

**THE ADMINISTRATION'S PROPOSAL FOR A
U.N. RESOLUTION ON THE COMPREHENSIVE
NUCLEAR TEST-BAN TREATY**

HEARING

BEFORE THE

**COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE**

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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WEDNESDAY, SEPTEMBER 7, 2016

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m., in Room SD-419, Dirksen Senate Office Building, Hon. Bob Corker, chairman of the committee, presiding.

Present: Senators Corker [presiding], Risch, Rubio, Flake, Isakson, Cardin, Menendez, Shaheen, Udall, Murphy, and Markey.

**OPENING STATEMENT OF HON. BOB CORKER,
U.S. SENATOR FROM TENNESSEE**

The CHAIRMAN. Call the Foreign Relations Committee to order. And I want to thank everyone for being here.

I want to thank our witnesses, which I know will be invaluable in helping us understand this topic.

I want to thank Senator Cardin for agreeing to have this hearing, and for changing the time. We had a little blowup on the Senate floor yesterday, which changed our committee process to a degree. And I want to thank him so much for being so cooperative on all issues and working with us.

I would like to, on the front end, talk about what this is not about today. This is, to me, not about the substance of any treaty. That is not what this is about. I actually have been a part of supporting arms-control treaties. I think I played a pivotal role, as a matter of fact, in the New START Treaty, when we were able to do things that enhanced our Nation's security by getting commitments towards modification of our nuclear program, modernization of our nuclear program, where we have warheads and guidance systems that are outdated. And we had the—through that process, we got the administration to commit to that modernization, which they have been on pace—not quite at the levels we would like for them to be over the course of time. There has been a little bit of a detour this year, unfortunately. But, it has moved along, to a degree. We had commitments on missile defense that were part of the RUDs that I helped craft. And, look, I am proud of what I did in that particular case. And this is not about being against arms control.

This is about one thing, and that is, all of us run to serve in the United States Senate. We come here. We know what a privilege it

is to weigh in on important issues. And this is really about one thing, regardless of who is in—President, regardless of who is chairman of the committee, regardless of who is serving. And that is to ensure that the Senate plays its appropriate role as it relates to international agreements. This agreement could be about apple pie, and I would be bringing this hearing together.

So, I just want to, again, try to set the context. And I know that Senate Cardin and I have talked about this on a couple of occasions. This is not about trying to pass judgment on the Comprehensive Test-Ban Agreement. That is not what this is about. It is about trying to understand what it is the administration is doing. They are on the way out the door. We understand that administrations try to create legacies. And there is a concern—I think it is a legitimate concern—about going to the U.N. Security Council and bypassing the Senate, possibly—and that is what this is about; we have not seen the language yet—but, possibly causing something to, in essence, become binding.

I know that today our policy, relative to testing, is that we do not test. And that is fine with me. That is a policy. It has been a policy that has been around for some time. What I am concerned about is that the administration is taking steps that possibly—again, we have not seen the language—could take that policy and turn it into something that is binding through customary international law, down the road, which makes it difficult for a future administration, who may want to have a different policy, for whatever reasons, from being able to move in that direction.

I read a brief—I wrote a letter too—by the way, I did write a letter to the administration regarding this, and I want to thank them. Well, first of all, I called Samantha Power and asked her to tell me what it is they were up to. She wrote me a letter, which I appreciate greatly. Because of ambiguities that existed in that letter, I wrote a letter to the President, telling him I had significant concerns because some of the language certainly had ambiguities and could, in fact, be interpreted to be something that creates customary international law, which is—which could create some binding effects on future administrations. I just got back, today—I have not read it; it was just handed to me, it is still hot I just got back a response to that letter, which I—again, I appreciate. And we certainly will look at that. But, we went through—we went through and looked at what is happening here. This gentleman named David Koplow, who is a professor of Georgetown Law, who basically has written the playbook for the administration, or for anyone who wishes to cause something to be binding—binding on our country through going straight to the U.N. Security Council versus causing something to be brought to Congress and through the United States Senate to have a treaty ratified. And so, it looks to me like that—I do not if they even know this gentleman, I do not know this gentleman—it looks to me like, based on what is happening, that they are following, if you will, a game plan that has been laid out. Again, they may have laid it out themselves. So, I just have concerns. And I appreciate having two brilliant people here before us to help us with this.

I want to reiterate, with my good friend Senator Markey coming in—Senator Markey, to me, this has nothing to do with the sub-

stance of the treaty itself. It has to do with the fact that you are a respected Senator from Massachusetts. You have a role to play here in determining things that bind us, as it relates to foreign policy. And I just want to make sure that we are not allowing an administration on the way out the door to do something that ends up binding us, through customary international law, down the road, in taking actions at the U.N. Security Council that I would deem to be inappropriate if that were the case.

So, with that, thank you for your patience in letting me speak longer than I normally do, Senator Cardin, our great Ranking Member. And I think that we agree on this topic. And that is—and I will be very specific, because I do not want to speak for you—and that is that we want to make sure that we do everything we can together to preserve the prerogatives of this committee, preserve the prerogatives of the United States Senate in being able to carry out our responsibilities.

This is my editorial comment that I will add on. I will just tell you. I have watched, through the years, and the responsibilities of the United States Senate have eroded—have eroded. And I—I am just here today, with this hearing and pushing back against the administration, to try to make sure that we do everything we can to ensure that that is not something that continues.

So, with that, again, our distinguished Ranking Member and my friend, Senator Cardin.

**STATEMENT OF HON. BENJAMIN L. CARDIN,
U.S. SENATOR FROM MARYLAND**

Senator CARDIN. Well, Chairman Corker, thank you for calling this hearing. And I certainly concur in your observations as to the prerogatives of the United States Congress and the Senate.

We do not have any proposed language that the administration is seeking in regards to United Nations actions, so we are going, right now, by what has been presented to us by the administration. And I have been told that it will—that what is being negotiated would not legally affect the actions of the United States in regards to the prerogatives of the United States Congress or the prerogatives of the United States Senate in the ratification of a treaty.

You referenced a letter we got today, dated September 7th, from Secretary Kerry. I am—was reading it, not to—I did not observe every word that you said, but I was reading it as you were giving your opening statement. And I will read one sentence out of that letter, which says, “We are not proposing, and will not support, the adoption of the U.N. Security Council resolution imposing a legally binding prohibition on nuclear testing.”

So, I would ask that that letter from Secretary Kerry be made part of our record.

The CHAIRMAN. And without objection.

[The information referred to is located in the Additional Material Submitted for the Record section at the end of this transcript.]

Senator CARDIN. So, we do need to talk a little bit about the Comprehensive Test-Ban Treaty, because it is kind of unique. Of course, every treaty has some unique features to it. We will celebrate, this month, the 20th anniversary of the adoption by the United Nations General Assembly of the Comprehensive Test-Ban

Treaty. It was ratified by 164 nations, if my staff information is correct. It has not yet entered into force. And I think we all will agree that it is unlikely that it will enter into force, not because the United States has not ratified the treaty, because it requires ratification by countries that have not signed it and show no interest in signing it, such as North Korea, and such as, unfortunately, Pakistan and India. So, there are several—and Iran would have to sign the treaty and ratify it. And we are not expecting to get cooperation there. So, it is unlikely that this treaty is going to go into effect anytime in the near future.

But, since 1992, the United States policy has been to impose a moratorium on nuclear explosive testing. That was proposed by President George Herbert Walker Bush and supported by the United States Congress. That was done regardless of the ratification of the treaty. It was thought to be the right policy for America, and one in which I certainly believe is in our best interest. President Clinton then tried to enshrine that in the negotiations of the Comprehensive Test-Ban Treaty. None of us want to live in a world, as we did during the Cold War, where nuclear tests were a regular frightening occurrence, a reminder of the terrible destructive power of these weapons. I think the United States is safer, and the world is a better place, without nuclear testing.

So, the real question, Mr. Chairman, is that the administration has indicated that there will be no legal impact in what they are talking about in the United Nations. Why are we doing this in the United Nations? And I think that is the question we all should be asking. And it seems to me that what we are attempting to do is to get more countries to follow the policy that we adopted in 1992, and not to do active nuclear testing. Why? Because it is in our national security interests and in the security interest of the global community.

If nuclear tests could be verifiably ended worldwide, the United States would disproportionately benefit. We do not need nuclear tests to ensure our weapons are effective or secure. Year after year, our National Laboratory directories have certified the Stockpile Storage Program provides us with 100-percent confidence that the United States nuclear weapons are reliable without testing.

We do not need nuclear active testing to have our deterrent stockpile. It is the countries that are trying to develop a stronger capacity in nuclear weapons that could benefit by active nuclear testing. It is those countries that we do not want to test. It is in our national security interest that they do not test. Therefore, as I look at this, if we are capable of putting more pressure on those countries not to test, it is in our national security interests.

The world we seek is the one President Reagan sought in his second inaugural address. And I quote President Reagan, “We are not just discussing limits on a future increase of nuclear weapons, we seek instead to reduce their number. We seek the total elimination, one day, of nuclear weapons from the face of the Earth.”

I certainly agree with President Reagan in that desire. And it seems to me the actions that the Obama administration is taking now might be furthering that objective by getting countries that could develop a greater capacity for nuclear to have the pressure of the P5, the world leaders, to say, “We are not testing, and we

believe you should not test, and that we will continue to pursue avenues to enforce that through our individual actions in our countries.”

So, I look forward to hearing from our witnesses. And I certainly agree with the Chairman that this is an important subject for the Senate Foreign Relations Committee. We have the jurisdiction, in the Senate, on treaty ratification. A legal document needs to have the support of Congress.

The CHAIRMAN. Well, thank you. I somewhat regret that we moved into the subject of the treaty as part of the discussion, because, to me, again, it is not even relevant to our discussion.

I do want to say that there are ways that the administration can go to the U.N. Security Council and create something that, on its surface at the U.N. Security Council, is not legally binding. But, over time, especially because of certain things that we agree to with the Vienna Convention, which, again, we have never ratified, over time makes it something that is customary international law.

So, we have some witnesses here today who will help us think that through. I hope that is not the case. I certainly agree with the comments that President Reagan made, again. And I—unfortunately, I hope this does not devolve into whether we should have a Test-Ban Treaty or not, but that we focus on the substance, not of the treaty, but of just the U.N. Security actions, itself, and how it might affect future administrations. That is, to me, the only thing that matters.

I will say, the Test-Ban Treaty was voted down—was voted down. I will say that two of our internationalists, to use Mr. Krepon’s words, Dick Lugar and John Warner, voted against it. And so, I just want to ensure—I am not saying as to how I would vote or not vote on a treaty. We have not had any debate. I just want to make sure that nothing is occurring that usurps the responsibilities that we have as United States Senators. Whether it is a good treaty, bad treaty, to me, is not the issue today. It is whether something can be done at the United Nations that usurps our role. It can. We know that can happen. Hopefully, there is a degree of pushback that will occur, as a part of this hearing, to ensure that that is not the case.

Senator CARDIN. Mr. Chairman, if I might just—short reply.

The Test-Ban Treaty is not going to go into effect in the near future. That is, I think, a pretty safe statement to say. It is also, I believe, a safe statement to say that it is in our national security interest to preserve and expand the moratorium on nuclear testing. So, the question is, What actions can the United States take? And, in that context, we have this hearing on potential action in the United Nations.

You and I both agree that that action should not compromise the prerogatives of the United States Congress or the United States Senate. And I agree with you completely on that, and that is why I think this hearing is very important. But, I also believe that we need to pursue policies that preserve and expand the moratorium that has been in effect since 1992 unilaterally in the United States.

It is interesting, under George W. Bush’s administration, where he openly said he would not seek the ratification of the Test-Ban

Treaty, he did not notify that he was withdrawing, and he maintained the moratorium. So, I think—

The CHAIRMAN. Yes.

Senator CARDIN [continuing]. The issue you are raising is a very important issue on the legalities of what we are dealing with here, but the underlining strategy on how do we stop emerging nuclear powers from testing is an important issue that needs to be dealt with. And the Obama administration, I believe, is using its opportunities at the United Nations to advance that, not to advance the treaty.

The CHAIRMAN. Well, I hope that is the case. And, because we have not seen the language—

Senator CARDIN. That is right.

The CHAIRMAN [continuing]. There is no way for us to know that.

And we have two people here today who can help us think through what that language might, and might not, do.

With us, our first witness, is The Honorable Stephen Rademaker, of The Podesta Group. Mr. Rademaker is a former State Department Assistant Secretary for several bureaus, including arms control, international security, and nonproliferation. He has also served in the White House Counsel's Office and as a staffer here in the Senate. He has written and spoken extensively on the CTBT.

Our second witness today is Mr. Michael Krepon, co-founder of The Stimson Center, an internationally recognized leading think tank focused on global security issues. Mr. Krepon has written extensively on the threat of nuclear weapons.

And I want to thank you both for being here, for sharing your thoughts and viewpoints. Your full statements will be entered into the record, without objection. And, you know, generally speaking, if you could speak for about 5 minutes—you have been here before, you understand the process—we would appreciate it. And we look forward to our questions and answers.

And truly, I think, for most of us, this is a deepening-of-understanding hearing. And we thank you both for contributing to that. So, with that, Mr. Rademaker.

**STATEMENT OF HON. STEPHEN RADEMAKER, PRINCIPAL,
THE PODESTA GROUP, WASHINGTON, D.C.**

Mr. RADEMAKER. Thank you, Mr. Chairman and Ranking Member Cardin, members of the committee. It is a great honor to be invited to appear today, and I thank you for that.

I want to note, at the outset, that I work at one of D.C.'s large public affairs firms. And, notwithstanding that, I am appearing here in a purely personal capacity. I am expressing only my own views, not the views of my firm or any of its clients.

I want to strongly agree with what Chairman Corker said at the outset about the issues here. I think there are two issues. One is, Is the Comprehensive Test-Ban Treaty a good idea or a bad idea? And that was extensively debated in the past, and it will probably be extensively debated in the future. But, I think there is a second issue that is more timely, and I devoted my prepared statement to that second issue. The second issue is the process by which the Obama administration appears to be going about trying to advance the Comprehensive Test-Ban Treaty. And I hope everyone in this

room would agree that the administration could have the most worthy objective in the world, but if it is violating the U.S. Constitution or trampling on the prerogatives of this committee to achieve that worthy objective, that is a problem.

And so, I think, as the Chairman indicated, the question we should be asking is, Is what the administration is proposing to do here a problem from the point of view of the United States Constitution or the prerogatives of this committee, which, in essence, are—I think the relevant one is the prerogative of this committee and the United States Senate to approve the imposition of binding international legal obligations on the United States? You know, basic constitutional issue, Does the President have the authority to do that on his own, or does he have that authority only with the approval of the United States Senate? And, I think, traditionally, the answer at the Senate has been an emphatic, “The Senate has to approve.” No binding legal—international legal obligations without approval of the Senate. So, is the administration doing something here that would violate that principle?

Mr. Chairman, you referred to one thing they could be doing that would clearly violate that principle, and that would be to go to the U.N. Security Council and ask for, basically, the Security Council to impose the Comprehensive Test-Ban Treaty on the world by vote of the U.N. Security Council. You know, that would turn the United States Senate and this committee into a complete afterthought. You would have no role whatsoever in approving or disapproving or even reviewing a decision like that.

Is that within the authority of the Security Council? I think there are a lot of people who would argue that it is within the authority of the Security Council to do something like that. And law review articles are being written, scholars are actually addressing this issue right now and call—and, you know, some activist individuals and organizations are calling on the President to do precisely that.

So, it is not a strawman. I mean, the President is actually under pressure from some of his constituency to do what I think all of us would agree would be a very dangerous thing, from the point of view of the prerogatives of the Senate.

Now, as I understand it, the administration is now assuring everyone that, “Relax. We are not going to do that. We are not going to ask the Security Council to impose a test ban by Security Council vote.” I hope that is true. We need to wait and see what the resolution that passes the Security Council looks like.

But, I would point out that it is important—it is most important not to see what the final resolution looks like. What would be most interesting would be to see what the initial U.S. proposal looked like, because that will reveal what the administration’s intention was.

And I point out in my testimony that there are two things you should look at on the question of whether they are seeking to, basically, turn the U.N. Security Council into a global legislature, a global superlegislature, to impose binding legal obligations on not just the United States, but all the countries of the world.

The first indicator would be if the administration's proposal to the other members of the U.N. Security Council called for action by the Security Council under Chapter 7 of the U.N. Charter.

And then, the second thing to look at would be whether one of the operative paragraphs begins with the word "decides." Because if the initial U.S. proposal had those two features, they were, in fact, asking the U.N. Security Council to act as a superlegislature, maybe not to ban nuclear testing, but to adopt some binding measures with respect to the issue of nuclear testing.

And I also point out in my testimony that, you know, it is unusual for the Security Council to jump into an issue and impose some radical new mandate on an—on a country or a group of countries or the world. Usually, they take a bunch of baby steps leading up to the radical step. So, the—you know, the interesting question is, Is this the first baby step toward the ultimate objective of getting the U.N. Security Council to impose—essentially, impose the Comprehensive Test-Ban Treaty on the world by Security Council action rather than by approval of individual countries of the world of the CTBT?

So, I do not think this is a strawman, I think it is an issue that needs to be carefully considered.

But, if that is not what the administration is doing, then what are they doing at the Security Council? My impression is that what they are planning to do is get a statement out of the Security Council that, basically, tells the world that any country that signed the Comprehensive Test-Ban Treaty is subject to an obligation under international law not to defeat the object and purpose of the Test-Ban Treaty, and that a nuclear test by any signatory would violate that obligation. And what you are being told by the administration is, "Hey, that is customary international law. No big deal." And not just customary international law, but also reflected in something called the Vienna Convention on the Law of Treaties, which, again, we are told reflects customary international law.

And what the administration is leaving out of that narrative is that—if you look at the history of the Vienna Convention on the Law of Treaties, what emerges is, there has been a huge food fight over the last 50 or 40 years between the Senate and the administration over that treaty. And it has been about the prerogatives of the Senate. And the Senate has traditionally considered that the Vienna Convention on the Law of Treaties basically does not take account of the constitutional role of the United States Senate.

And so, this whole notion that, under Article 18 of the Vienna Convention, there is an obligation not—when the United States signs a treaty not to defeat the object and purpose of that treaty, that is a proposition that, to my knowledge, the Senate has never agreed to. Because the question would be that when the President signs a treaty does the United States immediately become subject to international legal obligations not to defeat the object and purpose of that treaty? Yes or no? Because if the answer is yes, you know, that is a diminution of the role and the authority of the Senate to approve or disapprove the imposition of legal obligations—international legal obligations on the United States. And so, one of the reasons this committee has never approved the Vienna Convention on the Law of Treaties is because of concern about that.

Now, beyond that, there is the question of, you know, what that provision of the Vienna Convention says is—you sign the treaty, you are obligated not to defeat the object and purpose until the country has made its intention clear not to become a party to the agreement.

So, then there is a second question of, basically, How do you get out from under that obligation? And, more specifically, when the United States Senate votes to reject a treaty, like it did in 1999, does that extinguish the claimed obligation not to defeat the object and purpose, or does the United States remain subject to that obligation even though the Senate has rejected the treaty?

And, of course, the executive branch's view on this is, "Well, we decide. And, yes, maybe the Senate foolishly rejected a treaty, but we still intend to become subject to it." So, the President, having imposed this obligation not to defeat the object and purpose of a treaty on the United States by signing the treaty, even after the Senate rejects the treaty, the President can declare to the world, "Hey, we are still bound, not I am going to, one day, change the Senate's mind, so we remain subject to that legal obligation."

That was actually the position of the Clinton administration after the Senate voted. They went around the world and told countries, "Relax. The United States—we still have an obligation under the Vienna Convention not to defeat the object and purpose of the treaty, so, you know, we are still constrained legally. You should not worry about what the Senate has done."

There were a lot of Senators, in 1999 and thereafter, who thought that was a constitutional overreach, that—for the President to say that, basically, Senate action to reject a treaty is of no account, of no meaning internationally. That was their position. But, there was big debate about it. President Bush took office. His position was, he did not favor ratification of the Comprehensive Test-Ban Treaty.

In 2008, Secretary of State Condoleezza Rice sent a letter, on behalf of the administration, to Senator John Kyl on this very issue, about the obligation of the United States not to defeat the object and purpose of the Comprehensive Test-Ban Treaty. And what she said was that, because President Bush was not committed to ratification of the Comprehensive Test-Ban Treaty, the obligation of the United States not to defeat the object and purpose of that treaty had terminated. And then she went on to say, "We do not believe that such obligation would arise again unless the treaty was to be ratified by the United States." I've included a copy of that letter as part of my prepared statement.

Okay? So, she assured the Senate, in 2008, that—you know, without really rejecting what the Clinton administration had said, but she said, with the advent of the Bush administration, we are not committed to this treaty, so we no longer have this obligation not to defeat the object and purpose.

Now, Obama gets elected. He, of course, favors the treaty. Is this thing like a light switch? I mean, the international legal obligation of the United States gets flipped on and off, depending on the state of mind of the President of the United States? And the Senate can reject a treaty any number of times, and that is completely irrelevant to whether the United States has legal obligations not to de-

feat the object and purpose of a treaty? I mean, that is, actually, the premise of what the administration is doing, that—I think they are going to ask.

My point to you is, this should be a controversial issue. I mean, the United States Senate should say, “Wait a second. We do not agree, in the first place, that, just because you signed a piece of paper, Mr. President, the United States incurs international legal obligations. We have to approve that before that happens.” But, even if you take that position, when we reject a treaty, certainly that obligation ends. And then, the idea that, you know, you can later agree that it has ended, but then a new President comes in and flips the switch again and we are subject to the international legal obligation, that should be controversial.

But, then—to then take that to the U.N. Security Council and get them to agree that, on this—what is, in fact, a separation-of-powers issue—what is the relative authority of the Senate versus the President?—get the U.N. to weigh in on the President’s side of the—of that argument—to me, is, you know, astonishing. And that is where we are.

I have gone way over my 5 minutes.

[Mr. Rademaker’s prepared statement follows:]

PREPARED STATEMENT OF STEPHEN G. RADEMAKER, PRINCIPAL, THE PODESTA GROUP

Chairman Corker, Ranking Member Cardin, and Members of the Committee, thank you for inviting me to testify on the Obama administration’s plan to seek U.N. Security Council adoption of a resolution relating to the Comprehensive Nuclear Test-Ban Treaty (CTBT).

As you consider the subject of today’s hearing, I would suggest that there are two dimensions to the issue, each of which needs to be considered separately. The first is the wisdom of the administration’s policy objective—seeking to promote and ultimately bring into force the CTBT. The second is the propriety of the administration’s strategy for advancing this policy—specifically their decision to bring the CTBT before the U.N. Security Council (UNSC) for a vote rather than asking the Senate to reconsider its rejection of the treaty in 1999.

While I suspect there are divergent views within this Committee on the first issue, I would expect much less disagreement about the importance of ensuring that the process followed by the administration to advance the CTBT respects the constitutional prerogatives of the Senate. Further, because the CTBT has been debated extensively in the past, I don’t expect us to be able to offer you many truly novel insights into whether the Senate should give its advice and consent to its ratification.

I therefore intend to devote most of my remarks to the second issue. I will make the case that there are important separation of powers issues at stake in what the administration is proposing to do, and the Senate should not look the other way, irrespective of how it feels about the administration’s larger policy objective. I will turn only at the end of my remarks to some observations about the CTBT itself.

I. THE THREAT TO THE SENATE’S CONSTITUTIONAL PREROGATIVES

In discussing whether and how the administration’s plan to seek a UNSC resolution on the CTBT threatens the constitutional prerogatives of the Senate, I am at the disadvantage of not knowing for sure what type of Security Council action the administration is seeking. And, of course, whatever language the administration initially proposes will likely be further modified as a result of the Council’s deliberations. I therefore can only talk in general terms about some of the options for Council action, and how those options should be viewed by anyone concerned about protecting the prerogatives of the Senate.

A. *Imposition of the CTBT by UNSC Fiat*

When it first emerged that the administration had decided to take the CTBT to the UNSC, there was a great deal of speculation that the administration intended to ask the Council to simply adopt a global prohibition on nuclear weapons testing. In other words, rather than seeking to ban nuclear testing the traditional way—

through a tedious multilateral arms control negotiation like the one that gave us the CTBT—they might ask the UNSC to impose something akin to the CTBT overnight in an exercise of the Council’s authority under Chapter VII of the U.N. Charter to “decide what measures shall be taken . . . to maintain or restore international peace and security.”

I have no doubt that the speed and simplicity of this approach would appeal to some who value progress on arms control above all else. But I submit that such a step would be highly corrosive not only to the Senate’s constitutional authority to approve the imposition of new international legal obligations on the United States, but also to the legitimacy of the UNSC. While multilateral arms control processes can be excruciatingly cumbersome and slow, they do have the advantage of producing legal regimes that command universal, or near-universal, respect because they are the product of international consensus.

The imposition of a new arms control regime by UNSC fiat would inevitably be viewed by some countries as an illegitimate power grab by the Council, particularly by the five permanent members of the Council. It therefore could diminish the Council’s ability to act effectively in the future. And, of course, it would deny the Senate any role whatsoever in approving imposition the new arms control regime on the United States.

This does not necessarily mean, however, that it would be beyond the power of the UNSC to seek to prohibit nuclear weapons testing under Chapter VII of the U.N. Charter. Undoubtedly there are many scholars of international law who would argue that the Council does indeed have the authority to take such action, and that such action would be binding on the United States because the United States is a party to the U.N. Charter.

They would argue that the pesky problem of Senate advice and consent to the new international legal obligation is taken care of by the fact that, in 1945, the Senate gave its advice and consent to ratification of the U.N. Charter, which carried with it a grant of authority to the UNSC to take actions like imposing a ban on nuclear testing. They would further point to Congress’s enactment of the United Nations Participation Act in 1945 as providing a statutory foundation for deeming the United States bound by the UNSC action.

The problem with this line of reasoning is that it accepts that the UNSC is empowered under Chapter VII to act as a global super-legislature, ordering about the nations of the world as it sees fit, so long as it can characterize its actions as intended “to maintain or restore international peace and security.” Once this principle has been accepted, there really is no outer limit to it. Certainly, the principle would not be limited to UNSC action in the area of arms control. There would be no legal reason why this same authority would not extend to UNSC action with respect to all kinds of other matters traditionally subject to multilateral and bilateral treaties among nations. Indeed, there is no reason why the authority would not also extend to all manner of domestic policy issues that today are considered the exclusive province of national governments. The implications of this, not only for the Senate, but for Congress as a whole, and indeed for American democracy as we know it, are obvious.

To be sure, administration spokesmen quickly denied that they intended to seek a UNSC resolution that would essentially impose the CTBT on the world by Council mandate, bypassing not only the Senate, but also many other governments around the world. But this begs the question what they are trying to accomplish by means of a UNSC resolution, and in particular whether they are still trying to utilize the UNSC as a global super-legislature with respect to nuclear testing, just one that they are not today asking to ban such testing outright.

I would suggest to the Committee that you be alert to two legal indicators of whether they are seeking to erect the UNSC as a super-legislature on this issue. The first is whether, at outset of the operative portion of the resolution, the Council recites the magic words that it is “Acting under Chapter VII of the Charter of the United Nations.” The second is whether one or more of the operative paragraphs begins with the word “Decides.” The combination of these two features will be a clear indication that the Council is in fact seeking to act as a global super-legislature with respect to some aspect of nuclear testing.

The fact that this particular resolution may not go further and seek to impose the CTBT today by UNSC fiat should be no cause for complacency. It is quite common for the Council to act incrementally in matters such as this, laying a foundation of baby steps in precursor UNSC resolutions before eventually taking the giant step that has been the true objective all along.

B. Imposition of an Obligation Not To Defeat the Object and Purpose of the CTBT

One thing the UNSC resolution could do short of seeking to impose a CTBT-like prohibition on nuclear testing would be to cement in place an understanding that any test of a nuclear weapon would violate what is claimed to be the obligation of signatories of the CTBT “to refrain from acts which would defeat the object and purpose” of the treaty. I have heard suggestions that as part of the administration’s plan, there may be a Joint Statement of the P-5 members of the UNSC affirming that any nuclear weapons test by a CTBT signatory would violate this obligation, and that this Joint Statement may then be incorporated by reference, or otherwise approved by, the UNSC resolution.

I believe any UNSC action along these lines would be a serious threat to the prerogatives of the Senate. This is a complicated area of international and U.S. constitutional law, so I beg your indulgence as I try to explain why the Committee should be concerned if this is the approach the administration takes. There is also a fair amount of history on this very issue with respect to the CTBT, which, once understood, makes this potential course of action at the UNSC particularly audacious.

1. Article 18 of the Vienna Convention

I want to emphasize at the outset that there is a serious question whether the Senate accepts, or should accept, the notion that the United States has an obligation under international law “to refrain from acts which would defeat the object and purpose” of any treaty that the President has signed but the Senate has not yet approved. To accept this notion would concede that the President has the constitutional authority to unilaterally impose international legal obligations on the United States without the Senate’s approval, a proposition the Senate has vigorously rejected in the past.

The principal authority for the claim that the President has this authority arises from Article 18 of the Vienna Convention on the Law of Treaties. That article states:

A state is obliged to refrain from acts which would defeat the object and purpose of an international agreement when (a) it has signed the agreement . . . subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the agreement; or (b) it has expressed its consent to be bound by the agreement, pending the entry into force of the agreement and provided that such entry into force is not unduly delayed.

You will observe that virtually any time the Vienna Convention is mentioned, the reference is accompanied by a disclaimer that the Convention has not been ratified by the United States, but is generally considered to reflect customary international law. So there is a rather obvious question to be asked: if the Vienna Convention on the Law of Treaties reflects customary international law, why hasn’t the United States ratified it?

The simple answer is that some of the claimed principles of international law set forth in the Convention have been judged by this Committee in the past to be inconsistent with the prerogatives of the Senate under Article II, Section 2, clause 2 of the Constitution to approve or disapprove the imposition by the President of international legal obligations on the United States. So the more correct statement with respect to the Vienna Convention would be that in the opinion of the Executive branch it generally reflects customary international law, but, in the opinion of the Senate, in important respects it does not.

The Vienna Convention was concluded in 1969, and submitted to the Senate by the Nixon administration in 1971. In a 2001 study prepared for this Committee by the Congressional Research Service (CRS), entitled “Treaties and Other International Agreements: The Role of the United States Senate”, CRS notes acidly with regard to the negotiations the produced the Vienna Convention that:

As in the case of many treaties . . . the executive branch conducted the negotiations without congressional observers or consultations, although the subject matter was of clear concern to the Senate.

Following due consideration, a resolution of advice and consent was approved by this Committee in 1972, subject to an understanding and interpretation. The understanding was directed primarily at the issue of what we in the United States call executive agreements, but the concerns raised in the understanding apply equally to the legal obligations claimed to arise under Article 18 of the Convention. As summarized in the 2001 CRS study, the understanding:

... would have made clear that the Vienna Convention does not establish an international law rule which could hold the United States bound to a treaty which a President had signed, but which the Senate had not accepted.

The Nixon administration disagreed with this understanding, and therefore the approval process for the Vienna Convention stalled. The Convention was subject to Committee hearings again in 1986, and again the same disagreements emerged regarding the compatibility of the Convention with the constitutional prerogatives of the Senate to approve the imposition of international legal obligations on the United States. Accordingly, the Vienna Convention has not been approved, and remains pending today before the Senate.¹

2. *The Rice Letter*

Even if one accepts the view of the Executive branch that the United States has an obligation under international law not to defeat the object and purpose of a treaty that has been signed by not approved by the Senate, there is the equally important question of when and how that obligation can be terminated.

Article 18 of the Vienna Convention itself specifies two circumstances under which this obligation can be terminated. First, Article 18 says a signatory remains subject to this obligation “until it shall have made its intention clear not to become a party to the agreement.” Second, it says that once a country has ratified, it remains subject to this obligation until the treaty enters into force, “provided that such entry into force is not unduly delayed.”²

In the case of the CTBT, the question is whether the Senate vote in 1999 to reject the treaty made America’s “intention clear not to become a party to the agreement.” I would expect most Senators to agree that when the Senate votes to reject a treaty, that is a clear expression of intent not to be bound, and that if the United States initially had a binding legal obligation not to defeat the object and purpose of the treaty, that obligation is terminated once the Senate has spoken.

That, however, was not the view of the Clinton administration following the Senate vote in 1999. To the contrary, shortly after the Senate vote, Secretary of State Albright sent a letter to a number key governments describing the Senate action as a “disappointment” and stating:

Despite this setback, I want to assure you that the United States will continue to act in accordance with its obligations as a signatory under international law, and will seek reconsideration of the Treaty at a later date when conditions are better suited for ratification.

The “obligations as a signatory under international law” referred to in Albright’s letter consisted primarily of the obligation not to defeat the object and purpose of the treaty. Not surprisingly, a number of Senators objected to this effort to claim that the United States had continuing legal obligations under the CTBT notwithstanding the Senate’s vote. Led by Senator Jon Kyl, they pressed the Bush administration to repudiate the Albright letter.

On June 5, 2008, Secretary of State Rice responded to Senator Kyl by assuring him that:

¹ A second source of authority for the claim that a treaty signatory is obliged not to defeat the object and purpose of a treaty prior to its entry into force appears in section 312(3) of the Restatement of the Law, Third, Foreign Relations Law of the United States, published by the American Law Institute in 1987. Interestingly, the Reporters’ Notes on this section include the observation that “The principle that a signatory state may not take steps that would defeat the object and purpose of an international agreement, even prior to its entry into force . . . is less familiar to common law writers than to their civil law counterparts.” The Reporters’ Notes also point out that this principle did not appear in the Restatement of the Law, Second, Foreign Relations Law of the United States, published in 1965. It is hard to resist the conclusion that the addition of this principle to Restatement, Third reflects the influence of Article 18 of the Vienna Convention, which was concluded in 1969. All of this suggests that the notion that a treaty signatory is legally obliged to refrain from acts that would defeat the object and purpose of the treaty is a relatively new innovation in the understanding of American scholars of international law—one that arguably developed with little regard for the constitutional concerns of the Senate.

² The United States has not ratified the CTBT, so the second circumstance specified in Article 18 for terminating the legal obligation arising under the Article is not directly relevant to the question at hand. It is worth noting, however, that entry into force of the CTBT has already been delayed for 20 years since the treaty was signed, and the treaty’s complicated mechanism for achieving entry into force makes it unlikely that the treaty will enter into force at any point in the foreseeable future, irrespective of whether the United States decides to ratify the treaty.

...the United States has no international legal obligations resulting from the 1996 signature of the CTBT, and *we do not believe that such obligations would arise unless the treaty was to be ratified by the United States.* (Emphasis added)

I do not agree entirely with the legal analysis in the Rice letter. Read carefully, she does not say that the Albright letter—which essentially dismissed the significance under international law of the Senate vote on the CTBT—was wrong at the time it was written. Rather, she implies that circumstances subsequently changed, and therefore the Albright letter became wrong. The change in circumstances had to do with the attitude of the President toward the treaty. President Clinton favored approval of the treaty, and therefore the United States remained obligated not to defeat its object and purpose despite the Senate vote. But President Bush did not favor approval of the treaty, so that obligation terminated upon his coming to office, according to the reasoning of the letter. Because of its significance to this issue, I have attached a copy of Secretary Rice's letter to my testimony.

Clearly implicit in what the Obama administration may now be planning to do at the U.N. is the notion that when President Obama came to office favoring the treaty, the switch flipped again, and the United States once again became bound not to defeat the object and purpose of the CTBT.

This notion is hard to reconcile with Article 18 of the Vienna Convention, which does not appear to contemplate the obligation not to defeat the object and purpose of a treaty switching on and off, depending on the state of mind of the chief executive of a treaty signatory. And it is impossible to reconcile with the Rice letter, which states unequivocally that given the CTBT's history in the United States, "we do not believe that such obligations would arise unless the treaty was to be ratified by the United States."

In view of the concerns that the Senate has consistently expressed regarding the Vienna Convention, the 1999 Senate vote on the CTBT, and the letter that Secretary Rice sent to Senator Kyl in 2008, I am surprised that the Obama administration would today take the view that the United States has an obligation under international law not to defeat the object and purpose of the treaty. And I find it astonishing that the administration would consider asking other governments and the UNSC to endorse its position on the issue, given the serious separation of powers concerns that position raises under the U.S. Constitution.

II. SO WHY NOT ASK THE SENATE TO RECONSIDER THE CTBT?

Many have asked why, if the CTBT is so important to the Obama administration, the President has decided to bring the matter before the UNSC rather than before the U.S. Senate for reconsideration of its 1999 decision to reject the treaty. One has to suspect that the administration fears that if it were to ask the Senate to reconsider the treaty today, the probable result would be the same as in 1999.

I promised at the outset of my testimony not to belabor the tired arguments for and against the CTBT. But I do want draw the Committee's attention to one of the key obstacles to approval—one which, in my opinion, helps explain why the Obama administration has not tried harder over the last seven years to build support for the treaty in the Senate.

This obstacle is clearly identified in the 2009 report of the Congressional Commission on the Strategic Posture of the United States. This Commission was appointed by the congressional leadership in 2008 to forge bipartisan recommendations regarding the nuclear weapons strategy of the United States. The Chairman of the Commission was former Secretary of Defense William Perry, and the Vice-Chairman was former Secretary of Defense James Schlesinger. The Commission had a total of 12 members, equally divided among Democrats and Republicans, all experts in the field of defense and arms control.

Among other things, the Commission carefully reviewed the CTBT. Unlike most other issues considered by the Commission, it was unable to forge a consensus on the CTBT. The members split evenly on whether the CTBT should be approved, with all the Democratic members favoring approval of the CTBT, and all the Republicans opposing it.

The portion of the Commission's report dealing with the CTBT is only seven pages long, and provides an excellent synopsis of the state of the debate. It includes brief summaries of the case for approval of the CTBT made by the Commission members in favor of the treaty, and of the case against approval made by the Commission members opposed to the treaty.

One of the key points made by the opponents was that:

... the treaty remarkably does not define a nuclear test. In practice this allows different interpretations of its prohibitions and asymmetrical restrictions. The strict U.S. interpretation precludes tests that produce a nuclear yield. However, other countries with different interpretations could conduct tests with hundreds of tons of nuclear yield—allowing them to develop or advance nuclear capabilities with low-yield, enhanced radiation, and electro-magnetic pulse. *Apparently Russia and possibly China are conducting low yield tests.* This is quite serious because Russian and Chinese doctrine highlights tactical nuclear warfighting. (Emphasis added)

Opponents of the treaty went on to point out that, according to a 2002 report of the National Academy of Sciences, it is possible to conceal from detection underground nuclear tests with yields up to 1000-2000 tons. This means that it is possible for countries like Russia and China to conduct low-yield tests based on their definition of what is prohibited by the treaty without fear of detection. Further, even if these countries agreed to our definition of what the treaty prohibits, we would be unable to verify whether they were respecting that agreed definition.

Supporters of the CTBT on the Commission agreed that the lack of an agreed definition of precisely what activity the treaty prohibits is a problem, and they did not dispute the assertion that Russia and possibly also China are conducting low-yield nuclear tests that the United States considers to be prohibited under the treaty.

Because of the shared concern about the lack of an agreed definition, the Commission unanimously recommended that:

To prepare the way for Senate re-review of the CTBT, the administration should ... secure P-5 agreement on a clear and precise definition of banned and permitted test activity.

This was not a minor matter, even to the CTBT's supporters on the Commission. Former Senator John Glenn, a member of the Commission and supporter of the CTBT, made this clear when he testified before the Armed Services Committee on the Commission's report in 2009. Senator Glenn stated:

I would favor CTBT, but I would only vote for it if it had better definition. Right now the Russians do not have an agreement with us as far as I know on exactly what it is we're agreeing to. They, for instance, have said that as long as they can test to smaller levels, as I understand it, they can test to smaller levels as long as it's not detectable. Well to me that's like saying it's OK to rob the bank so long as nobody catches me. ... A treaty is equal on both parties, and right now the Russians do not see it that way as I understand it. So I would want better definition of it and then I'd be for it ...

To my knowledge, notwithstanding the unanimous recommendation of the Strategic Posture Commission in 1999, no agreement has been reached among the P-5 regarding the definition of prohibited activity under the CTBT. I do not know if it hasn't happened because the Obama administration hasn't tried to negotiate such an agreement, or because it has tried and failed. A third possibility is that it is impossible for the United States to even ask Russia and China to agree to a definition of what the treaty prohibits, because during the CTBT negotiation the P-5 affirmatively agreed to disagree about what they were prohibiting. Whatever the reason, one of the key Commission-recommended steps to lay the groundwork for Senate reconsideration of the treaty has not been achieved.

For these reasons, it should come as no surprise that the administration has decided to bring the CTBT before the UNSC rather than the Senate.

III. CUSTOMARY INTERNATIONAL LAW

I will conclude my testimony with two comments on another theory about what the administration may be hoping to accomplish by bringing the CTBT before the UNSC. Some have suggested that the UNSC could adopt a resolution fostering the notion that following signature of the CTBT there has emerged a new norm of customary international law which prohibits nuclear weapons testing.

My first comment on the suggestion that a new norm has emerged is that it is counterfactual. There have been 14 acknowledged nuclear weapons test explosions since the CTBT was signed in 1996: five by India in 1998, five by Pakistan in 1998, and four by North Korea, in 2006, 2009, 2013, and 2016.

Beyond this, we cannot ignore that statement in the report of the Strategic Posture Commission that "Apparently Russia and possibly China are conducting low yield tests." Because whatever additional information the U.S. Government has about these low yield tests presumably is classified, and because the tests appar-

ently took place at a level below the threshold of detectability by existing verification mechanisms, we do not know how many such tests have taken place, nor when. But anyone who wishes to contend that a new norm of international law has emerged must explain how such a norm can exist in the face of so many exceptions to it.

My second point is that the same definitional problem that bedevils the CTBT will also bedevil any claimed norm of customary international law against nuclear weapons testing. (This presumably would also be a problem for any UNSC resolution that sought to prohibit nuclear weapons testing.) Unless agreement can be reached on precisely what is a prohibited nuclear weapons test, different countries would be free to adopt different interpretations of the alleged norm.

In practice, this would mean that, as is already the case today under the CTBT, acceptance of the notion that customary international law prohibits nuclear weapons testing would give rise to a situation in which some countries claimed the right to conduct low level nuclear weapons tests, but the United States considered itself prohibited to do so. And as under the CTBT, the shortcomings of existing verification technology would ensure that we had no real certainty about the degree to which other countries were taking advantage of their interpretation of what was prohibited to conduct low yield nuclear tests. This would hardly be an advantageous arrangement for our nation.

This concludes my prepared testimony. I thank you for your attention and look forward to your questions.

The CHAIRMAN. No, that is all right. Thank you. I think, again, this is a technical issue.

I want to say, to some of the newcomers, especially on the Democratic side of the aisle, I am not here today to debate the benefits, or lack thereof, of the Test-Ban Treaty. I am here to protect your rights and our rights as it relates to our constitutional role here in the Senate. And I appreciate Senator Cardin agreeing that that is something we should protect.

And I want to thank Mr. Krepon for being here, who I think, has a very different point of view, and then we will try to—we will try to thrash this out. But, thank you for being here. And if you would begin.

**STATEMENT OF MICHAEL KREPON, CO-FOUNDER
AND SENIOR ASSOCIATE, THE STIMSON CENTER,
WASHINGTON, DC**

Mr. KREPON. Mr. Chairman, thank you. I appreciate the care and the depth with which you have gotten into really complicated, difficult subjects. I do appreciate that.

And the Test-Ban Treaty is a complicated and difficult subject. It is one that the Senate really has not addressed since 1999. So, we have a lot to talk about. And I appreciate that this is the start of this conversation.

The administration has assured you, and us, that this resolution will not be binding. It is a nonbinding resolution. The administration has assured us that this resolution will not invoke Chapter 7 of the U.N. Charter. It will not override national law and national prerogatives. The administration has assured us that nothing in this resolution will extend or change existing obligations on our country. We are all waiting to see the language that comes out of the current negotiations. And we will all be able to check the administration's assurances against actual text. I am asking for a little bit more patience, and we will get to the bottom of this.

If it—if this resolution does not change anything, it just reaffirms things, why go to the bother, and why exercise you?

The CHAIRMAN. Which is what gives one's antenna a rise, right?

Mr. KREPON. I hear you.

The CHAIRMAN. So—

Mr. KREPON. I hear you.

The CHAIRMAN [continuing]. I do not think they are doing this for the fun of it.

Mr. KREPON. I do not, either. I think there are serious purposes behind it.

The CHAIRMAN. Yes.

Mr. KREPON. I happen to agree with those purposes.

We have Presidents who go to the U.N. Security Council periodically to pursue U.N. Security Council resolutions whose purpose is to reduce nuclear dangers. President Bush—George W. Bush—has done this more than President Obama. And sometimes, in the past, these U.N. Security Council resolutions have had a bearing on treaties or protocols or conventions that the Senate has yet to act upon. So, what is happening here is not new. It is not a precedent, in my view. But, it does touch on a treaty that the Senate did not consent to ratify. So, that piece is new—

The CHAIRMAN. Yes.

Mr. KREPON [continuing]. And is worthy of consideration. Why do it?

Number one. To reaffirm this treaty. This is a treaty that the George W. Bush administration had a low regard for and decided not to pursue ratification. It is a treaty that this administration, maybe future administrations, will seek the Senate's consent to ratify.

It is not a light switch that turns on and off. There are lots of treaties that have lingered on the Senate's calendar for a lot longer than the Comprehensive Test-Ban Treaty. I can think of one that was on the Senate's calendar for 50 years. Some administrations had disregard for it, others pursued it. I am thinking of something called the Geneva Protocol. It was negotiated after World War I, and it dealt with prohibiting the use of asphyxiating gases. It lay on your calendar for decades before President Nixon and Ford decided to pursue it.

So, there is nothing new. Executive branches sometimes pursue treaties, sometimes they leave them on your calendar. I do not think that is an offense to your prerogatives. You have prerogatives, too, whether or not you would agree or disagree with an administration that does seek the Senate's consent.

I think an important reason to do this is that U.S. national and international security interests are served by the absence of testing. We have got the best conventional capability in the world. We have got the best stockpile stewardship program in the world. The longer these moratoria last, the better off we are, relative to others.

Our allies do not want to see Russia resume testing. They do not want to see China resume testing. And we are looking for more leverage on North Korea, because that is the only country left that tests.

So, reaffirmation of moratoria is important. Reaffirmation of a treaty that this administration believes in after its predecessor did not is very important to the international community. We are supporting our allies, and we are supporting monitoring of very low-yield covert testing.

So, this treaty organization has an international monitoring system. It has stations in over 80 countries for complementary technologies, almost 300 stations. It is a parallel public network to our national technical means, which are, of course, secret. Having these two parallel networks, working together, is a great deterrent to covert low-yield testing. And this resolution seeks continued support, funding, for this parallel network that supplements our own. Because the longer the treaty is in limbo, the more people will walk away from this monitoring network that we need to detect low-yield covert testing.

I think these are good reasons, sir, to pursue this resolution without causing offense to the Senate's prerogatives.

Thank you.

[Mr. Krepon's prepared statement follows:]

PREPARED STATEMENT OF MICHAEL KREPON, CO-FOUNDER, THE STIMSON CENTER

Chairman Corker, Ranking Minority Member Cardin, members of this committee: Thank you for inviting me to testify.

I know that you and other Senators hold strong feelings about protecting the Senate's prerogatives, especially regarding the Senate's advice and consent to treaty ratification.

My understanding is that nothing in the administration's proposed United Nations Security Council resolution on the Comprehensive Test Ban Treaty impinges on Senate prerogatives.

The Obama administration has stated that this will be a non-binding resolution.

The administration has stated that this resolution will not invoke Chapter Seven of the U.N. Charter to mandate new obligations on the United States. Instead, this resolution will reaffirm existing obligations.

The administration has stated that this resolution will not be a substitute to or an end-around for the Senate's advice and consent to treaty ratification.

I don't expect you to take this on faith from the Obama administration or from me.

A drafting process has been underway. When it is concluded, we will be able to check the words of the UNSC resolution against the Obama administration's assurances. I doubt that there will be any basis to conclude that the Senate's prerogatives have been circumvented.

If this UNSC resolution is not legally binding, if it simply reaffirms, but adds no new obligations on the United States and everyone else, why take this step, along with a companion statement by the five Permanent Members of the Security Council?

In my view, there are three very important reasons to support this initiative.

First, a U.N. Security Council resolution will reaffirm and strengthen national moratoria on nuclear testing. This resolution provides an opportunity for the Permanent Five members of the Security Council to reaffirm a global ban on testing. It also provides an opportunity for India and Pakistan—two states that seek membership in the Nuclear Suppliers Group—to reaffirm their national moratoria on testing. And it will reaffirm North Korea's outlier status as the only state that has tested nuclear explosive devices in the Twenty-First Century. This resolution can facilitate new penalties if North Korea continues to test.

It is in the U.S. national security interest that Russia not test again. And China. And Pakistan. And North Korea. And India. Support for this resolution can reaffirm and extend national moratoria. Opposition to this resolution and to the CTBT weakens national moratoria.

Second, this resolution will reaffirm national commitments in support of the Comprehensive Test Ban Treaty's entry into force. Reaffirmation is necessary because the Treaty has been in limbo for twenty years. As a result of a generously funded stockpile stewardship program, and due to extreme diligence by the U.S. nuclear laboratories, the United States has no need to test nuclear weapons. We are in a better position than any other country to extend national moratoria on testing.

The CTBT's entry into force would make America stronger because U.S. national and international security is strengthened by the absence of nuclear testing by others, and weakened by the resumption of testing by others.

Reaffirmation of support for the CTBT's entry into force by means of a U.N. Security Council resolution is clearly in the interest of the United States and our allies.

Our allies don't want a resumption of testing by anyone. Support for this resolution will strengthen alliance ties. Opposition to this resolution and the CTBT will weaken alliance ties.

Third, a U.N. Security Council Resolution will recommit states to support the Test Ban Treaty Organization's international monitoring system that detects covert, low-yield testing. This monitoring system also provides a global early warning system for tsunamis. Detection and disaster relief are worth investing in.

Concerns over covert, very low yield testing can be addressed by continued funding for the Test Ban Treaty Organization's global monitoring network. Withholding funds for treaty monitoring weakens deterrence of covert, very low yield testing which, in turn, damages U.S. national security.

The Comprehensive Test Ban Treaty has 183 signatories and 164 ratifications. The Treaty establishes a global norm against testing nuclear explosive devices. The negotiating record of the CTBT clarifies that is a zero yield treaty. The Organization created to prepare for the Treaty's entry into force has established an international monitoring network consisting on 282 certified stations employing four different and mutually reinforcing technologies, situated in 80 countries, including all permanent members of the U.N. Security Council.

The CTBT's biggest weakness is its entry-into-force provision, which requires the deposit of an instrument of ratification by North Korea, among others. Two other key states have yet to sign, let alone ratify the CTBT: India and Pakistan. The United States, China, Israel, Egypt and Iran have signed the Treaty, but have not deposited instruments of ratification. All of this must happen before entry into force.

If the Senate sees fit to consent to the CTBT's ratification, China is likely to follow suit. If China ratifies, India can ratify. If India ratifies, Pakistan can ratify. This progression would make it easier for Israel's leadership, which has expressed an interest in ratification, to act on its stated intention. Then the international focus on ratification would fall heavily, and usefully, on Iran and Egypt.

In other words, nuclear dangers can be reduced in East Asia, South Asia and the Middle East if the Senate sees fit to consent to the CTBT's ratification. If the Senate refuses to consent to ratification, nuclear dangers will be compounded in East Asia, South Asia, and the Middle East.

Without U.S. ratification, the Treaty will remain in limbo. The CTBT's Organization (or "Preparatory Commission"), its "Provisional" Technical Secretariat, and its International Monitoring System created to prepare for entry into force are now functioning well, but limbo is not an equilibrium state.

The longer the CTBT remains stuck in limbo, the more its essential monitoring system is likely to atrophy. Champions of the Treaty will continue to pay their dues and maintain their monitoring stations; others will, over time, short-change international institutions that provide essential global services.

Why should we be bothered, when we have our own "National Technical Means" to monitor extremely low yield nuclear tests? Our NTM is better than the Treaty Organization's International Monitoring System. But our NTM, while exceptional, is not in almost 300 places around the world, like the Treaty Organization's International Monitoring System. And two monitoring systems are better than one. And because our system is secret, and our pronouncements based on secret data will be challenged by some.

When the monitoring systems of the United States and the Treaty Organization work separately but in parallel, deterrence against extremely low-yield, covert testing is reinforced. And rebuttals to those who challenge data will be far more effective.

Opposing this Treaty will not address concerns about monitoring very low-yield, covert testing. Indeed, opposing this Treaty makes it easier for other states to resume testing, without easing the significant challenges to resume testing nearby Las Vegas. What we once called the Nevada Test Site is now called the Nevada National Security Site.

A 2012 National Academy of Sciences Report concluded that, "Substantial improvements in the U.S. and international ability to monitor underground nuclear-explosion testing have been made" since its earlier Report in 2002. Moreover, the 2012 National Academies of Science Report goes on to say, "Seismic technologies for nuclear monitoring have the potential to improve event detection, location, and identification substantially over the next years to decades."

The Congress can continue to improve detection capabilities by continuing to fund the Treaty Organization's International Monitoring System and U.S. NTM. The Treaty's entry into force would add another important mechanism—on-site inspections—to verify compliance. Opposing ratification means foreclosing on-site inspections. Transparency measures at test sites can also help, as might joint verification experiments at or near test sites.

There is precedent for this step. The George H.W. Bush administrations pursued joint verification experiments with the Soviet Union to address verification and compliance issues related to the 1974 Threshold Test Ban Treaty negotiated by President Nixon. Precise yields were hard to control and hard to measure, and some asserted that the Soviet Union tested above this threshold. Joint U.S. and Soviet teams carried out verification experiments close to test sites to better calibrate yields. These experiments strongly indicated that assertions of Soviet violations in this case were unfounded. The United States Senate then proceeded to provide its consent to ratification.

We've come a long way since the dark days of the Cold War, when countries tested in the open air and in the atmosphere. There were a great many tests. The United States tested over 1,000 times, including over 200 atmospheric tests. The Soviet Union tested over 700 times, including more than 200 tests in the atmosphere.

By the early 1960s, the human and environmental consequences of open air and atmospheric nuclear testing came to be clearly understood. We learned of terrible public health hazards, especially with regard to Strontium 90 levels in bones and in breast milk.

After the chastening experience of the Cuban Missile crisis, the United States and the Soviet Union negotiated the Limited Test Ban Treaty which banned tests in the atmospheric and everywhere else except underground.

This wasn't easy to do in 1963. Some prominent U.S. scientists, Members of Congress, and strategic thinkers were convinced that the Soviet Union would cheat and that the United States would be disadvantaged. One scenario postulated Soviet cheating by testing behind the Moon.

The United States and the world benefitted greatly from the Limited Test Ban Treaty, but the superpower nuclear competition continued unabated after testing was driven underground. There was, on average, one nuclear test per week from 1955 to 1989.

The goal of a Comprehensive Test Ban Treaty was a bridge too far for President Nixon, who instead negotiated the aforementioned Threshold Test Ban Treaty in 1974 limiting the yield of underground tests to 150 kilotons. (The atomic bombs that destroyed Hiroshima and Nagasaki had yields of about 15 kilotons.) The Nixon administration also negotiated a detailed Protocol to help verify compliance. Nonetheless, both superpowers acknowledged that a strict threshold of 150 kilotons would be hard to adhere to and monitor. They anticipated that some would be quick to assert purposeful violations of tests above this threshold—as was, indeed, the case. President Ford nonetheless sent this Treaty to the Senate for its advice and consent in 1976.

President Reagan decided to pursue negotiations with the Soviet Union on additional measures to monitor compliance with the Threshold Test Ban Treaty, and President George H.W. Bush negotiated new procedures to better assess the yield of underground nuclear tests. The Senate then consented to ratify the Threshold Test Ban Treaty, which entered into force in 1990.

In 1995, the Nuclear Non-proliferation Treaty was indefinitely extended. Nuclear weapon states promised that, in return for the NPT's indefinite extension, they would pursue in good faith negotiations to complete a Comprehensive Test Ban Treaty. The following year, President Bill Clinton and the leaders of Russia, China, Great Britain and France made good on this promise.

The fates of the NPT and the CTBT have always been intertwined. Continued testing facilitates horizontal and vertical nuclear proliferation. The absence of testing supports nuclear non-proliferation and makes it difficult for states to pursue advanced nuclear weapon designs. It's hard to strengthen the NPT by opposing the CTBT.

The negotiation of the Comprehensive Test Ban Treaty came as unwelcome news to those who were accustomed to and expected more advanced warhead designs.

China had tested less than 50 times, and was reluctant to close this door. Great Britain and France were reluctant to, as well—even though their options to test nuclear weapons within their borders had reached a dead end.

India and Pakistan hadn't conducted any hot tests—and were upset that nuclear weapon states negotiated the CTBT, especially after the Non-proliferation Treaty's indefinite extension.

And some in the United States and Russia wanted to continue testing, believing that nuclear deterrence and war-fighting capabilities depended on it.

The result of all of this ambivalence was the CTBT's entry-into-force provision, which requires no less than 44 states to deposit their instruments of ratification before entry into force.

While the CTBT remains in limbo, the norm against nuclear testing grows stronger every year that major powers and regional powers do not test. But this norm cannot be taken for granted.

The Treaty's Organization in Vienna, its International Monitoring System, and its Technical Secretariat work just fine. But the global services they provide cannot be taken for granted, either.

The U.N. Security Council resolution now under consideration does not take the CTBT or the Treaty Organization's International Monitoring System for granted. On the twentieth anniversary of the Treaty's signing, this resolution reaffirms the Treaty's central object and purpose of banning nuclear tests, strengthens national moratoria on testing, and supports monitoring to deter extremely low yield nuclear test explosions.

The reasons for this resolution are straightforward: The world will be safer without renewed nuclear testing. Nuclear non-proliferation will be advanced in a world without testing, and set back by the resumption of testing.

The American public and our allies do not want to resume nuclear testing. The U.S. stockpile stewardship program is a significant success story. Advances in monitoring extremely low yield, covert nuclear testing is a significant success story. This U.N. Security Council resolution builds on these successes. Reaffirming the global norm against nuclear testing serves U.S. national and international security interests. This resolution and the companion P-5 statement are worthy of your support.

The CHAIRMAN. Thank you. And I appreciate that testimony.

And again, I appreciate you heralding the merits of the treaty, itself. And I want to just say, again—I will probably say this 10 times throughout the process—I am not here to debate the merits.

I would ask you—and I am only going to ask a couple of questions, and really defer to Ben, and then step back in later. You would agree, it seems to me, that if the administration took steps that changed policy—in other words, I am not debating the policy that we have right now, nor the Bush administration had. I mean, the policy has been that we have not tested. And it is perfectly appropriate for administrations to determine that policy. But, if that becomes something that is legally binding without going through the treaty process, especially in a case where a treaty has been turned down, that would be—you would agree—that would be inappropriate.

Mr. KREPON. I do think that would offend the Senate's prerogatives.

The CHAIRMAN. And I think what we are doing here, if I could, is—you know, we had a situation where the President, recently, was going to stipulate a no-first-strike policy. His advisors came to him and said that would be very inappropriate as it relates to our allies. You may agree or disagree with that. But, he decided not to do it in that manner.

And I would like to ask unanimous consent to enter into a record a letter that I received from the State Department, by Julia Frifield, explaining what they were doing, and also my letter to the President that was written subsequently, if we could, just to lay a track record here.

[The information referred to is located in the Additional Material Submitted for the Record section at the end of this transcript.]

The CHAIRMAN. But, the purpose of this—to lay a record here—the purpose is just to ensure that that is not the case. Again, if that is the policy of this administration, it is the policy of this administration. Are there things—I would ask Mr. Rademaker, and I will move on—that, short of citing Chapter 7, as has been alluded to in the letter—are there things the administration could do, short

of citing Chapter 7, that would move us along a path of making something legally binding over time?

Mr. RADEMAKER. Yes, Mr. Chairman, I believe there are.

When you refer to Chapter 7, essentially what you are saying is that when the Security Council invokes Chapter 7, that signifies that the Security Council is trying to act in a binding fashion, that it is trying to impose a legally binding obligation on all the nations of the world. And we have been assured, in this case, that the administration is not going to do that. And I assume that is true.

But, as I was discussing at toward the end of my opening remarks, there are other things that a Security Council resolution could do without invoking Chapter 7, that would tend to impose binding legal obligations on the United States, that I would argue do not exist today. And I think, if members of the committee were to study the issue, they would also take the view that these binding legal obligations do not exist today. And I think you would actually quarrel with the notion that the Security Council is telling us that they do exist. And I am referring specifically to this obligation not to defeat the object and purpose of a treaty that the United States has signed.

Again, as I said in my opening remarks, the notion that such an obligation exists really traces back to Article 18 of the Vienna Convention on the Law of Treaties. That is a Convention that was submitted to the Senate in 1972, I believe, by the Nixon administration—or not—submitted in 1971, it was voted on by the committee in 1972. The committee was prepared to approve it, subject to a reservation that, basically, made clear that the United States has no binding legal obligations under international law, under any treaty, until the Senate approves the imposition of that. And Article 18 is one of the provisions of the Vienna Convention that is inconsistent with that notion, because what Article 18 says is, the moment the President signs a treaty, the United States incurs, becomes subject to, a binding obligation under international law not to defeat the object and purpose of that treaty.

So, my first point to you is, one of the reasons that, since 1972, this committee has refused to approve the Vienna Convention on the Law of Treaties is the very issue we are talking about here, whether, when the President, with the stroke of a pen, signs a treaty, he imposes a binding legal obligation on the United States. The Convention says yes. The executive branch says yes. Not surprisingly. Every President, Republican or Democrat, takes a maximalist view of his authority under the constitution. This committee, traditionally, has said no, “No, you do not. No binding legal obligations without our approval. That is what the Constitution means.” Okay?

So, that is—as I understand it, they are going to ask the Security Council to affirm that the United States, and all the other signatories of the CTBT, have this obligation not to defeat the object and purpose of the treaty, which is a principle that, traditionally, this committee has rejected.

Mr. KREPON. Mr. Chairman.

The CHAIRMAN. Yes, sir.

Mr. KREPON. If I may.

What Steve is suggesting, the concept that he asks you to embrace, is a radical concept. It is radical. It is a concept that says you can sign a treaty on day one, and be free to violate it on day two. You are under no obligation to respect the treaty that you have just signed. That is what he is proposing here.

No administration has ever adhered to this before this Vienna Convention that he is referring to was negotiated and finished negotiations, 36 years ago, nor in the 36 years afterwards. When you sign a treaty while you are awaiting its entry into force through the constitutional processes of advice and consent here and other processes elsewhere, you sign it with the intention of adhering to it. This is wild, if he is proposing that you sign something and then you are free of any obligation?

The CHAIRMAN. Yes. But let me ask you this. If the Senate rejects the treaty, votes it down—and my guess is—I do not know this to be true, but my understanding is, if it were brought forth today, it might actually be defeated by a larger margin than it was the last time it came up. I think that that is what people like you tell me. You have not told me that, but others have told me that.

So, if the Senate has rejected that, does that not have some bearing on the future of that particular treaty? And I might add, the administration, to my knowledge, has never even brought up trying to bring it back to the United States Senate in 7 and a half years, including the timeframe when the Senate was controlled by Democrats.

Mr. KREPON. Mr. Chairman, I am a big fan of having very lengthy, indepth hearings on this treaty. A lot has happened since the Senate declined to provide its consent. We have a Stockpile Stewardship Program now. We did not then. We have this parallel monitoring network now. We did not then. Both our NTM capability—

The CHAIRMAN. But, you are sort of moving off the subject, here. If you would get back to the fact—does it change the characteristic? I mean, I know you love the treaty, and we will have you in here if we ever debate that. But, the fact is, the Senate rejected the treaty. So, does that have any effect on—

Mr. KREPON. Point well taken.

The CHAIRMAN [continuing]. The things that you are saying?

Mr. KREPON. Point well taken.

I am going to ask you to think by analogy here. So, the Bush administration, George W. Bush administration, rejected the Rome—the International Criminal Court, something you are familiar with deeply. So, the administration notified the committee. The administration sent a formal letter to the depository of this Convention, the United Nations. A senior official in the administration sent a letter to the United Nations Secretary General clarifying our intention to pull away.

The CHAIRMAN. Right.

Mr. KREPON. And indicated that we would be under no obligation. And the depository then put the United States in brackets in that treaty as being a state that no longer felt in the least way obligated to respect the object and purpose of that Convention. It went off the Senate calendar.

Now look at the CTBT. The administration, George W. Bush administration, clarified it was not a fan of this treaty and it was not going to seek its entry into force. The administration sent a letter to a Senator on this committee back then. And there were public statements along those same lines. The treaty remained on the Senate calendar. You did not send it back to the executive branch. It is on your calendar now. The administration did not formally notify the depository of our intent. It just said, "We do not like this treaty. And, by the way, we are also not going to take actions that defeat its objects and purposes, even though we do not like it."

The CHAIRMAN. Yes. I think those are good points. I apologize to the committee members for taking so much time on this issue personally. And I am going to turn to our ranking member, Senator Cardin.

I would just say that it would be good, I think, on an issue of this importance, if we actually had some consultation as this language was being drafted. And I know we have received some letters of assurance. And I would just say to my—to the ranking member, I do not know when would be appropriate, but it seems to me that there is a process here that—relative to transparency, relative to consultation—and potentially when a treaty has been sitting before the United States Senate for some duration, that automatically, it goes back, if it has not been ratified. But, I would love to talk to you about those things, and other committee members, down the road. And again, thank you for the indulgence of time.

Senator CARDIN. Well, first, Chairman Corker, thank you for your passion for the constitutional protections of the legislative branch of government, and particularly the United States Senate, because I share that. I have spent my entire adult life in the legislature, in the State government, as Speaker of the House, and now in the Senate. And I do not think there has been a year that has gone by, whether there was a Republican Governor or a Democratic Governor, or Republican President or a Democratic President, that I did not have problems with the prerogatives taken by the executive branch that I thought was disrespectful of the legislation branch. So, this is not a new subject.

And I do think we all would be stronger if the Senate exercised its prerogatives more frequently. That does not mean we are going to reach conclusions, but I think having a healthy debate on treaties—I think your suggestion about bringing these—we have had a lot of treaties that have been around here for a long time that are—some are not terribly controversial, such as the disabilities treaty. And I hope the Law of the Sea is not terribly controversial.

And I understand that we may not have the support for ratification, but I do not think we do the Senate a service by leaving them in limbo for all these periods of time. And, of course, we also have totally noncontroversial treaties that have passed this committee that we are having a hard time getting through on the floor of the Senate. So, I think exercising our prerogatives would be something that we should do, and figure out a way to get that done.

I just want to respond to the point of executive actions. There are executive agreements, hundreds, entered into every year by every President since the beginning of the—of our Republic. And so, that is not an unusual issue. There is a huge difference, though, be-

tween an agreement signed by the President and one in which the Congress has joined, either through ratification or through passage of legislation. And that is, the next President can change it if it is not in law. If it is not ratified, the next President can do whatever he wants to do. If it is ratified, then he has to follow the protocols of the treaty. If it is in statute, he has to follow the statute. So, there is a huge difference.

And, Mr. Krepon, as you pointed out, President George W. Bush could have, if he wanted to, disavowed our signature on the treaty, that we no longer be bound by it. And as you pointed out, we no longer would have been subject to the terms of the treaty, the object and purpose would no longer be effective against the United States. So, just by a single action, the President could have done that. He chose not to. And I think that is noteworthy, that he chose not to do that, keeping open the policies. Because, again, I would come back to the point that, for over, oh, now, close to three decades, it has been the policy of America that we believe that we should not test, and that other countries should not actively test, nuclear materials. That is our—been our policy. And it is been not terribly controversial, quite frankly, because of the capacity that we have and that active testing is not that critically—not that important to us in our capacity.

So, I am not sure what the concern is right now, since whatever is done—and we have to wait to see the final action, I agree with the Chairman completely on that—if what Secretary Kerry has said now in writing, that there will be no legal impact, then what is the prerogatives taken away from the Senate if the United States can get the P5 to acknowledge that nuclear test bans are a good idea, the treaty should be still considered, considering that two of those P5s have not ratified the treaty? We are not alone. China has not ratified the treaty. What is the—what is the risk factor here for that, carrying out a policy of our country, leaving to the Congress, by passing laws, or the next administration, by simple action, the ability to negate any obligations we have? What is the risk factor here? To the Senate prerogatives, I am referring to.

Mr. KREPON. We will see once the language is finalized, but I believe the risk factor will be zero. The risk factor of a resumption of nuclear testing—by Russia, by China, by Pakistan, by India, continued testing by North Korea—is high. So, I see no balance here. U.S. national security interests, international security interests, are served by a reaffirmation of this treaty's object and purpose, by a reaffirmation of moratoria, and by a vocalized sense of support for treaty monitoring that deters very low yield covert testing.

Senator CARDIN. The risk factor?

Mr. RADEMAKER. So, it will not surprise you to hear that I disagree with much of what Mr. Krepon has just said.

Senator CARDIN. I know, I just wanted to give you a chance.

Mr. RADEMAKER. Look, if the Security Council passes a resolution that amounts to what we here would call a Sense of Congress Resolution that just says nuclear testing moratoria are a good thing, it would be a bad thing if everybody tested a nuclear weapon—I do not see any threat to the prerogatives of the Senate. But, my understanding is, that is not where this resolution is going to

stop. My understanding is, this resolution is going to go further, and it is going to try and do something that is legally significant, that goes beyond Sense of—what we would call Sense of Congress. And that is, they are going to try and embrace—get the U.N. Security Council to declare that all signatories of the Comprehensive Test-Ban Treaty have an obligation not to defeat the object and purpose of the treaty. Now, they may do that directly, or get the P5 to make a declaration about that, and then somehow the Security Council will approve that or incorporate it by reference. I do not know what.

But, if that is what they do, they are doing more than just expressing an opinion. And—

Senator CARDIN. But, that—

Mr. RADEMAKER [continuing]. And so, this notion that doing that does not change the legal obligations of the United States, that is a—that is an accurate characterization of the view of the executive branch. The traditional view of the executive branch is, the President signs a treaty, and the United States incurs an international legal obligation, the moment he does that, not to defeat the object and purpose of the treaty. The traditional view of the Senate has been, “No, it does not.”

Senator CARDIN. But—

Mr. RADEMAKER [continuing]. You know, Presidents can sign any kind of crazy treaty. Okay? And, you know, the Comprehensive Test-Ban Treaty, a lot of people like it, but, you know, we could elect a President who wants to deport every illegal alien in the country, and he could sign some treaty with some country about facilitating that. And then, are you going to credit him, when he comes to you and says, “Well, I am just, you know, I have this international legal obligation not to defeat the object and purpose of this treaty that I have signed. And so, that is what I am doing here by deporting all these illegal aliens.” You know, I think—

Senator CARDIN. I am just trying to—

Mr. RADEMAKER [continuing]. You need to sort of think through whether—Mr. Krepon says it is a crazy idea to say that—

Senator CARDIN. Yes.

Mr. RADEMAKER [continuing]. The United States does not have to abide by a treaty—

Senator CARDIN. All I am suggesting to you is, the President’s already signed that, with the treaty protocols in Vienna, that we are subject to the object and purpose. He has already done that. So, if he does it again—although a President does it again—the point is that the next President can reverse that in one minute. That is the point. The Congress can take action in one minute. Nothing prevents us legally from doing that.

So, I hear what you are saying. But, I think there is risk factors here. And you have to balance the risk factors. And I am all on board with the Chairman on the oversight of the United States Senate in this committee to preserve our prerogatives. He has my full support on that, because I have yet to meet an administration that does not try to grab as much as they possibly can and ignore us as much as possible. That seems to be what they learn in President 101 when they go to school.

Mr. RADEMAKER. I submit that is what is happening with this resolution.

The CHAIRMAN. And, if I could—I mean, we have some insights as to—it could have changed this morning—but we have some insights, based on leaks and discussions, that have created concerns.

And, Mr. Krepon, for what it is worth, it does go beyond what you just said. And so, we have concerns. And maybe this hearing will cause the administration to take a different tact and not bring forth language. I mean, I hate to say it, but, you know, I got a copy of some language that is concerning to me, and maybe that is not the language that ends up being submitted, and maybe this hearing will be helpful in ensuring that Senate prerogatives are not dealt with inappropriately.

Senator Risch.

Senator RISCH. Thank you, Mr. Chairman.

I share Senator Cardin's view on the prerogative of the first branch of government. Unlike him, I served both in the executive—as a chief executive and in the legislative branch.

But, you know, this whole discussion is absolutely astonishing to me. We are mixing the constitutional prerogatives of two co-equal branches of the federal government, the constitutional law of America, with the right or wrong of the treaty that we are dealing with here. Before we can even have this discussion, we need a set of rules.

Mr. Krepon, if I understand you correctly, somehow the signature of the head of the second branch of government binds this sovereign country in a treaty with another nation. This is something absolutely foreign to me. I mean, if your analysis is correct, we were bound by the treaty that sat here for 50 years because the United States Senate did not reject it, that somehow the signature of the head of the second branch binds America even though the Constitution is crystal clear that it cannot be binding until it is ratified by the United States Senate.

Now, your legal foundation for that is language in another treaty that was not ratified by the United States Senate. So, this unratified second treaty bolsters the first treaty; and you put all this together, and somehow we are bound. I mean, we have got to get a set of rules that we all acknowledge are binding as far as whose job it is to do what in this democracy that we have before we can even have this discussion.

You know, it is incredibly frustrating when you have a discussion with a member of the foreign media. They come to you, and they stick a mic in your face, “Are you going to back the President on this?” And I say, “No, I am not going to do that.” He says, “How can you do that? This man's leader of the free world.” And we are saying, “Wait a minute. You are talking about a man who heads the second branch of this great country of ours. And his job is to execute the laws and policies as enacted by the United States Congress and to oversee the spending that is done by the first branch of government.” the first branch of government is another bastion of this country. It was the first, not the second or third, branch of government established by the founding fathers, and it was intended that this first branch would do the things that I have just outlined, not the second branch of government.

Now, I agree with Senator Cardin that the CEOs always reach as far as they possibly can. But, you cannot overreach the Constitution by which you are bound by simply signing a treaty that is not ratified, and bolstering that treaty by saying, "Aha, I signed another treaty that was not ratified that says that we are bound, that the first treaty that I signed is binding us."

I mean, this is nonsense. This is absolute nonsense. And I think we—and forget that the—the right or wrong of the treaty. I think probably in—when the Senate debated this, there were hours—hundreds of hours of debate as to whether it was right or wrong. And we could have that same debate today. As you point out, things are different. But, that is got nothing to do with the legal binding nature of the President's signature on a treaty. And, for me to sit here and listen to you say that him simply signing it binds us, without the first branch of government—notwithstanding what the Constitution says—without the first branch of government ratifying that, that somehow we are bound by this is just—is absolutely astonishing to me.

Mr. KREPON. Senator, it seems to me you have a gripe, a big gripe with customary international law.

Senator RISCH. Well, what customary international law binds me, as a United States Senator? I am not responsible to anyone except the people of America and the courts of America, not to some court convened in Europe because I violated customary international law. That is nonsense, absolute nonsense. For us, as Americans, who consider us members of a sovereign free nation on the face of this planet. No, I do not have a gripe with it, I absolutely reject it.

Mr. KREPON. I know you do.

The word "bind," "bound," that is your word, it is not my word.

Here is my understanding of how customary international law works. And you can get much more authoritative testimony on this. But, when a country signs a treaty, it does not sign the treaty in order to violate it. It usually does not. There have been instances where this has occurred, but not many. Most countries, when they sign a treaty, it is their intention not to violate it, not to disregard it, not to defeat the object and the purpose of the treaty. So, the fundamental object and purpose of the Test-Ban Treaty is not to test.

Now, whether you are bound or not, if you have a Congress, a Senate, a Senate Foreign Relations Committee, and a Senate as a whole, that does not like the obligations of that treaty, you can reject it. If you have a President, an executive, who does not like this treaty, the President can, through a series of procedures that have been developed over time, clarify, "We are no longer going to follow the object and purpose."

So, the binds that you talk about are informal until a treaty is consented to ratification in this Senate and enters into force. If these—

Senator RISCH. But, that is nonsense, Mr. Krepon. There is no—there is absolutely no precedent for what you have just stated. You know, I had a professor like you in law school that could make an argument for anything if he believed the ends justified the means.

My time's up. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Menendez.

Senator MENENDEZ. Well, thank you, Mr. Chairman.

First, I want to applaud your vigorous assertion of the Senate's prerogatives and your understandable concern that we may be looking at a separation-of-powers issue here. I have a strong view, that I have asserted throughout my 24 years in Congress, that there is a reason the founders created a separation of powers. And I believe very strongly in the Congress, and certainly in the Senate, pursuing its separate co-equal branch of government status and the importance that the founders gave them. And I have done that whether it be in questioning of administration witnesses, in the sponsorship of legislation that administrations have not liked or have opposed, and in the votes that I have taken. So, I appreciate very much your concern.

Having said that, I think, as important as safeguarding the vital role of the U.S. Congress, and especially the Senate, where international treaties are concerned, I think that the apprehension in this case may be misplaced. And, of course, we will have to see the language of the U.N. Security Council resolution. But, I believe that our national security is actually better served by the appropriate set of understandings that are being maybe put forward. And I will wait, in terms of judgment, to actually seeing the language.

Since 1992, successive administrations representing a broad swath of public opinion from both parties have sought fit to continue to observe and support the ban on nuclear testing. And, while we are certainly not here to reconsider the Senate's decision with regard to the CTBT, I would suggest that many of the objections raised back in 1999 are less valid today. The advancement of America's science and technological abilities, the needful activities of a CTBT organization and the international monitoring system, and our enhanced national technical means suggest that we have less cause for concern today, from my perspective, than when the matter was first discussed in the Senate.

Indeed, it is, in my opinion, in our national interest to support the continuation of what has been a hugely successful international moratorium on testing. Reaffirming our commitment to the objectives and purpose of the treaty in doing so ensures that conditions that undergird this observance continue to exist for the foreseeable future. A nonbinding resolution that does leave open the possibility of our country unsigning the CTBT in the future, in the unlikely event that resuming nuclear testing is necessary to our national security, I think is appropriate.

And so, in the time left, let me just ask one or two questions in pursuit of that.

And, Mr. Rademaker, it is good to see you. I enjoyed our time together when you were in the House of Representatives, on the House Foreign Affairs Committee.

If the CTBT is so injurious to the U.S. national security, why did the Bush administration not unsign the treaty, as it did in the Rome statute of the International Criminal Court and the Anti-ballistic Missile Treaty?

Mr. RADEMAKER. Thank you. First, it is nice to see you again, Senator Menendez.

The—you know, the—I heard the argument that, “The Bush administration unsigned the Rome statute; why did it not unsigned the CTBT?” I would commend to you the letter that I submitted as an attachment to my testimony, the letter from Condoleezza Rice, signed in 2008. She was being asked by Senator Kyl essentially the same question, Why have you not unsigned the CTBT? And if you read the letter—and I hope it is made part of the record—her answer is, basically, “We do not need to unsigned it, because we have done that through other means.” And then she cites all of the public statements of the Bush administration, by Bush administration officials, including me, to the effect that, “The United States does not intend to join this treaty, we have unsigned it.” And she said, “Having done that, we do not need to send another letter.”

Mr. Krepon was wrong when he said that the U.N. has put in brackets the name of the United States on the Rome statute. That is not true. You can go look online. They put a footnote. They said, you know, “The United States signed this treaty.” And there is no eraser in the world of treaty signature. I mean, the United States—

Senator MENENDEZ. Well, the point is still the same. Whether you unsigned it or whether, through your statements, executive statements, declare that in essence you are not pursuing it, the result is that you are not bound in the way that a ratification of a treaty would bind you.

Mr. RADEMAKER [continuing]. Well, again, I would commend to you the Rice letter, because I think what she says in that letter is, “We have unsigned this.”

Senator MENENDEZ. All right. Mr. Krepon, do we have leadership role here that encourages other states to support the CTBO organization? How important is the continued viability of it, going forward? And does the IMS not provide a helpful, complementary layer to detect, and thus deter, nuclear testing that supplements our own national technical means?

Mr. KREPON. Senator, if I could quickly offer a rejoinder to Steve on this point.

Let us grant that the George W. Bush administration unsigned the CTBT by lesser means than the Rome statute or the ABM Treaty. If future—the Bush administration’s unsigneding, if we were going to call it that, does not bind a future administration. It can pursue this treaty. So, even if we were to grant this, it is irrelevant in the case of an administration that sees value in this treaty that remains on the Senate calendar.

With respect to this International Monitoring System, it is crucial, because everybody has bought into it.

With respect to our parallel and better system of national technical means, it is secret. We can reach a judgment based on secret data. Some people will agree with us, other people will take issue with us. But, everybody will have data from the International Monitoring System. And every country that is a party to this treaty can reach conclusions about compliance.

And we are in a much stronger place, if there is cheating, if we go ahead and continue to fund this system and pursue entry into force of this system. The system is ready. It works. We know it

works. It works well. But, it is in limbo. Limbo is not a sustainable state.

Senator MENENDEZ. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

And before turning to Senator Rubio, I just want to say, one more time, I am not here to debate the merits of the treaty, itself. I am trying to protect everyone's rights here as it relates to being a U.S. Senator. And I appreciate Mr. Krepon's advocacy here. I have no reason to want to debate that today. I want him to just make sure that we have a process that is not being undermined. And we will not know that until we get the language, itself. And I think Mr. Krepon, himself, who advocates for this policy, would agree that anything that undermines that through going to the U.N. Security Council with inappropriate language that takes away our authority would not be something that would be good for the United States Senate or our country. So, that is all I am focusing on.

Senator MENENDEZ. Mr. Chairman, I understand that, but in pursuit of the full prerogatives we all have, some of us do want to debate it.

The CHAIRMAN. I got that. And you have got the microphone, and you are a United States Senator, you can do whatever you wish, and I respect that and thank you for that.

Senator Rubio.

Senator RUBIO. Thank you, Mr. Chairman.

I want to return to the process. And it is important. I think this is a fascinating hearing and an important debate about the role the Senate plays as a check and balance on the executive, which I think is as important as it has ever been.

I think the argument—just to summarize, the argument I have heard today from Mr. Krepon—and if I am wrong, you will point this out—is, there is no doubt, no one disputes that, under domestic law, the United States is in no way obligated, because it has not been ratified by the Senate. The secondary argument is: However, under customary international law, at the moment that President Clinton signed in to this agreement, the United States is under an obligation, under Article 18 of the Vienna Convention, to not do anything in contravention that goes against or defeats the purpose of anything that we have signed on to. That is the argument. And so, even if we are not domestically bound by this, the argument is that, under Article 18 of the Vienna Convention, we are bound internationally to not do anything in contravention of the agreement. Therefore—you do not want to use the word “bound,” but, in essence, bound by that provision.

I find the flaw in it in two points. The first is that, by the signature of the President alone, that somehow enters us into this agreement. That may be true in North Korea, because they have a Supreme Leader. That is not true in our constitutional system of the United States. We do not have a Supreme Leader. In order to bind the United States or to enter us into anything requires not one step, but two steps. The first step is the signature of the chief executive, the President, and the second is the ratification, the affirmative ratification of the Congress, not simply a affirmative rejection and sending back for comments.

So, my argument is, we have not entered into this agreement. Even if you wanted to adhere to Article 18, which, by the way, we also did not ratify our Vienna Convention, but the argument, I think, falls apart because the simple signature by our President, in our system, under our sovereign constitutional system, does not, in and of itself, enter us into anything until it is affirmatively ratified. Otherwise, what is the purpose of the Constitution? At that point, basically, the President can bind us under “customary international law” anytime he or she signs on to any document in the world, irrespective of whether Congress acts or does not. And if Congress chooses to approve it, well, that is a nice touch. Well, that is not my reading of our constitutional order, and I hope that is not where we have reached.

The second argument is the role of the Security Council at the United Nations, and the impact that any resolution therein would have, again, on the United States, in addition to Article 18 of the Vienna Convention. And there was a dispute or a debate out there about the—again, the legal binding associated with a U.N. resolution. And it is this argument between whether it is a decision of the Security Council, basically an affirmative decision—and there is a notion out there, and a strong argument by many, that a decision of the Security Council is binding, pursuant to Article 25 of the U.N. Charter versus a recommendation of the Security Council, which would lack binding force. And hence, I think some of the discomfort you see from this committee, because there is no engagement with the executive branch, that I understand—and perhaps you have had some deeper engagement—about the specific language that they are pursuing. And again, the difference between a decision and a recommendation is in the eye of the beholder.

And so, where we find ourselves here is that, at some point, in 15 years, in 10 years, there may be occasion where a future President decides the U.S. does need to test. But, the argument against us will be twofold. Number one, you are violating customary international law, under Vienna; and, number two, you are violating a U.N. resolution, 15 years ago, which was a decision of the U.N. Security Council. And hence, why the language is so important, especially given the track record of the U.N.

All of this within the context of our constitutional system, where some of the arguments that have been made here today, basically, say, “Your Constitution is nice. And when it comes to domestic issues, it is great. But, on international issues, there is international law, both customary and through the U.N. Security Council, that supersede your constitutional order.” And that is an argument that I hope we never accept in this chamber, whether we are Republicans, Democrats, or Independents. Because, at that point, we truly have given over our sovereignty in a way that I think is dangerous for the national security of the United States.

And I would welcome both of your comments.

Mr. KREPON. Senator, the language of this resolution is crucial. As I told the Chairman, if this resolution imposed any new obligation on the United States, I think it would be an infringement.

Senator RUBIO. Well, what about reaffirming what you argue is an existing obligation?

Mr. KREPON. If it reaffirms existing obligations, if it reaffirms the treaty text, the plain language of the treaty text, I am more than fine with it. I support it, because I support the treaty.

Senator RUBIO. But, would that not be another way to bind this country to a treaty that we have not ratified under our system of government? In essence, that is a backdoor way of ratifying a treaty that a President could not get through the constitutional order, and so he went around it and said, "Fine, I will not bind you under our Constitution, I will bind you under the U.N. Charter."

Mr. KREPON. I completely disagree with that, Senator.

Senator RUBIO. Well, then what is the point of making it?

Mr. KREPON. Allow me. I disagree with you, because the Senate still has to provide its advice and consent. This treaty cannot be circumvented, except by a U.N. Security Council resolution that provides directive language. The U.N. Security Council decides, it imposes. Check out the language. Bring in a panel of lawyers.

The CHAIRMAN. Does language that says "calls upon" do the same thing? Does it?

Mr. KREPON. It does not, in my opinion. That is hortatory. Hortatory. You have passed so much legislation that has hortatory language. You know the difference between hortatory and directive.

I would also want to suggest to Senator Rubio that the Congress has had a role in this whole process. It began, as Senator Cardin said, with legislation in 1992. One of your former colleagues, Senator Hatfield, was a big part of this. So, we have national legislation as well as a treaty. The question that is worth wrestling over—a President signs a treaty. The treaty does not enter into force the next day. Sometimes it takes decades. So, what obligations are we under, is the Congress under, in that period of time between when a President signs and when the treaty enters into force? Are we free to do exactly what the treaty says we should not do? Is that okay? If you think that is okay, then you are contravening centuries—centuries—of law.

Senator RUBIO. Well, we did that when we founded our country, too. I mean we basically rejected the old order.

Mr. RADEMAKER. Could I comment on this? Because this is completely incorrect.

First of all, Mr. Krepon is looking through one end of the telescope. He is saying, "Do we have the right to completely violate a treaty the day after the President signs it?" The other way of looking at it is, if the United States is doing something one day, and the President signs a treaty and says we cannot do that anymore, do we have an obligation to stop doing what we have been doing just because the President signed a piece of paper? That is another way looking at the same issue. And the view of the Senate on that has always been no. Until the Senate approves a treaty, it is not binding on the United States in any respect. That is the view of the Senate. Now, that is not the view of the executive branch.

Mr. Krepon says: For centuries, this has been established, that, once the sovereign signs a treaty, it is binding. You know, that—again, that is not true. I am sorry to belabor the international law here. There is a thing called the "restatement of foreign relations law of the United States," which is basically a statement of the law—international law. In 1965, the second version of that came

out. No mention whatsoever of this obligation. 1969, the Vienna Convention is signed. What CRS told this committee in a very important document that you ought to look at that was submitted to this committee in 2001, a study of the treaty-making process—and it is sort of the bible for your lawyers, by the way. If you look at it, they make the comment that, as in the case of many treaties, the executive branch conducted the Vienna Convention negotiations without congressional observers or consultations, although the subject matter was of clear concern to the Senate. They go to Vienna. They sign this thing that includes Article 18, something not reflected in the restatement of foreign relations law of the United States from 1965.

The next version of the restatement comes out in 1987. It includes, now, this notion adopted from the Vienna Convention, but it goes on to say, in the reporter's notes, that this principle is less familiar to common law writers than to their civil law counterparts. So, I mean, we are a common law jurisdiction, so it is basically saying—

Senator CARDIN. Mr. Chairman, I—

Mr. RADEMAKER [continuing]. This is kind of a European law—

Senator CARDIN [continuing]. I am going to insist somewhat on regular order here. I would like to free-flow. I enjoy it. I enjoy members interacting. I do not always enjoy witnesses not allowing the other witness to finish. So, I would just urge us to have some semblance of order here and allow each person to be able to complete their thoughts.

I also want to underscore that this, as the Chairman pointed out, is focused on the process and prerogatives of the Senate. This is not a new subject. My staff pointed out to me that, in 2001, under Senator Helms, who was Chairman of the committee, the blue book that was printed by the committee spelled out very clearly the lineage of how treaties are treated between signature and ratification, which is exactly as we are discussing today. This is not a new subject. This is not a new interpretation by an administration. This has been the practice. And the Senate has done nothing active to dispute the responsibilities we have been signature and ratification but the prerogatives that remain until ratification.

So, this subject is one that I think is very worthy of a hearing, but it is clearly not a new subject, and one in which we have to function as a Nation through our chief executive. I do not look at Article 1 or 2. I look at it as working together. And we do try, on this issue—I know we are not talking about the substance of the issue, but, on this issue, it was a joint legislative-executive policy to prevent nuclear testing that was taken to the international stage; and now we are debating how the United States leadership should be maintained, which I would hope you would find the legislative and executive branches working together.

The CHAIRMAN. Let me, if I could, I appreciate the interjection, and I respect very much the fact that we have allowed this to be a little freewheeling. And I think it is been very informative.

So, what I think we will do is be a little more closely aligned to regular order, and then come back around for a second round, if people wish to do that. And I thank you for your input.

With that, Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman.

And, you know, I think, as I understand, here, part of what we are talking about is really speculation, because we really do not know what is being proposed, in terms of U.S. position with respect to a U.N. Security Council resolution, or the language. And so, while I think it is important for us to send a strong message to the White House that we all believe the Senate has a very important constitutional role, and we intend to play that role, we are really speculating, at this point, about what may or may not be in language for this resolution.

So, I appreciate everybody's speculation about what that may be, but I think it is important to say we do not know, at this point.

The CHAIRMAN. That is correct.

Senator SHAHEEN. So, Mr. Krepon, let me just ask you. I think you have said this, but assume the administration secures a U.N. Security Council resolution and P-5 statement along the lines of reaffirming what is in the CTBT. And assume that a future President determines that the U.S. should conduct another nuclear test. Not something I think we should do, but assume that happens. What would he or she need to do to relieve the U.S. of its statutory—or signatory obligations?

Mr. KREPON. Senator, we are talking about Senate prerogatives, as you should, but there are Senate prerogatives associated with the withdrawal of a U.S. commitment to a treaty. And I do not see a standard, here. And if you are concerned about Senate prerogatives, it might make sense to clarify standards.

So, in answer to your question, I believe the proper standard is what the George W. Bush administration did with respect to this Rome statute on the International Criminal Court. The Bush administration very forthrightly came to you, came to the American public, went public to the international community, said, "We are outta here," and conveyed a very formal letter to the U.N. Secretary General, the depository of the treaty. Now, that seems to me to be respectful of the Senate's prerogatives.

Senator SHAHEEN. Okay. Thank you.

Mr. Rademaker, do you agree with that? In 30 seconds or less.

Mr. RADEMAKER. Yes, the Bush administration did that. I would argue, with respect to the Rome statute, the International Criminal Court—

Senator SHAHEEN. No, no, that is not the underlying question. What would a future President—what should a future President do if they decide that they do not want to follow the U.S. signatory obligations of the previous President?

Mr. RADEMAKER. Yes. In that—yes, the President can get out from under that obligation.

Senator SHAHEEN. Okay.

Mr. RADEMAKER. That is correct.

Senator SHAHEEN. Thank you.

Now, Mr. Chairman, with all due respect, I understand that you want to keep this on process, but I think it is very hard to talk about an issue like this and keep it totally on process.

The CHAIRMAN. You are free to do whatever you wish.

Senator SHAHEEN. Thank you. I intend to do that.

The CHAIRMAN. Yes. I know you will. Thank you.

Senator SHAHEEN. So, Mr. Krepon, you listed a number of countries that might like to test, some of which already are, at least one. So, can you tell us what countries you believe would benefit most right now from testing?

Mr. KREPON. China tested 50 times, Senator. We tested about 1,000 times. China was very reluctant to sign this treaty, and still has not ratified.

Senator SHAHEEN. Right.

Mr. KREPON. So, there are some things they could do.

Russia does not have as good of a stockpile stewardship as we do. I am convinced of that. Now, we have tunnels and we have facilities above ground at the Nevada National Security site, where we do experiments that do not produce nuclear yield. I suspect other countries with nuclear weapons do, too. But, they may feel more constrained than we. So, they might benefit, too.

Senator SHAHEEN. Okay. So, that is two countries who I think it is fair to say are not our allies when it comes to a nuclear arsenal. So, would you agree that strengthening the norm—this is essentially what Senator Menendez was asking—strengthening the norm against nuclear testing makes it harder for other nuclear states to develop more sophisticated nuclear arsenals?

Mr. KREPON. Absolutely.

Senator SHAHEEN. Do you disagree with that, Mr. Rademaker?

Mr. RADEMAKER. I have no objection to the current situation, where countries are observing a moratorium on nuclear testing. The concern I have expressed in the past is one where a moratorium would become legally binding on the United States, because we do not know what will happen 50 or 100 years from now. And so—

Senator SHAHEEN. Okay, but I am not suggesting completely binding.

Mr. RADEMAKER [continuing]. I think ways to strengthen the notion of a moratorium are fine, as long as they are not legally binding on the United States.

Senator SHAHEEN. So, you would agree, then, that it is probably in the interests of the United States and our allies to see norms that would discourage nuclear testing by other nations.

Mr. RADEMAKER. Non-legally binding, you know, political pressures brought to bear on other countries not to test that, I have no problems with that.

Senator SHAHEEN. Okay. And I just have—I know I am out of time, Mr. Chairman, but I just have one more question. Are our allies, those who rely on the U.N. nuclear umbrella, are they supportive of our efforts to strengthen the norms against testing?

Mr. KREPON. Absolutely. They would be rattled by testing by China and Russia, and they are not real happy with the only outlier that still tests: North Korea.

Senator SHAHEEN. And, Mr. Rademaker, do you agree with that?

Mr. RADEMAKER. About the feelings of our allies? I think our allies are an important element of this equation. They depend—some of our allies depend very much for their security on the U.S. nuclear umbrella. And so, I think none of our allies today would be enthusiastic about an American nuclear test. I think if any—I can say there are a number of allies who would be deeply troubled if

they became concerned about the reliability of the U.S. nuclear umbrella. The country of South Korea—did you know two-thirds of the South Korean people today think South Korea should deploy its own nuclear weapons because they live next to North Korea, which keeps setting them off, and they feel that they are in the target zone for North Korea? If we do not want South Korea, where two-thirds of the people favor this, to go down that road, the South Korean people need to be reassured that the American nuclear umbrella exists and we will protect them in a crisis. And that is sort of my concern about permanent prohibition, that it could put us in a place where we are not able to maintain that reliability.

Senator SHAHEEN. Well, I appreciate that. I have not heard anybody on this panel argue that we should make this resolution at the U.N. legally binding. I have not heard anybody say that. I have not heard the White House say that. So, I appreciate that there may be conspiracy theories out there that suggest that that is going to happen, but I have not heard any good evidence to suggest that that is, in fact, the case.

Thank you, Mr. Chairman.

The CHAIRMAN. Okay. Thank you.

Senator Udall.

Senator UDALL. Thank you, Mr. Chairman.

And I think this has been a very interesting discussion. And I know, Mr. Chairman, you visited our National Laboratories in New Mexico, as some other Senators on this, and we do a lot of this work that Mr. Krepon talked about, in terms of stockpile stewardship and safety, reliability of our nuclear stockpile.

So, I welcome this discussion on the Comprehensive Test-Ban Treaty. The treaty is important to reach international nonproliferation goals. I believe the United States should ratify it. And I am disappointed we have not been able to have a serious conversation, or even a hearing, about ratification. Every administration since President Clinton has observed the moratorium on testing. And I am proud that the science-based work behind the life-extension program at New Mexico's National Security Labs has made a moratorium on testing possible. And that is what I talked about with Chairman Corker. In the absence of testing, the Labs have carried out science-based efforts to maintain the weapons stockpile safely and securely. This work has also increased our understanding of physics and other sciences while giving our top scientists and engineers the ability to apply these efforts to other national security interests.

And, Mr. Krepon, you raised this issue. I believe you said Russia is not as good as we are on their stockpile stewardship program. And I would ask you to rate that. I mean, you could do it on a 1-to-10, saying we are 10 or—how would you compare our ability in this period where we have not tested our stockpile stewardship programs?

Mr. KREPON. Senator, I need to declare an interest. I previously was a consultant to Sandia's International Security Program, so I was involved with cooperative threat reduction work and their Cooperative Monitoring Center.

Nobody is in our league. Nobody. Now, the Russian labs took a huge hit when the Soviet Union dissolved. China's labs, I am guessing, are better than the Russian labs.

But, I also want to point out something that our labs have done in the past and might do in the future. We had this big wrangle over a treaty that set a threshold for underground testing. This was a treaty that was signed by President Nixon in '74. President Ford sent it to the Senate. There were still issues. We did not know that much about the geology of the test sites over in the Soviet Union. There were disputes that the yield—this threshold was being violated—assertions that it was being violated. And we really had trouble calibrating.

And so, what the Labs did—President Reagan pursued this, and President George H. W. Bush made it happen. He sent the Labs to the Soviet test sites. And we invited their guys to come to our test sites. And we calibrated underground yields. And we gained satisfaction that we could do this. Indeed, we came to the conclusion, a reasonable conclusion, that assertions of violations were not right. And President George H. W. Bush persuaded the Senate to consent to ratify this treaty.

I think this can come in handy again in the future if we ever get to that place, if we ever get to the point where, on balance, the Senate believes this treaty is in our national security interests. And we love where the detection has gone. It has just driven down yields, driven down detectable yields. But, maybe we need—we need a little bit more.

Senator UDALL. You still have not made the comparison among China, Russia, and United States, on stockpile stewardship.

Mr. KREPON. I cannot say. I do not have a confident—

Senator UDALL. Yes. But, you would say that we are tops, China is probably second, and Russia is third, is your estimate at this point.

Mr. KREPON. It is.

Senator UDALL. Yes. Yes. Okay.

And I have additional questions, but Senator Markey's here. I will put them, in the record.

Thank you.

[The information referred to is located in the Additional Material Submitted for the Record section of this transcript.]

The CHAIRMAN. Thank you. Thank you so much.

Senator Markey.

Senator MARKEY. Thank you very much, Mr. Chairman.

Thank you for having this hearing. I think it is a very important subject, obviously, and it is one that we need in order to clarify what the law is on this issue.

In August of 1986, my amendment passed on the House floor, calling for a moratorium on U.S. underground nuclear testing as long as the Soviet Union also abided by that. So, that passed by about a 100-vote margin on the floor of the House in August of 1986. We also passed a ban on anti-satellite weapons at the time. Those two amendments, as they passed the House, are the two amendments that largely drove Reagan to Reykjavik. Because, otherwise, it was inexplicable what he was doing there in the first week of October with no preparation beforehand. We were closing

in on these assets. Okay? And by 1992, the United States basically just stopped underground nuclear testing. The Russians have, as well. So, that was the beginning of the end of underground nuclear testing.

So, what we are talking about now is really, What do we do in order to make sure that North Korea and others do not escalate their underground nuclear testing? That is at the heart of this issue.

Here is what Senator Kerry's letter to us this morning says. The administration says:

The administration fully respects the Senate's constitutional role in treaty ratification, and the actions currently being considered at the United Nations are consistent with that role. We remain committed to securing the Senate's advice and consent on the U.S. ratification of the CTBT, the entry into force of which would result in a durable, legally binding test ban and bring into full force the treaty's vital verification mechanisms. The actions we are pursuing with the Nuclear Non-Proliferation Treaty, nuclear weapon states, and separately in the United Nations Security Council, are in no way a substitute for entry into force of the treaty.

As you know, the President made CTBT ratification a U.S. priority in his 2009 Prague speech. And I have also been clear on this point. Although the policy of the last administration was not to pursue U.S. ratification of the CTBT, that has not been the current administration's policy. "We are not proposing, and will not support, the adoption of a U.N. Security Council resolution imposing a legally binding prohibition on nuclear testing. Rather, we are pursuing a political statement of the NPT's nuclear weapon states, all of whom are CTBT signatories, affirming their view that a nuclear test would defeat the object and purpose of the CTBT. As a matter of international law, treaty signatories are obliged to refrain from acts which would defeat the object and purpose of a treaty unless they make their intention clear not to become a party to the treaty.

A future administration could make clear that the United States no longer intends to become a party to the treaty, in which case the United States would no longer have such an obligation. This is well-established principle of treaty law and is consistent with the constitutional role of the Senate in U.S. treaty practice. "The resolution we propose would take note of the political statement by the NPT's nuclear weapon states. It would not impose that view as a legal matter or place any other legal prohibition on nuclear testing on U.N. member states. At the same time, such a statement could encourage other countries that have not yet signed or ratified the CTBT to take steps to do so. The proposed resolution also seeks to reinforce the existing moratoria on nuclear testing and strengthen the CTBT's verification regime.

Could you talk about that, Mr. Krepon, just so that we, again, zero in on the political, rather than legal, nature of what the President and John Kerry are talking about?

Mr. KREPON. Senator, I appreciate your history on this subject.

What we are hearing from some members of this committee is a radical new legal theory, which is that a state is absolutely free to violate a treaty that it has just signed before its entry into force, which would, by the way, nullify its entry into force. This is wild. And nothing that I can think of at the moment would so seriously undermine U.S. leadership in the world as to propound this theory.

No administration has embraced this theory. When our Presidents negotiate and sign treaties, it is their intention not to violate them. We are unlike other countries in that respect. And we are proud of it.

So, I hope that this committee will not go down the route of embracing a radical notion that, "Oh, we just signed that treaty, but we are not obliged to adhere to it."

Senator MARKEY. So, you agree, this is just a political statement that they are making. Do you agree with that?

Mr. KREPON. I do.

Senator MARKEY. Okay. Well, that is very important, because that is the nub of this case right now.

And, by the way, the argument that was made on the CTBT, that we could not verify, well, it was not true in 1974. We knew that India was testing, we were not sure when Pakistan did it. Today, we have a sophisticated system that picks up anything that North Korea does instantaneously. The question is whether we want to construct a regime that will tighten the noose around North Korea and other rogue nations that continue down a pathway that China and Russia and the United States and others do not, in fact, go down, which is additional testing of nuclear weapons.

So, that is really what this whole debate is all about. It comes down to North Korea, to a very large extent. And, to the extent to which we want to ensure that we are using every possible mechanism at the U.N. that is still consistent with the prerogatives of the United States Senate, I think that we should pursue them. We have to let the world know—we have to let North Korea know that they are isolated and that they can expect the noose to continue to tighten. And if we can get China and Russia to go along with that as a political statement, I think it helps to make the world safer.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

If I could, while you are still here, I would like to say that, while this is about the process—it is not about the substance—since the speech in Prague, this is the only hearing that has ever occurred on this topic. So, you talk about hortatory. I mean, Chairman Kerry, who just sent us this letter, never even had a hearing on this. Okay? So, I do want to say that this certainly has not been on the front burner. It has not been pushed by this administration. And there have been legitimate concerns about a going-out-the-door obligation. And I do not think we would have received this letter that we received today that states that they are not going to do anything that is binding.

Now, I would like to follow up on your question, if I could.

So, here is what I would like to make: I think where there is disagreement, Mr. Krepon has a point of view, Mr. Rademaker has a point of view, and we had two committee members who had a point of view relative to the object-and-purpose issue. I would just like to ask this question. And, you know, Senator Shaheen said it is based on rumor. Actually, I do not think so. I mean, I think there have been some legitimate concerns, and I think we are airing those. And hopefully what is going to happen is, when the administration works things out with its partners at the U.N. Security Council, it will not be something that goes a step further and takes away our obligation and steps on our own responsibilities.

But, I would like to ask Mr. Rademaker this. Affirming this—the—let me find the language here that was just read—the purpose and objective. Mr. Rademaker, would you agree with what Mr. Krepon just said, relative to its binding effect, and what Secretary Kerry affirmed in this letter? I mean, if we are in agreement there, and they end up coming down that path, then that would be wonderful. But, do you agree with that, that it is not in any way legally binding if the next administration decides to withdraw?

Mr. RADEMAKER. I am confident that the next President could find a way to terminate the obligation not to defeat—or the—I guess I should say, the alleged obligation not to defeat the object and purpose of the treaty. But, the Security Council action, I think, is intended to make it more difficult for him to do so. I do not think it makes it legally impossible, but it makes it harder for the next President to do that.

And I do just want to emphasize that I believe there is a difference of view between the two branches of government on this issue of whether the United States incurs a legal obligation the moment the President signs a piece of paper. It is not that anybody's suggesting the U.S. wants to immediately violate treaties that the President signs, but there are many times when the President signs a treaty that would require the United States to stop doing something that it has been doing for years. And the question is, Does the United States incur a legal obligation, by the stroke of the President's pen, to stop doing things that it has been free to do in the past? And I think to the Senate on that has always been that it does.

And, of course, the case before us is even more complicated because it is not just a question of what is the initial obligation, there is also—even under the Vienna Convention, this obligation exists until the signatory has made clear its intention not to become a party. And so, for the CTBT, the question is, What is the meaning of the Senate action in 1999? And then, we have the Condoleezza Rice letter, where she said—

The CHAIRMAN. Yes.

Mr. RADEMAKER [continuing]. The view of the President is that we are not intending to be bound. And so, where does anyone come to the conclusion that, today, with both branches of government having spoken—now, you know, I realize we have a different President who has a different opinion, but does this change the legal obligation of the United States under the customary—what is alleged to be the customary international law reflected in the Vienna Convention? I think it is a pretty tenuous argument.

The CHAIRMAN. Well, I think we—I mean, we kind of live in that world, and we have that same disagreement over the War Powers Act and numbers of things.

Mr. RADEMAKER. Right.

The CHAIRMAN. I understand it. But, I would like to get back, specifically, since you have so much knowledge on this. Affirming their view that the nuclear test would defeat the object and purpose of the CTBT—you have seen this letter—in that language that has been sent to us this morning, is it your belief that, if that is the path that is followed, the Senate prerogatives, as it relates to treaties and affirmations of international agreements, have or have not been infringed upon?

Mr. RADEMAKER. I think that statement is irreconcilable with what Secretary Rice wrote in her letter to Senator Kyl. And I think it is irreconcilable with the position of the Senate that the United States has no such legal obligation.

The CHAIRMAN. Mr. Krepon.

Mr. KREPON. Mr. Chairman, we elect Presidents that have irreconcilable differences with their predecessors from time to time. But, that does not nullify a treaty that remains on the Senate calendar. You still have the prerogative to not consider this treaty, reject it—

The CHAIRMAN. Not have hearings on it in 8 years.

Mr. KREPON. Well, I—you have started. [Laughter.]

The CHAIRMAN. Yes.

Mr. KREPON. And that is a good thing.

The CHAIRMAN. Yes.

Senator CARDIN. Mr. Chairman, I just really want to thank both of our witnesses. They are a great resource to the committee.

And I think this hearing was long overdue, and I thank you for calling it.

The CHAIRMAN. Thank you. And thanks for allowing us to have it on short notice, and for changing the time.

The business—there will be questions that will follow, and I will keep the record open until the close of business Friday. If you could fairly promptly—especially with this potentially going to the U.N. Security Council fairly soon, if you could fairly promptly respond, we would appreciate it.

Thank you for sharing your wisdom and knowledge with us.

And, with that, the meeting is adjourned.

[Whereupon, at 12:00 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

LETTER FROM SENATOR BOB CORKER TO PRESIDENT BARACK OBAMA

U.S. SENATE, COMMITTEE ON FOREIGN RELATIONS,
*Washington, DC 20510-6225, August 12, 2016*PRESIDENT BARACK OBAMA,
1600 Pennsylvania Avenue,
Washington DC 20500

Dear Mr. President, I write to express my strong opposition to efforts by your administration to circumvent the U.S. Congress and the Senate's constitutional role by promoting ratification of the Comprehensive Test Ban Treaty (CTBT) at the United Nations. The Senate could not have been more straightforward in its opposition to U.S. ratification of the CTBT with 51 members of the Senate voting against ratification in 1999. The U.S. Constitution clearly provides the Senate—not the United Nations—the right to the provision of advice and consent for the ratification of any treaty, including the ability to identify when a treaty or the application of the provisions contained in a treaty is not in the U.S. interest.

Your administration seeks to ignore the judgment made by a co-equal branch of government regarding the treaty. Following the defeat of the CTBT, the Executive Branch came into line with the Senate's view through a 2007 Statement of Administration Policy that "[i]t would be imprudent to tie the hands of a future administration that may have to conduct a test" and Secretary Condoleezza Rice stated that "the Administration does not support the Comprehensive Test Ban Treaty and does not intend to seek Senate advice and consent to its ratification." The planned U.N. effort would reverse course on that shared understanding between the Senate and Executive Branch.

A recent State Department letter explains that the administration will support ratification of the CTBT through a resolution in the U.N. Security Council and a "political statement expressing the view that a nuclear test would defeat the object and purpose of the CTBT" that will be referenced in the U.N. resolution. A political statement invoking the "object and purpose" language could trigger a limitation on the ability of future administrations to conduct nuclear weapons tests. "Object and purpose" obligations for countries that have signed and not ratified a treaty are specifically articulated in Article 18 of the Vienna Convention on the Law of Treaties, which the United States also has not ratified; but they have been recognized by successive U.S. administrations as customary international law that present a binding restriction on the United States.

By signing onto language declaring avoidance of nuclear weapons testing to be essential to the "object and purpose" of the CTBT, the State Department is in effect submitting the United States to the restrictions of a treaty that has not entered into force. Regardless of one's view about the necessity of nuclear testing, seeking to limit a future administration through a customary international law mechanism, when your administration has only four months left in office, is inappropriate. The appropriate mechanism would be to have sought and fought for ratification of the treaty. Should your administration have a different view about the planned actions' effect on customary international law, I would appreciate knowing that.

Support for the constitutional division of powers and the U.S. ability to make decisions about our own best interests in carrying out foreign policy demands a rethinking of any effort to pass a resolution and issue political statements in the United Nations that could impose international legal restrictions on the U. S. nuclear deterrent capability without first obtaining the advice and consent of the Senate.

Sincerely,

HON. BOB CORKER, *Chairman,*
U.S. Senate Committee on Foreign Relations.

cc:

Hon. John Kerry, Secretary, U.S. Department of State
Hon. Samantha Power, U.S. Permanent Representative to the United Nations

SECRETARY OF STATE JOHN KERRY'S RESPONSE
TO SENATOR BOB CORKER'S LETTER OF AUGUST 12, 2016U.S. DEPARTMENT OF STATE,
Washington, DC, September 7, 2016.HON. BOB CORKER, *Chairman*,
Committee on Foreign Relations,
U.S. Senate, Washington, DC 20510

DEAR MR. CHAIRMAN, this letter addresses steps the administration is taking on the subject of the Comprehensive Test Ban Treaty (CTBT).

The administration fully respects the Senate's constitutional role in treaty ratification and the actions currently being considered at the United Nations are consistent with that role. We remain committed to securing the Senate's advice and consent to U.S. ratification of CTBT, the entry into force of which would result in a durable, legally binding test ban and bring into full force the treaty's vital verification mechanisms. The actions we are pursuing with the Nuclear Non-Proliferation Treaty (NPT) nuclear-weapon states and separately in the United Nations Security Council are in no way a substitute for entry into force of the treaty. As you know, the President made CTBT ratification a U.S. priority in his 2009 Prague speech and I have also been clear on this point. Although the policy of the last Administration was not to pursue U.S. ratification of the CTBT, that has not been the current Administration's policy.

We are not proposing and will not support the adoption of a UN Security Council Resolution (UNSCR) imposing a legally binding prohibition on nuclear testing. Rather, we are pursuing a political statement of the NPT's nuclear-weapon states, all of whom are CTBT signatories, affirming their view that a nuclear test would defeat the object and purpose of the CTBT. As a matter of international law, treaty signatories are obliged to refrain from acts which would defeat the object and purpose of a treaty, unless they make their intention clear not to become a party to the treaty. A future Administration could make clear that the United States no longer intends to become a party to the treaty, in which case the United States would no longer have such obligations. This is a well-established principle of treaty law and is consistent with the constitutional role of the Senate in U.S. treaty practice.

The Resolution we propose would take note of this political statement by the NPT's nuclear-weapon states; it would not impose that view as a legal matter, or place any other legal prohibition on nuclear testing on UN member states. At the same time, such a statement could encourage other countries that have not yet signed or ratified the CTBT to take steps to do so. The proposed Resolution also seeks to reinforce the existing moratoria on nuclear testing and strengthen the CTBT's verification regime.

The UNSCR text is evolving as our consultations proceed, but I want to assure you that it will not cite Chapter VII of the U.N. Charter or impose Chapter VII obligations. It will be a non-binding resolution that advances our interests by affirming the existing nuclear testing moratoria, while highlighting support for the CTBT and its verification regime. These goals are widely shared, including among our closest treaty allies, all of whom ratified the CTBT years ago. I am committed to keeping you informed of the progress of the discussions on the Resolution.

This Administration considers U.S. ratification of the CTBT to be strongly in our national security interest. We continue to welcome a full and substantive discussion on the Treaty's technical, military and political merits with Congress and with the American public. As it has been seventeen years since the Senate vote on the Treaty, we believe that ratification should not be rushed. We have no doubt that the nation would be best served by expanding the discussion on why the CTBT's global ban on nuclear explosive testing, which would expand on the Limited Test Ban Treaty that was approved by the Senate over 50 years ago, is in the national security interest of the United States.

I hope this information proves helpful and stand ready to discuss it at any time.

Sincerely,

JOHN KERRY,
Secretary of State.

LETTER TO SENATOR BOB CORKER FROM JULIA FRIFIELD,
ASSISTANT SECRETARY OF STATE FOR LEGISLATIVE AFFAIRS

UNITED STATES DEPARTMENT OF STATE,
Washington, DC, September 7, 2016.

HON. BOB CORKER, *Chairman,*
Committee on Foreign Relations,
U.S. Senate, Washington, DC 20510

DEAR MR. CHAIRMAN, per your phone conversation with Ambassador Power of August 4, the Administration wishes to make clear the following:

The United States is not proposing and will not support the adoption of a UN Security Council Resolution (UNSCR) imposing a legally binding prohibition on nuclear testing. Rather, the resolution we envision would reaffirm the existing testing moratoria, which have become a de facto standard of responsible international behavior that only North Korea is ignoring. We seek a resolution that will also reinforce support for the Comprehensive Nuclear-Test-Ban Treaty (CTBT) Organization (CTBTO) and the Treaty's verification system, including by facilitating reporting on States' CTBTO financial contributions and efforts to build out the verification system.

In parallel to the UNSCR, we have proposed that we, China, France, Russia, and the United Kingdom (the five nuclear weapons states under the Nuclear Non-proliferation Treaty (NPT)) issue a political statement expressing the view that a nuclear test would defeat the object and purpose of the CTBT. This statement would make clear our and the other P5 members' view that CTBT signatories have an international legal obligation not to test unless they make it clear they no longer intend to become a party to the CTBT. The UNSCR would take note of this political statement made by the P5, but it would not impose that view as a legal matter, or any other legal prohibition on nuclear testing, on UN member States.

These actions would not tie the hands of future Administrations, which will retain full agency on all matters pertaining to testing. We fully respect the Senate's constitutional role in treaty ratification, and wish to emphasize that our proposal is absolutely no substitute for entry into force of the CTBT, which would result in a durable, legally binding test ban and which would bring into full force the treaty's vital verification mechanisms.

Sincerely,

JULIA FRIFIELD,
Assistant Secretary for Legislative Affairs

LETTER FROM SECRETARY OF STATE CONDOLEEZZA RICE
TO SENATOR JON KYL, JULY 5, 2008

THE SECRETARY OF STATE,
Washington, DC, July 5, 2008.

Hon. Jon Kyl,
U.S. Senate, Washington, DC.

DEAR SENATOR KYL, I am responding on behalf of the Departments of State, Defense, Justice, and Energy to your letters of July 17, 2006, relating to the Comprehensive Nuclear-Test-Ban Treaty ("the CTBT"), as well as your prior letters on that subject.

As you have noted, the Senate declined to grant its consent to ratification of the CTBT on October 13, 1999. Following the Senate's action, then-Secretary of State Madeleine Albright made certain statements to foreign policy leaders regarding the Clinton Administration's policy with respect to U.S. compliance with the CTBT. The Bush Administration has taken a fundamentally different approach to the CTBT. This Administration has stated that it does not intend to request another vote from the Senate seeking advice and consent to ratification of the treaty, and this Administration has clearly expressed to the United Nations and foreign governments that the United States does not intend to become a party to the treaty.

At the August 2001 meeting of the Preparatory Commission for the CTBT, at which all signatories to the CTBT were represented, the U.S. representative said in an opening plenary statement that the United States "has no plans to reconsider the CTBT for ratification."

Furthermore, in a speech before the First (Disarmament) Committee of the United Nations General Assembly on October 7, 2003, then-Assistant Secretary of State for Arms Control Stephen G. Rademaker stated that “the United States maintains its current moratorium on nuclear explosive testing. That having been said, the United States does not support the Comprehensive Nuclear-Test-Ban Treaty, and will not become a Party to it.” The position taken at the Second Session of the Preparatory Committee for the 2005 NPT Review Conference, held in Geneva from April 28 to May 9, 2003, also reaffirmed this position; it was here that the U.S. Representative said, “[t]he United States Administration does not support the CTBT and does not plan to proceed with ratification.” In addition, the May 2, 2003, Information Paper from the United States concerning Article VI of the NPT (provided to the Second Session of the Preparatory Committee for the 2005 NPT Review Conference) stated, “the United States will not pursue ratification of the CTBT.”

Most recently, in a statement delivered at the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), held in New York, May 2-27, 2005, the U.S. Representative to the Conference on Disarmament in Geneva and Special Representative of the President for Nuclear Non-Proliferation, Ambassador Jackie Sanders, stated, “the United States does not support the [CTBT], and will not become a party to it.”

Responses to your specific questions are enclosed.

I hope that this letter clarifies this Administration’s position on the CTBT and resolves the issues that you raised in your letter.

Sincerely,

CONDOLEEZA RICE,
Secretary of State.

SECRETARY RICE’S RESPONSE TO SENATOR KYL’S
QUESTIONS OF JULY 17, 2006 ON THE CTBT

Question 1. Whether Secretary Albright’s 1999 assurances regarding U.S. obligations under the Comprehensive Nuclear-Test-Ban Treaty are consistent with the current policy of the United States.

Answer. No. As noted above, the assurances provided by former Secretary Albright to foreign governments regarding the CTBT are not consistent with the policy of this administration, and this has been repeatedly (and authoritatively) stated in international fora. Specifically, Secretary Albright expressed the hope and intention that the United States would become a party to the treaty in the future, but this administration has made clear that the United States does not intend to become a party to the CTBT.

Question 2. If the assurances are not consistent with U.S. policy, a description of the steps taken by the President to communicate to the foreign governments that received these assurances that they are no longer operative.

Answer. The principal occasions on which the Bush administration has clearly communicated to all governments its position on the CTBT, namely, that the United States does not intend to become a party, are set forth in the enclosed letter from Secretary Rice to Senator Kyl. These were clear statements that the United States does not intend to become a party to the CTBT. These statements made clear that the United States does not support entry into force of the CTBT.

Question 3. If the assurances are not consistent with U.S. policy, whether the President has provided written notice of this fact to the foreign governments that received them.

Answer. As noted above, the United States circulated a written Information Paper on May 2, 2003 to the Second Session of the Preparatory Committee for the 2005 NPT Review Conference, and the text of the U.S. statement at the U.N. General Assembly on October 7, 2003, is set forth in the Official Records of that meeting.

Question 4. Whether the President agrees with the 1999 statement by Secretary Albright in the assurances letter that the Comprehensive Nuclear-Test-Ban Treaty imposes on the United States continuing “obligations as signatory under international law,” irrespective of the October 13, 1999 rejection of the treaty by the Senate.

Answer. No. As noted above, the Bush administration has made its position on the CTBT clear. We do not believe the treaty imposes any current obligation on the United States resulting from U.S. signature in 1996, and we do not consider the

United States to have obligations under international law as a signatory to the treaty.

Question 5. If the President believes that the Comprehensive Nuclear-Test-Ban Treaty does not impose on the United States continuing obligations as a signatory under international law,

- ◆ whether the President believes that the statement that such obligations existed was erroneous; and
- ◆ if not, a description of the steps taken by the President to terminate the obligations that existed in 1999 when the assurances letter was sent.

Answer. Irrespective of the position stated in the 1999 letter, we do not believe that the treaty imposes any current obligation on the United States resulting from U.S. signature in 1996. The various communications by the Bush administration to representatives of foreign governments are described in the text above and in response to Question 3.

Question 6. If the President believes that the Comprehensive Nuclear-Test-Ban Treaty does impose on the United States continuing obligations as a signatory under international law, a description of the nature and extent of such obligations.

Answer. As stated in response to Question 4, the United States has not consented to be bound under international law to the CTBT and we do not believe the treaty imposes any current obligation on the United States resulting from U.S. signature in 1996.

Question 7. Whether, as a matter of international law, the United States is, at present, a signatory to the Comprehensive Nuclear-Test-Ban Treaty.

Answer. There is a distinction under international law between whether a State is a “signatory” to a particular treaty and whether that State has any obligation by virtue of having signed that treaty. In this case, the United States signed the treaty during the prior administration. As noted above, however, we have since clearly expressed the U.S. intention not to become a party to the CTBT. As noted above, the United States does not have any obligations under international law as a signatory to the CTBT.

Question 8. Whether the official list of signatories of the Comprehensive Nuclear-Test-Ban Treaty maintained by the depositary of the treaty accurately reflects whether the United States is still a signatory of the Treaty.

Answer. As noted in the answer to Question 7, there is a distinction under international law between whether a State is a “signatory” to a particular treaty and whether that State has any obligations by virtue of having signed that treaty. In its capacity as depositary, the United Nations treaty office has simply recorded the fact that the United States signed the CTBT on September 24, 1996. That, of course, is correct as a matter of historical record. This, however, has no effect on whether the United States has any current obligations resulting from that fact, and it has no effect on U.S. conduct or policy.

Question 9. Whether the President has a constitutional duty to ensure that U.S. international legal obligations conform with domestic legislation subsequently enacted that is inconsistent with such obligations, and whether any such duty extends to reconciling or changing internationally maintained records that purport to reflect the official status of the United States as the signatory of a treaty that has been rejected by the Senate and is no longer supported by the President.

Answer. As noted above, the United States has no international legal obligations resulting from the 1996 signature of the CTBT, and we do not believe that such obligations would arise unless the treaty was to be ratified by the United States. We do not believe that either the Constitution or international law would require the United States to seek to change the records in the U.N. treaty office.

STATEMENT FOR THE RECORD SUBMITTED BY SENATOR TOM UDALL

I welcome this discussion on the Comprehensive Test Ban Treaty. The treaty is important to reach international nonproliferation goals. I believe the United States should ratify it. And I'm disappointed that we haven't been able to have a serious conversation . or even a hearing . about ratification.

Every administration since President Clinton has observed the moratorium on testing. And I am proud that the science-based work behind the life extension program at New Mexico's national security labs . has made a moratorium on testing possible.

In the absence of testing, the labs have carried out science-based efforts to maintain the weapons stockpile safely and securely. This work has also increased our understanding of physics and other sciences..while giving our top scientists and engineers the ability to apply these efforts to other national security interests.

I have seen our top scientists at work at Los Alamos and Sandia labs. And I say to anyone who questions this program: I would be happy to host you in New Mexico, at Los Alamos and Sandia, Lawrence Livermore or Oak Ridge so that you can see for yourselves how the stockpile stewardship program has improved national security.

And if any senator here wishes to resume detonating nuclear warheads for testing purposes, I would ask: Will your state volunteer for such testing? New Mexico has been a site for testing. Victims of the Trinity Test in Tularosa live with a legacy of illnesses. Families in Northern New Mexico lost fathers, brothers and uncles to nuclear bomb making. I am still fighting to help them—and other New Mexicans who were victims of nuclear testing. My guess is that you—and your constituents—would be strongly opposed to new testing in their backyards.

That is one of many reasons I am such a strong supporter of the life extension projects that are currently being undertaken at the labs. These programs have proven that we can maintain our deterrent without the dangerous impacts of testing.

And I would strongly urge my colleagues to see the connection between the two and support the life extension programs in the budget process.

Regarding the question at hand. I believe that there is no legal reason or constitutional impediment for the President to support in the Security Council..a nonbinding resolution which calls on member states to abide by the CTBT and not conduct a nuclear test.

 MICHAEL KREPON'S RESPONSE TO QUESTIONS SUBMITTED BY SENATOR TOM UDALL
Comprehensive Test Ban Treaty

Question 1. Would you agree that working to limit and ban the testing of nuclear weapons is a step towards maintaining international peace?

Answer. Banning nuclear test explosions can help reduce the salience of nuclear weapons in international relations, and it can remove one important contributing factor to horizontal and vertical proliferation. In this sense, banning tests contributes to international peace. But there are other contributing factors to warfare that will not be affected by a ban on testing, as useful as this would be.

U.S. Senate implementing legislation

Question 2. In addition to the U.N. Charter, the U.S. Senate also passed implementing legislation, the United Nations Participation Act. The language is clear, it states that our representative "shall, at all times, act in accordance with the instructions of the President" and shall "in accordance with such instructions, cast any and all votes under the Charter of the United Nations." Would you agree that this sounds like a pretty straightforward authorization for the President to negotiate a resolution such as the CTBT?

Answer. Yes. Presidents have gone to U.N. Security Council to reduce nuclear dangers previously. President George W. Bush has done so more than President Obama. I see no grounds to claim that the Senate's prerogatives are being infringed upon by negotiating a non-binding resolution that imposes no new obligations on the United States.

Lawfare blog article

Question 3. In order to move this discussion along, I would like to ask unanimous consent that an article by Jack Goldsmith, a Harvard professor and cofounder of the Lawfare blog, be submitted for the record. In his piece, Mr. Goldsmith concludes “Congress is complaining about the President circumventing its prerogatives . when in fact, the President is exercising authority that Congress gave him.” Mr. Krepon, would you agree with this statement?

Answer. Yes, I would agree.

QUICK REACTIONS TO OBAMA'S U.N. GAMBIT
ON NUCLEAR TESTING, *by Jack Goldsmith*

LAWFARE

EXECUTIVE POWER

Quick Reactions to Obama's UN Gambit on Nuclear Testing

By **Jack Goldsmith** Friday, August 5, 2016, 7:02 AM

Josh Rogin of the *Washington Post* [reports](#) that “President Obama has decided to seek a new United Nations Security Council resolution that would call for an end to nuclear testing, a move that leading lawmakers are calling an end run around Congress.” The piece’s title says Obama’s gambit will “bypass” Congress. The Wall Street Journal editorialists similarly [maintain](#): “Our sources say the President has also decided to seek a United Nations Security Council resolution banning the testing of nuclear weapons. This means that two decades after the U.S. Senate refused to ratify the Comprehensive Test Ban Treaty, Mr. Obama may usurp the Senate’s constitutional treaty powers with an end-run to the U.N.” And Senator Corker, the Chairman of the Senate Foreign Relations Committee, says:



Jack Goldsmith is the Henry L. Shattuck Professor at Harvard Law School, co-founder of Lawfare, a Senior Fellow at the Hoover Institution at Stanford University, and co-chair of its Working Group on National Security, Technology, and Law. He teaches and writes about national security law, presidential power, cybersecurity, international law, internet law, foreign relations law, and conflict of laws. Before coming to Harvard, Professor Goldsmith served as Assistant Attorney General, Office of Legal Counsel from 2003-2004, and Special Counsel to the Department of Defense from 2002-2003.

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This is a plan to cede the Senate's constitutional role to the U.N. It's dangerous and it's offensive. Not only is this an affront to Congress, it's an affront to the American people. It directly contradicts the processes that are in place to make sure that Congress appropriately weighs in on international agreements.

What it really does is allow countries like Russia and China to be able to bind the United States over our nuclear deterrent capability without the scrutiny of Congress. Should we ever decide we may wish to test, we could be sued in international courts over violating a United Nations Security Council resolution that Congress played no role in.

My first reaction is to doubt that the President will (as the WSJ says) seek a U.N. Resolution "banning the testing of nuclear weapons." It is unclear whether the Security Council would have the authority to issue such a ban, even assuming that one of the other permanent five would not veto it. Rogin's claim is more circumspect, and probably more accurate. He says the planned Resolution would "call for an end to nuclear testing," and says that the NSC Spokesman told him that the administration is "looking at possible action in the UN Security Council that would call on states not to test and support" the Comprehensive Test Ban Treaty's objectives. Rogin's reporting make it sound like the administration is

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considering a hortatory Resolution that would state the ambition or goal to end nuclear weapons testing, not one that would impose a ban on such testing. Those are two very different things, and the former is much less significant than the latter (though not insignificant).

If I am right that what is planned is not a ban on nuclear weapons testing, then the significance of the UN action is much less a threat to Congress's prerogatives than is suggested in the two articles. But what are Congress's prerogatives here? The situation is akin to the one in the Paris Agreement and the Iran Deal, which I have written a lot about in these pages (and in succinct form in the second half of [this essay](#)). In those examples, the President acted (1) in the face of opposition by the current Congress, but (2) based on older authorities delegated by Congress to the President, to (3) effectuate domestic law change in order to satisfy pledges made in non-binding international agreements. Or, simplifying a bit, the President used an authority delegated by a prior Congress to achieve an international goal without seeking contemporary approval from Congress. Something like that is happening here, though the international "agreement" will come in the Security Council rather than a broader multilateral pact, and I don't see any need to change domestic law.

The Senate has for two decades refused to consent to the Comprehensive Test Ban Treaty, and it is not inclined to give it consent in the last six months of the Obama administration. So the President is doing what he can—probably no more, at best, than a Resolution encouraging a universal test ban, or

starting an alternative process toward one. And where does the President get this authority to make policy and cast votes in the U.N. Security Council?

Presidents have exercised discretion under Article II of the Constitution to speak and vote for the United States in the United Nations—with enormous consequences on a variety of topics, and without congressional input or approval on particular matters—since the 1940s. And importantly, *Congress has expressly approved and authorized this practice in broad and unqualified terms.*

Section 287 of Title 22 provides that the President, with the Senate's advice and consent, "shall appoint a representative of the United States to the United Nations" who "shall represent the United States in the Security Council of the United Nations." And Section 287a of Title 22 provides that the U.S. representative to the United Nations "shall, at all times, act in accordance with the instructions of the President" and shall "in accordance with such instructions, cast any and all votes under the Charter of the United Nations." In sum, Congress has delegated unqualified authority to cast votes in the U.N. Security Council to the President.

I am not suggesting that there are no limits on what the President can do, or how he can vote, in the Security Council. He may not be able to vote in ways that violate a specific domestic law restriction or a U.S. treaty obligation. I do not know what domestic laws or treaties might hand-tie the President related to nuclear test bans, but it is quite possible that none exists. (Non-consent to a treaty doesn't count). There also may be some constitutional limit on the

President agreeing to a U.N. Security Council Resolution that imposes large and novel international law obligations on the United States. This is entirely untested legal ground, as far as I know. But I can imagine an argument that at some point an international law-creating U.N. Security Council Resolution violates the Senate's or Congress's exclusive constitutional prerogatives even if it does not run afoul of prior law. And yet this would be a hard argument to make, I think, since (i) Congress has expressly authorized the President to vote in the Security Council in open-ended terms, and (ii) Presidents have for 60 years exercised this authority in a number of very consequential ways without prior congressional input. The constitutional argument would have to be that the delegation itself was somehow unconstitutional. But Congress's power to delegate is, according to a long line of Supreme Court cases, at its apex in the foreign relations context.

So this once again seems like a situation where President Obama is taking advantage of congressional non-action on one front (the refusal to Consent to the CTBT) and congressional delegation on another front (authority to vote in the U.N. Security Council) to achieve an international goal that many and perhaps most in Congress do not like. Once again, Congress seems defeated by its own delegation.

I want to emphasize that I am not arguing here in favor of a nuclear test ban or even a hortatory U.N. Security Council Resolution. I simply want to underscore that once again, Congress is complaining about the President circumventing its prerogatives when in fact the President is exercising authority that

Congress gave him. In a world in which constitutional etiquette between the branches has evaporated, a president will fall back on his hard-law prerogatives, especially those expressly delegated from Congress, especially at the end of a second term. It is a lesson that Congress should consider—but likely won't—the next time it gives away foreign relations authorities to the President.

Topics: Executive Power

