment on foreign policy.

Since 2009, Congress had passed a series of mandatory sanctions bills addressing Iran's nuclear program and other issues, culminating in the enactment in 2011 of Section 1245 of the National Defense Authorization Act for Fiscal Year 2012, which required foreign financial institution sanctions on any who failed to significantly reduce crude oil purchases from Iran. On Capitol Hill, the widely held view was that these sanctions brought Iran to the negotiating table. Because of this history, many members of Congress felt significant ownership over the Iran nuclear issue.

Throughout the negotiations of the Joint Plan of Action and the subsequent JCPOA, there was intense interest on Capitol Hill in what the Obama Administration was doing. But little information flowed from the Administration about what was being negotiated. The sense on Capitol Hill was that the Obama Administration minimized information to Congress for fear that such information would be used to criticize the talks publicly and derail them. It was clear from the beginning to those working on the issue on Capitol Hill that the vast majority of Republican members would oppose a deal negotiated by the Obama Administration.

That the agreement would not be submitted to the Senate as an Article II treaty but instead formulated as a nonbinding "plan of action" was also not a surprise. In 2001, a Senate Foreign Relations Committee report on treaties stated that "[a] perennial concern of Senators has been to insure that the most important international commitments are made as treaties rather than executive agreements."[7] But by 2015, in the wake of a difficult fight over the Strategic Arms Reduction Treaty II in 2010, followed by the multiple failed attempts to pass the Law of the Sea Convention and the Disabilities Convention, the idea that President Obama would submit a treaty to the Senate on the Iran issue was laughable. Doing so would have ensured its demise.

Most Senators were not particularly perturbed about this situation even if it meant foregoing institutional prerogatives on ownership of the Iran issue and the consideration of treaties. Why? For Democrats, in varying degrees of intensity, the prospect of voting on a complicated, high-profile, high-stakes issue that could be used against them by political opponents in their state elections was unappealing. For Republicans, in varying degrees of intensity, the prospect of being able to criticize the content of the Agreement and the President's end-run around the Senate's treaty powers—without being responsible for killing the Agreement and the uncertain political consequences that might follow—was appealing. For many months, it seemed like no formal congressional action would be taken regarding the Iran Agreement once it was complete.

Why did that change? The Iran Nuclear Agreement Review Act of 2015 (INARA) was the product of the policy entrepreneurism of then-Chairman of the Senate Foreign Relations Committee, Bob Corker. Though a fairly modest assertion of institutional prerogatives, INARA provided a review period for Congress to consider the final agreement; created the possibility of an up-or-down vote; and outlined oversight measures for its implementation. The Chairman and Ranking Members instructed the SFRC staff to negotiate a compromise text that would obtain the greatest number of votes in committee.

So we did. We knew that all or most Republicans would oppose the final Agreement, and we knew that the idea of an up-or-down vote that was sure to "kill" the Agreement would not garner much Democratic support. So we sought to structure the vote process in a way that would not *necessarily* kill the deal but, rather, leave the outcome uncertain. In the negotiations, we proposed a unique review mechanism that would have disallowed implementation of the agreement only if there were at least sixty Senators who opposed it. This proposal would not have

[7] S. Comm. on Foreign Rel., 106th Cong., Treaties and Other International Agreements: A Study Prepared for the Committee on Foreign Relations, United States Senate, by the Congressional Research Service, Library of Congress, S. Prt. 106–71, at 26 (2001).

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allowed Republicans to kill the deal unilaterally. We also included text providing stringent oversight of the implementation of any deal.

A number of Democratic offices were reluctant to support the bill because they were concerned an up-or-down vote might kill the Agreement. In the end, however, the bill passed the committee unanimously and passed the Senate with the support of all Democrats. Why? Among other things, it was difficult for these Senators to resist institutional arguments by supporters of the bill that it was appropriate and necessary for Congress to assert ownership over both the Iran issue generally and an international agreement so central to U.S. national security.

Securing bipartisan agreement on a controversial bill in committee is not enough to ensure its passage through the full Senate. The most important factor in whether such a bill will pass the Senate is whether the Majority Leader decides to give it precious time on the Senate floor for consideration. Why did the Republican majority leader allow INARA to move forward to consideration on the floor? There is no definitive way of knowing exactly why a Senator decides to do something, and there are almost certainly multiple reasons. But it made sense to those working on the issue that requiring Democrats from purple states to take a difficult vote in support of President Obama's Iran Agreement—even if the vote did not "kill" the Agreement—could be useful for Republicans because such a vote could be used against those Democrats in future elections. The passage of INARA, and the later up-or-down vote on the Agreement, reflected a situation in which the political landscape aligned with efforts to assert the Senate's institutional prerogatives.

Conclusion

How treaties, executive agreements, and political commitments made by Presidents are treated in the Senate in any given congressional session depends on many factors—most of them political in nature. In this essay, I have sought to record some details of what it was like to confront these issues in the 2013–18 timeframe. Political ownership of an issue, policy entrepreneurism by an individual member, and electoral politics all play a key role. As the executive branch innovates ways to avoid uncertain congressional consideration of agreements, the legislative branch may selectively—and often unpredictably—respond with its own oversight innovations.

The differences that Nyarko reveals regarding the durability of Article II treaties and executive agreements are unlikely to change the nature of these political considerations even as they produce a seemingly ironic result—that select obscure and narrowly drawn issues can be dealt with as treaties, but high-profile issues of major import will be less legally binding, less durable, and more subject to the whims of who holds political power in which branch of government. Nyarko's essay could provide the seeds for arguments that could produce a different result—for example, that nondurable outcomes have a significant negative impact on U.S. national security. For any such arguments to be effective, however, they would need to be specific and able to adapt to the ever-changing domestic political landscape.

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