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I. INTRODUCTION

The prospect of future ratification of the Convention Against Torture, the Covenant on Civil and Political Rights and the Covenant on Social, Cultural and Economic Rights emerges in a context where ratification in general, of the human rights instruments, in the United States is a politically rare phenomenon.¹

Optimists in the human rights community viewed the Genocide Convention as a key to the log jam since ratification, or should I say non-ratification, has been indelibly linked to the Genocide Convention. The Genocide Convention after some thirty-seven years of frustration was finally given the advice and consent of the United States Senate.² What is a matter of debate may be the substantive worth of United States ratification of the Convention forty years after it opened for signature and adoption. What is not debatable is

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¹ See generally, Boyle, The Hypocrisy and Racism Behind The Formulation of U.S. Human Rights Foreign Policy: In Honor of Clyde Ferguson, in 16 Social Justice 71-93 (1981) [hereinafter Boyle]. According to Boyle, the United States “has absolutely one of the worst records among all of the so-called Western Liberal Democracies when it comes to the ratification of the major multilateral human rights instruments.” Id. at 71.

the psychological relief that the Genocide "monkey" is now off the back of the Department of State, the United States Government and the human rights community. The Genocide Convention, but for its unfortunate history, should have been a "motherhood and apple pie" convention, i.e., one that should have evoked little substantive concern, and even less juridical apprehension.

We have a Genocide Convention. What does that tell us about the politics of successful ratification? The lesson may be a dismal one. The Genocide Convention was basically gutted to get it through. Leading democratic figures have expressed dismay at the willingness of the human rights community to get the convention through at almost any price. They view the sovereignty limitation on the Convention as an unprincipled concession to the right-wing minority in the Senate. Moderate Republicans, although less voluble, feel decided unease about that and indeed other limitations attending the package of reservations, declarations and understandings.

As a representative of Amnesty International, I have been presently in the midst of another ratification battle: The Convention Against Torture and other forms of cruel, unusual or degrading treatment. This should be another "motherhood and apple pie" convention. Even Senator Helms disapproves of torture: Who does not? Yet in the hearings, Senator Helms described the Convention as a "skunk in a bag" - the implication being that the Senate might think it has something great, until the "stench" catches the nostrils of the right wing.

It seems to me that the lessons gleaned from the historical experience of the ratification process in the United States, together with an appraisal of progress on the Genocide and now Torture Conventions may give us valuable clues to the prospects for ratification of the Covenants on Civil and Political Rights, and the Covenant on Social,

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3 These comments result from discussions the author has had with either senators or their aides, as well as administration representatives.

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5 This statement was part of the opening remarks Senator Helms made at the outset of the hearings before the Senate Foreign Relations Committee on January 30, 1990.

6 For the conservative, right-wing objections to the human rights covenants, see Kaufman and Whiteman, Opposition to Human Rights Treaties in the United States Senate: The Legacy (the Bricker Amendment), 10 HUMAN RIGHTS QUARTERLY 309-337 (1988) [Hereinafter Kaufman].
Cultural and Economic Rights. It should be kept in mind that the Genocide Convention and the Torture Convention are not as juridically complex as the conventions whose political future we are now appraising.

The complexities emerge best in the light of the underlying deep-seeded legal-political concerns which accompanied and, indeed, frustrated the Genocide Convention. Hostility to the Genocide Convention and concerns about the nature, scope, and character of the Universal Declaration itself generated a confluence of interest between powerful right-wing elements in the United States Senate. These influences were excessively concerned about the emergence of internationalism, the spread of world communism, the military capability of the "Russian Empire," and an all pervasive fear that internationalist values were code phrases for racial equality. These pervasive concerns allied to security doctrines purporting to manage the prospect of a nuclear holocaust [massive retaliation] furthered a climate that nurtured a widespread insecurity about the place of American values in a larger and hostile world arena and whether "American" values could survive the assault of internationalism, humanism, and Soviet imperialism.

These fears were compounded by interest groups in the American Bar Association (ABA) which began to see human rights instruments as a threat to American legal culture and to the foundational principles of federalism and constitutionalism. Those groups envisioned that a

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*Id.* The following provisions of the U.S. Constitution are relevant to the ratification process:

Article I, Section 10 Clause 3: No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State or with a foreign Power ...  
Article II, Section 2 Clause 2: He[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, ...  
Article II, Section 3 Clause 1: ... [H]e shall receive Ambassadors and other public Ministers; ...  
Article VI, Clause 2: This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.  
Tenth Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
commitment to human rights principles in law would permit racial integration through the side-door and erode the sovereignty of states whose political and legal process monopolized race relations policy.\(^8\)

A. **ABA - Politics of Precision\(^9\)**

Apart from the substantive concerns about the Constitution, federalism, states rights and race relations, the ABA in effect introduced a curious dimension to the politics of the ratification process. It is difficult to find an apt label to functionally describe this phenomenon, but I would venture the phrase "politics of precision," and view it as an aspect of the juridical ideology of legalism.

The politics of precision meant that "legalism" would become a core political ally of the senatorial right-wing group opposed to ratification. Moreover, the ABA, as an institution, in effect became a key player in shaping the "paradigm" of the advice and consent process. The character of that process makes legalism influence, if not dominate how the Senate looks and thinks, appraises, and evaluates any human rights treaty submitted for its advice and consent as required by the Constitution.

Since human rights instruments are indeed juridically complex, the level of detail that can be generated about every conceivable meaning of every word, phrase, paragraph or punctuation mark could be endless. Moreover, all legal instruments - statutes, constitutions, case law and what have you, do involve, from a juridical perspective, complex and controversial standards of construction and interpretation. These issues are frequently so basic, that the most innocuous issue of legal construction and interpretation can provoke serious concerns about the nature and scope of the judicial role. For example, does a broad view of interpretation mean a broad view of the judicial role, trenching on the sphere of legislative, administrative, or executive

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competence? Does a narrow view of interpretation undermine the judicial role and its appropriate concern for justice under law?

When the ABA joined the Bricker crowd in the 1950's,10 it institutionally did several things of serious import to the human rights agenda of the United States. First, it gave Bricker a powerful patriotic crutch upon which to hang his crude, nativistic sense of patriotism. Second, from a functional point of view, the ABA set itself up as the juridical guardian of the purity of the United States Constitution and legal culture from the alien liberalism of modern international law. Third, its "judgments" on the covenants juridicalized the discourse of ratification and human rights in the United States, making it legal-constitutional rather than political and grassroots in focus. Fourth, this level of juridical complexity has meant that the public sense of the human rights instruments is virtually non-existent, and that among specialist lawyers it is a live, if impotent, issue. Impotent, because of the thirty-seven years of myopic inertia before a watered down version of the Genocide Convention was approved. Impotent, because the "legalistic" frame has produced a form of political constipation regarding the responsible support for international human rights standards by a major player in the world arena.

A further implication of the ABA's influence on the process is that the skepticism of the human rights treaties, as nurtured by the politics of precision has meant that almost all of these prospective treaties are now viewed as non-self-executing. What is curious about this outcome is that in effect a non-self-executing clause will leave the processes of construction and interpretation to a legislative rather than juridical arena of action. This could be viewed as a dysfunctional allocation of the respective spheres of law-making competence and indeed may explain why ratification has become a multi-generational process for the United States. As I later suggest, a clearer sense of the respective spheres of law-making, and a greater respect for judicial conservatism would, at least, to a rational observer, be a more sensitive approach to the log-jam problem.

The conflicts over the status of human rights instruments encompassed a wide array of contentious matters, some of which bear directly upon the politics of ratification. The most important of these considerations was the recognized need, in a cold war context but-

10 There is a vast collection of literature on the Bricker Amendment. See Sohn and Buergenthal, International Protection of Human Rights 948, 964 (1973).
tressed by the deployment of thermonuclear weapons, that a strong national executive was indispensible to the security of the United States. The thought, therefore, that conservative senators could threaten the executive's key role in foreign relations by using human rights issues as a means to constrain the power of the presidency became a serious matter for the Dulles - Eisenhower administration.

An uneasy deal was struck between Dulles and key senators. The deal in effect meant that threats to executive competence in the foreign relations field would be defeated so long as the ratification of offending human rights instruments was correspondingly shelved. In part the treaties were sacrificed at the altar of executive power. Executive power, it was thought, ought not to be eroded in conditions of perceived crisis as reflected in the dynamics of the cold war. Bricker lost. Barely.

The most curious part of this historical footnote is the ease with which conservative lawmakers in the Senate could, not simply separate the idea of freedom from human rights, but actually suggest that human rights might be incompatible with American principles of

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11 The position of the Eisenhower Administration was well stated by Secretary of State Dulles:

The present Administration intends to encourage the promotion everywhere of human rights and individual freedoms, but to favor methods of persuasion, education and example rather than formal understandings which commit one part of the world to impose its particular social and moral standards on another part of the world community which has different standards . . . we therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the U. S. Senate.

*Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S. J. Res. 43 Before a Subcommittee of the Senate Judiciary Committee, 83rd Cong. 1st Sess. (1953).*

It was section four of the Bricker Amendment that threatened the Eisenhower Administration. The gist of section four was the notion that executive agreements would have to have some sort of Congressional approval to be effective. Boyle, *supra* note 1, at 81.

On the "Dulles Compromise", Boyle says:

Dulles explicitly promised that if the Bricker Amendment were defeated, then the executive branch would not become a party to any human rights convention or present it as a treaty for consideration by the U. S. Senate. Partly as a consequence of that Eisenhower-administration promise, the Bricker Amendment was ultimately defeated in the Senate. Nonetheless, the concession remained intact: namely, that the U.S. government would not sign international human rights treaties and present them to the Senate for its advice and consent. That compromise was essentially continued by subsequent administrations, both Democratic and Republican.

*Id.* at 82.
freedom and democracy. Let it not be forgotten that the official "grievance" against Soviet hegemony was that Soviet totalitarianism was incompatible with individual freedom, values which were central to the American experience.

B. *The Ghost of Bricker in the 1990's*

The politics of ratification in the 1990's must confront the legacy of Senator Bricker, and it is important to understand what that legacy is, and why it is important to the 1990's.

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12 Bricker cited the ABA to the effect that the Genocide Convention was a "grave threat to freedom of speech, press, and the rights of persons accused of crimes." *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcommittee of the Senate Judiciary Committee, 83rd Cong. 1st Sess. (1953).* Bricker conceded that an alternative interpretation was also possible. *Id.*

13 The theoretical import of the Bricker, Ervin, Thurmon, Helms position is important for understanding the nature of a complex problem: the interrelations between national and international law. The implications of their view, stated simply, that the sovereignty of the U.S. is compromised by acceding to the covenants. Professor McDougal summarizes the key tenets of this view, normally associated with the theory of dualism in international law, as follows:

The dualist or pluralist theories, still perhaps the most popular of all theories, while not explicitly denying that international law is law and commonly conceding a wide scope to inclusive decision, exhibit as their most distinctive characteristic, an attempt to rigidify the fluid processes of world power interactions into two absolutely distinct and separate systems or public orders, the one of international law and the other of national law. Each system is, thus, alleged to have its own distinguishable subjects, distinguishable structures and processes of authority, and distinguishable substantive content. The subjects of international law are said to be states only (with occasional reluctant, contingent admission of international governmental organizations), while those of national law embrace individuals and the whole host of private associations. The sources of international law are found only in the customary behavior of states and in agreements between them, while the sources of national law are located in the state's structure of centralized and specialized institutions. The substantive content of international law is said to be rules regulating relations between states, while that of national law is that of rules regulating the interrelations of individuals and private associations. Concise expression of this point of view is offered by the late, most authoritative Professor Lassa Oppenheim:

*Neither can International Law per se create or invalidate Municipal Law, nor can Municipal Law per se create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches - but separate branches - of the tree of law. Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become ipso facto*
Bricker was an implacable enemy of the human rights instruments. In 1951 he stated that the purpose, "in offering [this] resolution is to bury the so-called covenant on human rights so deep that no one holding high office will ever dare to attempt its resurrection."[5]

A recent study of the politics and perspectives that have historically influenced the Senate's advice and consent regarding the human rights covenants concluded as follows:

... the proponents of the Bricker amendment were primarily concerned with human rights treaties... contemporary arguments against passage of human rights treaties have not changed substantially from arguments presented in the 1950's, and that the legacy of these rules of Municipal Law.

See McDougal, The Impact of International Law Upon National Law: A Policy Oriented Perspective, 4 S. DAK. L. REV. 25, 27-31 (1959). Bricker and his successors held a view of dualism that is so extreme as to amount to a parody of this theory.

"Several administrations supported ratification. A key right wing concern voiced regarding the Genocide Convention and broadly applicable to the Torture Convention is the states rights or 10th Amendment issue. Senator Strom Thurmond, the right-wing senator from South Carolina has argued that matters of basic criminal law are principally matters of "state domestic jurisdiction."

The Supreme Court has affirmed the Missouri v. Holland, 252 U.S. 416 (1920) principle in Reid v. Covert, 354 U.S. 1 (1957). Reid dealt with the competence to try the dependants of United States servicemen abroad on the basis of an executive agreement between the United States, the United Kingdom and Japan. The agreement did not guarantee a jury trial or other protections of the bill of rights. The Court noted that Missouri in fact supported the principle that "the United States can validly make treaties, the people of the States have delegated their power to the National Government and the Tenth Amendment is no barrier." See Boyle supra note 1, at 91.

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It is perhaps ironic that the conservative states rights and sovereignty of the U.S. objections to the international human rights instruments have been most effectively refuted by the most conservative of chief justices of the Supreme Court, William H. Rehnquist. During the hearing on the Genocide Convention, Rehnquist, then Assistant Attorney General, effectively refuted the right-wing constitutional attacks on ratification. He concluded that the Genocide Convention was entirely constitutional. Id. See The Genocide Convention: Hearings on Ex. O. 81-1 Before the Senate Committee on Foreign Relations, 91st Cong., 2nd Sess. at 12-14, 147-61 (1970).

earlier deliberations is still apparent in the attitude of those considering these treaties now.\textsuperscript{16}

The treaty power read literally is broad, but has not been jurisprudentially interpreted to undermine the constitution itself. The relevant article reads as follows:

All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.\textsuperscript{17}

In theory the literal import of this section might be construed as permitting a rewrite of the constitution, i.e., in effect an amendment inspired by a power-hungry executive branch and a concurrence of a pliant two-thirds of the Senate. In reality our constitutive process and the jurisprudence implied in it would never permit such far-fetched extravagance.\textsuperscript{18} Indeed, the executive is under a constitutional obligation to defend and honor the constitution and laws of the United States. Nonetheless the language of Article VI(2) proved a convenient cross upon which to crucify the Genocide Convention and to frustrate the ratification of all the important human rights covenants. Bricker put these bogus concerns bluntly:

The American people want to make certain that no treaty or executive agreement will be effective to deny or abridge their fundamental rights. Also, they do not want their basic human rights to be supervised or controlled by international agencies over which they have no control.\textsuperscript{19}

And the control of these dangerous international agencies in Bricker's view seemed to be in the hands of world communism. Thus he continued:

Iron Curtain countries would no doubt welcome a new Roosevelt-Litvinov agreement to make their confiscatory decrees effective in the United States . . . [R]eactionary one-worlders [are] trying to vest legislative powers in non-elected officials of the UN and its satellite bodies with a socialist-communist majority.\textsuperscript{20}

\textsuperscript{16} Kaufman at 309.

\textsuperscript{17} Id.

\textsuperscript{18} Reid v. Covert, 354 U.S. 1 (1960).

\textsuperscript{19} \textit{Hearings on S.J. Res. 1 and S.J. Res. 43 (Treaties and Executive Agreements) Before a Subcommittee of the Senate Committee on the Judiciary, 83rd Cong., 1st Sess. at} 1-12, 823-27 (1953) (statement of Sen. Bricker).

\textsuperscript{20} \textit{Quoted in} 1954 CONG. Q. ALMANAC 245.
The key provision (Section 1) in the 1953 version of the Bricker Amendment was this:

A provision of a treaty which denies or abridges any right enumerated in this constitution shall not be of any force and effect.\(^{21}\)

The basic idea here was not to vest a treaty or an executive agreement with a power broader than ordinary federal legislation. Bricker relied on an old case, *De Geofroy v. Riggs*\(^{22}\) which suggests that a treaty could not authorize what the constitution forbids. However, Bricker felt that *Missouri v. Holland*\(^{23}\) the later case had perhaps misstated the law or left it unclear. In *Missouri* it was stated that:

Acts of Congress are the supreme law of the land only when made in pursuance of the constitution, while treaties are declared to be so when made under the authority of the United States. It is an open question whether the authority of the United States means more than the formal acts prescribed to make the convention.\(^{24}\)

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\(^{21}\) *Hearings on S.J. Res. 1 and S.J. Res. 43 [Treaties and Executive Agreements Before a Subcommittee of the Senate Committee on the Judiciary],* 83rd Cong., 1st Sess. at 1-12, 823-27 (1953).

\(^{22}\) 133 U.S. 258 (1890).

\(^{23}\) 252 U.S. 416 (1920).

\(^{24}\) Although it is worth noting in this regard the statement of Justice Black on the constitutional implications of Missouri in *Reid v. Covert*, 354 U.S. 1 (1960): This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. For example, in *Geofroy v. Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642, it declared:

> The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a session of any portion of the territory of the latter, without its consent.”

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

There is nothing in *State of Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power
The contemporary framing of this issue is whether human rights guts the sovereignty of the United States, a point to which we shall return. I suspect that this issue though was not as central to Bricker and his supporters as the impact of human rights on federalist issues, i.e. states rights.

Section 1 of the Bricker Amendment is still an issue today. It reads as follows:

No treaty shall authorize or permit any foreign power or any international organization to supervise, control or adjudicate rights of citizens of the United States which the United States enumerated in this constitution or any other matter essentially with the domestic jurisdiction of the United States.\(^{25}\)

In *Missouri*, Justice Holmes had formulated the issue as to whether the federal treaty and legislation was somehow "forbidden by some invisible radiation from the general terms of the tenth amendment."\(^{26}\) He answered this negatively, creating a federal wedge in the armor of states rights. Section 2 of the Amendment sought to, in effect, overrule *Missouri v. Holland* in this respect. In Bricker's own words, "It reverses the doctrine of *Missouri v. Holland* which holds that a treaty may empower Congress to legislate in areas prohibited by the Tenth Amendment in the absence of a treaty."\(^{27}\)

In the 1950's a key concern of conservative senators, especially those from the south, was the apprehension that race-relations would become a federal issue at the expense of states rights, and the states' right to continue the practices of racial discrimination. The Genocide Convention dealt with racism, the most virulent form of it. President Truman's executive order to integrate the armed forces gave a clue about American values at the national level. The human rights treaties and declarations were an indicator of the importance Americans might give to internationalist values they themselves, or at least the new dealers, in part had crafted.

A third part of the Bricker legacy was the principle that human rights treaties not be self-executing. Section 3 reads as follows:

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not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

\(^{25}\) Supra note 19.

\(^{26}\) Supra note 20.

\(^{27}\) Supra note 19.
A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by Congress.\textsuperscript{28}

Bricker had correctly foreseen that complex juridical instruments like human rights treaties present ongoing challenges to both prescription and application of the human rights standards they encompass. But strategically, this proviso was a second shot at the apple. That is to say, if ratification did succeed, a second "ratification" battle would take place in the legislative arena of the United States Congress.

The fourth part of the Bricker Amendment was a swipe at, inter alia, the power of the presidency to conclude executive agreements. Here the communist-coddling Litvinov assignment was the "fiend." But in a larger sense, Bricker was attacking the scope of the executive's competence in foreign affairs.\textsuperscript{29}

I should like to touch on four issues from a political point of view, although these issues are usually discussed as purely legal matters. The first is the issue of precision of the language used in the principal human rights instruments. This issue becomes especially acute when universal responsibility is envisioned as a major purpose of the instrument. But, in any event both the Covenant on Civil and Political Rights (hereinafter "CCPR") and the Covenant on Economic, Social and Cultural Rights (hereinafter "CESCR") contain language whose meaning by ordinary processes of construction and interpretation are complex, to say the least. This ties in indirectly

\textsuperscript{28} Id.

\textsuperscript{29} The two key cases dealing with the validity of the Litvinov assignment are of course United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942). Bricker put his views on the Litvinov assignment as follows:

So far I have discussed the need for section 1 of the joint resolution. Section 4 places the same limitation on Executive agreements. The need for such limitation arises from the fact that the Supreme Court has held that Executive agreements, even those not approved by Congress, become the supreme law of the land. In United States v. Pink (315 U.S. 203 (1942)), the Court said: "A treaty is a 'law of the land' under the supremacy clause . . . of the Constitution. Such international compacts and agreements as the Litvinov assignment have a similar dignity (p. 230)."

The Pink case involved the distribution of assets of the New York branch of a Russian insurance company. In 1918 Russia nationalized the business of insurance, but the State of New York refused to give the decree any extraterritorial effect. No one questioned New York's power to make that decision. In 1925, Pink, the New York superintendent of insurance, took possession of the insurance company's assets. Claims of domestic creditors were paid in full. The New York Court of Appeals directed payment of the balance to foreign creditors.
with the business of non-self-executing versus self-executing treaties. However, the politics of precision can be used in a negative and not very constructive manner. Let me illustrate this by reference to the Department of Justice’s concerns vis-a-vis the Torture Convention.

The members of the Department of Justice have consistently attacked the definition of torture. Despite the fact that there is a workable understanding about the meaning of psychological torture, I was still surprised that a lack of clarity remains. In the oral testimony mention of torture was explicitly made with the added flourish of possible constitutional infirmity along the lines of a due process, "void for vagueness" analysis.

Now it is always gratifying when prosecutors, who spend their professional lives broadening the scope of what constitutes criminal conduct, become so defendant oriented. Perhaps they do this only when it comes to the criminalizing of official misconduct. When I first heard this line of argument I thought I was hearing an ACLU official rather than a Department of Justice functionary.

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31 The lawyer who "negotiated" the definitional issue with the Department of Justice was Nigel Rodley. His discussion of this issue is most insightful. See Rodley, The Treatment of Prisoners -International Law 7344 (1987).

32 Supra note 28. Reynolds said that those who negotiated the convention for the United States did not have "the slightest concept of criminal law." He also stated that in his view, if the Convention were to be "reopened" or if a "renewed negotiation" were to occur, there is no question that the Department of Justice would be squarely opposed to ratification of the current convention. He also indicated that the Department of Justice had a heavy influence on the Reagan package of reservations, declarations and understandings that attended the President's letter of transmittal. These latter concepts are explained by Whiteman as follows:

Basic definitions of the terms "reservation," "understanding," "declaration" and "statement":

The term "reservation" in treaty making, according to general international usage, means a formal declaration by a State, when signing, ratifying or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving State and other States party to the treaty . . ..

The term "understanding" is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than as a substantive reservation . . ..

The term "declaration" and "statement" are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty.

A distinguished criminal law professor who heard me relate this episode disabused me of my ACLU fantasy. "These guys" he said are simply "hypocritical." As a raw description of the law, the Department, it seems to me, is completely off base. Indeed, a key cause for concern among criminal law scholars is how far the courts have gone in upholding vague statutes imposing criminal responsibility. Let me give several examples of notoriously vague federal criminal statutes. First, there is the Sherman Act. Everyone knows the concept of restraint of trade can be so broad that you can drive a jumbo jet through it. It was Holmes who suggested in this context that the defendant would find out what the law is after he is convicted. Again, the interpretation of "fraud" in the mail fraud statutes is extremely broad when you include in the definition of fraud non-tangible rights whose scope is undefined. Finally, the RICO statute does not define the term association, which has similarly been broadly construed. I mention these examples because they represent a segment of the criminal law that the Department of Justice has not been reluctant to use, and whose constitutionality has been sustained to the dismay of, at least, some civil libertarians.

If there is a caution we should all honor, it is that the imposition of criminal responsibility on the basis of vague, undefinable standards, defeats the principle of legality, a cornerstone of human rights. But the convention's definition of torture, while broad, is not license for unlimited discretion. Interpretation of similar language in other contexts has been, if anything, restrained and in any event, the principle of reasonableness that constrains all prescription and application in

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33 A conversation with Professor Francis A. Allen.


35 See Francis A. Allen, The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Puena Principle, 29 Ariz. L. Rev. 385, 404-11 (1987). It should be noted that in the recent case, McNally v. United States, 483 U.S. 350 (1987), the court held that the legislative history of §1341 limits its applicability to the protection of property rights and not to the intangible right a citizen has in honest government.

36 The RICO legislation stipulates that "the provision of this title shall be liberally construed to effectuate its remedial purposes." Title IX §904a, 84 Stat. 941, 947 (1970). According to Bradley, the courts "reflecting the natural fears of racketeering, have extended RICO beyond the broadest boundaries permitted by the statutory language . . ." Bradley, Racketeers, Congress and The Courts, 65 Iowa L. Rev. 837, 838 (1980). For further discussion, see Allen, supra note 33, at 318-403.

37 Allen, supra note 35, at 398-403.
international law serves as a further guide and limitation on unreasonable interpretation.\textsuperscript{38} Amnesty International itself has intervened over the years on behalf of thousands of torture victims. I cannot recall many cases where the infliction and description of torture has been at all problematic. There is no definitional problem in the CAT that is not characteristic of the interpretation of what the boundaries of the "living thoughts" are that are encapsuled in the legal terms. I would venture a similar conclusion for the CCPR and the CESLR.\textsuperscript{39}

Let us return to the other Bricker concerns that have been repeated by Senator Helms in context of the CAT. A dominating theme of concern to right wing senators like Senator Helms is that somehow or other the CAT will undermine the foundations of the federal system, indeed some even fear ratification with a federal-state proviso. The first practical principle to keep in mind is that our federalism is a process, tied to our constitutive process. And as Myres McDougal and Karl Llewellyn have indicated, the constitution is not a mum-mified relic surrounded by a stock of reified ideas.\textsuperscript{40} The constitution is an institution, a living dynamic institution. Our concepts of federalism intrinsic to our constitutive process are not correspondingly an amalgam of reified principles. But the core principle behind our constitutive and federalist ideas I would suggest has much to do with the control and the regulation of power to ensure that it is sufficiently distributed and not concentrated, so that the abuse of power may be limited. In dealing with principles that seek to control one of the most egregious uses of governmental power such as the use of torture, it would seem that controls on what a state can do to its own citizens or its responsibility for containing such abuse to secure the well-being of all is eminently compatible with the fundamental principle behind the federalist idea.

Let us face it, the worst abuse of the federalist ideal was the notion that the systematic brutalization and repression of black Americans and the enslavement of them was shielded by the federalist ideal.

\textsuperscript{38} See Rodley, \textit{supra} note 29.

\textsuperscript{39} A particular concern of the CESLR is the question of whether its terms are amenable to the conventional juridical interpretation that does not do violence to the judicial vote in the constitutive process. The possibility that other agencies of constitutive decision may be identified or created to realistically respond to its prescriptions should, of course, not be precluded. Lasswell and Chen, \textit{Human Rights and World Public Order} (1981).

\textsuperscript{40} McDougal, \textit{supra} note 13.
Federalism interpreted in this way is a corruption of the fundamental ideal, because today we know that the invocation of bogus federalism to promote racism and some forms of sexism is no longer tolerable. And federalism that seeks to insulate the torturer from accountability is a corruption of a terrific ideal. Put bluntly, no state wants or should want the license to torture. I fear that the federalist concerns, first put forward by Senator Bricker, and carried forward with a patina of erudition by Senator Sam Ervin, and now volubly proclaimed by Senator Helms, not only misdescribes the actual practice of federalism in the here and now, but seemingly never has accepted the principle that federalism is no excuse for racism or the gross abuse of civil and political rights that our constitutive-federal process now honors. *Dred Scott* and *Plessy* are long buried.

A third major issue is whether the CAT and other human rights instruments must be self-executing. Amnesty International took the position that this reservation was not necessary. My sense of the dynamics of the process is that this element is here to stay. The Amnesty International position was therefore to record that it was unnecessary, but not to stand or fall on it from a practical point of view.

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41 These issues were seriously raised by Senator Bricker who was from Ohio. The bill he introduced became known as the Bricker Amendment. S.J. Res. 1, 83rd Cong., 1st Sess., 99 Cong. Rec. 160 (1953); see Hearings on S.J. Res. 1 and S.J. Res. 43 (Treaties and Executive Agreements) Before a Subcommittee of the Senate Judiciary Committee, 83rd Cong., 1st Sess., 96 Cong. Rec. 5994-6000.

Section 3 of the Bricker Amendment introduced the principle of the non-self executing reservation to a human rights treaty, should it be ratified. The idea was that articles of the treaty could not as federal-international law permit the striking down of state law and practice under the authority of the supremacy clause. This would have immunized laws mandating segregation and racial discrimination from the reach of the particular treaty outside of specific legislation by Congress to that effect. At that time such congressional action was a remote possibility. The law of race relations has long since disposed the Bricker view of Federalism insulating states from the constitutional mandate of the 14th Amendment.


44 It is worthy of notice that the jurisprudence of constitutional interpretation in the Bricker view was somewhat odd when evaluated against the actual practice of constitutional adjudication. Bricker adopted the analysis of the ABA that, in effect, the Supreme Court could not be trusted to *not* amend the constitution via the path of treaty-making and the supremacy clause. Therefore, that constitutional competence and duty must be vested in the legislature. In effect then, the Senate would be a kind of surrogate supreme court serving as a final interpreter of the constitutional status and congruence of any human rights treaty. That, at least, has been the legacy. In the quotation that follows, Bricker in fact tells us that the supremacy of
My personal view on this is that the judiciary is itself so conservative that I fear what kind of future the CAT would have in the hands of a Posner or a Scalia. My sense is that a liberal congress will give more precise direction to the judiciary and possibly avoid constrictions of the CAT that might undermine its efficacy. It should be conceded that the jury is out on this one.

The final point I would like to address is this: some conservative senators have a deep concern that the torture convention and the other human rights conventions are incompatible with American sovereignty in the world arena. The sovereignty issue is essentially a concern that the United States not subject itself to international law, to the extent that international law is inconsistent with the principles

the constitution must be established by the legislature in the area of treaty ratification:

The American Bar Association sees in the Genocide Convention a grave threat to freedom of speech, press, and the rights of persons accused of crimes. Proponents of the treaty deny that such dangers exist. Neither interpretation of the treaty is unreasonable. The Supreme Court has the final word, but it is constitutionally incapable of rendering an advisory opinion. No doubt the Senate could remove any danger to American rights by a series of reservations to the treaty. However, the International Court of Justice has held that substantial reservations to the Genocide Convention will nullify the effect of ratification. The Senate will never be able to vote intelligently on the Genocide Convention until such time as the supremacy of the Constitution over treaties is firmly established, and that, of course, is the purpose of this amendment.

The Senate is confronted by no such dilemma in the legislative process. It has complete freedom of action in framing language for the protection of constitutional rights. If a law does deny or abridge some constitutional right, the Supreme Court will strike it down. Never in our history, however, has the Supreme Court held any provision of any treaty unconstitutional. The reason is that article VI, paragraph 2, provides that laws of the United States "shall be the supreme Law of the Land" only if made "in Pursuance" of the Constitution. Treaties, on the other hand, become the supreme law of the land merely by virtue of being made "under the authority of the United States," which is an entirely different thing.

The world court considered the permissibility and acceptance of reservations to the Genocide Convention in an advisory opinion. See Reservations To The Convention on Genocide, 1951 I.C.J. 15.

More recently the "Liberty Lobby" in testimony before the Foreign Relations Committee in 1981 expressed the view that the Supreme Court might not be bound by its own ruling in Reid v. Covert. They argued:

... at different times in history different rulings have been made on this issue—and nothing prevents the Supreme Court from making a new ruling in the future that would again make treaties the supreme law of the land.

of American political sovereignty.\textsuperscript{45} This generally means international law should not trump the United States Constitution. This concern is dressed up in the garb of an alien international law riding roughshod over the civil and political rights of Americans and thereby being incompatible with the Bill of Rights of our own Constitution. I fail to see why such a heavy emphasis should be placed on the supposed incompatibility of our Bill of Rights with the international Bill of Rights.

Much ink has been spilt on this one, and no one will, I think, object to the constructions given to freedom and equality in our legal culture when those constructions give a higher standard of human rights protections than those indicated in a particular human rights instrument. But prescriptions that expand or enhance our concern for human and civil rights are the essence of the global Bill of Rights, and I do not see how this can be viewed as an attack on the civil rights of Americans. The whole argument from a policy perspective is curious. It confuses the principles of collectivism implied in the sovereignty idea, and the protection of individual rights which derogate from the collectivist idea. In short, the right wing cannot have it both ways.

I have another element of concern about the sovereignty idea. As I indicated to the minority counsel over dinner, the term sovereignty has a vast number of meanings for a wide range of international actors, including nation states. When the system allocates the state rights (freedom of the oceans, space, air space, territory, etc.) it

\textsuperscript{45} One of the basic concerns of the right-wing opposition to the ratification of the human rights covenants was the assumption that, read literally, the supremacy clause as applied to treaty law would permit the erosion of American sovereignty by the executive entering into treaty obligations (with the advice and consent of the Senate) inconsistent with the Constitution itself. When Bricker himself testified before Congress he quoted the position expressed by then Secretary of State John Foster Dulles as follows:

The treaty-making power is an extraordinary power, liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution, treaties become the supreme law of the land. They are, indeed, more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas treaty law can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the States and give them to the Federal Government or to some international body; and they can cut across the rights given the people by the constitutional Bill of Rights. . . .

See also, Kaufman, supra note 6.
"expands" whatever we mean by sovereignty. When the system imposes duties (obligations to cooperate and promote friendly relations between states, not to use aggression, not to abuse human rights) it may be said that sovereignty, by assuming obligations, "contracts." But the legal complementarity of rights and duties is unavoidable both for states and individuals. Are some senators really saying the United States has sovereign rights, but no sovereign obligations? Surely not? The process is far from over.

In addition to these traditional ultra-conservative concerns, the covenants present distinctive political and ideological problems for the right-wing. These issues cannot be glossed over if we want to realistically appraise the prospects of ratification. Without being exhaustive, let me outline some of the obvious concerns that would trigger right-wing objections to the covenants.

In the CCPR, Article 6 seeks to limit the use of capital punishment with a view to its ultimate abolition.\(^46\) This comes at a time when capital punishment figures prominently on the right-wing and conservative agenda of both state and national politics. With Congress looking to pass capital punishment legislation and liberal state politicians scurrying for cover at the mere mention of the death penalty, the Senate will have a difficult time dodging Article 6, let alone the optional protocol.

Article 20 on the other hand will have liberals fuming about limitations on first amendment rights.\(^47\) Articles 23\(^48\) and 26\(^49\) may come close to the enactment of the ERA, and Articles 23\(^50\) and 24\(^51\) would reinvigorate Tenth Amendment concerns.

The CESCR has a number of high visibility issues of a controversial nature in domestic politics. Again Article 3 may be the equivalent of the ERA.\(^52\) Article 10 trenches upon states' rights issues of family regulation and the provisions of Article 10(2) maternity leave and


\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id.

Articles 11 and 12 dealing with living standards are more like New Deal concerns than supply side, market economics priorities. The provisions of Article 12 seem to imply a much greater collective responsibility for health care, with corresponding fears about socialized health care, a permanent nightmare of the AMA.

Whether the CESCР's principal "rights" are formulated as social goals rather than legal or juridical expectations would seem to be beside the point from the perspective of the core of right-wing senators who will see in these instruments a sickly humanism, a creeping socialism, or a reinvention of the ultimate catastrophe of the American right wing, a new, New Deal.

II. THE CONSTITUENCIES FOR RATIFICATION

If one wishes to assay the prospects for ratification for the global Bill of Rights, the central question one must ask is what kind of process does ratification entail. Ratification is, in fact, a lawyer's deal. The vast literature written about ratification tracks some of the most convoluted and technically opaque questions of constitutional law, foreign relations law, and basic principles of federalism. In effect, the political objections of Senator Bricker became effectually preempted by the bag and baggage of legal argument of the ABA establishment and its adversaries.

What is distinctive about the legal paradigm of the legal process is that the critical decision points are not legal but political. The judge and the jury is for practical purposes the United States Senate, not the Supreme Court of the United States. We therefore have the curious situation of sophisticated legal argument being presented to

53 Id.
54 Id.
55 Apart from the problems Bricker saw in the Litvinov assignment, Bricker saw the growth of the treaty-making initiatives of the I.L.O. as reflecting, in effect, "the increasing impact of Marx" and he sarcastically described the "modest ambition of this international labor organization . . . to become the economic overseer of all humanity." Bricker listed the matters he thought not to be the concern of the I.L.O.: social security, minimum wages, compulsory health insurance, and labor-management relations. He acknowledged that these issues do not conflict with the Constitution including the Tenth Amendment. He, in effect, saw them as a kind of international version of the New Deal and did not believe this to be the legitimate concern of any international organization. Hearings on S.J. Res. 1 and S.J. Res. 43 Before Subcommittee of the Senate Judiciary Committee, 83rd Cong., 1st Sess. (1953).
56 Kaufman, supra note 6.
a forum whose knowledge of the structure and process of legal argument cannot begin to match a court of law. Unlike a legal forum, however, the Senate is not going to be the most competent body to adjudicate these fine legal points, although some members of the Senate are distinguished lawyers and could do so with enviable competence.

The basic problem of ratification is that as it is technically presented as a "legal" problem, it is directed to a forum that is essentially and formally a political forum. Unless the issues can be presented to that body as a political rather than legal choice, there is a major problem about asking senators to make choices that they may not fully understand with implications for governance that are perhaps only dimly perceived. Indeed, it may well be suggested that ratification is an exceptional, possibly unique form of law-making from the way in which the Senate usually operates. And ratification relating to human rights covenants is an especially rare experience for the Senate. I suspect therefore that the extreme legalistic nature of ratification, the lack of experience in law, and the lack of general exposure to ratification of complex juridical—political documents like the Covenant on Civil and Political Rights or the Covenant on Social, Cultural and Economic Rights compounds the decisional challenge or problem for the Senate.

The problem as I see it is that it is more realistic and more useful to look at ratification as a political issue, involving a complex political process in which important choices have to be made that will impact both domestically and internationally on expectations about United States policy. Of course law and legal argument have an important role to play in understanding what ratification of the human rights covenants means for United States law and policy. But that is only one aspect of the matter. It must be remembered that the same basic arguments opposing ratification have been around for a very long time, the most important of which have sealed the fate of the Genocide Convention for over thirty-seven years. I shall take these up at a later time. For now I want to focus on the politics of the process in a strategic sense, unencumbered by the weight of legal doctrine and constitutional nightmares.

The first important question to ask is, does ratification have a constituency? My educated guess is the constituency that has had the most to say about it is the lawyers, and perhaps, the enlightened elements of the foreign policy establishment—not a constituency that generates grass roots mobilization. Perhaps the apt description is that
we have here an impressive array of "generals" and no "troops" to speak of. A second constituency might be identified as the human rights constituency. The key question to ask is, what is the abstraction called the human rights constituency, and with brute realism we may ask as Stalin once did in another context, how many "divisions" (read voters) can the human rights community deploy in the cause of ratification? To a large extent most human rights groups located in Washington and New York are shell operations. They are not as membership intensive as say the ACLU or Amnesty International.

This means, of course, that the human rights community itself may not be organized to bring a grass roots focus to the issue of ratification, simply because the nature of these groups is directed at influencing policy through direct appeals, skillful argument, the manipulation of the media, and through publications and general outreach, to influence public opinion. The business of grass roots mobilization of votes would tend not to be a part of the action program of many organizations which comprise the human rights community. As defined here, the human rights community is more accurately a community of lobbyists, than an organization that focuses on grass roots action.

The third constituency is the United States Government. During Bricker's time the government was made a hostage of the Senate and literally traded off the human rights ratification agenda. With the exception of the Carter administration, ratification has not been a high priority. Non-ratification remains a source of embarrassment to the Department of State and its diplomatic corps, but the political capital that must be invested in ratification is high and the payoff marginal in terms of perceived efficacy in United States foreign policy. The concerns of the Department of State are made more complex by the interest the Department of Justice seems to evidence in the ratification. This interest may be episodic viz., that Mr. Thornburgh is a bureaucratic imperialist, or structural viz., the State Department's relative impotence on this issue has opened a wedge for the Department of Justice to demand and indeed play a lead role in the process.

The fourth constituency is one that I think brings something distinctive to the process of ratification. This constituency is Amnesty International USA, a grass roots human rights organization of some 450,000 members in the United States.

It is itself an interesting tale of the internal politics of Amnesty International about how it came to make a conscious commitment
to launch a long-term campaign to secure ratification of the principal human rights covenants. Suffice it to say that such a commitment was made, notwithstanding the following concerns. First, Amnesty is an activist organization. What kind of activism is involved in a juiceless, abstract, no flesh and feel campaign, like ratification? At the very least this is not the kind of activism that is characteristic of what an ordinary Amnesty member does. Second, does anyone except a handful of specialists really understand what ratification is, let alone why it is important? The campaign was in many ways an initiative from the top rather than the grass roots, thus a key danger to the campaign presented itself at the outset: Is this an operation led by all generals and no troops?

The decision of the AIUSA Board of Directors to make ratification a major long-term goal for the United States Section was a decision of some consequence for our organization. The simple political explanation for this campaign focus may simply be that ratification is a lawyer's deal. There are strong powerful lawyers on the AIUSA Board. A united group of lawyers is an irresistible force. What should be remembered is that, as a colleague at the University of Florida has written, one cannot ignore the personality of lawyers as power players in any institutional context.57

The lawyer and law professor elements on our Board proved to be the irresistible "lawyer" force on the Board. The lawyers had settled on a name for the working group. It was called the "rat pac." The first key campaign meeting was held in California on January 13, 1989. The objectives, strategies, and tactics were developed there. The purpose of the campaign was to secure ratification of the Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, the Torture Convention, the Racial Discrimination Convention and the Convention that outlaws discrimination against women. A key part of the campaign was to isolate all relevant actors who might directly or indirectly secure the goal of ratification. (The players were in the Administration, Senate, House, other organizations, grass roots members).

Although the overall purpose of the campaign was and is ratification, a number of sub-objectives were identified as important to the ratification process. These included the notion that in the long

haul senators might have to be “educated” about both ratification and the human rights instruments; there was a recognition that our own membership needs to be educated and activated about “ratification.” Also recognized was the necessity to build coalitions with groups that share common interests in all or some aspects of ratification (civil rights groups and the race convention, women’s groups and the women’s convention), arrange international as well as domestic pressure and finally, but more technically seek to both technically and politically limit the excessive and unreasonable use of reservations, declarations, and understandings.

Our meeting also carefully reviewed the tactical ways to implement these sub-objectives viz., education of senators, limits on reservations, etc., activate and educate AI membership, public education on this issue, focus on key actors, coalitions and special interest target sections (for example the Race Convention and the Civil Rights Community, the Women’s Convention and women’s groups).

Our elaborate plans were in some degree short-circuited by the Reagan Administration’s transmittal of the Convention Against Torture to the Senate for its advice and consent to ratification. The letter of transmittal was accompanied by a package of reservations, declarations and understandings that we viewed with consternation, and that we judged were unprecedented.

The package was so extensive that it generated numerous theories about the administration’s strategy of ratification. For example, did the package simply rewrite the convention? If it did, why did the administration do it? One might have conceivably seen the package as symbolically saying a qualified “yes” to the effort to universally proscribe torture, and at the same time indicate to the important “home” constituencies that the convention does not mean very much. But this would be quite a hypocritical commitment to a process the administration itself had a strong hand in negotiating. And it would have been a transparent one. Given the pathetic United States record on ratification, ratification under these circumstances would hardly be credible and worse, would send exactly the wrong message to the relevant target audience.

Fundamentally, it has to be conceded that Human Rights instruments, like all comprehensive documents of governance, are juridically complex. Indeed, I would hazard the guess that if Senators Bricker, Ervin and Helms had incarnated retroactively to the founding days of the Republic, they would have found so many possible “possibilities” in the United States Constitution that a multigenerational constitutional convention would have been a historical certainty. Still,
it has to be asked whether the United States Government should have joined in an approach to the ratification process that looks very much like the form and substance of objections to ratification characteristic of the politics of Senator Bricker in the 1950's. But there is a difference. All these objections, traditionally at least, make the case for no ratification. Yet here the Administration had accommodated or succumbed to most of these "traditional" right-wing concerns, and still has emerged with a position in support of ratification.

I hope that cynicism is not as highly developed an art in this context as I suspect it is. But let me venture a possible explanation. If we strip a convention like the Torture Convention of most of the meaningful substance that it has, and still proclaim our support for it, we will have satisfied the nativistic jingoism associated with the far right's distrust of human rights, and we will have (or so some might think) indicated that at last the United States has come on deck with the rest of progressive humanity when it comes to giving international weight, legitimacy, and authority to the protection of the individual in the world arena.

Having put on record Al's concern for the package as presented, we waited for the results of the election and what promise for ratification a new administration might bring. The new (Bush) Administration brought a new internal review of the Reagan package. In our early communications with relevant Bush officials, it seemed clear to us that the Legal Adviser of the Department of State was not necessarily on the same wavelength as the Human Rights Bureau of the Department. As events turned out, it seemed to us that the Bureau of Human Rights lost out to the Legal Adviser's office on what the package would include, which meant that the package was destined for Senate action in unamended form—essentially the Reagan and Schultz transmittal.

A relatively fortuitous meeting between an Amnesty International staff person and a member of the Bush Administration records an exchange of some fairly mild, but deletable expletives, which evidently did the trick in promoting a reconsideration of the package. Perhaps it was less the expletives than the sense that perhaps Amnesty International and its allies might have been neutral on the ratification of the CAT or perhaps even oppose it in the form that the package was presented. Perhaps there was concern that on something like the CAT, AI and its human rights allies might be able to get enough bipartisan support for the convention to put through an alternative package. We can only speculate here.
What is clear is that the Administration was willing to talk. As it turned out, the key concerns to AI were ones brought into the picture by the Department of Justice. Inside the Administration, the picture was beginning to become clearer. There was another player, a player that had belatedly come on the scene. That player was, of course, the Department of Justice, and it was with them that we held the next phase of discussions.

I may note parenthetically that according to senatorial sources, it is now recognized that the Department of Justice in general wants to become, and evidently will be, more directly involved in the treaty making process. This means that the Department of Justice will be a key player in the process of ratification regarding human rights treaties in the future. It means that possibly all such instruments will now be subjected to strict review from the Department of Justice, or that this is a real political and legal possibility. How the precise lines of competence and influence will be drawn between the legal advisor of the Department of State and the head of the Department of Justice is important to the future course of ratification. My sense is that the added review by the Department of Justice will add more, much more, front end detail, and will embroil the covenants in added levels of, at least in my view, needless complexity. Good, skillful lawyering, however, should enable the human rights community to limit the negative aspects of this factor.

There is a positive side to this possible eventuality. The positive side is that disposing of all those bogus arguments of the 1950's vintage with the double imprimatur of both the Department of State and Department of Justice will, I suspect, help the ratification process and not impede it. Indeed, permit me to remind both the "old Turks" and the "young fogies" in the audience that Mr. Justice Rehnquist, when he served as a highly valued member of the tragic team in the Department of Justice during the Nixon years (the early seventies), thoroughly demolished the old objections to ratification. 58

The next phase of the political process was the negotiations with the Department of Justice as principal negotiating actor for the Administration. Here we decided that it would be a useful tactic to bring in the legal advisor of AI from London (Nigel Rodley). Since the nature and quality of concerns, especially relating to the definition of torture were highly technical in nature, I gambled that a lawyer

58 See supra note 14.
schooled in the linguistic analytical tradition of British legal culture would be a good match for the Department of Justice's technicians. Moreover, our legal advisor from London had written the key, authoritative book on the treatment of prisoners in international law.\(^{59}\) The choice of Nigel Rodley from London appeared to be a good one, since he is an experienced negotiator—a technician's technician—when it comes to the law, and never loses his composure no matter what the circumstances.

Amnesty was pleased that the negotiating team (with Rodley) managed to persuade the Department of Justice to be flexible and to retreat on points that were unacceptable to it and to the rest of the human rights community. What resulted was not an ideal package, but we felt it was a workable package to be put to the Senate Foreign Relations Committee which still has to go through the mark up process (at least, at the time of writing).

Although the request that the Convention be viewed as an urgent priority by the Senate, and although there is in general strong bipartisan support for the ratification of the CAT, it is difficult to find a driving force within the Senate willing to invest time and political capital in the ratification issue; unless one views the extreme concerns of right-wing or very conservative senators as central. In a curious way these "men" do make ratification an issue if it is pushed, but they themselves do not care much for ratification in the human rights context. So far as I am able to gather (from a key senatorial source), one of the keys to movement in the committee on the CAT was the stimulus provided by constituent letters.

We know, for example, that Senator Pell strongly supports the Convention. But the Senator's committee is a busy committee. Time in Washington is political capital, especially committee time. Moreover, the committee itself has a superabundance of what in baseball would be called heavy hitters, both Republican and Democratic. Heavy hitters are busy, and always in demand. Even more importantly, the ranking minority member of the Senate is a feisty, determined right-wing senator from North Carolina, Jesse Helms.\(^{60}\)


\(^{60}\) On the Helms' style of senatorial politics, see H. Smith, The Power Game 58-69 (1989). Smith describes the Helms' style as follows:

In the Senate his manners are courtly. But his parliamentary techniques are telling and crafty. Helms plays the politics of confrontation: stalling, filibustering with marathon speeches, tying the Senate up in knots, frus-
Every committee meeting, I should guess, is a theatrical and political opportunity for the Senator. In the CAT context his admirers were not to be disappointed. When we view strong support for the CAT in general and juxtapose it against these kinds of obstacles, the question becomes obvious: Why should the chair of the committee want to push ratification of the CAT? The answer is simply politics. The timely letters from all those Rhode Island human rights activists were enough to reinforce the already existing innate commitment to push ratification of the convention.

It may not be appropriate to generalize, but the key question may be put as follows: What kind of political constituency has ratification had? Has ratification in the past been promoted through the modality of special interest politics without the backing of grass roots mobilization? I was told by senatorial aides that the senators take seriously the concerns and interests of their constituents. Perhaps then there is some earthy wisdom in the tactics and strategies of the Amnesty International rat-pac group, who felt their push for ratification was distinctive this time based on an aggressive approach to building coalitions and mobilizing their own membership at the grass roots level, with a core emphasis on this latter political resource.

A. The CAT Hearing

Two hours were scheduled for the hearing. The Departments of State and Justice had a lion's share of the limelight—or at least it may be fairer to say Senator Helms kept them in the spot light. Not many Democrats came. Not many Republicans came. Senator Pell could not stay for the whole proceeding, and Senator Helms himself covered the question and answer part of it as it related to non-governmental groups. Apart from a few minor questions from others, Senator Helms showed the most interest in the CAT. He seemed to be somewhat merciful to the Department of Justice, but he was rough on the Legal Adviser of the Department of State. Judge Sofaer's task was not an easy one and it appears that the Department of State

trating others to attain his own ends. Id. at 58.
Described as "Senator No," the senator has been thought to master the arts associated with "another kind of basic power in Washington: the power of obstruction, a negative power to block and deny, the power of being difficult and prickly." Some call it "porcupine power." Id. According to Senator Biden, "He's the toughest, he's the smartest. He is the three hundred-pound gorilla of the right-wing..." Id.
It has been urged that Senate procedures encourage the "negative power game." Id. at 63.
may not be Senator Helms' favorite bureaucracy. The AIUSA chair was disappointed that Senator Helms had to leave the room for AIUSA's testimony, but he was assured that the Senator had read the written version of it. Apart from an interjection by David Weissbrodt, Senator Helms was only interested in the input of two participants whose views were largely a confirmation of his own.

Before getting into some of the dominating themes at the hearing, the question must be asked: Why did the Democrats and the moderate Republicans stay away? It may simply be that influential senators have busy agendas. Why should they show up for a "motherhood and apple pie" issue that will sail through once we get through the preliminaries and simply vote. After all, the votes are there! It must be remembered, however, that so uncontroversial an issue as the Genocide Convention took some thirty-seven years before the Senate's advice and consent were forthcoming.

One influential senator's aide reminded me, when I expressed concern about the low attendance, that the support for ratification was solid, and that most moderate senators knew in advance what the tone of the hearing would be. I could only infer that everyone seemed to know what Senator Helms would say and how he would say it. Whether conscious or simply a matter of the way it worked out, the scenario seems to be that Senator Helms would prefer to have long and drawn out hearings on the CAT. He referred to it as a "skunk in a bag" in his introductory statement. Perhaps the strategy of the rest of the committee members who did not come was to deprive the Senator of a senatorial audience, and limit discussion, since the central Helms' issues are as old as the Genocide Convention itself. This seems to amount to a "let the senator from North Carolina have his say," and let's get to the business of voting for this Convention. This seems to be confirmed by the signals emerging from the minority wing of the Senate, that indeed there is a "workable" package, and that the mark up phase should not prove to be highly problematic. While this strategy may be successful in the case of a relatively "uncontroversial" convention like the CAT, it is not necessarily a model that will necessarily work when we approach the other components of the global Bill of Rights.

III. Conclusion

I suspect that the optimistic prognosis on ratification has to lie with a concerned and determined constituency. Second, it has to have the support of the United States Government. And by support I
don’t mean support of the spineless variety. Third, the process needs the support of leadership in the Senate on both sides of the political spectrum. And here, there is a problem. There is no dearth of clones of Bricker who are willing to block ratification, but there seems to be no senator strong enough to make this his or her issue as a foil to senators like Helms. Fifth, there is a genuine fear of taking on the senator from North Carolina. This may be in part, because his style ostensibly runs counter to the collegial standards of senatorial courtesy. Several Republicans indicated to me through their aides that they support ratification, and the administration’s package. But none so far was willing to tangle with the distinguished senator from North Carolina. As I earlier indicated the CCPR and the CESC are more complex juridical instruments than either the Genocide or the Torture Conventions. It remains to be seen whether the grass roots movements that we are trying to mobilize including civil rights groups, women’s groups, church and civic organizations will be strong enough to neutralize the extreme right wing in the Senate and to confirm a moderate but important human rights agenda for the American people viz., the legalization of the global Bill of Rights.

IV. POSTSCRIPT

The Senate Foreign Relations Committee voted 10-1 on July 19, 1990, to submit the Bush Administration’s package on the Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment to the Senate. The floor debate was scheduled for October 3, 1990. In addition, the Senate Foreign Relations Committee held

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61 The following letter was sent to a number of Senators on October 5, 1990. The correspondence was signed by Senators Daniel Moynihan, Richard Lugar, Claiborne Pell, Nancy Kassebaum, John Kerry, Mark Hatfield, Alan Cranston, and Joseph Biden, Jr.:

Dear Colleague:

The United Nation Convention Against Torture will come before the Senate shortly. It is strongly supported by the Administration, the Committee on Foreign Relations and the American Bar Association. The Convention establishes standards which can be used to bring charges against countries practicing torture like Iraq.

The Senate may be asked to create a dangerous “escape clause” for human rights abusers by adopting a totally superfluous “sovereignty reservation.”

The reservation—which states that the Convention does not authorize unconstitutional laws—is superfluous because it is already established constitutional law that a treaty cannot override the Constitution (see Reid v. Covert, 354 U.S. 1, 16-17 (1957)). Moreover, the Convention simply does not require unconstitutional legis-
hearings on August 2, 1990, on the Convention Outlawing Discrimination against Women. The Senate Foreign Relations Committee also scheduled hearings for September 26, 1990, on the Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. These hearings have been postponed.

The reservation is unnecessary—it also has the potential to do great harm. The “sovereignty reservation” will protect human rights abusers because it can be invoked on a reciprocal basis by every state abusing human rights pursuant to its domestic legal system. Our Constitution does not allow human rights abusers, but that is not true for every nation. In fact, it is not uncommon for other nations to permit “exceptions” to the normal protection of human rights during emergencies. If we attach the reservation to the Torture Convention states like the People's Republic of China which permit “reeducation” and forced labor can reject complaints based on the Convention by invoking our own reservation. The Administration, the ABA, Amnesty International and other human rights groups strongly oppose the reservation for that reason.

True, the Senate adopted the “sovereignty reservation” on the Genocide Convention and some legal assistance treaties. The result? Our closest allies have vigorously objected to our “sovereignty reservation,” arguing that it undercuts the Convention. Experience has convinced the Departments of State and Justice that it is not in our national interests to adopt the reservation.

In the case of the legal assistance treatise, we have given other states a right to refuse to help the U.S. bring criminals to justice if they can claim that it would violate their constitutions. Some constitutions restrict extradition. Other nations might refuse to help track illegal drug profits by invoking bank secrecy provisions. In other words, the “sovereignty reservation” deprives the United States of the very leverage over other states which these treaties were intended to create.

Who does the “sovereignty reservation” help? Not Americans. They are fully protected by the Supremacy Clause of the Constitution. It only provides comfort to states who wish to abuse human rights and protect criminals by invoking their domestic legal systems as a shield for their wrongdoing. That is precisely what these international agreements are intended to prevent.

We strongly urge you to vote to reject the “sovereignty reservation” if it comes before the Senate (emphasis in original).