UC Irvine
UC Irvine Previously Published Works

Title
Stealth Multilateralism: U.S. Foreign Policy Without Treaties-or the Senate

Permalink
https://escholarship.org/uc/item/64j9r74h

Journal
Foreign Affairs, 92(5)

ISSN
0015-7120

Author
Kaye, DA

Publication Date
2013-10-01

Copyright Information
This work is made available under the terms of a Creative Commons Attribution License, availalbe at https://creativecommons.org/licenses/by/4.0/

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

Stealth Multilateralism

U.S. Foreign Policy Without Treaties—or the Senate

David Kaye

The U.S. Senate rejects multilateral treaties as if it were sport. Some it rejects outright, as when it voted against the Convention on the Rights of Persons With Disabilities in 2012 and the Comprehensive Nuclear-Test-Ban Treaty (CTBT) in 1999. Others it rejects through inaction: dozens of treaties are pending before the Senate, pertaining to such subjects as labor, economic and cultural rights, endangered species, pollution, armed conflict, peacekeeping, nuclear weapons, the law of the sea, and discrimination against women. Often, presidents don't even bother pushing for ratification, since they know the odds are long: under the U.S. Constitution, it takes only one-third of the Senate to reject a treaty.

The United States' commitment problem has grown so entrenched that foreign governments no longer expect Washington's ratification or its full participation in the institutions treaties create. The world is moving on; laws get made elsewhere, with limited (if any) American involvement. The United States still wields influence in the UN Security Council and in international financial and trade institutions, where it enjoys a formal veto or a privileged position. But when it comes to solving global problems beyond the old centers of diplomatic and economic power, the United States suffers the self-inflicted wound of diminishing relevance. Administrations operate under the shadow of Senate rejectionism, harboring low expectations that their work will be ratified.

The foundation of the Senate's posture is the belief, widespread among conservative Republicans, that multilateral treaties represent a grave threat to American sovereignty and democracy. Treaties, they argue,

DAVID KAYE is a Professor at the University of California, Irvine, School of Law.

create rules that interfere with the democratic process by allowing foreigners to make law that binds the United States. These "sovereigntists" portray treaties as all constraint, no advantage, as Jon Kyl, Douglas Feith, and John Fonte did recently in these pages ("The War of Law," July/August 2013). These Republicans automatically resist, in the words of the 2012 GOP platform, "treaties that weaken or encroach upon American sovereignty." And because such a small group of senators can block any given treaty, they essentially control ratification.

Treaty-making, however, is an expression of sovereignty, not a threat to it, and by excluding itself from the process, the United States loses the opportunity to influence global problem solving. The legal scholar Peter Spiro rang the alarm early on, writing in these pages in 2000 that the sovereigntist approach would leave the United States with "no voice in shaping international norms." And he was right, for whether Senate Republicans like it or not, international negotiations and the regimes they produce shape the global landscape of international cooperation. They establish rights—and, it is true, obligations—for U.S. officials, citizens, and corporations, and they will do so even as the United States continues to opt out.

Conservative Republicans in the Senate portray treaties as all constraint, no advantage.

In fact, the Senate's pattern of rejection harms the United States now more than ever, since the rest of the world increasingly resists U.S. influence. Today, other governments anticipate Washington's unilateralist impulses, which were fixed in their minds not only by the early hostility of the George W. Bush administration toward the International Criminal Court (ICC) and the Kyoto Protocol but also by the Clinton administration's mantra that Washington will act multilaterally when it can, but unilaterally when it must. Meanwhile, China is taking a greater interest in global issues; rising powers such as Brazil, India, and South Africa are asserting themselves; and Europe is consolidating and thus enhancing its negotiating power. American disengagement is allowing all these trends to accelerate.

Yet rejection is just the beginning of the story. Over the past two decades, the executive branch has developed and expanded a variety of lower-profile methods for asserting the country's interests abroad in ways that do not require Senate involvement. The Clinton, Bush,

and Obama administrations figured out that on some issues, they could circumvent the Senate entirely, and they developed new ways to participate in international forums, sometimes even exercising leadership in institutions that the Senate had refused to allow the United States to join.

Call it "stealth multilateralism." Using a patchwork of political and legal strategies, the United States has learned how to respond to the global problems that are pulling it into the world even as Senate Republicans are trying to hold it back. As sound and effective as such measures can be, however, stealth multilateralism has its limits, since treaties establish more stable, transparent, and predictable relationships than political commitments. Both the United States and the rest of the world would benefit from a return to responsible multilateral engagement in which treaties regain their central role.

NO, NO, NO

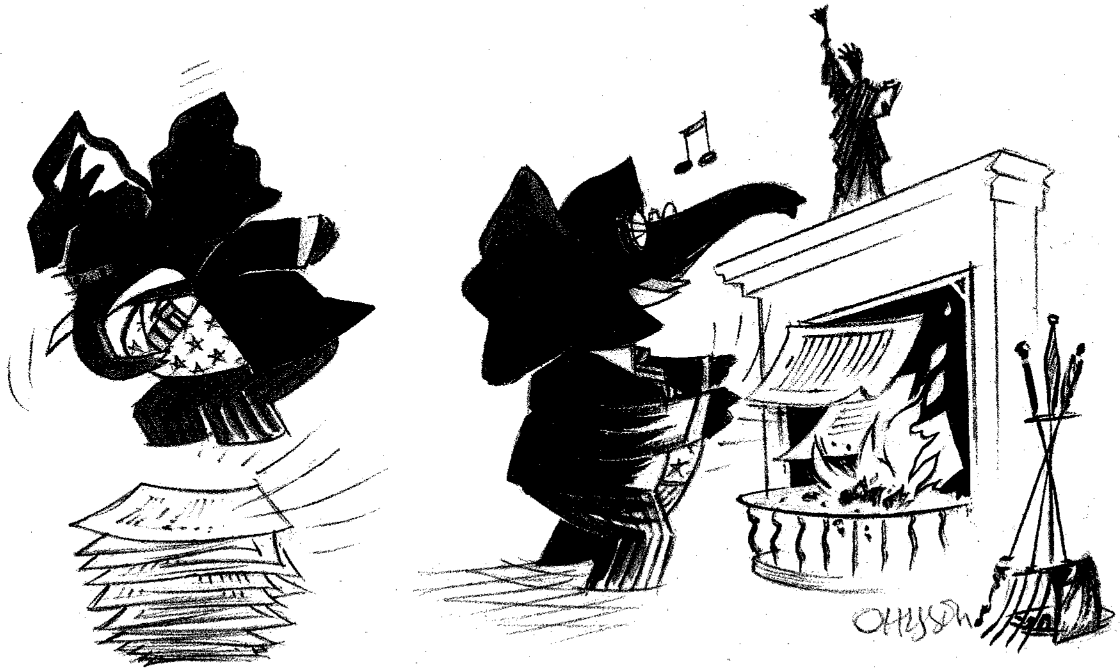
The Senate, of course, has exercised its power to reject treaties for generations—President Woodrow Wilson, for example, could never get it to ratify the Treaty of Versailles—but it did so sparingly. Its recent turn to blanket rejection is especially damaging to U.S. interests because so many of today's proposed treaties are devoted to managing global problems. Simply put, by absenting the United States from the process by which international legal rules are made, the Senate has limited the country's ability to help shape them.

The problems now begin during negotiations. Back when multilateral treaties actually had a chance of passing the Senate, U.S. diplomats could argue that they needed particular provisions or language inserted into agreements so as to ensure congressional support. Such claims are no longer credible—so much so that U.S. officials rarely bother to make them anymore, losing much of their power to shape texts to their liking.

Once an agreement has been concluded, the Senate's failure to approve it can directly damage U.S. interests. Consider the 1982 UN Convention on the Law of the Sea. The convention codified the customary rules that govern the extent of a state's sovereignty over its territorial seas, rights of passage and navigation, seabed resource allocation, illegal fishing, and much else. Despite the Senate's ongoing refusal to join 165 nations in ratifying the convention, the United States has long considered most of it to re-

flect customary international law and thus to be binding on the country anyway. The convention coordinates law and policy around critical security and trade issues on the high seas; the problem is that since the United States has excluded itself from the convention's formal legal processes, it can exert only limited influence over those developments. For example, Washington's current absenteeism ensures that it gets no say in deciding what rules should govern mining the international seabed, even though U.S. corporations have a huge stake in the outcome.

U.S. influence is also diminishing in environmental negotiations. Until the 1990s, the United States could offer not only the prospect of its joining a treaty but also a level of technical expertise and financial support that no other country could match. In exchange, its negotiating partners were often willing to agree to U.S. proposals to dilute particular provisions more than they would otherwise have liked. But the Senate's pattern of rejection has undermined that willingness markedly. Although the United States still often sends observers to meetings of parties to environmental treaties, such as those pertaining to biodiversity or the regulation of chemicals, it has largely lost the ability to influence the discussions, in part because rules often restrict attendance at the most important sessions to delegates from states that have actually ratified the treaties.



The same holds true for a number of human rights treaties that the Senate has refused to ratify, such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons With Disabilities, among others. Each agreement establishes a committee of experts to monitor compliance and interpret provisions, and although none issues binding decisions, they influence policymakers worldwide, as well as judges in domestic and international courts. Because it has no voice on these committees, the United States cannot influence the course of the law, even by dissent.

Even when the Senate does approve a human rights treaty, it often adds conditions that forfeit the United States' ability to influence the law, a subtle form of rejection. For example, when the Senate approved the International Covenant on Civil and Political Rights (in 1992) and the International Convention on the Elimination of All Forms of Racial Discrimination (in 1994), it did so only after securing reservations that stipulated that the treaties would have no legal force in U.S. courts absent further congressional or state action. As a result, when it comes to a wide range of human rights issues covered by these treaties—such as protections against torture, the right to a fair trial, freedom of expression, religious liberty, the right to political participation, and so on—the United States lacks a formal mechanism to affect how other

states and international courts interpret the evolving norms. U.S. judges interpret similar federal and state constitutional provisions, but they rarely influence the broader efforts to embed human rights norms in the laws of foreign countries.

Unlike U.S. judges, foreign judges in domestic and international courts—most prominent among them the European Court of Human Rights—are guiding the development of human rights law around the world. The Inter-American Court of Human Rights, for example, interprets basic norms of human rights law, creating an extensive jurisprudence that has a pronounced effect on states' behavior, but the United States has failed to ratify the treaty that established it. And so Washington stands beyond the court's jurisdiction, with the result that it cannot nominate U.S. judges to the court, who could then participate as the court develops human rights law in the Americas. There is a more direct concern, too. One might think that these kinds of courts cannot influence the United States, but in an era when Americans travel and live and work around the globe, the norms these courts shape might ultimately be applied by foreign national courts, and legitimately so, to U.S. citizens.

Republicans in the Senate may be willing to pay the price of nonratification, but U.S. presidents still have to conduct foreign policy.

In a similar vein, Washington's failure to ratify the 1998 Rome Statute, which established the ICC, will probably reduce the United States' influence on the development of the law governing war crimes, crimes against humanity, and genocide. In particular, Washington cannot nominate judges to the tribunal. That's a problem, because the court is likely to address legal issues that implicate U.S. concerns, such as rules about targeting and detaining combatants, even though Americans would rarely, if ever, find themselves subject to the ICC's jurisdiction.

To get a sense of how this might work, consider the fact that besides Turkey, the United States is the only NATO member not to have accepted the Rome Statute. If the ICC's jurisprudence evolves in ways that diverge from U.S. interpretations of the law of armed conflict, NATO states may find themselves slowly but inexorably coming to different views of the law's requirements. Such legal divisions could create real conflict in joint operations, limiting the U.S. military's ability to do things it believes are lawful. Although U.S. judges would

GEORGETOWN UNIVERSITY

School *of* Foreign Service *in* Qatar

Center for International and Regional Studies

About CIRS

Established in 2005, the Center for International and Regional Studies (CIRS) at the Georgetown University School of Foreign Service in Qatar is a premier research institute devoted to the academic study of regional and international issues through dialogue and exchange of ideas, research and scholarship, and engagement with scholars, opinion-makers, practitioners, and activists.

Current Research Initiatives

The State and Innovation in the Persian Gulf

Analyzes how GCC states engage in extensive and expansive efforts to foster technical and scientific innovation in their societies to bring about knowledge-based, post-oil economies.

Politics and the Media in the Post-Arab Spring Middle East

Explores the role of traditional and new media across the Middle East during and after the Arab Spring.

Arab Migrant Communities in the GCC

CIRS supports original research examining the communities of migrants and other temporary residents from across the Arab world.

Weak States in the Greater Middle East

Examines the causes and consequences of the fragility of states from Afghanistan and Pakistan in the east to Sudan and Libya in the west.

Social Change in Post-Khomeini Iran

Investigates some of the most important topics within contemporary Iran, focusing on its social, cultural, economic, and political domains.

Research Opportunities

To contribute to the existing body of knowledge on issues related to the Persian Gulf region and the Middle East, CIRS funds empirically-based, original research projects on a variety of solicited topics: http://cirs.georgetown.edu/research/grants/.

Books

- *Food Security in the Middle East* (Hurst, 2013).
- *The Gulf Monarchies and Climate Change* (Oxford University Press, 2012).
- *Migrant Labor in the Persian Gulf* (Hurst, 2012).
- *The Nuclear Question in the Middle East* (Oxford University Press, 2012).
- *The Political Economy of the Persian Gulf* (Oxford University Press, 2012).
- *International Politics of the Persian Gulf* (Syracuse University Press, 2011).
- *Innovation in Islam: Traditions and Contributions* (University of California Press, 2011).

Call for Papers

CIRS invites manuscript submissions for its Occasional Paper series. Papers dealing with issues of relevance to the Persian Gulf are accepted from all disciplines. To submit a paper, or to request free copies of CIRS materials, contact cirsresearch@georgetown.edu or visit http://cirs.georgetown.edu/publications.

"...a forum for scholarship & research on international and regional affairs..."

For more information, please email cirsresearch@georgetown.edu

Tel: +974 4457 8400 • Fax: +974 4457 8401 • http://cirs.georgetown.edu

WHEN ALL YOU WANT ARE THE FACTS

Keesing's Record of World Events

A comprehensive and accurate monthly news digest providing country by country coverage of all the world's vital political, social and economic events to **keep you very well-informed.**

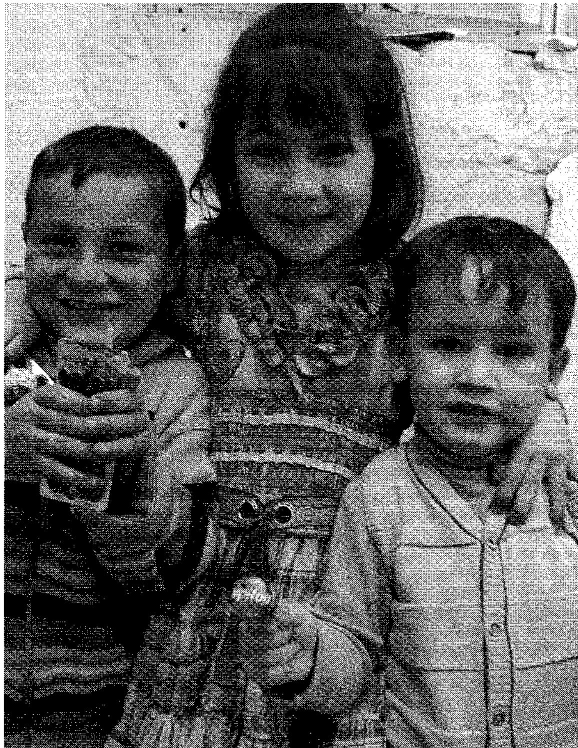
Access to an exclusive archive of 40,000 original news digest articles, covering the last 25 year gives you **instant access to relevant historical context** on today's breaking news stories.

RECORD OF WORLD EVENTS

CONCISE
ACCURATE
COMPREHENSIVE

Founded in 1931 in Amsterdam. Authors of tens of thousands of books and published scholarly papers on international affairs topics cite *Keesing's* as the source of the facts and information they rely upon. *Keesing's* has long been a core reference resource at the world's leading universities and research institutions. Learn more about how *Keesing's* can help you stay very well-informed.

Updated monthly. Affordable monthly or annual subscription rates www.recordofworldevents.com



SYRIAN
HUMANITARIAN RELIEF

Providing food, medicine, & shelter inside Syria and the bordering countries of Jordan, Lebanon and Turkey

Donate Today

zakat.org

1.888.ZAKAT.US

not necessarily adopt the same positions as the U.S. government, they would, more than others, intuitively understand the Pentagon's concerns in an area of law that balances military and humanitarian interests.

WORK-AROUNDS

Conservative Republicans in the Senate may be willing to pay the price of nonratification. U.S. presidents, on the other hand, still have to conduct foreign policy, seek solutions to global problems, and exercise leadership on the world stage. Although not always successful, they have found ways to influence negotiations for treaties the United States will not join, support organizations to which it is not a party, and solve problems without resorting to legally binding treaties. Pursued outside the glare of congressional klieg lights, these methods make up a substantial part of the United States' stealth multilateralism. No recent administration has used them more frequently or effectively than President Barack Obama's, but it is following the lead of its predecessors.

The most striking of these tactics has involved treaties that conservative senators opposed and that the United States therefore rejected. In each case, the refusal to ratify looked like a sign of the country's growing rejection of multilateral engagement. Yet in a surprising postscript, the White House ultimately found ways to participate in and even influence many of the resulting institutions.

In 1996, for example, the UN General Assembly, with strong support from the Clinton administration, adopted the CTBT, which the Senate rejected in 1999, largely along party lines. For the entirety of George W. Bush's presidency, the United States refused to participate in follow-up meetings held by the parties to the treaty. But Bush maintained the moratorium on nuclear testing that his father had declared in 1992 and followed President Bill Clinton's lead by pressing for U.S. funding for one of the signature features of the treaty: the global network of monitoring stations that detect illicit nuclear tests. Obama has backed the CTBT even more openly. He has explicitly called for its ratification even though its prospects look dim, and in 2009, the United States began attending the annual meetings of the CTBT's signatory states. Over the course of 15 years, the White House has devoted millions of dollars to fund the CTBT's nuclear monitoring, with the majority support of both houses of Congress—if not the support of two-thirds of the Senate.

Then there is the 1997 Ottawa Treaty, which sought to ban antipersonnel mines and was opposed by the Senate and the Pentagon, largely

on the grounds that land mines were critical for keeping the peace on the Korean Peninsula. After the treaty was adopted, both the Clinton and the Bush administrations refused to participate in subsequent meetings of its parties. And yet, as with the CTBT, the U.S. government quietly found other ways to support the agreement. Since the land-mine ban came into effect, the United States has scrupulously avoided producing, transferring, or deploying the mines forbidden by the treaty, and it leads the world in demining projects. In 2009, the United States began attending the major meetings of the treaty's parties; it has even helped pay for the meetings.

Nonbinding arrangements may now be the executive branch's preferred way of doing business.

The Rome Statute followed Ottawa within a year, and it created a permanent criminal court in The Hague to deal with atrocities. The Clinton administration actively participated in the negotiations, all the way till the end, in the summer of 1998. Yet the Senate and the Pentagon, animated by the outsized fear that a rogue prosecutor would pursue Americans for political ends, upped its opposition to the treaty, and the United States voted against the final draft. At the end of his presidency, Clinton authorized the United States to sign the Rome Statute, but he refused to send it to the Senate for ratification.

The Bush administration initially treated the ICC with hostility. In 2002, Bush signed the American Service-Members' Protection Act, which prohibited U.S. cooperation with the ICC, penalized U.S. allies that did cooperate, and authorized the president to use "all means necessary and appropriate" to rescue Americans held by the court. (Among Europeans, the law earned the nickname "The Hague Invasion Act.") The Bush administration even tried to get the ICC's parties to sign agreements not to transfer any Americans to the ICC's custody. By 2005, it seemed as though the United States was working as hard as possible to kill the court.

After four years of animosity, however, the Bush State Department saw the pointlessness of that stance. Indeed, after Secretary of State Colin Powell labeled events in the Darfur region of Sudan genocide, the administration accepted the possibility that the ICC might be the only way to hold the perpetrators accountable. After months of negotiations, Bush consented to a UN Security Council

resolution that referred the conflict in Darfur to the ICC. The State Department then slowly extended an olive branch to the ICC, opening channels of communication with its prosecutor.

Obama has taken this cooperation to unprecedented levels. He has thrown his administration's support behind the ICC, even though the underlying treaty is unlikely to be ratified anytime soon. His administration offers million-dollar rewards for information leading to the arrest of ICC fugitives. After the Congolese warlord Bosco Ntaganda presented himself to the U.S. embassy in Rwanda in March 2013, the U.S. government quickly transferred him to the ICC. In these and other ways, the United States, once the court's most implacable foe, has arguably become its most significant supporter.

As for treaties concluded more recently, the U.S. government has continued its pattern of engagement without ratification. For instance, the World Health Organization's 2003 Framework Convention on Tobacco Control has never been submitted to the Senate. Yet the Obama administration and even Congress have embraced the treaty's objectives. In 2009, Congress gave the Food and Drug Administration broad new authorities to regulate tobacco, aligning U.S. law with the convention. And the Centers for Disease Control and Prevention and the U.S. Department of Health and Human Services now collaborate with the World Health Organization to help developing countries around the world implement the accord.

THE TIES THAT DON'T BIND

In addition to lending support to rejected treaties, the executive branch also gets around the Senate by striking nonbinding international agreements and crafting informal arrangements on its own authority. One area where the government has done so has been climate change policy. In 2001, when Condoleezza Rice, then Bush's national security adviser, told European diplomats, "Kyoto is dead," her message couldn't have been clearer: the Bush administration had no interest in the negotiation process of the UN Framework Convention on Climate Change (UNFCCC). But Rice also said that they would "have to find new ways to deal with the problem." And sure enough, the Bush administration spearheaded modest voluntary arrangements for fighting climate change, such as an 18-member group aimed at transitioning to hydrogen fuel and a 14-member group that focuses on reducing methane emissions.

These efforts did little to alter the perception that the Bush administration was generally opposed to a full-scale fight against climate change, but they did allow it to pursue a kind of low-profile multilateral engagement. In 2007, late in his second term, Bush convened a meeting of large economies, along with major carbon emitters, such as China, that bore minimal responsibilities under Kyoto, to cooperate politically on reducing their emissions. That same year, his administration finally acknowledged the role of the UNFCCC when it agreed to participate in post-Kyoto negotiations.

The Obama administration has been open to binding approaches to climate change, willing to see how far negotiations under the UNFCCC can go. It participated actively in the negotiation process that led to the 2009 Copenhagen accord, which, although nonbinding, laid the groundwork for future agreements under the UNFCCC. But it has also pressed ahead with the voluntary coalitions, eliciting little pushback from Congress. It has expanded the climate change meetings of major economies that began under Bush, holding nearly a dozen high-level gatherings, and it has consulted Congress on setting U.S. emissions targets at Copenhagen.

Many global solutions still require the binding force and permanence that only treaties can provide.

The Obama administration has made use of nonbinding commitments to advance international nuclear policy, too. The Nuclear Security Summit that Obama convened in Washington in 2010, along with a follow-up meeting in Seoul in 2012, brought together dozens of world leaders who, instead of seeking to conclude a binding agreement, agreed to a communiqué, a work plan, and voluntary pledges. In a bilateral setting, Obama has also called for "negotiated cuts" in the United States' and Russia's nuclear arsenals, but given the Senate's likely resistance, the administration has not committed to a legally binding treaty, the traditional form for such agreements.

Indeed, nonbinding arrangements may now be the executive branch's preferred way of doing business. Consider the movement to regulate private military contractors. The United States is both the largest provider and the largest consumer of their services, and in the wake of alleged abuses by U.S. contractors in Afghanistan and Iraq, the UN began developing an agreement to regulate the field, a process that both the Bush and the Obama administrations (and the EU, also

home to many such contractors) refused to support. But both participated in nonbinding efforts that have inoculated the United States against charges of unilateralism without the hassle of a treaty. In 2006, the Bush administration backed efforts organized by Switzerland that resulted in the International Code of Conduct for Private Security Service Providers, through which over 650 companies (including over 60 U.S. ones) have agreed to adhere to a long list of best practices.

Yet there are still times when the White House prefers a binding agreement, such as when it has to get another country to make legal changes. Even in these cases, however, recent administrations have often opted for something outside the usual treaty process, such as "sole executive agreements," which become effective on the president's signature and are limited to areas that fall under the president's constitutional authority. This method is typically bilateral, but the Obama administration used it to join the Anti-Counterfeiting Trade Agreement in 2011, generating some opposition in Congress. To pass free-trade compacts, such as the North American Free Trade Agreement, presidents have relied on "congressional-executive agreements," which, instead of requiring the consent of two-thirds of the Senate, can pass with a simple majority in both houses of Congress. These agreements are usually limited to trade deals, since the Senate, reluctant to allow the erosion of its power to approve treaties, would no doubt strongly resist any efforts to expand their use.

THE LIMITS OF END RUNS

When the Senate rejects treaty after treaty, or when a president fails to seek the ratification of important agreements, it can look like the United States has given up on multilateral deal-making. But behind the scenes, successive administrations have done a remarkable amount of work, often with other sympathetic governments, developing international arrangements that bypass the U.S. Senate and try to accomplish U.S. and global objectives—stealth efforts that conceal the full extent of the United States' engagement.

Stealth multilateralism lets both Senate Republicans and the White House get their way: the former can play to their anti-internationalist base, and the latter can go about the business of foreign policy. Indeed, this process might seem preferable to the alternatives. If presidents can strike the international deals necessary to advance U.S. interests without requiring the messy involvement of Congress, why ever bother with the Senate?

The problem is that stealth multilateralism is not a long-term answer, because many global solutions require the binding force and permanence that only treaties can provide. Challenges such as climate change, for example, are best addressed through binding treaties—which involve real legal commitments—rather than nonbinding political agreements, because in order to undertake painful reductions in carbon emissions, each country needs to know that the others are taking the plunge, too. The same can be said for the laws and regulations concerning the high seas and the seabed, biological diversity, armed conflict, public health, pollution, the arms trade, and on and on. Treaties create settled and reliable expectations and impose consequences for violators. In areas that touch on commercial concerns, U.S. businesses and investors demand such predictability. Political commitments, on the other hand, can be reversed in an instant.

Moreover, treaties are not always aimed at changing U.S. behavior; in many other countries, treaties can trigger badly needed legal reforms. Increasingly, contemporary treaties are devoted to areas in which U.S. law is already compliant, or close to it, and so treaty-making often looks less like a bargaining process and more like foreign assistance to develop the rule of law elsewhere. In such realms as human rights, environmental regulation, public health, and international criminal law, treaties are aimed at ensuring that all countries observe certain minimum standards—something the United States has long valued, and on which U.S. agencies spend billions of dollars a year. Washington's ability to promote these interests diminishes with every step taken away from multilateral lawmaking.

Some analysts and officials celebrate the U.S. ratification process as deliberative: politicians care so much about the country's obligations that they take the process of consenting to them very seriously. There is, to be sure, some truth in this claim. But the stance the Senate has taken in recent years goes well beyond caution to impulsive rejection. This attitude has already damaged the Senate's own interests, having given the executive branch a legitimate reason to cut it out of the process of global cooperation. Stealth multilateralism involves legitimate and lawful alternatives to treaties, but the American public ultimately loses out. In a perfect world, a responsible Senate would carefully weigh the costs and benefits of joining every treaty and would seek to integrate the United States into the international forums from which it is now estranged. Until that happens, the White House will have to settle for end runs.