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POLITICAL CONSEQUENCES OF THE UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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One reason that it took so long for the United States to become a party to the International Covenant on Civil and Political Rights (Covenant)¹ is that ratification never became an important issue on the agenda of the many organizations devoted to the protection of civil rights and civil liberties within the United States. As national executive director of the American Civil Liberties Union (ACLU) at the time that President Jimmy Carter signed the Covenant, this writer can attest that the largest such organization in the United States provided at best perfunctory support for approval by the Senate. Moreover, most of the ACLU's officers and staff, let alone its membership of nearly 300,000, were oblivious to the fact that such a treaty existed. Other groups formed to promote rights within the United States, such as those devoted to the advancement of women or particular minorities, evinced no greater concern with the Covenant.

This lack of interest in the Covenant reflected the view that the protection of liberty within the United States would not be noticeably affected by international agreements, regardless of whether the United States became a party to them. The ACLU, and other organizations concerned with civil rights and liberties, then and now, considered that the liberties of Americans have depended largely on the Constitution of the United States and its interpretation and enforcement by the executive, legislative, and judicial branches of government. So far as the ACLU has been concerned, it is the First Amendment that above all has epitomized the significance of the

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1. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR].

Constitution as the escutcheon of liberty, not only because of the intrinsic significance of its protections for freedom of speech, press, assembly, and religion, but also because of the instrumental significance of the right to protest in assuring that other important rights, such as equal protection of the laws, will actually be enforced. Disdain for the International Covenant on Civil and Political Rights by many of those Americans familiar with its terms focused particularly on the abridgments of the freedoms of speech, press, and assembly permitted by Articles 19, 20, 21, and 22.²

In the Carter years, when ratification of the International Covenant on Civil and Political Rights might have been possible if the groups concerned with civil rights and liberties within the United States had weighed in significantly, the movement concerned with human rights internationally was relatively puny. It lacked the capacity to mobilize the necessary support for ratification. Accordingly, despite the support of the president and the Department of State, ratification was not possible at that time.

In the intervening years, concern with human rights internationally has grown greatly within the United States. Accordingly, it is now *de rigueur* for public officials — presidents, Secretaries of State, members of Congress, and others — to profess their dedication to the cause. International human rights issues, involving such countries as China, Bosnia-Herzegovina, and Haiti, occasionally became a factor in the 1992 presidential election campaign. The growth of concern is also reflected in press coverage, courses in colleges and schools of law, and the proliferation and expansion of non-governmental organizations devoted to the promotion of human rights internationally. When I made the transition at the end of the 1970s from a career that focused on the promotion of civil liberties domestically to one concerned with protecting human rights internationally, it was the occasion for rather quizzical responses from many of my acquaintances. They were perplexed at what was perceived as a shift to a cause of marginal significance. Such a reaction would not be possible today. The international human rights cause has achieved a legitimacy comparable to that of the movement for the promotion of rights and liberties domestically. The decision by the Bush Administration to seek ratification of the Covenant reflected that legitimacy. Failure to ratify increasingly had come to be

2. ICCPR, *supra* note 1, arts. 19-22, 999 U.N.T.S. at 178.

an oddity; more than that, it was an international embarrassment.

The political genesis of the movement to ratify the Covenant is important to understand in evaluating its significance. It would be misleading to suggest that ratification is attributable in the slightest degree to the efforts of those who thereby sought to achieve increased protection for rights and liberties within the United States. That is not to say that ratification is without value in this respect. My own view is that, despite the Bush Administration's reservations, declarations, and understandings, the Covenant will, over time, prove valuable in civil liberties litigation in the United States and, conceivably, will also be helpful in shaping the decisionmaking of the executive and legislative branches of government. The reason to be clear about the provenance of the effort to ratify is to assist in assessing whether the form in which the Covenant was approved so undermines the purposes of ratification as to render what took place either meaningless or harmful. In my judgment, though I object to most of the reservations, declarations, and understandings — but certainly not to those that reject the limitations in the Covenant on what would be First Amendment rights in the domestic context — so harsh a judgment is not warranted. On balance, ratification, even in this circumscribed form, is an important step in the right direction.

In essence, ratification in this form is a valuable symbolic gesture. It is explicit acknowledgment that it is inappropriate for the United States to abstain from the international system of the protection of rights. Though the United States was obnoxiously smug about its own system of protecting rights and liberties domestically in the manner that it became a party to the Covenant, this does not gainsay the value of the explicit recognition that this country should be accountable to the international community for the way that the government deals with its own nationals. Previously, the United States had thumbed its nose at the international community on this score. No more. Now the United States has said that it accepts the competence of the U.N. Human Rights Committee to receive and consider communications under Article 41 of the Covenant in which one government that is a party to the Covenant may complain that another such government is not fulfilling its obligations. Despite the reservations entered by the United States, the great majority of the guarantees of rights in the Covenant are not so encumbered. Accordingly, the United States has undertaken an international obliga-

tion to comply with virtually all the significant provisions of the Covenant (again, excepting those that purport to limit First Amendment rights) and would be obliged to set forth its responses to complaints. In this manner, the United States would subject itself, with its own formal consent, to international scrutiny of its performance with respect to the provisions of the Covenant.

Critics of the manner in which the Covenant was ratified have focused not only on the reservations with respect to particular provisions but also on the declaration by the United States that the provisions of Articles 1 through 27 are not self-executing.³ Though this declaration is deplorable, it must be viewed in the light of the practice in the great majority of countries that are parties to the Covenant. It has been unnecessary for them to make such declarations because there is no opportunity for their nationals to obtain domestic judicial enforcement of the provisions of the Covenant. Yet advocates of human rights internationally rightly attach great significance to the widespread ratification of the Covenant because it legitimizes monitoring of compliance with its requirements by the United Nations, other governments, and nongovernmental organizations, and denunciation of governments for their failure to live up to their international commitments. Worldwide, international monitoring is the foremost means of protecting human rights. It is now also legitimate in the case of the United States and has been so recognized by our government.

In becoming a party to the Covenant, of course, the United States has done more than signify that it too is accountable to the international community for its domestic practices. It has also enhanced the legitimacy of international monitoring and accountability generally. As the most powerful country on earth, as the government that has the most solidly entrenched legal protections for rights and, despite its inconsistencies, as the government that has played the leading role on the world scene in calling on other governments to respect rights, the previous failure of the United States to ratify had a particularly unfortunate effect. It suggested that the United States held the view that respect for rights was a question of geopolitical alignment rather than a universal obligation. By becoming a party to the Covenant, the United States has made a significant shift in its

3. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 23, 102d Cong., 2d Sess. 19 (1992), *reprinted in* 31 I.L.M. 645, 657 (1992).

international posture.

My belief that ratification of the Covenant will ultimately prove useful in the protection of civil liberties and civil rights in the United States reflects the fact that, in many important provisions that were not the subject of reservations, there are protections in the Covenant that go beyond those set forth explicitly in the U.S. Constitution. To the extent that these protections are available to Americans, it is as a consequence of judicial decisions interpreting the U.S. Constitution or as a result of state constitutional or federal and state statutory provisions. That the United States has declared that the Covenant is non-self-executing will not prevent the courts or the other branches of government from shaping their decisions to conform to international standards to which the United States has now proclaimed its adherence. Over time, ratification of the Covenant will almost certainly help to mitigate the isolation of the United States from the international system for the protection of rights. Accordingly, it can be predicted that the provisions of the Covenant will, slowly but surely, become more influential in the decisions of the courts and the other branches of our government.

The following are some examples of such rights that were not made subject to reservations:

(1) The Covenant prohibits sex discrimination.⁴ Except with respect to voting, the U.S. Constitution has no explicit prohibition.

(2) The Covenant protects ethnic and linguistic minorities, including the right of the latter to use their own language.⁵ The U.S. Constitution is silent.

(3) The Covenant protects the right of privacy in the family, home, or correspondence.⁶ The U.S. Constitution is silent except with respect to the home.

(4) The Covenant protects liberty of movement.⁷ The U.S. Constitution has no explicit protection.

(5) The Covenant prohibits medical or scientific experimentation without consent by the subject.⁸ The U.S. Constitution is silent.

(6) The Covenant requires that the victim of an unlawful arrest or detention shall have an enforceable right to compensation.⁹ The

4. ICCPR, *supra* note 1, art. 26, 999 U.N.T.S. at 179.

5. *Id.* art. 27, 999 U.N.T.S. at 179.

6. *Id.* art. 17, 999 U.N.T.S. at 177.

7. *Id.* art. 12, 999 U.N.T.S. at 176.

8. *Id.* art. 7, 999 U.N.T.S. at 175.

9. *Id.* art. 9, 999 U.N.T.S. at 175-76.

Administration has entered an understanding that would limit this to what may be available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁰ Yet the U.S. Constitution is silent even as to this much, and it seems to me entirely possible that *Bivens* could be further eroded.

(7) The Covenant requires that a defendant must be informed in a language which he understands and have free assistance of an interpreter in court.¹¹ The U.S. Constitution is silent.

(8) The Covenant requires equality of the rights of spouses.¹² The U.S. Constitution is silent.

(9) The Covenant requires that parents may educate their children in accordance with their own religious and moral convictions.¹³ The U.S. Constitution is silent.

(10) The Covenant requires that, save in exceptional circumstances, the accused shall not be mingled with convicts.¹⁴ The United States has entered a reservation that such mingling would be permissible on the basis of dangerousness or when the accused waive their right to segregation.¹⁵ Yet the mingling of the accused and convicts in the United States in practice generally takes place because of administrative convenience or overcrowding. No reservation exempts this practice from the requirements of the Covenant. The U.S. Constitution is silent.

(11) The Covenant requires the availability of commutation of a death sentence.¹⁶ The U.S. Constitution is silent except with regard to federal offenses.

This list could be expanded. Some of the rights explicitly guaranteed in the Covenant but protected in the United States now only by judicial decision are probably secure, quite aside from the ratification of the Covenant. For example, it seems unlikely that the courts will turn their backs on the line of judicial decisions of the past two decades that prohibit sex discrimination. Other rights that Ameri-

10. 403 U.S. 388, 388 (1971) (holding that a violation of the petitioner's Fourth Amendment rights by a federal agent acting "under color of his authority" may give rise to a cause of action for damages). For the precise wording of the understanding, see SENATE COMM. ON FOREIGN RELATIONS, *supra* note 3, at 16, *reprinted in* 31 I.L.M. at 656.

11. ICCPR, *supra* note 1, art. 14, 999 U.N.T.S. at 176-77.

12. *Id.* art. 23, 999 U.N.T.S. at 179.

13. *Id.* art. 18, 999 U.N.T.S. at 178.

14. *Id.* art. 10, 999 U.N.T.S. at 176.

15. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 3, at 16-17, *reprinted in* 31 I.L.M. at 656.

16. ICCPR, *supra* note 1, art. 6, 999 U.N.T.S. at 174-75.

cans enjoy as a result of judicial interpretation of vaguely worded constitutional provisions are less secure. Ratification could weigh in the balance in future consideration by the courts.

Of course, the Covenant would be a stronger source of protection for the rights of Americans if the Congress were persuaded to adopt implementing legislation.¹⁷ That is a goal to be pursued. Pending the enactment of such legislation, ratification of the Covenant even in its encumbered form is a significant accomplishment.

Just how significant this accomplishment turns out to be is, in some measure, dependent on the manner in which nongovernmental organizations concerned with rights deal with ratification. If groups litigating rights issues in the United States regularly invoke the Covenant, it will become more familiar to judges and, thereby, its influence will be heightened. Similarly, if nongovernmental groups concerned with rights internationally promote assessment of the United States in the light of the international commitments it has now undertaken, the symbolic significance of adherence will be enhanced.

When ratification took place, it was not noticed, or barely noticed, by the general press. That is unfortunate. The movements in the United States concerned with rights domestically and internationally should have celebrated, thereby drawing attention to an historic event. That opportunity was missed; it is largely up to the nongovernmental rights group to see to it that they do not lose the chance to obtain tangible advances in the years ahead from the decision by the United States, at long last, to join the international system for the protection of rights.

17. See Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States' Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209 (1993).

