

# NATIONAL SECURITY POLICY AND RATIFICATION OF THE COMPREHENSIVE TEST BAN TREATY

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While no legal obstacles prevent the U.S. Senate's reconsideration of the Comprehensive Nuclear-Test-Ban Treaty (CTBT),<sup>1</sup> lingering doubts (about the effectiveness of the international treaty) and partisan politics (founded upon outdated ideologies of national sovereignty) may again foreclose the opportunity for the United States to lead a just and thorough regime of international arms control. By closely examining the U.S. Senate's previous rejection (and, by implication, the nation's non-ratification) of the CTBT, we assess the political process that failed to realize the security values now imperative to U.S. national defense. To this appraisal, we join analysis of the contemporary law, policy, and science related to U.S. nuclear arms control policy; and we urge that now is the time for the U.S. Senate to reconsider and give its advice and consent for the ratification of the CTBT.

## I. INTRODUCTION

"And so, to all the other peoples and governments who are watching today, . . . know that America is a friend of each nation and every man, woman[,] and child who seeks a future of peace and dignity. And we are ready to lead once more."<sup>2</sup>

"With both sides of this divided world in possession of unbelievably destructive weapons, mankind approaches a state where mutual annihilation becomes a possibility. No other fact of today's world equals this in importance. . . ."<sup>3</sup>

If the complete eradication of nuclear weapons seems a remote possibility, it is nonetheless important for wise policy makers to consider such a goal in terms of the rational control and regulation of nuclear arsenals by law. America's national

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1. Comprehensive Test Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439 [hereinafter CTBT].

2. Barack H. Obama, President, Inaugural Address (Jan. 21, 2009), *available at* <http://www.whitehouse.gov/blog/inaugural-address/>.

3. Dwight D. Eisenhower, President, Annual Message to the Congress on the State of the Union (Jan. 7, 1960), *available at* <http://www.eisenhowermemorial.org/speeches/19600107%20State%20of%20the%20Union.htm>.

discourse on foreign policy and security makes only fleeting references to managing nuclear dangers through international law.<sup>4</sup> The tactical emphasis on a few rogue states appears to obscure the strategic interest in a broader, more comprehensive, and more effective approach to the problems of nuclear testing and proliferation.<sup>5</sup>

The Bush Administration made clear its position on a universal testing prohibition in 2001, when President Bush announced that he would not submit the treaty to the Senate for

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4. See Steven E. Miller, *Until the Sun Grows Cold: Persisting Nuclear Dangers in a Complacent World* 28 (July 22–27, 2005), available at <http://www.pugwash.org/publication/op/feb2006.pdf> (“In the decades since the end of World War II, the United States has generally played an important global leadership role in promoting arms control, international law, and international institutions. Now Washington seems to have turned its back on that legacy. . . .”); see also Jonathan Medalia, *Comprehensive Nuclear-Test-Ban Treaty: Issues and Arguments*, CRS Report RL34394, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 73 (2008) [hereinafter *Issues and Arguments*] (“The 2005 [Treaty on the Non-Proliferation of Nuclear Weapons] review conference was widely seen as ending in failure. The United States focused on Iranian and N. Korean nuclear issues, and on steps to counter proliferation, while, according to one report, ‘nonnuclear states insisted that the United States and other nuclear powers focus on radically reducing their nuclear armaments,’ and some wanted agreement on the CTBT.”).

5. BOB GRAHAM ET AL., *WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WMD PROLIFERATION AND TERRORISM* xx–xxi (2008) (“The United States should work internationally toward strengthening the nonproliferation regime, reaffirming the vision of a world free of nuclear weapons by (1) imposing a range of penalties for NPT violations and withdrawal from the NPT that shift the burden of proof to the state under review for noncompliance; (2) ensuring access to nuclear fuel, at market prices to the extent possible, for non-nuclear [sic] states that agree not to develop sensitive fuel cycle capabilities and are in full compliance with international obligations; (3) strengthening the International Atomic Energy Agency, to include identifying the limitations to its safeguarding capabilities, and providing the agency with the resources and authorities needed to meet its current and expanding mandate; (4) promoting the further development and effective implementation of counter-proliferation initiatives such as the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism; (5) orchestrating consensus that there will be no new states, including Iran and North Korea, possessing uranium enrichment or plutonium reprocessing capability; (6) working in concert with others to do everything possible to promote and maintain a moratorium on nuclear testing; (7) working toward a global agreement on the definition of ‘appropriate’ and ‘effective’ nuclear security and accounting systems as legally obligated under United Nations Security Council Resolution 1540; and (8) discouraging, to the extent possible, the use of financial incentives in the promotion of civil nuclear power.”).

advice and consent, declaring the document “fatally flawed.”<sup>6</sup> In 2002, a Department of Defense official stated, “We are continuing the current administration policy, as I said, which is we continue to oppose ratification of the CTBT; we continue to adhere to a test moratorium.”<sup>7</sup> In 2007, the Administration reaffirmed this stance. Secretary of State Condoleezza Rice stated in a letter to a senator that, “the Administration does not support the Comprehensive Test Ban Treaty and does not intend to seek Senate advice and consent to its ratification. There has been no change in the Administration’s policy on this matter.”<sup>8</sup>

Excessive confidence in the deployment of limited tactical assets (e.g., national intelligence), supplemented by direct military confrontation, appears to have increased the dangers to U.S. national security interests.<sup>9</sup> Given the asymmetrical nature of threats to U.S. security, the “Shock and Awe” force model<sup>10</sup>

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6. See Deborah Charles, *President Hopes Test-Ban Treaty Dies; An Aide Says the Nuclear Pact is Flawed Because it Likely Cannot Be Verified*, PHILA. INQUIRER, July 8, 2001, at A11 (noting that during his 2000 Campaign President Bush had called the CTBT “fatally flawed.”).

7. See J.D. Crouch, Assistant Sec’y of Def. for Int’l Sec. Policy, Special Briefing on the Nuclear Posture Review (Jan. 9, 2002), available at <http://www.defenselink.mil/transcripts/trascripts.aspx?trascriptid=1108>.

8. See Jonathan Medalia, *Comprehensive Nuclear-Test-Ban Treaty: Background and Current Developments*, CRS Report RL33548, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 4 (2008) [hereinafter Background] (citing Letter from Condoleezza Rice, Secretary of State, to Pete V. Domenici, Senator (June 25, 2007)).

9. See GRAHAM ET AL., *supra* note 5, at xvi (explaining how the United States has spent billions of dollars on counter proliferation measures during a new era of proliferation by North Korea, Iran, Pakistan, and the Middle East); *id.* at xv (“The simple reality is that the risks that confront us today are evolving faster than our multilayered responses. Many thousands of dedicated people across all agencies of our government are working hard to protect this country, and their efforts have had a positive impact. But the terrorists have been active [sic] too[,] [sic] and in our judgment America’s margin of safety is shrinking, not growing.”); *id.* at vi (explaining that this Commission was chartered by Congress to assess the nation’s progress in preventing WMD proliferation and terrorism, as well as to provide the President and Congress with concrete, actionable recommendations that can serve as their road map to a safer homeland and world).

10. Sue Chan, *Iraq Faces Massive U.S. Missile Barrage*, CBS NEWS, Jan. 24, 2003, available at <http://www.cbsnews.com/stories/2003/01/24/eveningnews/main537928.shtml>. Harlan Ullman, one of the authors of the shock and awe concept, which relies on large number of precision guided weapons, stated that “[t]he battle plan is based on a concept

has proven to be expensive and ineffectual.<sup>11</sup> The conventional military approach has been unable to constrain alienated groups of violent actors, often driven by confessional fanaticism.<sup>12</sup>

The real danger of asymmetrical threats is the possibility that terrorist groups may acquire and seek to use weapons of mass destruction (WMD), including nuclear arsenals.<sup>13</sup> The gravity of this threat necessitates a broader, more comprehensive approach to national security.<sup>14</sup> Central to this

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developed at the National Defense University. . . and it focuses on the psychological destruction of the enemy's will to fight rather than the physical destruction of his military forces. . . . So that you have this simultaneous effect, rather like the nuclear weapons at Hiroshima, not taking days or weeks but in minutes." *Id.* See generally NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007) (providing for an in-depth perspective on the shock doctrine).

11. See HARLAN K. ULLMAN & JAMES P. WADE, *SHOCK AND AWE: ACHIEVING RAPID DOMINANCE* 132 (1996) (explaining the prohibitive cost of using ballistic missiles in large-scale operations).

12. GRAHAM ET AL., *supra* note 5, at xvi–xvii (according to an April 2006 National Intelligence Estimate on Trends in Global Terrorism, “Activists identifying themselves as jihadists, although a small percentage of Muslims, are increasing both in number and geographic dispersion. . . . If this trend continues, threats to U.S. interests at home and abroad will become more diverse, leading to increasing attacks worldwide.’ Since 9/11 there has been an increase in the number of groups that have associated or aligned themselves with al Qaeda—the preeminent terrorist threat to the United States and the perpetrators of 9/11—including al Qaeda in Iraq, the Libyan Islamic Fighting Group, and the Algerian al Qaeda in the Islamic Maghreb, formerly the Salafist Group for Preaching and Combat (GSPC). This increase in terrorist networks is a threat to the entire world.”).

13. See Jonathan Medalia, *Nuclear Terrorism: A Brief Review of Threats and Responses*, CRS Report RL32595, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 1 (2004); see also Amy Woolf, *Nuclear Weapons in U.S. National Security Policy: Past, Present, and Prospects*, CRS Report RL34226, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 18 (2008); Mark Holt & Anthony Andrews, *Nuclear Power Plants: Vulnerability to Terrorist Attack*, CRS Report RS21131, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 1 (2007); Jonathan Medalia, *Terrorist “Dirty Bombs”: A Brief Primer*, CRS Report RS21528, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 1 (2004).

14. GRAHAM ET AL., *supra* note 5, at xvii (“Though U.S. policy and strategy have made progress, they have not kept pace with the growing risks. In the area of counterterrorism, our government has innovated and implemented new initiatives since 9/11, but its focus has been mainly limited to defense, intelligence, and homeland security programs and operations. The next [A]dministration needs to go much further, using the tools of ‘soft power’ to communicate effectively about American intentions and to build grassroots social and economic institutions that will discourage radicalism and undercut the terrorists in danger[ous] spots around the world—especially in Pakistan.”);

approach is the principle that the United States must lead, on a bipartisan basis, on the issue of global arms control. More specifically, a salient initiative remains—the control and regulation of testing and deployment of nuclear arsenals. To the extent that the law effectively regulates an important component of this process, there is a timely need for the Senate to revisit the pending status of the CTBT.

The CTBT evolved from negotiations that produced a number of international legal initiatives concerning the control and regulation of nuclear testing and the issue of nuclear proliferation.<sup>15</sup> One of the most important initiatives that emerged from those concerns was the Non-Proliferation Treaty (NPT).<sup>16</sup> The NPT was an important international step toward establishing control over the proliferation of nuclear weapons.<sup>17</sup> In fulfillment of the continuing measures required by Article VI of the NPT, the CTBT seeks to prevent the testing of nuclear weapons by states wanting to create or augment nuclear arsenals.

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*see also* Rafael F. Perl, National Strategy for Combating Terrorism: Background and Issues for Congress, CRS Report RL34230, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE 1 (2007) (“These [issues for Congress] include:] (1) democratization as a counterterrorism strategy; (2) the validity of the Strategy’s assumptions about terrorists; (3) whether the Strategy adequately addresses the situation in Iraq including the U.S. presence there as a catalyst for international terrorism; (4) the Strategy’s effectiveness against rogue states; (5) the degree to which the Strategy addresses threats reflected in recent National Intelligence Estimates; (6) mitigating extremist indoctrination of the young; and (7) the efficacy of public diplomacy. To the degree that the 2006 *National Strategy for Combating Terrorism* may not adequately address the importance of these and other relevant factors, some adjustment of the strategy and its implementation may be warranted.”).

15. Issues and Arguments, *supra* note 4, at 65 (“Efforts toward a CTBT date from the dawn of the nuclear age.”); *see id.* at 65–74 (providing for a detailed history of nuclear testing, test bans, and nonproliferation).

16. Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161.

17. Issues and Arguments, *supra* note 4, at 47 (explaining how the NPT “represents a bargain in which nuclear weapon states could have nuclear weapons, non-nuclear [sic] weapon states agreed not to acquire them, and both agreed, in Article VI, ‘to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.’”).

The Senate's rejection of the CTBT in 1999 sent an inadvertent global message about nuclear weapons testing and the role of the United States in arms control leadership. The defeat of the Treaty by the world's most important super power was a significant blow to the global effort of establishing a stable system of control and regulation with the goal of completely abolishing nuclear weapons. Meanwhile, the former chairperson of the Senate's Committee on Foreign Relations, the late Senator Jesse Helms of North Carolina, endeavored to certify that the Treaty, now defeated, would remain defeated and unratified by the United States.<sup>18</sup> He commissioned the Congressional Research Service of the Library of Congress to prepare a report entitled, *Treaties and Other International Agreements: The Role of the United States Senate*.<sup>19</sup> Although the scope of the report was very broad, it specifically addressed the question of whether the Senate's defeat of the CTBT in 1999 assured that it was a juridically deceased instrument.<sup>20</sup> Under cover of a general review of the treaty law and practice of the United States, the report concluded that the Senate's refusal to ratify a treaty does not bar its revival for future ratification.<sup>21</sup> Indeed, the report indicated that the Treaty remains within the jurisdiction of the Senate, which has competence to reconsider the matter in subsequent deliberation and action.<sup>22</sup> Current

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18. Daryl G. Kimball, Arms Control Association, Holding the CTBT Hostage in the Senate: The 'Stealth' Strategy of Helms and Lott, June–July 1998, <http://www.armcontrol.org/print/374>.

19. Cong. Research Serv., 106th Cong., *Treaties and other International Agreements: The Role of the United States Senate*, S. Prt. No. 106-71, at iii (Comm. Print 2001) [hereinafter *Treaties and Other International Agreements*].

20. *Id.* at 3.

21. *Id.* at 144.

22. *See id.* at 433; *see also id.* (explaining how after the Senate rejected the CTBT by a vote of 48–51, one present, on Oct. 13, 1999, “[t]he Treaty reverted to the Senate Foreign Relations Committee at the end of the 106th Congress, where it remains pending.”).

federal publications directly support this position.<sup>23</sup> In short, the Senate may in its political discretion and wisdom reconsider the CTBT, should it so determine.

This article clarifies the current policy importance of the CTBT—particularly in the context of responsible arms control and the War on Terror<sup>24</sup>—and the unfortunate procedures previously used to defeat the Treaty in the Senate. We respectfully submit that severe flaws in the procedures leading to its defeat subverted an important U.S. national security interest. Using objective scholarly techniques, we articulate the key issues, relevant history, political deficits, and the possibility of a better national discourse with the new Obama Administration. Our objective is to improve the political prospects of the Senate’s reconsideration of the CTBT using an open and transparent process, which we hope to result in the Senate giving its advice and consent.

The first part of our article describes the decision process involved in negotiating the CTBT. During the Cold War, states adopted numerous treaty-based agreements targeting nuclear testing in response to environmental consequences that this testing posed.<sup>25</sup> The cross border pollution, dangers to human health, and the perception of threat to global security created the political will to attack the problem of testing nuclear weapons.<sup>26</sup>

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23. Background, *supra* note 8, at 1 (The CTBT “is on the Senate Foreign Relations Committee’s calendar. It would require a two-thirds Senate vote to send the treaty back to the President for disposal or to give advice and consent for ratification.”).

24. GEORGE W. BUSH, NATIONAL STRATEGY FOR COMBATING TERRORISM 3 (2006) (“The War on Terror extends beyond the current armed conflict that arose out of the attacks of September 11, 2001, and embraces all facets of continuing U.S. efforts to bring an end to the scourge of terrorism.”).

25. See UNION OF CONCERNED SCIENTISTS, EVOLUTION OF THE COMPREHENSIVE TEST BAN TREATY, NUCLEAR WEAPONS & GLOBAL SEC., 2009, [http://www.ucsusa.org/nuclear\\_weapons\\_and\\_global\\_security/nuclear\\_weapons/policy\\_issues/evolution-of-the.html](http://www.ucsusa.org/nuclear_weapons_and_global_security/nuclear_weapons/policy_issues/evolution-of-the.html) (explaining how the 1963 Partial Test Ban Treaty “banned nuclear testing in the atmosphere, in space, and under water. . . [which] addressed the most prominent environmental concerns. . .”).

26. See John F. Kennedy, President, Commencement Speech at American University (June 10, 1963), available at <http://www1.media.american.edu/speeches/Kennedy.htm> (describing the dangerous effects and explosive force of nuclear weapons).

The second part of this article outlines the political rise and fall of the CTBT in the United States. It explores the role of the key policymakers, the advantages and disadvantages of the CTBT, and the real reasons for the defeat of the Treaty in the Senate. To state it neutrally, “[t]he procedure by which the treaty came to a vote was unusual, and influenced its consideration.”<sup>27</sup> We agree with this assessment and assert that the applied process lacked the firm guidance of a clarified bipartisan national interest and that the Chairman’s strategy for defeating the Treaty was not in keeping with the traditions of Senatorial process. We examine the political consequences of the defeat of the CTBT and the prospect of the Senate’s reconsideration of this still pending treaty under the leadership of a new Senate and a new Executive.

In part three, we give a historical description to the international political consequences of the defeat of the CTBT. In withholding advice and consent, the leading nuclear power of the world sent a message of aggressive independence to the target audience of adversaries around the world. It was universally felt that the U.S. non-ratification of the CTBT enhanced states’ competitive and defensive global predisposition to test and acquire nuclear arsenals.<sup>28</sup> Foreign ministers and heads of state of traditional U.S. allies expressed high criticism of the defeat of the Treaty in the U.S. Senate.<sup>29</sup> Absent U.S. ratification of the CTBT, they argued, the Non-Proliferation Treaty lost much of its effectiveness.<sup>30</sup> Not only would states

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27. Treaties and Other International Agreements, *supra* note 19, at 262.

28. Issues and Arguments, *supra* note 4, at 73–74; See Barbara Crossette, *Defeat of a Treaty: The Shock Waves; Around the World, Dismay Over Senate Vote on Treaty*, N.Y. TIMES, Oct. 15, 1999, at A1.

29. See David S. Jonas, *The Comprehensive Nuclear-Test-Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT’L & POL. 1007, 1027–28 (2007); see also Issues and Arguments, *supra* note 4, at 73–74 (explaining how fifty-nine foreign ministers in September 2006 called “upon all States that have not yet done so to sign and ratify the [CTBT] Treaty without delay, in particular those whose ratification is needed for its entry into force.” The United States still has not ratified the Treaty, and it unilaterally opposes U.N. resolutions supporting the Treaty.).

30. See Issues and Arguments, *supra* note 4, at 73–74 (stressing how ratification from the United States is crucial for the CTBT to enter into force).

find it easier to acquire nuclear technology and material, they would now have an incentive to do so.<sup>31</sup> In short, if the United States does not take the control and regulation of nuclear arsenals seriously, why should lesser powers act with greater restraint?

In part four, we emphasize the relevance of international cooperation (via the CTBT in particular) to ongoing efforts to fight the War on Terror. We urge the inclusion of specific strategies within the foreign policy of the incoming presidential Administration. This section also addresses several concerns we anticipate opponents will argue regarding the effective lawfulness of the CTBT on the U.S. government's strategic and tactical posture.

The conclusion addresses important questions raised about the U.S. national interest in ratification.<sup>32</sup> Then we reframe the issue in light of the fact that the CTBT has always been, and still is, a vital component of America's national security posture and international legal responsibilities.<sup>33</sup> By good-faith navigation of international standards, the United States would legitimize external standards of world authority and cooperation that alone have the ability to police the testing, creation and proliferation of dangerous nuclear weapons.<sup>34</sup> Moreover, by

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31. CARNEGIE ENDOWMENT FOR INT'L PEACE, FINDINGS AND RECOMMENDATIONS CONCERNING THE CTBT (SHALIKASHVILI REPORT) 5 (2001), <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=20248>.

32. See Issues and Arguments, *supra* note 4, at 1 (significant questions include[:] "Can the United States maintain deterrence without testing?" and "Are monitoring and verification capability sufficient?" and "How might the treaty affect nuclear nonproliferation and disarmament?").

33. David S. Jonas, *The Comprehensive Nuclear-Test-Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT'L L. & POL. 1007, 1040 (2007) ("The United States is not currently required to comply with the test ban *per se*, since that obligation would only attach upon entry into force. But if the object and purpose of the CTBT could conceivably be located at a higher level of abstraction, such as inhibiting the nuclear arms race or staving off the creation of knowledge pertaining to new and potentially more dangerous nuclear weapons, with a test ban as simply the method for accomplishing those overarching goals, then other states could argue that the United States and other signatories are obligated to refrain from testing even before EIF if such testing would help to develop new nuclear weapons or new insight regarding existing types of weapons.").

34. CARNEGIE ENDOWMENT FOR INT'L PEACE, *supra* note 31.

accepting the role as global leader in disarmament, the United States can exert greater influence over nuclear programs of lesser nuclear powers and nuclear aspirants. The cumulative effect of this article, we hope, will be to persuade decision-makers that ratifying the CTBT is the national security priority of our nation.

President Obama has promised to “work with the Senate to secure the ratification of the CTBT at the earliest practical date and will then launch a diplomatic effort to bring on board other states whose ratifications are required for the treaty to enter into force.”<sup>35</sup> Unfortunately, this auspicious commitment does not guarantee U.S. ratification of the CTBT.<sup>36</sup> To that end, this article recommends all citizens, parties and opinion-leaders press for the reconsideration of the CTBT before the Senate. We expect that the Senatorial leaders will seek to avoid the unusual circumstances and possibly damaging precedent established in the prior defeat of the CTBT. This will require a deliberate, transparent, and informed process as well as public debate on this national security priority.

## II. PART ONE: WORK TOWARDS A COMPREHENSIVE NUCLEAR TEST BAN

The need for international cooperation regarding the proliferation, testing, and use of nuclear weapons became inescapably apparent after their first use in Hiroshima and Nagasaki in the waning days of World War II.<sup>37</sup> In August 1945, the United States was the only global nuclear power.<sup>38</sup> As the other global power, the Soviet Union would have to compete with the United States to achieve some form of parity in order to

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35. Fact Sheet: Obama’s New Plan to Confront 21st Century Threats, Obama News & Speeches, July 16, 2008, [http://www.barackobama.com/2008/07/16/fact\\_sheet\\_obamas\\_new\\_plan\\_to.php/](http://www.barackobama.com/2008/07/16/fact_sheet_obamas_new_plan_to.php/).

36. U.S. CONST. art. II, § 2, cl. 2 (requiring the President to obtain the advice and consent of the Senate by two-thirds majority vote before he may ratify treaties).

37. See, e.g., Helen M. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT’L L.J., 408, 410 (1994).

38. Winston P. Nagan, *Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium*, 24 YALE J. INT’L L. 485, 489 (Summer 1999).

preserve its war gains and status (absorption of Eastern Europe).<sup>39</sup> It became the policy of the Soviet Union to match (or supersede) U.S. nuclear capabilities.<sup>40</sup>

The Soviet Union and the United States embraced radically different political and economic views,<sup>41</sup> and each saw its security, in part, in global expansion of its ideological outlook.<sup>42</sup> This combination of factors led to the Cold War, which generated the greatest arms race in history.<sup>43</sup> During this period, the Soviet and U.S. governments, aligned with their ideological allies, developed and strengthened their respective nuclear arsenals.<sup>44</sup> They implemented comprehensive programs of nuclear testing, with detonations occurring in the oceans, land, and atmosphere.<sup>45</sup>

The United States and Britain tested their own nuclear arsenals far from home. For example, during March of 1954, the United States tested thermonuclear weapons in a number of South Pacific Islands.<sup>46</sup> These islands were a U.S. possession as a trust from the United Nations.<sup>47</sup> Since testing, they remain uninhabitable.<sup>48</sup>

It was the physical and political fallout from this and similar testing which energized international action for a ban on

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39. See Erik Ringmar, *The Recognition Game: Soviet Russia Against the West*, 37(2) COOP. AND CONFLICT 115, 127 (2002) (“[W]hat the Soviet Union sought was primarily neither expansion nor protection, but instead recognition as a country equal to the undisputed leader, that is, the United States.”).

40. See *id.* at 128 (“Instead, the Soviet quest for parity with the U[.]S[.] continued. To this end they needed . . . a nuclear weapons arsenal. . .”).

41. See Harvey Rishikof & Patrick Bratton, *Brave New World: U.S. Responses to the Rise in International Crime*, 50 VILL. L. REV. 655, 672 (2005).

42. Nagan, *supra* note 38.

43. *Id.* at 489.

44. *Id.* at 488–91; see also Angelique R. Kuchta, *A Closer Look: The U.S. Senate’s Failure to Ratify the Comprehensive Test Ban Treaty*, 19 DICK. J. INT’L L. 333, 339–40 (2001) (providing a concise timeline of historical events in nuclear testing).

45. Issues and Arguments, *supra* note 4, at 32–33 (discussing various testing methods and locations). In the 1950s, the United States and Soviet Union conducted hundreds of hydrogen bomb tests. *Id.* at 1.

46. See Nagan, *supra* note 38, at 499.

47. *Id.*

48. *Id.* at 502.

nuclear testing.<sup>49</sup> The collective awareness of the dangers posed by proliferation and unrestricted testing of nuclear weapons, particularly their environmental consequences and threat to human health, resulted in international agreements designed to mitigate the dangers of living under the prospect of a nuclear holocaust.<sup>50</sup> To this day, nuclear arms control strategies focus chiefly on nuclear testing prohibitions, which are a primary means of limiting both horizontal and vertical proliferation of nuclear arms.<sup>51</sup>

Negotiations for a comprehensive nuclear test ban date as far back as 1960, when the Eisenhower Administration proposed such a nuclear test ban to the Soviet Union.<sup>52</sup> However, the politics of the Cold War prevented such an agreement.<sup>53</sup> In any

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49. CTBTO PREPARATORY COMM'N, 1945-54 EARLY EFFORTS TO RESTRAIN NUCLEAR TESTING, <http://www.ctbto.org/the-treaty/history-1945-1993/1945-54early-efforts-to-restrain-nuclear-testing/page-3-1945-54early-efforts-to-restrain-nuclear-testing> (“Debris from a U[.]S[.] test near the Marshall Islands in March 1954 in the Pacific Ocean exposed the crew of a Japanese fishing vessel, the Lucky Dragon. The thermonuclear device had produced a yield significantly higher than was expected and resulted in increased scrutiny of the effects of nuclear fallout.”).

50. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 23 (July 8). The international community has unequivocally and consistently reflected the attitude that nuclear weapons pose a grave threat to humanity and civilization. *Id.* at 227. See also Marian Nash, *Contemporary Practice of The United States Relating to International Law*, 92 AM. J. INT'L L. 60 (1998); Ambassador Thomas Graham Jr., *International Law and the Proliferation of Nuclear Weapons*, 33 GEO. WASH. INT'L L. REV. 49, 49–50 (2000); Raven Winters, *Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revisions to the Nuclear Non-Proliferation Treaty*, 38 VAND. J. TRANSNAT'L L. 1499, 1502 (2005).

51. David A. Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*, 1993 WIS. L. REV. 301, 359 n.245 (1993). “Testing has long been crucial to the development of nuclear weapons. Although it may be theoretically possible for a country today to develop a crude atomic device without conducting experimental explosions, the actual practice of countries has generally been to test extensively prior to production or deployment of new nuclear arms. The articulation of a test ban treaty, therefore, has long been appreciated as a key step toward heading off the invention and dissemination of new forms of nuclear warheads.” *Id.* at 316–17.

52. See Kuchta, *supra* note 44, at 340.

53. See *id.* at 340–41 (discussing the economic, political, and military issues that postponed an agreement). In 1957, President Dwight Eisenhower and Soviet Chairman Nikolai Bulganin began a correspondence on nuclear test bans, which continued for several years. “The two nations were often deadlocked over on-site inspections, which the United States claimed were needed to assure that the Soviets were not cheating and

event, skepticism at the capability of verifying a state's compliance with nuclear regulations was a major obstacle to international cooperative efforts drafting an effective instrument.<sup>54</sup>

The United States, Soviet Union, and the United Kingdom entered into the 1963 Treaty Banning Nuclear Weapons Testing in the Atmosphere, in Outer Space, and Under Water (also referred to as the "Limited Test Ban Treaty," or LTBT).<sup>55</sup> The LTBT was only a partial step, representing incomplete progress toward the ultimate objective of a comprehensive test ban treaty, which had eluded the negotiators due to a lack of consensus concerning the applicable verification structures.<sup>56</sup> Since the LTBT did not address nuclear testing underground, it functioned better as an environmental protection measure (in

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which the Soviets claimed were a means to introduce spies into the country." Issues and Arguments, *supra* note 4, at 65; William J. Broad, *U.S. Is Committed To Nuclear Tests*, N.Y. TIMES, Oct. 18, 1987, at A1; Nash, *supra* note 50, at 59 (observing that "the [CTBT] represents the culmination of nearly four decades of efforts, beginning during the Eisenhower Administration, to ban completely all nuclear weapon test explosions . . . wherever they might be carried out."); see Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 448 (2003) (noting the lapse in time between the negotiation of the Nonproliferation Treaty in 1960 and the ratification of the Nonproliferation Treaty in 1963). For a detailed history of the test ban negotiations from 1957 through 1963, see HAROLD KARAN JACOBSON & ERIC STEIN, *DIPLOMATS, SCIENTISTS, AND POLITICIANS: THE UNITED STATES AND THE NUCLEAR TEST BAN NEGOTIATIONS* (1966).

54. See Jonas, *supra* note 33, at 1010.

55. Jack Mendelsohn, *History and Evaluation of the Role of Nuclear Weapons in the Cold War*, 31 CASE W. RES. J. INT'L L. 609, 609–10 (1999); see also Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 [hereinafter Treaty Banning Nuclear Weapon Tests].

56. See Koplow, *supra* note 51, at 318. Negotiations between the Soviet Union, United Kingdom, and United States began in Moscow, when the Americans (highly motivated in the wake of the Cuban Missile Crisis) finally compromised with the Soviets to allow some form of nuclear testing. Issues and Arguments, *supra* note 4, at 65. The preamble to the LTBT declares that the original parties had been "[s]eeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end. . . ."; see Treaty Banning Nuclear Weapon Tests, *supra* note 55, 14 U.S.T. at 1316–17. Moreover, "the United States Secretary of State, upon signing the accord, referred to the 'unfinished business' remaining to be accomplished." Koplow, *supra* note 51, at 318 n.65.

keeping radioactive debris out of the atmosphere) than as an arms control device.<sup>57</sup>

The United States and Soviet Union negotiated two subsequent treaties to address the deficiencies in prior nuclear arms agreements. Both the 1974 Threshold Test Ban Treaty (TTBT)<sup>58</sup> and the 1976 Peaceful Nuclear Explosions Treaty (PNET) contain verification protocols.<sup>59</sup> The TTBT limited underground nuclear explosions to 150 kilotons (approximately ten times the intensity of the Hiroshima blast).<sup>60</sup> The PNET extended the 150-kiloton limit to nuclear tests done for “peaceful purposes.”<sup>61</sup>

Apart from the negotiations between the two superpowers, four regional groups of states formed international treaties protecting their “regional nuclear-free zones.”<sup>62</sup> Among those treaties were the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco),<sup>63</sup> the Southeast Asia Nuclear Free Zone Treaty,<sup>64</sup> the 1985 South

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57. “The first test ban agreement, the Limited Test Ban Treaty of 1963, confined only *the location* of nuclear tests, restricting the explosions to deep underground caverns where the radioactivity and other products would be safely contained, not venting into the biosphere.” *Id.* at 317. “Because the Limited Test Ban Treaty did not outlaw nuclear explosions underground, a comprehensive treaty was considered imperative by arms control advocates.” David Lenefsky, *The Entry-Into-Force Provision of the Comprehensive Test Ban Treaty: An Example of Bad International Lawyering*, 19 N.Y.L. SCH. J. INT’L & COMP. L. 255, 258 (1999).

58. Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, U.S.-U.S.S.R., July 3, 1974, 1714 U.N.T.S. 216.

59. Treaty on Underground Nuclear Explosions for Peaceful Purposes, U.S.-U.S.S.R., May 28, 1976, 1714 U.N.T.S. 431.

60. See David A. Koplow, *Bonehead Non-Proliferation*, 17 FLETCHER F. WORLD AFF. 145, 147 (1993); Kuchta, *supra* note 44, at 341.

61. See Michael Rubner, *U.S. Nuclear Weapons Policy in the Post Cold War Era*, 9 MICH. ST. U.-DCL J. INT’L L. 271, 272 (2000); Treaty on Underground Nuclear Explosions for Peaceful Purposes, *supra* note 59, 1714 U.N.T.S. at 434.

62. Nagan, *supra* note 38, at 505; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 23 (July 8); see Bonnie Jenkins & Theodore M. Hirsch, *Arms Control and Development*, 32 INT’L LAW. 427, 431–32 (1998).

63. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 281.

64. Treaty on Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, 1981 U.N.T.S. 130.

Pacific Nuclear Free Zone Treaty,<sup>65</sup> and the 1996 African Nuclear-Weapon Free Zone Treaty (Treaty of Pelindaba).<sup>66</sup>

The first major step toward controlling the proliferation of nuclear weapons emerged in 1968 with the Non-Proliferation Treaty (NPT), which the United States ratified (and subsequently brought into force) in 1970.<sup>67</sup> Signatories of the NPT recognized that nuclear capabilities would not be relinquished easily.<sup>68</sup> Nevertheless, the proliferation and testing of nuclear weapons presented a serious threat to humankind.<sup>69</sup> There was a strong belief that all states should remain committed to the ultimate goal of nuclear disarmament.<sup>70</sup> The NPT confirmed that the responsibility of controlling the proliferation, testing, use, and distribution of nuclear weapons was properly the province of the international community.<sup>71</sup>

The NPT established the International Atomic Energy Agency (IAEA), entrusting it to monitor member states, lest non-nuclear states acquire nuclear weapons or the means to make them.<sup>72</sup> The NPT aimed to deter nonnuclear-weapon states from acquiring nuclear weapons<sup>73</sup> by banning all members (except the United States, Britain, France, China, and Russia) from possessing nuclear weapons.<sup>74</sup> Thus, it divided the

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65. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 1445 U.N.T.S. 177.

66. African Nuclear-Weapon-Free Zone Treaty, Sept. 13, 1995, 729 U.N.T.S. 10485.

67. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T. 483.

68. See *generally id.*

69. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T. at 484.

70. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 23 at 265 (July 8). See also Winters, *supra* note 50, at 1500–02.

71. TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT): BRIEF BACKGROUND (UN Department for Disarmament Affairs, 2002), available at <http://www.un.org/events/npt2005/npttreaty.html>.

72. See Koplou, *supra* note 51, at 309 (illustrating that IAEA's monitoring process includes on-site inspections and other intrusions to verify compliance with treaty obligations); Graham Jr., *supra* note 50, at 52 (explaining how the International Atomic Energy Agency safeguard system guards against the diversion of nuclear materials from peaceful to war-making purposes); Winters, *supra* note 50, at 1501.

73. See Michael L. Freeley, *Apocalypse Now? Resolving India's and Pakistan's Testing Crisis*, 23 SUFFOLK TRANSNAT'L L. REV. 777, 786 (2000).

74. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T.

world into nuclear “haves” and “have-nots.”<sup>75</sup> However, the NPT committed these five nuclear-armed powers to negotiating a comprehensive nuclear test ban, with the obligation of eventually achieving complete nuclear disarmament.<sup>76</sup>

The Preamble to the NPT declares the signatories’ desire to:

. . . further the easing of international tension and the strengthening of trust between States in order to facilitate . . . the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control[.] . . . <sup>77</sup>

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at 487; George Bunn, *The Nuclear Nonproliferation Treaty: History and Current Problems*, ARMS CONTROL TODAY, Dec. 2003, [www.armscontrol.org/act/2003\\_12/Bunn.asp](http://www.armscontrol.org/act/2003_12/Bunn.asp).

75. Certain states, notably India and Pakistan, have rejected the Non-Proliferation Treaty as inherently unfair. See Freeley, *supra* note 73, at 800. By doing so, both India and Pakistan were able to detonate numerous nuclear weapons in 1998, thereby increasing tensions in the Kashmir region and showcasing their nuclear capabilities to the world. *Id.* at 777. Today, the conflict between Pakistan and India continues to grow and, as a result, the CTBT is seen by many as an essential safeguard in the international movement to reduce hostility in Southeast Asia. *Id.* at 783–84, 801. Because the CTBT binds all signatories in a same way, that is that all signatories agree to the complete cessation of nuclear testing, states such as India and Pakistan will likely be more inclined to ratify it. See *id.* at 801. It should be noted, however, that even if the United States was to ratify the CTBT, Pakistan and India would still have several reservations about signing the treaty. See *id.* at 788–89. Both India and Pakistan rely on China’s arsenal of nuclear weapons and China’s refusal to ratify the CTBT as a justification for their respective nuclear weapons programs. *Id.* at 790. Though far from a complete resolution of the long standing conflict amongst China, Pakistan, and India, it seems that U.S. ratification of the CTBT remains the first step in resolving the contentious nuclear weapons issue in Southeast Asia. D. Suba Chandram, *What If the U.S. Ratifies the CTBT? Debating India’s Options* (July 31, 2009), [http://www.ipcs.org/article\\_details.php?articleNo=2928](http://www.ipcs.org/article_details.php?articleNo=2928). See also Koplow, *supra* note 51, at 363 (noting that Pakistan and India have criticized the Non-Proliferation Treaty as incomplete pending the CTBT); Lenefsky, *supra* note 57, at 258.

76. See Freeley, *supra* note 73, at 799.

77. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T at 486.

The Preamble recalls “the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests . . . to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end. . . .”<sup>78</sup> In ratifying the NPT, parties to the Treaty were “[d]eclaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament. . . .”<sup>79</sup>

Article VI provides that “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”<sup>80</sup> Many negotiating states, such as Germany, Sweden, Canada and Japan, believed that only a Comprehensive Nuclear-Test-Ban Treaty could realize the objective of Article VI of the NPT.<sup>81</sup> Such a treaty is the only prospective arms control measure referred to in the Preamble of the NPT.<sup>82</sup>

The NPT, however, makes continuous reference to the development of nuclear technology for “peaceful purposes,” creating what amounts to an exception to the non-proliferation mandate of the NPT.<sup>83</sup> Article IV of the NPT stipulates that it is an “inalienable right” of states to develop nuclear research if doing so is for peaceful purposes.<sup>84</sup> The confusion generated by such an exception is compounded by the ambiguity of its

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78. *Id.*

79. *Id.* at 485.

80. *Id.* at 490; see Koplw, *supra* note 51, at 330–51 (discussing why the CTBT is essential to achieving the objectives set forth in Article VI of the NPT).

81. See Koplw, *supra* note 60, at 150 (observing that “[d]uring the key stages of the negotiations of the Non-Proliferation Treaty, the diplomatic representatives from West Germany, Sweden, Canada, Japan[,] and other pivotal states were unambiguous in asserting that a Comprehensive Test Ban Treaty was the crucial ‘effective measure’ that Article VI would mandate.”).

82. Koplw, *supra* note 51, at 333.

83. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T at 489–90.

84. *Id.*

terminology.<sup>85</sup> The “peaceful purposes” exception may be a byproduct of the ideas embodied in President Eisenhower’s 1953 “Atoms for Peace” address to the U.N. General Assembly.<sup>86</sup> The contemplated peaceful purpose of the drafters, of course, was the development of nuclear energy.<sup>87</sup> The exception, however, grants a state party an ostensibly legal basis for asserting its inalienable right to develop nuclear technology.

This question has recently emerged regarding uranium enrichment and plutonium separation programs of states implicated in sponsoring asymmetrical conflicts.<sup>88</sup> Uranium enrichment and plutonium separation does not violate the NPT if done for peaceful purposes.<sup>89</sup> Iran, Iraq, and North Korea are a few of the states that have sought to develop nuclear arms by

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85. Commentators have recognized the possibility of states being in technical compliance with the NPT while actively pursuing uranium enrichment for the purposes of developing a nuclear weapon. See David S. Jonas, *Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417, 424–25. It is one of the most commonly addressed weaknesses of the NPT. *Id.* Marvin Miller, a research affiliate at the MIT Center for International Studies and former director of Arms Control and Disarmament Agency for Non-Proliferation and Regional Arms Control for the Clinton Administration, observed that: “Although the NPT has been a major bulwark against nuclear proliferation and has provided the legal and evidentiary basis for cases of noncompliance, the Iranian and North Korean situations have underlined several of its known deficiencies, in particular the ability of non-nuclear-weapon [sic] states-parties to misuse Article IV to acquire weapons-relevant materials and technology, foil verification attempts, and then withdraw from the treaty by invoking Article X.” Marvin Miller & Lawrence Scheinman, *Israel, India, and Pakistan: Engaging the Non-NPT States in the Nonproliferation Regime*, ARMS CONTROL TODAY, Dec. 2003, [http://www.armscontrol.org/act/2003\\_12/MillerandScheinman.asp](http://www.armscontrol.org/act/2003_12/MillerandScheinman.asp); see Cousineau, *supra* note 37, at 422.

86. Dwight D. Eisenhower, President, Atoms for Peace, Address to the U.N. General Assembly (Dec. 8, 1953), *available at* <http://www.eisenhowerinstitute.org/themes/international/safeguarding/speech.dot>; Winters, *supra* note 50, at 1503.

87. Eisenhower, *supra* note 86.

88. The ability to enrich uranium is necessary for the development of both nuclear energy and nuclear weapons. See Benjamin M. Greenblum, *The Iranian Nuclear Threat: Israel’s Options Under International Law*, 29 HOUS. J. INT’L L. 55, 59 (2006). Enriched uranium is uranium whose uranium-235 content has been increased through the process of isotope separation. See Richard L. Williamson, *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 CORNELL INT’L L.J. 71, 78–79 (1995).

89. Bunn, *supra* note 74.

representing to the world that their acquisition of nuclear intelligence is for peaceful purposes.<sup>90</sup> This exception for nuclear energy development raises international concern, not only by providing an escape to those states seeking to develop nuclear arms under the veil of nuclear energy development, but also by providing to the signatories of the NPT a justification for the sale of nuclear intelligence to other states or groups.<sup>91</sup>

The possibility of abusing the ambiguity within the NPT is obvious. This is an indication of the weakness of the NPT.<sup>92</sup> For

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90. See *id.* (“[T]he three countries where uranium enrichment or plutonium separation was thought to have been conducted for weapons purposes—Iran, Iraq, and North Korea—the activities had taken place largely at locations not declared open for inspection to the IAEA.”). Interview by Bernard Gwertzman with David Albright, President, Institute for Science and International Security (Feb. 20, 2009), available at [http://www.cfr.org/publication/18570/iran\\_may\\_achieve\\_capability\\_to\\_make\\_a\\_nuclear\\_weapon\\_in\\_2009.html](http://www.cfr.org/publication/18570/iran_may_achieve_capability_to_make_a_nuclear_weapon_in_2009.html) (recognizing that, if Iran continues to be able to test and develop its nuclear technologies, Iran may be able to develop a nuclear weapon as soon as 2009). Experts agree that a test ban would halt nuclear advances because the testing of nuclear weapons is essential to the intelligent design and development of nuclear weapons. See Broad, *supra* note 53, at 1; Winters, *supra* note 50, at 1502 (noting that Libya, a party to the NPT, admitted in 2004 that it had sought to develop a nuclear weapon and that other states, such as Iran, have been suspected of doing the same).

91. In the 1990s North Korea, while still a member of the NPT, acquired nuclear technologies and information “under the guise” of nuclear testing. It then withdrew from the NPT and developed a nuclear weapon. See Vejay Lalla, *The Effectiveness of the Comprehensive Nuclear-Test-Ban Treaty on Nuclear Weapons Proliferation: A Review of Nuclear Non-Proliferation Treaties and the Impact of the India and Pakistan Nuclear Tests on the Non-Proliferation Regime*, 8 CARDOZO J. INT’L & COMP. L. 103, 117 (2000); Freeley, *supra* note 73, at 786 (noting that the Non-Proliferation Treaty provides “safeguards on peaceful nuclear exports”). Despite the peaceful purposes exception, the Non-Proliferation Treaty continues to provide the world community with a justification for questioning and investigating the nuclear facilities of states such as Libya and North Korea. David Koplow, a Professor at Georgetown University, observed: “Today, the NPT is recognized as even more important than it was in 1968. It provides a fundamental international lever for access to the otherwise-secret nuclear operations inside countries such as Iraq, Libya[,] and North Korea. It secures a basis for inquiry and objection to provocative nuclear collaboration with ‘threshold’ countries such as Brazil or India, even when they remain outside the treaty itself.” Koplow, *supra* note 60, at 152; see Jonas, *supra* note 85, at 424 (“A very small minority of NPT member states, such as Iraq and Iran, have shown a willingness to circumvent the mandates of the Treaty by actively pursuing nuclear weapons programs even after accession to the Treaty.”); Winters, *supra* note 50, at 1505 (noting that the exception for peaceful purposes “actually provides a way for non-nuclear [sic] states to initiate a process for building nuclear weapons[.]”).

92. See Jonas, *supra* note 85, at 419.

greater efficacy, the NPT needs a comprehensive test ban to complement it.

In 1995, the parties to the NPT held a Review and Extension Conference in New York to discuss whether the goals of the NPT were being realized and whether the NPT should be extended.<sup>93</sup> At the conference, the United States fought to extend the NPT indefinitely.<sup>94</sup> Other states (especially those banned from obtaining nuclear arsenals) hesitated to extend the Treaty, pointing out that the United States and other nuclear powers did not seem to be working toward the international goal of nuclear disarmament.<sup>95</sup> These states believed that parties to the NPT had made a commitment to negotiate and adopt a Comprehensive Nuclear-Test-Ban Treaty.<sup>96</sup> They viewed the international community's failure to adopt such a treaty as a blatant rejection of that commitment.<sup>97</sup> Maintaining that the five Nuclear Powers were not effectively pursuing their commitments under the NPT, nonnuclear states opposed to an extension of the NPT without a renewed commitment by the

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93. 1995 REVIEW AND EXTENSION CONFERENCE OF THE PARTIES TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS, PRINCIPLES AND OBJECTIVES FOR NUCLEAR NON-PROLIFERATION AND DISARMAMENT (1995), <http://www.basicint.org/nuclear/NPT/1997prepcom/principl.htm>. Article VIII, paragraph 3, of the NPT establishes that review conferences are to be held every five years "in order to review the operation of this Treaty with a view of assuring that the purposes of the Preamble and the provisions of the Treaty are being realized." Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T. at 491–92.

94. David Krieger, Senate Vote Leaves the World a More Dangerous Place (1999), [http://www.wagingpeace.org/articles/1999/00/00\\_krieger\\_senate-vote.htm](http://www.wagingpeace.org/articles/1999/00/00_krieger_senate-vote.htm).

95. *Id.*

96. *Id.* The adoption of a comprehensive nuclear test ban was a topic at every Review Conference held pursuant to Article VII of the NPT. Cousineau, *supra* note 37, at 417. The Review Conference held in 1985 affirmed that the language in Article VI of the NPT called for a comprehensive nuclear test ban. *Id.* ("[N]on-nuclear [sic] weapon states criticize the nuclear-weapon states, especially the United States, for their failure to adopt a comprehensive test ban agreement pursuant to Article VI of the N.P.T."); *see also* Graham Jr., *supra* note 50, at 55 ("A significant number of key non-nuclear [sic] weapon states were dissatisfied with the progress made by the nuclear weapon states in fulfilling their Article VI side of the bargain."); Issues and Arguments, *supra* note 4, at 73 (explaining the need for "nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI of the NPT.").

97. *See* Krieger, *supra* note 94.

nuclear powers to work toward the reduction of nuclear proliferation and ultimately nuclear disarmament.<sup>98</sup>

To achieve its goal of extending the NPT indefinitely, the United States and other States with nuclear weapons agreed to a set of “Principles and Objectives” that included “a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty no later than 1996.”<sup>99</sup> The set of Principles and Objectives outlined prospective steps that NPT parties will undertake to achieve the disarmament goals of Article VI of the NPT.<sup>100</sup> Furthermore, the United States and other states agreed to pursue progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons.<sup>101</sup> Ultimately, the NPT was extended indefinitely from its initial twenty-five year term.<sup>102</sup>

Negotiations at the Conference on Disarmament in Geneva, Switzerland, produced the CTBT,<sup>103</sup> which the U.N. General Assembly adopted in 1996.<sup>104</sup> President Clinton signed the CTBT in September of 1996.<sup>105</sup> The President referred to the CTBT as “[t]he longest-sought, hardest-fought prize in arms

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98. Issues and Arguments, *supra* note 4, at 72–73; Mendelsohn, *supra* note 55, at 610, 616 (“Th[e] [CTBT] has been considered quite understandably by the non-nuclear [sic] weapons states as a vital step toward fulfilling the commitment of the nuclear powers to scale back their nuclear weapon arsenals and infrastructures.”).

99. Krieger, *supra* note 94; *see* Jenkins & Hirsch, *supra* note 62, at 566–57 (noting that the treaty was negotiated intensely during the 1996 Conference on Disarmament in Geneva, Switzerland); Mendelsohn, *supra* note 55, at 612; *see also* Jonas, *supra* note 85, at 426–27; 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Principles and Objectives for Nuclear Non-Proliferation and Disarmament, <http://www.basicint.org/nuclear/NPT/1997prepcom/principl.htm> (illustrating the archives of the 1995 NPT conference).

100. Jonas, *supra* note 85, at 426–27.

101. Draft Decision Proposed by the President, 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Principles and Objectives for Nuclear Non-Proliferation and Disarmament (May 9, 1995), *available at* <http://www.basicint.org/nuclear/NPT/1997prepcom/principl.htm>.

102. Jonas, *supra* note 85, at 421.

103. Jenkins & Hirsch, *supra* note 62, at 562; Kuchta, *supra* note 44, at 337.

104. CTBT, *supra* note 1, 35 I.L.M. at 1439.

105. Sean D. Murphy, *Arms Control and Other National Security Law*, 94 AM. J. INT’L L. 137, 137 (2000); Nash, *supra* note 50, at 59.

control history.”<sup>106</sup> It is considered by many states as furthering the realization of the goals set out in the NPT.<sup>107</sup>

The CTBT proscribes all nuclear test explosions;<sup>108</sup> it is a necessary complement to the NPT.<sup>109</sup> To date, 182 states have signed the CTBT, including the United States.<sup>110</sup> One hundred fifty-one states have deposited an instrument of ratification.<sup>111</sup> The United States, though signing the CTBT in 1996, has yet to ratify it.<sup>112</sup> All NATO members, with the exception of the United States, have ratified the CTBT.<sup>113</sup> Of the five nuclear powers that signed the NPT, only China and the United States have not ratified the CTBT.<sup>114</sup>

In the United States, after the President negotiates and signs the Treaty, the President normally sends a formal letter to the Senate, which transmits the treaty for Senate action (advice and consent by vote).<sup>115</sup> If the Senate provides its advice and

106. William Clinton, President, Remarks by the President to the 52nd Session of the U.N. General Assembly (Sept. 22, 1997), [http://www.state.gov/www/issues/970922\\_clinton\\_unga.html](http://www.state.gov/www/issues/970922_clinton_unga.html).

107. Lalla, *supra* note 91, at 115 (“Many countries that participated in the 1995 NPT Review Conference urged that the CTBT be implemented as soon as possible to supplement and strengthen the NPT.”).

108. *See* CTBT, *supra* note 1, 35 I.L.M. at 1444.

109. Many of the current Treaty’s signatories argue that the enactment of a comprehensive test ban treaty remains vital to the future of the [NPT] and global non-proliferation efforts. Koplow, *supra* note 51, at 330–31; Cousineau, *supra* note 37, at 420 (“Proponents of . . . [the CTBT] contend that the states party to the N.P.T. originally passed the Treaty with an implicit understanding that a comprehensive test ban would follow shortly thereafter.”).

110. *See* CTBTO PREPARATORY COMM’N, STATUS OF SIGNATURE AND RATIFICATION (2010), <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/>.

111. “The Marshall Islands has ratified the [CTBT], becoming the 151st country to do so. The ratification of the CTBT by the Marshall Island is highly symbolic. A total of 67 atmospheric nuclear tests were conducted by the United States at the Bikini and Enewetak Atolls between 1946 and 1958.” CTBTO PREPARATORY COMM’N, MARSHALL ISLANDS RATIFIES COMPREHENSIVE NUCLEAR-TEST-BAN TREATY (2009), <http://www.ctbto.org/press-centre/press-releases/2009/marshall-islands-ratifies-comprehensivenuclear-test-ban-treaty/>.

112. *See* CTBTO PREPARATORY COMM’N, *supra* note 111.

113. *See id.* (listing NATO and non-NATO countries that have ratified the CTBT).

114. Hewitson, *supra* note 53, at 451 (noting that China expressed “profound regret” regarding the U.S. Senate’s refusal to ratify the CTBT).

115. Masahiko Asado, *CTBT: Legal Questions Arising from its Non-Entry-Into-Force*, 7 J. CONFLICT & SECURITY L. 85, 102 (2002).

consent, the Treaty returns to the President, who must then deposit an instrument of ratification with the United Nations.<sup>116</sup> This final act indicates that the Treaty is a legally binding obligation upon the United States.<sup>117</sup> Thus, competence over a treaty in the United States is a sequential competence, beginning and ending with jurisdiction in the executive branch.<sup>118</sup>

When the U.S. Senate voted 51-48 to decline to give its advice and consent for the CTBT,<sup>119</sup> it was the first time in eighty years that the U.S. Senate had voted against an arms control treaty.<sup>120</sup> In general, the importance of nuclear policy transcends partisan political lines. U.S. policy regarding nuclear arms had been consistent since the early 1960s.<sup>121</sup> This policy committed the United States to working toward the ultimate goal of nuclear disarmament, a goal shared by the international community.<sup>122</sup>

President Kennedy negotiated and signed the LTBT in the early 1960s.<sup>123</sup> These negotiations took place under both

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116. See Jonas, *supra* note 33, at 1018–19.

117. See *id.* at 1028.

118. See generally Asado, *supra* note 115, at 102 (“Thus, in the United States, the power seems to be with the President to make its intention clear to be or not to be a party to a treaty.”).

119. John R. Burroughs et al., *Arms Control and National Security*, 36 INT’L LAW. 471, 490 (2002).

120. See United States Senate, *Rejected Treaties*, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited Sept. 23, 2009) (indicating that the Treaty of Versailles was voted against in 1919 and 1920). See Press Release, Friends Committee on National Legislation, Senate Defeat Comprehensive Test Ban Treaty (Oct. 13, 1999) (on file with author) (explaining that the U.S. Senate last defeated a treaty relevant to arms control when it voted down the Treaty of Versailles in March 1920).

121. See Kuchta, *supra* note 44, at 340-43 (illustrating the history of U.S. policy toward nuclear arms).

122. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 227–28 (July 8, 1996) (observing that the international community has unequivocally and consistently reflected the attitude that nuclear weapons pose a grave threat to humanity and civilization and that the international community should adopt a Comprehensive Nuclear-Test-Ban Treaty and work toward complete disarmament); Nagan, *supra* note 38, at 506 (explaining that nuclear weapon-free zone regimes represent vast people who desire the eradication of nuclear weapons).

123. See William Burr & Hector L. Montford, *The Making of the Limited Test Ban*

President Eisenhower's Republican Administration and the Democratic Administration of President Kennedy.<sup>124</sup> During the Eisenhower and Kennedy Administrations, Republicans and Democrats were divided *within their own parties* regarding whether the United States should adopt policy that would work to proscribe, at least in part, the United States from testing of nuclear weapons.<sup>125</sup> Some believed testing is a necessary evil in maintaining a superior U.S. nuclear arsenal; some supported the Atomic Energy Commission's position<sup>126</sup> that atmospheric testing does not cause adverse health effects.<sup>127</sup> Others favored a comprehensive nuclear test ban.<sup>128</sup>

Negotiations leading up to the LTBT really centered around global politics, specifically international concerns regarding China's nuclear weapons program, nuclear proliferation, the ability to monitor nuclear testing and verify compliance with a test ban, and the humanitarian and environmental effects of nuclear fallout from weapons testing.<sup>129</sup> Both Eisenhower and Kennedy viewed the 1963 Treaty as a bipartisan issue,<sup>130</sup> recognizing the greater importance of realizing the United State's ultimate goal of world nuclear disarmament.<sup>131</sup> In an

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*Treaty, 1958–1963, THE NAT'L SEC. ARCHIVE, Aug. 8, 2003, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB94/> (explaining that the Geneva test ban negotiations, which took place from late 1958 to early 1962, eventually led to the Kennedy Administration "signing off on the first test ban treaty").*

124. *See id.* (explaining that the test ban negotiations carried over from the Eisenhower to the Kennedy Administration).

125. *See id.*

126. *Id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. In a prophetic television address to the American people on July 26, 1963, President Kennedy eloquently stated: "I ask you to stop and think for a moment what it would mean to have nuclear weapons in so many hands, in the hands of countries large and small, stable and unstable, responsible and irresponsible, scattered throughout the world. There would be no rest for anyone then, no stability, no real security, and no chance of effective disarmament. There would only be the increased chance of accidental war, and an increased necessity for the great powers to involve themselves in what otherwise would be local conflicts." John F. Kennedy, President, Radio and Television Address to the American People on the Nuclear Test Ban Treaty (July 26, 1963), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/>

address at American University on the CTBT, President Kennedy stated:

The pursuit of disarmament has been an effort of this Government since the 1920s [sic]. It has been urgently sought by the past three [A]dministrations. And however dim the prospects may be today, we intend to continue this effort—to continue it in order that all countries, including our own, can better grasp what the problems and possibilities of disarmament are.<sup>132</sup>

The Reagan and Bush (1989–1993) Administrations resisted both domestic and international pressures to negotiate a Comprehensive Nuclear-Test-Ban Treaty in the belief that the testing of nuclear weapons was essential for the United States to maintain its superior arsenal as a means of deterring future conflict.<sup>133</sup> Yet several arms control initiatives were launched. In 1992, President Bush (1989–1993) signed a legislative amendment for an approximately one-year moratorium on underground nuclear testing.<sup>134</sup> The Bush Administration saw the ratification of the LTBT and the PNET in 1990.<sup>135</sup> The United States also adopted the START I Treaty during

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Speeches/JFK/Nuclear+Test+Ban+Treaty+Speech.htm.

132. John F. Kennedy, President, *Address at American University on a Comprehensive Nuclear Test Ban* (June 10, 1963), available at <http://www1.media.american.edu/speeches/Kennedy.htm>.

133. Cousineau, *supra* note 37, at 415 (noting that “The Clinton Administration follows two Administrations that established a U.S. position against the formal enactment of a comprehensive test ban and in favor of the overall goals of nuclear non-proliferation.”); Koplow, *supra* note 60, at 147–48; see Koplow, *supra* note 51, at 321–27 (describing the Reagan and Bush strategies designed to fend off international and domestic pressure favoring testing limitations). The Reagan Administration’s “official Government position” was that a complete test ban would be appropriate “only when there is no longer a need to rely on nuclear weapons for deterrence.” See Broad, *supra* note 53, at 32. However, the Reagan Administration acknowledged that the “ultimate objective” is “the complete cessation of nuclear testing as part of an effective disarmament process.” *Id.*

134. Kuchta, *supra* note 44, at 339; Broad, *supra* note 53, at 32; James Glanz, *Testing the Aging Stockpile in a Test Ban Era*, N.Y. TIMES, Nov. 28, 2000, at F1.

135. Rubner, *supra* note 61, at 272; Nash, *supra* note 50, at 60.

President Bush's tenure.<sup>136</sup> That Treaty limited the number of nuclear tests that the United States and the Soviet Union (and its successors) could conduct.<sup>137</sup> The Clinton Administration re-emphasized nuclear proliferation concerns and actively worked toward nuclear disarmament goals.<sup>138</sup>

Nuclear arms control continued to be a bipartisan issue until 1999, when the U.S. Senate refused to give its advice and consent to the ratification of the CTBT.<sup>139</sup> Indeed, less than a month prior to the hearings, the issue was widely viewed as bipartisan. Senators Byron Dorgan (D-ND) and Arlen Specter (R-PA) stated:

As Senators from different parties, we can say that such a treaty has never been a partisan issue. Republican President Dwight Eisenhower first proposed such a treaty four decades ago. President Clinton recently joined a bipartisan group of senators calling for Senate hearings. Today, it enjoys the support from the current Joint Chiefs of Staff, four former chairmen of the joint chiefs and the directors of the three nuclear weapons testing laboratories.<sup>140</sup>

### III. PART TWO: THE RISE AND FALL OF THE CTBT IN THE U.S. SENATE

Since the discovery and exploitation of atomic energy sources, a handful of states around the world have tested nuclear arms to both develop new weapons and to assess the reliability of existing ones. Assorted agreements and treaties aimed to squelch the dangerous spread of nuclear arms, but none proved exceedingly successful. The shortfalls of the NPT,

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136. Rubner, *supra* note 61, at 272–73.

137. *Id.* at 273.

138. Cousineau, *supra* note 37, at 415–16; Rubner, *supra* note 61, at 276–77.

139. See Daryl Kimball, *How the U.S. Senate Rejected CTBT Ratification*, 40 *Disarmament Diplomacy* (Sept.–Oct. 1999), available at <http://www.acronym.org.uk/dd/dd40/40wrong.htm> (explaining that on October 13, 1999, the U.S. Senate failed to ratify the CTBT, rejecting it on a party-line vote of forty-eight for and fifty-one against, with one senator voting “present”).

140. Byron Dorgan & Arlen Specter, *U.S. Wants, Needs Nuclear Test Ban Pact*, *U.S.A. TODAY*, Sept. 13, 1999, at 27A.

in particular, brought into focus the need for a more comprehensive treaty that would control nuclear testing.

To that end, the United Nations unanimously approved a resolution calling for negotiation of a CTBT.<sup>141</sup> As the previous section explained, the U.N. Conference on Disarmament spent several years crafting a draft text of the Treaty; and the United Nations adopted the text of the Treaty on September 10, 1996.<sup>142</sup> This process represented the culmination of several years of negotiation and drafting; thus, the CTBT has been called the “longest-sought, hardest fought prize in the history of arms control.”<sup>143</sup>

President William Jefferson Clinton was the first head of state to sign the CTBT, on September 24, 1996.<sup>144</sup> One year later, he transmitted the CTBT to the Senate for their advice and consent.<sup>145</sup> The President’s letter of transmittal included “safeguards” in order to make the CTBT more palatable to the Senate.<sup>146</sup> However, despite the assurances President Clinton

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141. Issues and Arguments, *supra* note 4, at 12.

142. *Id.* at 2.

143. U.N. GAOR, 52nd Sess., 5th plen. mtg. at 9, U.N. Doc. A/52/PV.5 (Sept. 22, 1997).

144. President’s Message to Senate Transmitting the Comprehensive Nuclear Test-Ban Treaty and Documentation, 33 WEEKLY COMP. PRES. DOC. 1390 (Aug. 25, 1997).

145. *Id.*

146. Jonas, *supra* note 33, at 1019. Those safeguards consisted of:

“A. The conduct of a Science Based Stockpile Stewardship program to insure a high level of confidence in the safety and reliability of nuclear weapons in the active stockpile, including the conduct of a broad range of effective and continuing experimental programs. B. The maintenance of modern nuclear laboratory facilities and programs in theoretical and exploratory nuclear technology that will attract, retain, and ensure [sic] the continuous application of our human scientific resources to those program[s] on which continued progress in nuclear technology depends. C. The maintenance of the basic capability to resume nuclear test activities prohibited by the CTBT should the United States cease to be bound to adhere to this Treaty. D. The continuation of a comprehensive research and development program to improve our treaty monitoring capabilities and operations. E. The continued development of a broad range of intelligence gathering and analytical capabilities and operations to ensure accurate and comprehensive information on worldwide nuclear arsenals, nuclear weapons development

had taken care to attach to the Treaty, for several years it gathered dust in the Senate, subject to the jurisdiction of the Senate Foreign Relations Committee.<sup>147</sup>

In the month immediately following its transmission to the Senate, the Senate Governmental Affairs Committee and the Senate Appropriations Committee held hearings on the United States' ability to maintain nuclear weapons under a CTBT.<sup>148</sup> However, the Senate Foreign Relations Committee was the only committee of the Senate with jurisdiction to review and report to the Senate on treaties submitted by the President for Senate advice and consent to ratification.<sup>149</sup> Although President Clinton continued to press the Senate to approve it, Senate Foreign Relations Committee Chairman Helms rejected that request, saying that the treaty "from a non-proliferation standpoint, is scarcely more than a sham" and had low priority for the Committee.<sup>150</sup>

The Clinton Administration made serious representations to get Helms to act.<sup>151</sup> While some have mentioned "anemic

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programs, and related nuclear [sic] programs. F. The understanding that if the President of the United States is informed by the Secretary of Defense and the Secretary of Energy (DOE)—advised by the Nuclear Weapons Council, the Directors of DOE's nuclear weapons laboratories, and the Commander of the U.S. Strategic Command—that a high level of confidence in the safety or reliability of a nuclear weapon type which the two Secretaries consider to be critical to our nuclear deterrent could no longer be certified, the President, in consultation with Congress, would be prepared to withdraw from the CTBT under the standard 'supreme national interests' clause in order to conduct whatever testing might be required."

Press Release, Statement by the President, Comprehensive Test Ban Treaty (Aug. 11, 1995) (on file with the Office of the Press Secretary).

147. See STAFF OF S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 245 (Comm. Print 2001) [hereinafter FOREIGN RELATIONS]. In 1998 and most of 1999, the Senate Foreign Relations Committee did not hold hearings dedicated to the treaty, did not report the Treaty out, nor did the committee discharge the CTBT from consideration. *Id.* at 263–64.

148. FOREIGN RELATIONS, *supra* note 147, at 262–63.

149. *Id.* at 263.

150. Issues and Arguments, *supra* note 4, at 2.

151. "Pursuant to Rule 9 of the Senate Foreign Relations Committee, once the President has submitted a treaty for the advice and consent of the Senate, the treaty is referred to the Senate Foreign Relations Committee." Jonas, *supra* note 33, at 1045. "It

efforts”<sup>152</sup> from the Executive, it is on the record that President Clinton persistently urged Senators to pass the CTBT in his 1998<sup>153</sup> and 1999<sup>154</sup> State of the Union Addresses. In multiple speeches from the White House, the President sought to bring a

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then remains on the Committee calendar until the Committee acts to report it to the full Senate or suggests that it be returned to the President, or the Senate discharges the treaty from the Committee.” *Id.* (quoting RULES OF THE COMMITTEE ON FOREIGN RELATIONS, 109TH CONG., 1st Sess., S-PRT 109-11 (Feb. 1, 2005), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_senate\\_committee\\_prints&docid=f:98278.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_senate_committee_prints&docid=f:98278.wais)).

152. Their chief concern being nuclear espionage, Charles Ferguson (a former Los Alamos National Laboratory research scientist and a senior research analyst with the Federation of American Scientists) and Daryl Kimball (the executive director of the Washington, D.C.-based Coalition to Reduce Nuclear Dangers) wrote a news piece in June 1999 expressing strong criticism of the Clinton Administration for its inability to pass the Treaty through the ratification process with the Senate’s approval. Charles Ferguson & Daryl Kimball, *Test Ban Treaty is Last Line of Defense Against Nuclear Espionage*, MINNEAPOLIS STAR-TRIBUNE, June 4, 1999.

[T]he President thus far has failed to act on his promise to make the treaty a priority and to capitalize on the overwhelming public support, the endorsement of military leaders, and strong Senate backing for the Test Ban Treaty, which would win the two-thirds majority needed for ratification if a vote were allowed. The Clinton Administration must bolster its anemic efforts to press for Senate approval if the United States is to ratify this year.

*Id.*

153. In his 1998 State of the Union Address, President Clinton specially mentioned the CTBT.

I ask Congress to join me in pursuing an ambitious agenda to reduce the serious threat of weapons of mass destruction. This year, four decades after it was first proposed by President Eisenhower, a Comprehensive Test Ban is within reach. By ending nuclear testing, we can help to prevent the development of new and more dangerous weapons, and make it more difficult for non-nuclear [sic] states to build them.

I am pleased to announce that four former chairmen of the Joint Chiefs of Staff—Generals John Shalikashvili, Colin Powell and David Jones, and Admiral William Crowe—have endorsed this treaty, and I ask the Senate to approve it this year.

Press Release, Department of State, President Asks for Senate to Approve CTBT This Year (Jan. 28, 1998), *available at* [http://www.state.gov/www/global/arms/ctbtpage/test\\_ban\\_news/tbn04.html](http://www.state.gov/www/global/arms/ctbtpage/test_ban_news/tbn04.html).

154. “It’s been two years since I signed the . . . Treaty. If we don’t do the right thing, other nations won’t either. I ask the Senate to . . . [a]pprove the Treaty now, to make it harder for other nations to develop nuclear arms and to make sure we can end nuclear testing . . .” Bill Clinton, President, 1999 State of the Union Address (Jan. 19, 1999), *available at* <http://www.cnn.com/ALLPOLITICS/stories/1999/01/19/sotu.tra.nscript/>.

sense of the U.S. leadership and international responsibility to the leadership of the Senate.<sup>155</sup> Moreover, President Clinton forcefully targeted Congress in a speech he delivered before the United Nations in 1999.<sup>156</sup>

When the Senate failed to act on the Treaty for two years, frustrations began to mount. Democratic Senators became perturbed, prompting some to lash out at the Republican leadership for being “utterly irresponsible” in their failure to consider the CTBT.<sup>157</sup> Despite Democratic protestations<sup>158</sup> and Presidential exhortations,<sup>159</sup> the Treaty lingered in the Senate

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155. See Working Group on the Comprehensive Test Ban Treaty, *President, Secretary of State Call on Senate to Set Example, Vote on CTBT*, TEST BAN NEWS, June 5, 1998, available at <http://www.fas.org/nuke/control/ctbt/news/tbn21.htm> [hereinafter TEST BAN NEWS] (“Two years ago, I was the first to sign this treaty at the United Nation[s] on behalf of the United States. The present situation in South Asia makes it all the more important that the Senate debate and vote on the Comprehensive Test Ban Treaty without delay. The CTBT will strengthen our ability to detect and to deter testing. If we are calling on other nations to act responsibly, America must set the example.”).

156. Press Release, Office of the Press Secretary, Remarks by the President to the 54th Session of the U.N. General Assembly, (Sept. 21 1999), available at [http://clinton4.nara.gov/WH/New /html/19990921\\_1.html](http://clinton4.nara.gov/WH/New /html/19990921_1.html) (“And today again, I ask our Congress to approve the Comprehensive Test Ban Treaty.”).

157. Senator Joseph Biden, for example, said, “[i]t is high time that the Republican leadership of this body agreed to schedule Senate debate and a vote on ratification. It is utterly irresponsible for the Republican leadership to hold this treaty hostage to other issues, as it has for two years.” 145 CONG. REC. S11426 (daily ed. Sept. 24, 1999) (statement by Sen. Joseph Biden).

158. One letter from Senator Biden (co-authored by Republican Senator Arlen Specter) to his colleagues in the Senate, reveals a swelling impatience:

We write to ask for your co-sponsorship of a Sense of the Senate Resolution that the Foreign Relations Committee should hold a hearing or hearings on the Comprehensive Nuclear-Test-Ban Treaty and that the Senate should take up the treaty for debate and vote on ratification as expeditiously as possible. Failure by the United States Senate to ratify the Treaty may give rise to an inference that the United States government is not serious about banning nuclear testing and may, in effect, encourage or at least not discourage such testing.

Presbyterian Church (USA), U.S. Must lead on Comprehensive Test Ban Treaty, <https://www.pcusa.org/washington/issuenet/gs-000850.htm> (last visited Oct. 24, 2009) (explaining that the 149 countries have signed the CTBT and “many look to the U.S. for leadership on the issue.”).

159. See TEST BAN NEWS, *supra* note 155 (“President Clinton and Secretary of State Madeleine Albright urged the Senate to act quickly on the Comprehensive Nuclear

without action in the Senate Foreign Relations Committee.<sup>160</sup>

Democrats agitated for hearings.<sup>161</sup> In fact, some Democrats threatened to obstruct the Senate calendar if the Republicans refused to permit the consideration of the Treaty.<sup>162</sup> Completely blind to certain tactically secretive political maneuverings, the Democrats believed that they would persuade as many as twenty-five Republicans to vote to approve the CTBT.<sup>163</sup>

As it were, the prolonged inaction of the Senate Committee on Foreign Relations had been the intentional result of political maneuvering by Senator Jesse Helms. Senator Helms

Test-Ban Treaty”). Again, in a Rose Garden speech in July of 1999, President Clinton urged Senate Republicans to:

Hold hearings this fall. Hearings would allow each side to make its case for and against the treaty, and allow the Senate to decide this matter on the merits. We have a chance right now to end nuclear testing forever. It would be a tragedy for our security and for our children’s future to let this opportunity slip away.

Press Release, Department of State, Statement by the President (July 23, 1999), available at [http://www.state.gov/www/global/arms/ctbtpage/test\\_ban\\_news/tbn35.html](http://www.state.gov/www/global/arms/ctbtpage/test_ban_news/tbn35.html).

160. See FOREIGN RELATIONS, *supra* note 147, at 262–63 (describing the procedure by which the treaty came to a vote).

161. *Id.*

162. Senator Byron Dorgan (D-ND) articulated that he would be resorting to extreme measures if the Senate continued to refuse to consider the CTBT. 145 CONG. REC. 115, S10541 (Statement by Sen. Byron Dorgan on Sept. 8, 1999), available at <http://www.carnegieendowment.org/npp/resources/ctbtdorgan1.htm>.

I am sorry if I am going to cause some problems around here with the schedule. But frankly, as I said, there are big issues and there are small issues. This [the ratification of the Comprehensive Test Ban Treaty] is a big issue. And I am flat tired of seeing small issues around this Chamber every day in every way, when the big issues are bottled up in some committee and the key is held by one or two people. Then we are told: If you do not like it, tough luck; you don’t run this place. It is true, I don’t run this place, but those who do should know this is going to be a tough place to run if you do not decide to bring this issue to the floor of the Senate and give us the opportunity to debate a Comprehensive Nuclear-Test-Ban Treaty. This will not be an easy road ahead for the Senate if you decide that this country shall not exercise the moral leadership that is our responsibility on these matters.

*Id.*

163. John M. Broder, *Quietly and Dexterously, Senate Republicans Set a Trap*, N.Y. TIMES, Oct. 14, 1999, at A16. Nor did observers outside of politics foresee the outcome. In their (incorrect) estimation, highly ranked scientists believed that the Treaty would be greeted with a “strong Senate backing [and] would win the two-thirds majority needed for ratification.” Ferguson & Kimball, *supra* note 152.

personally repudiated the wisdom of U.S. leadership in arms control.<sup>164</sup> Implacably opposed to the CTBT, the Senator, using his bottleneck position of power, acting along with a small group of senators, including Senator Jon Kyl, engineered the defeat of the CTBT.<sup>165</sup>

“Since last winter [of 1998],” reported the New York Times, . . . a handful of Republicans led by Senator Jon Kyl of Arizona had been secretly proselytizing their fellow members about the treaty and accumulating committed votes against it. They enlisted several former top Administration officials who opposed the treaty, including James R. Schlesinger, a former Secretary of Defense, and retired Gen. Brent Scowcroft, a former national security adviser, to help sway their colleagues.

In May, Mr. Kyl told Mr. Lott he had 34 firm Republican votes against the treaty, meaning that advocates of the treaty could not reach the two-thirds majority needed to ratify it. Mr. Lott reported the news to Senator Jesse Helms, Chairman of the Foreign Relations Committee, an ardent foe of the nuclear testing agreement, and suggested that Mr. Helms could safely release the treaty for a quick rejection on the Senate floor.

Mr. Helms said, “Get me more,” according to an aide. “He wanted the treaty finished, dead, with no chance of revival,” the aide said. Mr. Kyl continued quietly rounding up opponents. <sup>166</sup>

It is clear that a group of right-wing Senators had, for many months, silently secured the “no” votes of some of their colleagues and quietly passed the information along to the organizer of the scheme, Senator Helms.<sup>167</sup> Knowing that there

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164. See WILLIAM LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* 459–60 (St. Martin’s Press 2008) (stating that in Oct. 1999, Helms abruptly shifted tactics by agreeing to an immediate vote on the treaty).

165. See *id.* (describing Helms’ delay tactics).

166. Broder, *supra* note 163.

167. See FOREIGN RELATIONS, *supra* note 147, at 263 (“Senators Kyl and Coverdell had arranged for briefings of other Republican Senators to make the case against the

would be enough votes to prevent the necessary two-thirds majority for ratification, Senator Helms was now confident that, in releasing the CTBT for a vote, he had more than the one-third necessary to defeat the Treaty—even amidst increasing pressure from the other side of the aisle.<sup>168</sup>

Senator Helms suddenly reversed his public position and addressed the CTBT.<sup>169</sup> He arranged for the critical, fast-track vote.<sup>170</sup> This abrupt change in course triggered his covert plan to kill the Treaty, a result he willfully secured in a non-transparent manner designed to subvert the democratic process.<sup>171</sup>

A speedy vote would result in a speedy execution of the instrument. Republican Senate Majority Leader Trent Lott agreed on September 30, 1999 to allow ten hours of debate prior to a vote on the CTBT.<sup>172</sup> With the unanimous consent of the Senate, Senator Lott released the CTBT to the Senate Foreign Relations Committee for consideration.<sup>173</sup>

‘There was a frustration with the failure to get this treaty considered, a legitimate frustration,’ said

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treaty, and by September 30 had lined up 42 votes against it. On that day, Senator Lott responded to demands to consider the treaty. He asked for unanimous consent to discharge the Senate Foreign Relations Committee from further consideration of the treaty on October 6, to begin consideration of the treaty on that day, with a total of 10 hours of debate, and then to vote on the resolution of ratification. Senator Daschle objected to the request on grounds that it proposed to hold the vote too quickly, did not allow enough time for debate, and assumed the treaty would be defeated. Under the final agreement, the Senate began consideration of the treaty on October 8. Each leader was permitted one amendment to the resolution of ratification, with 8 hours of debate permitted on the two amendments and 14 hours on the resolution of ratification. The Senate would then proceed to a vote.”)

168. See LINK, *supra* note 164, at 460–61.

169. *Id.* at 460 (stating that in October 1999, Helms abruptly shifted tactics by agreeing to an immediate vote on the treaty).

170. See FOREIGN RELATIONS, *supra* note 147, and accompanying text.

171. See LINK, *supra* note 164, at 460–61 (describing Helms’ change in tactics that “spelled the treaty’s doom.”).

172. Eric Schmitt, *Senate G.O.P. to Allow Vote on Pact to Ban Nuclear Tests*, N.Y. TIMES, Oct. 1, 1999, at A8.

173. 145 CONG. REC. S11, 819–21 (daily ed. Oct. 1, 1999) (statement of Sen. Trent Lott).

Senator Carl Levin, Democrat of Michigan.<sup>174</sup> He acknowledged that Democratic impatience gave Mr. Lott all the excuse he needed to call for a quick vote on the treaty.<sup>175</sup> . . . “They put us in a position of looking like we didn’t want the treaty to come up if we opposed that kind of extremely rapid consideration,” Senator Levin said.<sup>176</sup>

With enviable speed, both the Arms Services Committee and the Senate Foreign Relations Committee scheduled truncated hearings.<sup>177</sup>

The complete reversal of Republican priorities surprised the Democrats.<sup>178</sup> The Democrats realized belatedly that there were not enough votes to secure the approval in the Senate.<sup>179</sup> They began a campaign to forestall voting on the Treaty.<sup>180</sup> The White House was also blindsided by speed with which the hearings were scheduled.<sup>181</sup> In fact, it did not have enough time to organize the presentations from the Administration’s perspective in support of the Treaty.<sup>182</sup> The abnormally short period within which to prepare for the hearings and bring in appropriate experts insured the hearings were set up in such a way as to be perfunctory.<sup>183</sup> The complete merits of both

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174. Broder, *supra* note 163, at A16.

175. *Id.*

176. *Id.*

177. *Id.*; Richard F. Grimmert, *Overview of the Treaty Process*, in TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, SEN. COMM. PRINT. 106-71, 1, 4, 264 (Richard F. Grimmert ed., Jan. 2001).

178. See Broder, *supra* note 163, at A16 (stating that “[Senator] Biden and other Democrats were ignorant of the deeply rooted Republican opposition to the treaty,” and were only partly aware of what was happening behind the scenes in the Republican caucus).

179. See *id.* (stating that the Democratic Senators had not “adequate[ly] . . . gaug[ed] the sentiment in the Senate”).

180. *Id.*

181. Grimmert, *supra* note 177, at 262–65. President Clinton asked Senator Lott to defer consideration, in order to gain time for presenting the Administration’s position. *Id.*

182. Broder, *supra* note 163, at A16.

183. See Grimmert, *supra* note 177, at 264 (stating that, “on average, . . . other such agreements received much more consideration”).

arguments, for and against the CTBT, never made it before the Senate.<sup>184</sup> Neither the Senate nor the American people received a legitimate opportunity to consider the Treaty.

“By the time the debate began, all recognized that the treaty would be defeated.”<sup>185</sup> The hasty consideration and vote troubled individuals on both sides of the party lines.<sup>186</sup> “Accordingly, Senators Moynihan and Warner gathered sixty-two signatures—twenty-four Republicans and thirty-eight Democrats—for a letter to Senators Lott and Daschle requesting that the vote be deferred.”<sup>187</sup> Notwithstanding considerable requests to delay the vote, the Senate debated the CTBT on October 8th, 12th, and 13th.<sup>188</sup>

“Several hearings [had been] held the week before, by the Foreign Relations Committee on October 7, and by the Armed Services committee on October 5, 6, and 7.”<sup>189</sup> The Armed Services Committee was the first to hear testimony on the CTBT on October 5th, 6th, and 7th, 1999; and various experts represented both sides of the debate.<sup>190</sup> However, the main focus

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184. *See id.* (stating that both parties were “troubled by the hasty consideration and vote.”).

185. *Id.* at 264.

186. *Id.*

The Senate debate also addressed the question of whether the Senate had given the treaty adequate consideration in the form of hearings and floor debate. Senator Helms stated that the CTBT was ‘extensively discussed’ in 14 Senate Foreign Relations Committee hearings in 1998 and 1999, while Senator Daschle presented a list, “Senate Consideration of Major Arms Control and Security Treaties—1972–1999,” showing, on average, that other such agreements received much more consideration than did the CTBT. Senator Byrd stated that the process for considering this treaty was inadequate. “To accept or reject this treaty on the basis of such flimsy understanding of the details as most of us possess,” he said, “is a blot on the integrity of the Senate, and a disservice to the Nation.” As a result, he declared he would vote “present” for the first time in his 41 years as a Senator.

*Id.* (footnotes omitted).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* On Oct. 6, The Senate Armed Services Committee heard testimony from Secretary of Defense, William Cohen, and Chairman of the Joint Chiefs of Staff, General William Shelton, who both agreed that the CTBT would help reduce the evils associated

of the hearings was the Senate Foreign Relations Committee. It was in this Committee's leadership that we find subversion of the public interest.

The Foreign Relations Committee scheduled one day for the hearings.<sup>191</sup> The Committee started with comments from those opposed to the Treaty. Criticism focused on alleged weaknesses of verification and stock-pile stewardship concerns.<sup>192</sup> After the lunch recess, the proponents of the Treaty were given an opportunity to testify.<sup>193</sup> Senator Biden and Secretary of State Albright spoke in favor of the Treaty.<sup>194</sup> That was the extent of endorsement that the time-limited Democrats were able to provide.<sup>195</sup>

Throughout the day, Senators generally debated the effectiveness of the CTBT.

. . . Senators debated whether the treaty would advance nuclear nonproliferation objectives, whether other nations could conduct clandestine tests of military significance, and whether the United States could maintain its nuclear deterrent without nuclear tests.<sup>196</sup> Some also raised the question of how the international community might react to U.S. rejection of the treaty,

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with proliferation, and while not perfect, would reduce the nuclear threat to the United States. *National Security Implications of the Comprehensive Test Ban Treaty* Before the Senate Comm. on Armed Services, 106th Cong. (1999) (statement of William S. Cohen, Secretary of Defense, and General Henry H. Shelton, Chairman, Joint Chiefs of Staff), available at <http://armed-services.senate.gov/hearings/1999/c991006.htm>. James Schlesinger, former Secretary of Defense, also testified before the Armed Services Committee and stressed the risk that the CTBT would pose to the U.S. nuclear stockpile. *Comprehensive Nuclear Test Ban Treaty: Panels II and III of a Hearing Before the Senate Armed Services Comm.*, 106th Cong. (1999) (testimony of James Schlesinger, Defense Secretary) [hereinafter *Panels*].

191. Grimmett, *supra* note 177, at 264.

192. *Comprehensive Test Ban Treaty: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. (1999) (statement of Sen. Richard Shelby).

193. *Panels*, *supra* note 190.

194. *Comprehensive Test Ban Treaty: Hearing Before the S. Comm. Foreign Relations*, 106th Cong. (1999) (statement of Sen. Joseph R. Biden and Madeleine K. Albright, Secretary of State).

195. *See id.* (representing the only records which show endorsements by democrats).

196. Grimmett, *supra* note 177, at 264.

and whether rejection would undermine the U.S. leadership role in the world and lead to the unraveling of other arms control agreements.<sup>197</sup>

The complete hearing on the CTBT in the Foreign Relations Committee took less than eight hours.<sup>198</sup>

Senator Helms successfully held a minimalist hearing designed to meet the barest procedural requirements. Notwithstanding the superficial nature of the hearing, the Foreign Relations Committee sent the vote to the Senate floor.<sup>199</sup> “When the floor debate was concluded, fifty-one Republican Senators voted down the [CTBT] in the face of international pressure, the opposition of the White House, and hostile media.”<sup>200</sup>

Senators opposed to the CTBT had made three principal arguments. First, they argued that the CTBT is not sufficiently verifiable, because, as the argument went, “if we cannot detect another state’s nuclear test, then they could be perfecting their nuclear program while ours stays stagnant.”<sup>201</sup> Second, the opponents argued that the United States could not be good stewards of an already-existing nuclear stockpile without additional physical nuclear testing.<sup>202</sup> Finally, the Treaty’s opponents denied the basic expectation that U.S. ratification of the CTBT would serve as an incentive for other states to join the Treaty.<sup>203</sup>

These criticisms (which remain pertinent today and receive attention below) formed the ostensible justification of individual

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197. *Id.*

198. See *Final Review of the Comprehensive Test Ban Treaty (Treaty Doc. 105-28): Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. (1999), available at <http://www.fas.org/nuke/control/ctbt/text/ctbtSenate.htm> (showing that the hearing took place from 10:35 a.m. to 7:00 p.m. with a one-hour lunch recess).

199. *Panels*, *supra* note 190.

200. Richard Lowry, *Test-Ban Ban*, *NAT’L REVIEW*, Nov. 8, 1999, reprinted in 145 *CONG. REC.* 29, 477–78 (1999).

201. *Panels*, *supra* note 190 (noting that “we cannot be absolutely certain of detecting low-yield threats”).

202. *Id.* (reflecting Senator Smith’s concerns that the Treaty would not provide “verification” and “credibility” offered by testing).

203. *Id.*

Senators whose votes sustained the highly partisan agenda of the extreme right wing of the Senate. Nevertheless, based on then-contemporary responses put forth to these criticisms, it is unclear why individual Senators would vote against an instrument as important to U.S. national security as the CTBT. Thus, the positions of the opposing Senators left many rational third party appraisers far from convinced.<sup>204</sup> Background facts support the finding that the decision to reject the Treaty was made prior to and outside of the formal hearings.

Prior to signing the CTBT, President Clinton had refused to sign and transmit to the Senate the Republican-favored ABM and Chemical Weapons Treaty.<sup>205</sup> This may have generated vengeful motivation. Additionally, Senator Helms and his right wing acolytes remained bitter over President Clinton's victory in the impeachment trial eight months earlier.<sup>206</sup> Senator Helms thus scored an important political point. He would deprive President Clinton of an important political legacy.<sup>207</sup> The ratification of the CTBT could have been seen as an important victory for the Democrats over a critical national security issue. Such a victory would have been a political asset to a Democratic Presidential candidate. The conclusion is inescapable: the Senate defeated the Treaty on a basis of a highly politicized agenda, dominated by partisan concerns of electoral advantages versus the national common interest.

Leaders of the United States' most important allies wrote a strong plea to the U.S. Senate to ratify the CTBT.<sup>208</sup> Published

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204. See Barbara Crossette, *World Leaders React With Dismay to Rejection of Treaty*, N.Y. Times, Oct. 15, 1999, at International, available at <http://partners.nytimes.com/library/world/global/101599treaty-react.html> (noting the rejection of the treaty by the Senate was "interpreted by many diplomats and editorial writers abroad as a direct slap on the fact of American allies and friends").

205. WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* 459-63 (2008).

206. *Id.* at 443-44.

207. "The Senate action was a particularly sharp repudiation of Mr. Clinton because he had sold the treaty as a national security imperative for the United States." Broder, *supra* note 163, at A16.

208. "The United States and its allies have worked side by side for a Comprehensive Test Ban Treaty since the days of President Eisenhower. This goal is now within our grasp. Our security is involved, as well as America's. For the security of

in the *New York Times*, Prime Minister Tony Blair, President Jacques Chirac and Chancellor Gerhard Schroeder collaborated in an unprecedented op-ed, imploring the Senate to ratify the Treaty.<sup>209</sup> They warned of the consequences of U.S. isolationism; “[r]ejection of the Treaty in the Senate would remove the pressure from other states still hesitating about whether to ratify it” and would give “encouragement to proliferators.”<sup>210</sup> International leaders also emphasized that the Senate’s defeat of the Treaty would undermine the NPT, the cornerstone of global nuclear safety.<sup>211</sup> Their representations were ignored by Senator Helms and his allies.<sup>212</sup>

#### IV. PART THREE: POLITICAL FALLOUT OF THE REJECTION OF THE CTBT

Immediately following the vote, diplomacy took a back seat when foreign ministers and heads of state around the world openly criticized the United States for its failure.<sup>213</sup> The

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the world we will leave to our children, we urge the United States Senate to ratify the treaty.” Jacques Chirac et al., Op-Ed., *A Treaty We All Need*, N.Y. TIMES, Oct. 8, 1999, at A27.

209. *Id.*

210. *Id.*

211. *Id.* (“Failure to ratify the Comprehensive Test Ban Treaty will be a failure in our struggle against proliferation. The stabilizing effect of the Non-Proliferation Treaty, extended in 1995, would be undermined. Disarmament negotiations would suffer.”).

212. See Broder, *supra* note 163, at A16 (according to Helms’ aide, he wanted the treaty “finished, dead, with no chance of revival”).

213. See Craig Cerniello, *Russia, China, U.S. Allies Condemn Senate Defeat of Treaty*, ARMS CONTROL ASSOCIATION (Sept.–Oct. 1999) (describing how “[t]he Senate’s rejection of the [CTBT] . . . drew a barrage of criticism from Russia and China, as well as from U.S. allies in Europe and Asia”); see also Barbara Crossette, *Defeat of a Treaty: The Shock Waves; Around the World, Dismay Over Senate Vote on Treaty*, N.Y. TIMES, Oct. 15, 1999, at A1 (quoting the disappointment of foreign ministers and defense ministers from around the world); THE ACRONYM INSTITUTE FOR DISARMAMENT DIPLOMACY, SENATE REJECTION OF THE CTBT: INTERNATIONAL STATEMENTS AND COMMENT, <http://www.acronym.org.uk/ctbt/ctbreac2.htm> (last visited Sept. 13, 2009) (expressing statements of regret and disappointment from governments around the world) [hereinafter THE ACRONYM INSTITUTE]; U.S. Information Agency, Office of Research and Media Reaction, *CTBT: The U.S.’ “Dangerous Hesitance” Imperils Nonproliferation Regime*, Oct. 13, 1999, <http://www.fas.org/nuke/control/ctbt/news/www9o13.htm> (statements from various governments expressing regret at the failure of the U.S. Senate to pass the CTBT); Burroughs et al., *supra* note 119, at 491 n.101 (a

Japanese Foreign Minister Yohei Kono, joining the neighboring Philippine Foreign Secretary, stressed his country's disappointment with the United States' lack of leadership and labeled the adverse effects "inestimable."<sup>214</sup> Russia, which maintains the second largest nuclear arsenal in the world,<sup>215</sup> expressed its disappointment through Foreign Ministry Spokesman Vladimir Rackhmanin. The Spokesperson stated that "[t]his decision is a serious blow to the entire system of agreements in the field of nuclear disarmament and non-proliferation."<sup>216</sup> China, considered to be one of the greatest nuclear threats to the United States, said it "deeply regrets" the Senate's rejection.<sup>217</sup>

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sampling of expressed concerns from around the world).

214. Cerniello, *supra* note 213. "The situation should be deemed serious . . . Since Japan has expected U.S. leadership toward nuclear disarmament and nuclear non-proliferation throughout the world, this outcome is indeed regrettable." Press Release, Ministry of Foreign Affairs of Japan, Statement by Foreign Minister Yohei Kono on the Refusal by the U.S. Senate to Ratify the Comprehensive Nuclear-Test-Ban Treaty (CTBT) (Oct. 14, 1999), <http://www.mofa.go.jp/announce/announce/1999/10/1014-2.html>. The Mayor of Hiroshima said "[The United States is] going against international efforts to reduce nuclear arms . . . As a nuclear power, the U.S. should lead the way to end the proliferation of nuclear weapons." *Asia Dismayed by U.S. Treaty Vote*, ASSOCIATED PRESS ONLINE, Oct. 14, 1999. "Philippine Foreign Secretary Domingo Siazon called the United States vote 'an enormous blow to all our efforts to make the world a safer place to live in.'" Cerniello, *supra* note 213.

215. Cerniello, *supra* note 213; *Russia: An American Olive Branch*, STRATFOR, Feb. 4, 2009, [http://www.stratfor.com/analysis/20090204\\_russia\\_american\\_olive\\_branch](http://www.stratfor.com/analysis/20090204_russia_american_olive_branch).

216. THE ACRONYM INSTITUTE, *supra* note 213 (citing *Russia Concerned By U.S. Senate Nuclear Vote*, REUTERS, Oct. 14, 1999). The Spokesperson continued: "We express our disappointment and serious concern in connection with the rejection of the treaty by the U.S. Senate. The U.S. Administration worked very actively on all stages of its development and was first to sign it . . . There is a definite trend visible in recent times in U.S. actions and it causes deep alarm." *Id.* (internal quotation marks omitted). Igor D. Sergeev, Assistant to President Putin on Strategic Stability, "linked disruption of the CTBT to a weakening of the NPT and ABM, which would stimulate proliferation of weapons of mass destruction." Senator Douglas Roche, *Precious But Fleeting: Report on the November 2001 Conference on Facilitating the Entry-Into-Force of the Comprehensive Nuclear Test Ban Treaty*, THE PLOUGHSHARES MONITOR, Dec. 2001, <http://www.ploughshares.ca/libraries/monitor/mond01g.html>.

217. THE ACRONYM INSTITUTE, *supra* note 213 (citing *China to Speed Up CTBT Ratification*, REUTERS, Oct. 14, 1999). "China deeply regrets that the U.S. Senate voted to reject the ratification . . . The United States, as one of the 44 countries whose ratification is required for the enforcement of the treaty, has great influence on bringing the pact into force." *Id.*

Even the United States' traditional and most loyal allies lamented the decision. France found the Senate's refusal to ratify antithetical to the fight against proliferation and stated that, "[t]he decision will affect the credibility of the United State's [sic] role in this domain."<sup>218</sup> German Foreign Minister Joschka Fischer said he was "deeply disappointed."<sup>219</sup> The defense minister echoed his disappointment, calling it the "absolutely wrong decision."<sup>220</sup>

Canada's foreign minister voiced the paradoxical nature of the act, saying that "[a] world accustomed to U.S. leadership in the cause of non-proliferation and disarmament can only be deeply disturbed by this turn of events, which will be welcomed by those who remain uncommitted to that cause."<sup>221</sup> On a supranational level, both NATO and the EU voiced their concern; Secretary General George Robertson called the Senate action "very worrying"<sup>222</sup> and Foreign Affairs Minister for the EU Louis Michel expressed the EU's regret over the act and the hope that the United States would reconsider.<sup>223</sup>

Dating back to Presidents Eisenhower and Kennedy, the United States has been the leader on the international stage for disarmament.<sup>224</sup> The Senate's cavalier act was a sharp reversal

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218. *Id.* "France is but the more determined to assume its responsibilities, as it has done so far, as a responsible nuclear power resolved to maintain strategic stability." *Id.*

219. Cerniello, *supra* note 213 (internal quotation marks omitted).

220. *Id.* (internal quotation marks omitted).

221. THE ACRONYM INSTITUTE, *supra* note 213.

222. Cerniello, *supra* note 213. "[I]t's a very worrying vote . . . [.] I think it has a lot to do with the partisan nature of American politics at the moment and the sort of febrile atmosphere that comes with a Presidential election on the horizon." THE ACRONYM INSTITUTE, *supra* note 213 (alteration in original) (citing *Global Dismay at U.S. Senate Nuclear Ban Rejection*, REUTERS, Oct. 14, 1999).

223. Louis Michel, Deputy Prime Minister and Minister of Foreign Affairs of Belgium, Conference on Facilitating the Entry Into Force of the Comprehensive Nuclear Test Ban Treaty (Nov. 11, 2001), *available at* <http://www.un.org/webcast/ctbt/statements/belgiumE.htm>. "[W]e can only regret the United States' announcement that it will cease to participate in certain activities arising from the Treaty and that it does not plan to reconsider its position on ratification." *Id.*

224. *See* President Dwight D. Eisenhower, Address Before the General Assembly of the United Nations on Peaceful Uses of Atomic Energy (Dec. 8, 1953), *available at* [http://www.iaea.org/About/history\\_speech.html](http://www.iaea.org/About/history_speech.html) (last visited Oct. 10, 2009) (pledging the United States' "determination to help solve the fearful atomic dilemma"); President John

of this trend and signaled to the world that the United States appeared to abdicate its leadership, compromising the thirty-five plus year international process of disarmament and non-proliferation. To some states seeking to develop nuclear arsenals, this was a welcome surprise.<sup>225</sup> One analyst for the burgeoning nuclear power India commented that India “can just relax now,” anticipating the Treaty to be dead;<sup>226</sup> and Japan’s Vice Minister commented that “Japan may be better off if it arms itself with nuclear weapons.”<sup>227</sup>

The defeat of the CTBT on the Senate floor sent repercussions around the globe. World opinion found a united voice, overwhelmingly condemning the vote and calling on the United States to take the lead in ratifying the CTBT.<sup>228</sup> As one of four Republican senators voting in favor of the Treaty, Arlen Specter prophetically spoke to his colleagues, “[this] will be a vote heard around the world to the detriment of the United States.”<sup>229</sup>

In order for the CTBT to enter into force, forty-four of the States’ Parties listed in Annex 2 of the Treaty must deposit their instruments of ratification with the U.N. Secretary-General.<sup>230</sup>

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F. Kennedy, Radio and Television Address to the American People on the Nuclear Test Ban Treaty (Sept. 25, 1961), *available at* <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/Nuclear+Test+Ban+Treaty+Speech.htm> (last visited Oct. 10, 2009) (“we in the United States have labored . . . to find an approach to disarmament which would be so far-reaching, yet realistic, so mutually balanced and beneficial, that it could be accepted by every nation.”).

225. Joseph Cirincione, *U.S. Senate Rejection of the Comprehensive Nuclear Test Ban Treaty and the Possibly Deployment of Ballistic Missile Defense Systems*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Nov. 1999, <http://www.carnegieendowment.org/npp/publications/index.cfm?fa=view&id=136>. An analyst at the Center for Policy Research in New Delhi was “delighted with the Senate vote.” *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. “To enter into force . . . the Treaty must be signed and ratified by the 44 States listed in Annex 2 to the Treaty. These States participated in the negotiations of the Treaty in 1996 and possessed nuclear power or research reactors at the time. Thirty-five of these States have ratified the Treaty, including the three nuclear weapon States France, Russian Federation and the United Kingdom.” Press Release, Comprehensive Nuclear-Test-Ban Treaty Org. Preparatory Comm’n, Saint Vincent and the Grenadines

With thirty-five of these Annex 2 states having already ratified the CTBT, only nine states remain: China, Democratic People's Republic of Korea, Egypt, India, Indonesia, Iran, Israel, Pakistan, and the United States.<sup>231</sup> Aside from the United States, three major holdouts remain; China,<sup>232</sup> India, and Pakistan,<sup>233</sup> all of which have suggested that they will not ratify

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Signs Comprehensive Nuclear-Test-Ban Treaty (July 2, 2009), <http://www.ctbto.org/press-centre/press-releases/2009/saint-vincent-and-the-grenadines-signs-comprehensive-nuclear-test-ban-treaty/>; Burroughs et al., *supra* note 119, at 493; Kuchta, *supra* note 44, at 338. Some scholars have attributed India and Pakistan's failure to sign or ratify the treaty to the nuclear powers' failure to effectively work toward the disarmament goals outlined in the Non-Proliferation Treaty and United States' failure to ratify the CTBT. *See, e.g.*, Freeley, *supra* note 73, at 789–90 (stating that “India and Pakistan argue that the nuclear powers have ignored disarmament language found in the NPT and LTBT, and will not sign the [CTBT] unless more concrete steps toward global disarmament are pursued); Lalla, *supra* note 91, at 104–05.

231. Press Release, Comprehensive Nuclear-Test-Ban Treaty Org. Preparatory Comm'n, Progress in the Middle East: Lebanon Ratifies the Comprehensive Nuclear-Test-Ban Treaty (Nov. 25 2008), <http://www.ctbto.org/press-centre/press-releases/2008/progress-in-the-middle-east-lebanonratifies-the-comprehensive-nuclear-test-ban-treaty/> (last visited Oct. 25, 2009).

232. Sidney D. Drell, *The Shadow of the Bomb*, 136 POLICY REVIEW 55, 63 (2006), available at <http://www.policyreview.org/136/drell.html>; “China ha[s] indicated they will work to bring the treaty into force once the United States has ratified it.” Sidney Drell, et al., *A Strategic Choice: New Bunker Busters Versus Nonproliferation*, 33 ARMS CONTROL TODAY 8, 10 (2003), available at <http://www.armscontrol.org/print/1210> (last visited Oct. 11, 2009); American Foreign Press, *China Assures U.N. of Ratifying CTBT Soon*, DAWN (Pakistan), Sept. 4, 2003, available at <http://www.dawn.com/2003/09/05/int7.htm> (“We will see a Chinese ratification, rather sooner than later,” [Wolfgang Hoffman] said “To ratify they need a broad consensus[.] . . . I feel that this broad consensus is evolving.”). China has conducted thirty-nine tests and “[t]he Chinese government reportedly wrote to the U.N. Secretary-General . . . [that] ‘after a comprehensive test ban treaty is concluded and comes into effect, China will abide by it and carry out no more nuclear tests.’” JONATHAN MEDALIA, CONGRESSIONAL RESEARCH SERVICE, NUCLEAR WEAPONS: COMPREHENSIVE TEST BAN TREATY 4–5 (2000). In a white paper of December 2004, China stated its support for early entry into force and their continued commitment to the test moratorium until that is accomplished. STATE COUNCIL INFORMATION OFFICE, CHINA'S NATIONAL DEFENSE IN 2004 (2004), available at <http://www.fas.org/nuke/guide/china/doctrine/natdef2004.html>.

233. *See* Freeley, *supra* note 73, at 786; Lalla, *supra* note 91, at 104; Rebecca Johnson & Daryl Kimball, *Who Needs the Nuclear Test Ban?*, THE ACRONYM INSTITUTE, DISARMAMENT DIPLOMACY, July–Aug. 2001, available at <http://www.acronym.org.uk/dd/dd59/59ctbt.htm>. India, Pakistan, and China have all declared voluntary moratoriums on testing, and Pakistan and India have said that the “signature of the CTBT awaits the development of a ‘consensus’ for such action.” *Id.*

the Treaty until the United States completes its own ratification.<sup>234</sup>

All U.S. allies through NATO have signed and ratified the CTBT.<sup>235</sup> Historical U.S. adversaries such as Russia, Japan, and Vietnam also ratified the Treaty.<sup>236</sup> Indeed, as of March 2010, of the 195 states recognized worldwide by the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO Preparatory Commission), a total of 182 states have signed the CTBT; and 151 states have ratified the CTBT in total.<sup>237</sup> Only thirteen states in the world have yet to sign the CTBT; and only forty-four states in the world have not ratified.<sup>238</sup> The defeat of the CTBT in the Senate commenced a disappointing hiatus in stymieing the proliferation and testing of nuclear weapons. The cost of parochial, ideologically-driven politics was a less secure world.

Nevertheless, the CTBT is not dead juridically.<sup>239</sup> President

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234. See Jofi Joseph, *Renew the Drive for CTBT Ratification*, WASH. QUARTERLY, Apr. 2009, at 80 (suggesting that the United States' failure to ratify the CTBT provides an excuse for China, India and Pakistan to avoid ratification as well).

235. Compare NATO Member Countries [hereinafter NATO Members], [http://www.nato.int/cps/en/natolive/nato\\_countries.htm](http://www.nato.int/cps/en/natolive/nato_countries.htm) (last visited Oct. 11, 2009), with Status of Signature and Ratification [hereinafter CTBT Status], <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification> (last visited Oct. 11, 2009). The NATO alliance currently consists of twenty-six independent member countries, including Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom and the United States. NATO Members, [http://www.nato.int/cps/en/natolive/nato\\_countries.htm](http://www.nato.int/cps/en/natolive/nato_countries.htm). All NATO members have signed the CTBT. CTBT Status, <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification>.

236. CTBT Status, <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification> (noting the signature and ratification dates of those countries).

237. *Id.*

238. *Id.* The forty-six states that have not ratified the Treaty are Angola, Bhutan, Brunei Darussalam, the Central African Republic, Chad, China, Comoros, Congo, Cuba, the Democratic People's Republic of Korea, Dominica, Egypt, Equatorial Guinea, Gambia, Ghana, Guatemala, Guinea, Guinea-Bissau, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Mauritius, Myanmar, Nepal, Niue, Pakistan, Papua New Guinea, Sao Tome and Principe, Saudi Arabia, Solomon Islands, Somalia, Sri Lanka, Syrian Arab Republic, Thailand, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu, United States of America, Yemen and Zimbabwe. *Id.*

239. "At the end of the 106th Congress, pursuant to Senate Rule XXX, paragraph 2, the treaty moved to the Senate Foreign Relations Committee calendar, where it

Clinton predicted on the day following its defeat in the Senate: “When all is said and done, I have no doubt that the United States will ratify this Treaty.”<sup>240</sup> Senator Helms authorized a report of the entire treaty-making process in the Senate in order to determine whether the defeat of the Treaty meant that it was dead forever.<sup>241</sup> Yet Appendix 9 of that report indicates that the CTBT reverted to the status of a pending treaty.<sup>242</sup> It is therefore still within the custody of the Senate.<sup>243</sup> Since it is within the custody of the Senate, it is well within the rules and practices of the Senate that the Senate may reconsider a vote on any matter if it is still within its custody.<sup>244</sup> Having the legitimate authority to do so, a new Senate—guided by the Obama Administration’s strong, *nonpartisan* leadership—owes the American people full and fair hearings and debate in order to assess the CTBT’s value for the national security interests of the American people.

V. PART FOUR: INTERNATIONAL TREATIES AS A COMPONENT FOR  
STRONG NATIONAL SECURITY

You [military professionals] must know something  
about strategy and tactics and logic—logistics, but also

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currently resides.” Issues and Arguments, *supra* note 4, at 3.

240. President Bill Clinton, News Conference, *reprinted in Defeat of a Treaty; Clinton at News Conference: ‘Troubling Signs of New Isolationism’*, N.Y. TIMES, Oct. 15, 1999, available at <http://www.nytimes.com/1999/10/15/world/defeat-treaty-clinton-conference-troubling-signs-new-isolationism.html?pagewanted=1>.

241. See Treaties and Other International Agreements, *supra* note 19, at iii (referencing Senator Helms’ request for the study entitled “Treaties and Other International Agreements: The Role of the United States Senate” to be updated).

242. *Id.* at 433.

243. *Id.* at 143.

If a treaty fails to receive the two-thirds vote necessary for Senate advice and consent, the Executive Clerk normally prepares a resolution for Senate approval reporting that fact to the President. Unless the Senate acts affirmatively by resolution to return a rejected treaty to the President, however, that treaty is returned to the Senate’s Executive Calendar. Then, in accordance with paragraph 2 of Rule XXX, it automatically is referred back to the Foreign Relations Committee at the conclusion of the Congress.

*Id.*

244. See Rules of the Senate, Rule XXX, Executive Session-Proceedings on Treaties, para.2, <http://rules.senate.gov/public>.

economics and politics and diplomacy and history. You must know everything you can know about military power, and you must also understand the limits of military power. You must understand that few of the important problems of our time have . . . been finally solved by military power alone.

– President John F. Kennedy.<sup>245</sup>

Even with the power to reconsider the Treaty, why should the United States ratify the CTBT now? Research institutes, analysts, policy makers, and politicians have all arrived at the same conclusions: ratification of the CTBT by the United States will guarantee its lead in nuclear technology and will prevent other states from developing nuclear weapons.<sup>246</sup> The advantages of ratifying are inextricably linked with the consequences of failing to ratify.<sup>247</sup> Without a centralized and agreed upon international policing security force, and without a legally enforceable CTBT, we run the risk of creating a critical security legal vacuum, which will doubtless be filled by state and non-state actors holding aggressive, destructive objectives for themselves in the international system.<sup>248</sup>

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245. Remarks at Annapolis to the Graduating Class of the United States Naval Academy, 1 PUB. PAPERS 232 (June 7, 1961).

246. Global Beat: Military, Scientific Leader and the American People Want Test Ban Treaty, <http://www.bu.edu/globalbeat/nuclear/CRND091799.html> (last visited Oct. 24, 2009) (listing supporters of the CTBT as: a majority of American people, U.S. Presidents, Department of Defense and the Joint Chiefs of Staff, former military and diplomatic leaders, former United States Senators, key U.S. allies and nuclear weapon scientists, and leading scientific and professional organizations).

247. “The CTBT is a vital disarmament and nonproliferation instrument. By prohibiting all nuclear test explosions it impedes the ability of states possessing nuclear weapons to field new and more deadly types of warheads, while also helping to prevent the emergence of new nuclear-armed states.” Ambassador Thomas Graham Jr., *The Comprehensive Nuclear-Test-Ban Treaty*, in 2009 NATIONAL SECURITY AND NONPROLIFERATION BRIEFING BOOK 21, 22 (2008).

248. Because the terrorist networks scheming to attack the United States are global, “our response must be global as well. We need redoubled intelligence and police cooperation around the world to find and defeat terrorist groups with nuclear ambitions.” Matthew Bunn & Andrew Newman, *Preventing Nuclear Terrorism*, reprinted in 2009 NATIONAL SECURITY AND NONPROLIFERATION BRIEFING BOOK 30 (Charles Ferguson ed., 2008).

Former Secretary of Defense Robert McNamara warned in *Foreign Policy* that America's continuation of the current nuclear policy (non-ratification) will not only lead to substantial proliferation of nuclear weapon in states such as Egypt, Japan, Saudi Arabia and Syria but will also facilitate the improvement of nuclear arsenals in states that are already members of the nuclear club.<sup>249</sup> Meanwhile, non-state terrorist groups have demonstrated that they are ruthless and, should they acquire materials sufficient to create any sort of device, they will seek to use the device against U.S. interests.<sup>250</sup>

In order to ensure that states having weapons will place them in deep-freeze (upon finding that they are not worth the risks they entail to themselves), and to address the prospect of uncontrolled proliferation, the strategic approach of a new national security doctrine must deploy a broad toolkit containing both coercive and persuasive strategies and tactics.<sup>251</sup> A flexible approach requires the deft use of diplomatic strategies touching upon the wide range of cultural, educational, enterprising, humanitarian, and intelligence-sharing initiatives that broaden the points of common interest between the United States and such states.<sup>252</sup> Nevertheless, a flexible approach requires a backbone. The backbone of U.S. foreign policy

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249. Robert S. McNamara, *Apocalypse Soon*, FOREIGN POLICY, May–June 2005, at 34-35, available at [http://www.foreignpolicy.com/story.cms.php?story\\_id=2829](http://www.foreignpolicy.com/story.cms.php?story_id=2829); Jimmy Carter, *A Dangerous Deal With India*, WASH. POST, Mar. 29, 2006, at A19.

250. "A report of June 2004 by the National Commission on Terrorist Attacks upon the United States found that even though an attempt by al Qaeda in 1994 to purchase uranium failed, 'al Qaeda continues to pursue its strategic objective of obtaining a nuclear weapon.'" AMY L. FITZGERALD, TERRORISM AND NATIONAL SECURITY 2 (Nova Science Publishers) (Aug. 2, 2006).

251. "There is an urgent need to rebalance our foreign policy and national security toolkit, restructure the institutions and processes, and provide adequate funding for the civilian instruments of power." Former Government Official Who Prefers to Remain Anonymous, *Rebalancing and Reorganizing the Government to Better Address National Security Challenges*, in 2009 NATIONAL SECURITY AND NONPROLIFERATION BRIEFING BOOK 3, 4 (Aura Kanegis ed., 2008) [hereinafter Former Government Official].

252. *See id.* (describing the lack of flow in the sharing of terrorist-related information between and among federal, state, and local government and private sector partners and the need for coordination between the agencies in regards to funding, leadership and accountability).

requires an effective design of international law to ensure global security and stability.<sup>253</sup>

At present, the United States has one of the most advanced, powerful, and effectively deployed nuclear arms posture in the world.<sup>254</sup> It is an awesome strategic arsenal. The aggregate power inherent in it could destroy any enemy. It is a power that requires responsible and wise stewardship. It mandates collective governing responsibility and an appropriate degree of transparency and accountability to the people of the United States. U.S. tax-paying citizens have funded and authorized the technological developments and achievements in this field.<sup>255</sup> It is appropriate for these citizens to be informed participants in the shared responsibilities of national security in our democratic society.<sup>256</sup>

In the global context, a limited number of states maintain nuclear arsenals.<sup>257</sup> This limitation is largely a result of important developments in international agreement-making, international law, and a shared global responsibility on a matter of global importance.<sup>258</sup> The most important collective

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253. See BOB GRAHAM ET AL., *supra* note 5, at xx–xxi (recommending that the “United States should work internationally toward strengthening the nonproliferation regime” through international treaties and nonproliferation organizations).

254. Federation of American Scientists, Status of World Nuclear Forces, <http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.htm> (last visited Oct. 3, 2009).

255. Stephen I. Schwartz & Deepti Choubey, *Nuclear Security Spending: Assessing Costs, Examining Priorities*, Carnegie Endowment for International Peace, Jan. 2009, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=22601>.

256. We echo these opening remarks: “Though our recommendations are primarily addressed to the next President and the next Congress, we also envision an important role for citizens. We want to inform our fellow citizens, and thereby empower them to act. We call for a new emphasis on open and honest engagement between government and citizens in safeguarding our homeland and in becoming knowledgeable about and developing coordinated public responses to potential terrorist attacks.” GRAHAM ET AL., *supra* note 5, at xiii.

257. Union of Concerned Scientists, Worldwide-Nuclear-Arsenals-Fact-Sheet, <http://www.ucsusa.org/assets/documents/nwgs/Worldwide-Nuclear-Arsenals-Fact-Sheet.pdf> (last visited Oct. 24, 2009) (stating that the United States and Russia maintain 96% of the world’s nuclear weapons).

258. See Comprehensive Test Ban Treaty, United Nations, art. I, Nov. 1996, 35 I.L.M. 1439; The Treaty on the Non-Proliferation of Nuclear Weapons, United Nations, Mar. 1970, <http://www.un.org/events/npt2005/npttreaty.html>.

agreement is the Treaty on the Non-Proliferation Nuclear Weapons (NPT). The NPT has not stopped proliferation, but it has had a constraining effect on it.<sup>259</sup> It narrows the problem to a few states and challenges U.S. policy makers to design skilled strategic policies and practices to cooperate with allied states that have acquired nuclear arsenals and possibly delivery systems.<sup>260</sup>

Russia has replaced the USSR as the United States' historic nuclear adversary.<sup>261</sup> The United States must consider seriously Russia's emerging security doctrine, needs, and interests in order to diminish the nuclear threat to both states.<sup>262</sup> Chinese nuclear capabilities confront Russia on its border. In addition, Russia is geographically close to tense regions in the Middle East and South Asia and may harbor genuine fears of becoming an indirect victim of escalating conflicts. It is clear that, without reinventing a Cold War with Russia, we must generate or reaffirm understandings about the testing, deployment and strategic uses of nuclear arsenals. Bilateral agreements do not resolve all the problems between the major nuclear powers, but they establish a framework of better-known expectations and benchmarks for serious diplomatic communication and

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259. Jim Walsh, *Learning from Past Success: The NPT and the Future of Non-Proliferation* (2005), <http://www.wmdcommission.org/files/no41.pdf>.

260. See McNamara, *supra* note 249.

261. See posting of Ed Corcoran to SitRep, <http://sitrep.globalsecurity.org/articles/090421301-strategic-nuclear-targets.htm> (Apr. 21, 2009) (arguing that, after the fall of the Soviet Union, "US and Russian nuclear forces remained frozen in adversarial positions.").

262. Medalia, *supra* note 13, at i ("The nations of greatest concern as potential sources of weapons or fissile materials are widely thought to be Russia and Pakistan. Russia has many tactical nuclear weapons, which tend to be lower in yield but more dispersed and apparently less secure than strategic weapons. It also has much highly enriched uranium (HEU) and weapons-grade plutonium, some said to have inadequate security. Many experts believe that technically sophisticated terrorists could, without state support, fabricate a nuclear bomb from HEU; opinion is divided on whether terrorists could make a bomb using plutonium."); GRAHAM, ET AL., *supra* note 5, at xvi ("Since the end of the Cold War, the United States has spent billions of dollars securing nuclear weapons, materials, and technology in Russia and the former states of the Soviet Union . . . . But during that period, the world has also witnessed a new era of proliferation . . . . If not constrained, this proliferation could prompt nuclear crises and even nuclear use at the very time that the United States and Russia are trying to reduce their nuclear weapons deployments and stockpiles.").

collaboration on matters of mutual concern.

The world's lesser nuclear powers include allies like the United Kingdom, France, Israel, India and South Africa (which has given up its arsenal).<sup>263</sup> It is imperative that the United States work collaboratively with these traditional allies on the issue of arms control and its particular focus on nuclear arsenals. The United Kingdom and France, as members of NATO, offer reliable cooperation as a major component of shared security interests.

“The views of such key countries as Brazil, Egypt, Japan, South Africa,<sup>264</sup> and others should be sought on the importance ascribed to deeper reductions in U.S. and Russian arsenals and to CTBT ratification, as well as their response to an initiative to begin negotiations for a treaty to eliminate all nuclear weapons by a date certain.”<sup>265</sup>

The United States has fraternal and economic ties with nuclear-enabled China and Pakistan.<sup>266</sup> The United States simultaneously engages in tense relationships with North Korea and Iran (a potential nuclear power).<sup>267</sup> U.S. relations with most

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263. See Union of Concerned Scientists, *supra* note 257; People's daily online—U.S. Urges Iran to follow S. Africa's nuclear example, [http://english.people.com.cn/200608/25/eng20060825\\_296661.html](http://english.people.com.cn/200608/25/eng20060825_296661.html) (last visited Oct. 24, 2009).

264. A network of states around which disarmament policies are formulated and promoted should certainly include South Africa. South Africa is the nuclear power that has given up nuclear weapons but has not diminished in its status within the framework of world peace and security. South Africa is an example to be encouraged. See AMIR FRAYMAN, *IRAN'S NUCLEAR PROGRAM: LESSONS FROM THE SOUTH AFRICAN MODEL* (International Institute for Counter-Terrorism) (2005) (“Nuclear disarmament symbolized South Africa's shift from a nuclear power to a state committed to international conventions, and one that undertakes decisive efforts to curb the development and distribution of weapons of mass destruction, thus gaining a place of honor among the nations of the world.”).

265. See Barry M. Blechman, *Moving to a World Free of Nuclear Weapons*, in 2009 NATIONAL SECURITY AND NONPROLIFERATION BRIEFING BOOK 7, 10 PEACE AND SECURITY INSTITUTE (2008) (urging the new Administration to begin soundings on the priorities of the non-weapon states at the preparatory conference in May 2009 in order to avoid a confrontation at the review conference in 2010).

266. Fact Sheet Creation of the U.S.-China Strategic Economic Dialogue, Sept. 20, 2006, <http://www.ustreas.gov/press/releass/hp17.htm>.

267. Ivan Oelrich, *The North Korean Nuclear Challenge*, in 2009 NATIONAL SECURITY AND NONPROLIFERATION BRIEFING BOOK 53–54 (Peace and Security Initiative 2008) (describing the concern the United States has over the North Korean nuclear

of the lesser nuclear powers should enhance cooperation via important access points—politically, economically, educationally, and culturally—in order to reduce the possible threat these states may pose to the United States and themselves, as well as the world community.

Although they exist in regions of volatility and pose threats of unpredictable deployments and accidental nuclear engagement, the greater danger with states like Pakistan and North Korea is the possibility that they may be lax about the trade in nuclear technologies and materials or that there may be some slippage in the security of their arsenals.<sup>268</sup> In Pakistan, for example, the presence of terrorist groups adds to the dangers posed by nuclear slippage.<sup>269</sup> Such groups may well acquire nuclear hardware and be able to make crude devices with which to attack the United States and its allies.<sup>270</sup> Thus, instability in this region provides a serious threat to global security; connecting asymmetrical terrorism to nuclear capacity and the clandestine ability to opportunistically deploy and use for terrorist purposes.

One of the urgent tasks of a new administration should be a strenuous effort, bilaterally and multilaterally, to secure

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weapons program).

268. GRAHAM ET AL., *supra* note 5, at xvi (“Since the end of the Cold War, the United States has spent billions of dollars securing nuclear weapons, materials, and technology in Russia and the former states of the Soviet Union—to good effect—and has introduced some new counter-proliferation measures. But during that period, the world has also witnessed a new era of proliferation: North Korea tested a nuclear weapon; Iran has been rapidly developing capabilities that will enable it to build nuclear weapons; Dr. A. Q. Khan, of Pakistan, led a nuclear proliferation network that was a one-stop shop for aspiring nuclear weapons countries; and nuclear arms rivalries have intensified in the Middle East and Asia.”).

269. Medalia, *supra* note 13, at i (“The fear regarding Pakistan is that some members of the armed forces might covertly give a weapon to terrorists or that, if President Musharraf were overthrown, an Islamic fundamentalist government or a state of chaos in Pakistan might enable terrorists to obtain a weapon. Terrorists might also obtain HEU from the more than 130 research reactors worldwide that use HEU as fuel.”).

270. For detailed discussion of diplomatic efforts to secure nuclear weapons material, see *CRS Report RS21592*, *Iran’s Nuclear Program: Recent Developments*, by Sharon Squassoni; *CRS Issue Brief IB91141*, *North Korea’s Nuclear Weapons Program*, by Larry Nicksch; and *CRS Report RL31589*, *Nuclear Threat Reduction Measures for India and Pakistan*, by Sharon Squassoni.

maximum cooperation with all governments and associations of governments in policing global terrorism. The War on Terrorism has dramatically impacted the direction of U.S. foreign policy—especially strategic and tactical operations for securing U.S. objectives.<sup>271</sup> Under the Bush Doctrine, the United States formulated a policy that indicates that the United States will hold responsible any sovereign state that has aided and abetted the terrorists in the acquisition of WMD and their use against U.S. interests.<sup>272</sup> While the application of this doctrine to Iraq proved to be based on fictitious intelligence, the Bush Doctrine may have to be carefully evaluated in terms of the appropriate boundaries in international law.

The Obama Administration, for example, inherits wars in Iraq and Afghanistan and a “long-term struggle with [a]l Qaeda and its affiliates, while facing the possibility of another nuclear weapons state in Iran.”<sup>273</sup> The international legitimacy of U.S. preemption in these instances derives from the implicit efforts of President Bush to reframe the boundaries of sovereignty and security.<sup>274</sup> Unfortunately, President Bush has not adequately

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271. See Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375 (2004) [hereinafter *Bush National Security Doctrine*].

272. Wade Boese, Bush Administration Releases Strategy on WMD Threat, ARMS CONTROL ASS’N., Jan./Feb. 2003, [http://www.armscontrol.org/act/2003\\_01-02/wmds strategy\\_janfeb03](http://www.armscontrol.org/act/2003_01-02/wmds_strategy_janfeb03) (detailing the Bush Administration WMD Policy).

273. PEACE & SECURITY INITIATIVE, 2009 NATIONAL SECURITY AND NONPROLIFERATION BRIEFING BOOK 1 (2008).

274. *Bush National Security Doctrine*, *supra* note 271, at 380–81 (“Prior to October 7, 2001—when the United States began bombing Afghanistan—the invasion of Afghanistan staked a claim to more than mere self-defense. In general terms, it was a claim to intervene and change a state’s composition in the international constitutional system. This claim required an expansive interpretation of the right to self-defense in situations where the enemy is not a state, but a significant group of terrorists within a state. American officials and decision-makers who sought to solve the Afghanistan problem inflated the principle of self-defense so that international law would not be constrained by matters of temporal limitation, such as the imminence of future attacks or the need for immediacy required to repel an actual attack. The inevitable corollary envisioned a regime change in Afghanistan to replace the Taliban, which was a surrogate for terrorist interests. This relies on a notion that conflates the Taliban regime and the terrorists’ interests, manifesting the concept of a ‘terrorist state’ with only a patina of legitimate sovereignty. Thus, the Afghanistan intervention could be justified by the interesting principle that a regime sufficiently implicated in terrorism, in the

developed a reconciliation of the boundaries of legitimate international law, with the problem of global terrorism regarding the effective and appropriate reach of preventive strategies in the War Against Terrorism.<sup>275</sup> In short, the ambitious Bush Doctrine claims too much, with too little hard-nosed legal analysis to support it. The Obama Administration may moderate or correct these legal deficits in international/national law.

Underlying the Bush Doctrine is the complicated and inadequately developed notion of a unitary presidency, which

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protection of terrorist operatives, and unrepentant about the culture of terrorism within its borders may justify an invasion of the primary 'terrorist state' by a primary 'victim state' of terrorism. The specific purpose of the Afghanistan intervention was to remove all of its "terrorist state" characteristics and replace them with a new conception of statehood and sovereignty more consistent with these themes as defined by the U.N. Charter."); *Bush National Security Doctrine*, *supra* note 271, 380–81. *See generally id.* (addressing the problem of international constitutional law pertaining to the permissibility of altering the constitutional system of state sovereigns).

275. On September 5, 2006, the White House released the *2006 National Strategy for Combating Terrorism*, which provides a framework for protecting the United States and its allies from terrorist attacks. THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM (2006). "Core components of the Strategy are to disrupt and disable terrorist networks across the globe, and foster international cooperation in these efforts. Creating a global intolerance of terrorism is central as well. The 2006 Strategy differs from the 2003 version primarily in that it sets different priorities for the strategic elements designed to achieve its goals. Perhaps most significant of these differences is a major increase in emphasis on democratization as a method of combating terrorism. Additionally, the 2006 strategy places greater emphasis on denying terrorists sanctuary in underdeveloped, failed, and rogue states. The use of economic and political tools to strengthen nations vulnerable to the spread of terrorist influence appears to receive less emphasis in the 2006 Strategy than in the 2003 version." Perl, *supra* note 14, at 1–2 (examining the 2006 National Strategy in the context of its predecessor in 2003, and identifying issues and options for consideration by Congress). To the degree that the *2006 National Strategy for Combating Terrorism* does not adequately address the importance of these and other relevant factors, Perl recommends some adjustment of the strategy and its implementation. *See id.* (numbering issues inherent to the National Strategy, including: (1) democratization as a counterterrorism strategy; (2) the validity of the Strategy's assumptions about terrorists; (3) whether the Strategy adequately addresses the situation in Iraq including the U.S. presence there as a catalyst for international terrorism; (4) the Strategy's effectiveness against rogue states; (5) the degree to which the Strategy addresses threats reflected in recent National Intelligence Estimates; (6) mitigating extremist indoctrination of the young; and (7) the efficacy of public diplomacy).

has vast implications for the rule of law.<sup>276</sup> More helpfully, the Bush Doctrine also developed the notion of a “rogue state.”<sup>277</sup> Regrettably, while it may still be a useful international legal principle as a qualification on the idea of sovereignty, it has lost substantial credibility since later intelligence on Iraq’s WMD revealed that the President’s anticipatory attack on a so-called “rogue state” was used in the wrong place, in the wrong war, at the wrong time, and for the wrong reasons.<sup>278</sup> Nevertheless, while its value has dissipated in terms of international cooperation, the “Abuse of Sovereignty” idea may have substantial currency as part of a new national security doctrine for the United States.<sup>279</sup> International security may well be

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276. In assessing the legally binding aspects of the Bush Doctrine, consider that “[i]nternational law makes no distinction between treaties and executive agreements. Executive agreements, especially if significant enough to be reported to Congress under the Case-Zablocki Act, are to all intents and purposes, binding treaties under international law. On the other hand, many international undertakings and foreign policy statements, such as unilateral statements of intent, joint communiqués, and final acts of conferences, are not intended to be legally binding and are not considered treaties.” Grimm, *supra* note 177, at 4.

277. Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT’L L. 141, 170–71 (2004) [hereinafter Nagan, *Changing Character*].

Contemporary threats to international peace and security in the aftermath of 9/11 have generated concerns that powerful non-state [sic] actors might find refuge behind State protectors that in turn invoke the principle that sovereignty in international law bars intervention in the sovereign domestic jurisdiction of a State. States targeted by terrorist acts are reluctant to accept that their responses to such attacks are constrained by principles of sovereignty in international law. In response to this tension, the Bush [A]dministration has developed a national security doctrine with important challenges to sovereignty, and to notions of self-defense, the use of force, and intervention. The most controversial elements of the Bush doctrine are its claim to legitimate preemptive intervention, the implicit notion that ‘rogue’ States may not invoke sovereignty to escape retribution, and the advocacy of regime change.

*Id.* at 171.

278. The evidence relating to WMD amassed by the British Government, which the United States used to justify its anticipatory attack of Iraq in 2003, has been strongly questioned. *Bush National Security Doctrine*, *supra* note 271, 418 n.178.

279. For a careful examination of the notions of national sovereignty and the state in international law regarding the question of regime replacement in light of the abuse of sovereignty typical of the “rogue state,” see generally *Bush National Security Doctrine*, *supra* note 271 (discussing the notions of sovereignty in international law).

achieved by discriminating between bodies politic that observe international law and those that play by their own rules.<sup>280</sup>

The positive version of legal sovereignty is the one supported by the principles of democratic accountability based on transparency, responsibility and rule-of-law values.<sup>281</sup> A state that abuses its sovereignty may be under the undue influence of terrorist operatives or criminal cartels.<sup>282</sup> A new security doctrine would insist on a much more discriminating view of state conduct and its direct or indirect facilitation of groups promoting criminal activity such as terrorism and other forms of unauthorized transnational violence and coercion.<sup>283</sup>

We presume that it will remain U.S. policy to regard a sovereign state that uses its territory to shield or provide support to terrorist activity that targets the United States as one that has abused its sovereignty (or no longer maintains a legitimate claim to its sovereignty), and, as a consequence, the sovereign (under the UN charter) weakens its legal rights over its territorial integrity and political independence. Our perspective, in short, assumes that a state that has abused its sovereignty may find that its sovereignty is in fact porous and will not shield it from retaliatory attack. Thus, a state aiding and abetting terrorists may see such activity as a very high-risk

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280. See *Bush National Security Doctrine*, *supra* note 271, at 379–80 (“The first problem of international constitutional law is that the stability of the international system depends on the stability and security of the state. The state, therefore, must be given a preferred position in the international constitutional system. The circumstances under which external interferences in a state’s internal affairs might occur must be limited and specifically defined. In this sense, the U.N. Charter—with its endorsement of formal equality among states—protects the domestic jurisdiction of states and prohibits aggression against states large and small. The most explicit indicators of this constitutional principle are already in the U.N. Charter. The Charter also reflects that the international order is not static, so claims for self-determination and independence are tantamount to claims to change the composition of the sovereign entities in the international system. Accordingly, the international constitutional system, like all law, must clarify the circumstances under which it will defend the status quo or instead allow lawful change.”) (footnotes omitted).

281. See Nagan, *Changing Character*, *supra* note 277, at 166–67.

282. See *id.* at 173 & n.128 (noting that the Taliban regime in Afghanistan gave terrorists a disproportionate influence and thus transformed Afghanistan into a state that abused its sovereignty).

283. *Id.*

exercise, especially if that state aids but does not control those surrogate terror groups within its political boundaries.

Since terrorists today remain a threat, a new national security doctrine mandates the deployment and coordination of a multitude of strategic and tactical initiatives. A new administration should approach the rethinking of U.S. security doctrine with a key concern for avoiding the mistakes of the Bush Administration. We suggest that the approach be comprehensive. The Bush Administration's undue reliance on rather conventional military strategies, and its depreciation of other important strategic assets, has been unpromising and very expensive.

The U.S. military's drawn-out struggle has proven the price of engaging in this type of warfare. "[Counterinsurgency] is an extremely complex form of warfare. At its core, [counterinsurgency] is a struggle for the population's support" that requires great flexibility, creative thinking, and skilled tactical deployment.<sup>284</sup> Conventional military force in dealing with an asymmetrical threat may be too limited a strategic posture, dictating tactics that are costly and ineffective.

The necessary policy to promote and achieve such a goal requires a toolkit broader and more politically nuanced than the wooden, unimaginative approach of the Bush Administration. Such an objective would be congruent with the strategic assets that the United States would effectively deploy in the national interest.<sup>285</sup> These include the economic instrument, the military and intelligence instruments, and the communication instruments (touching upon diplomacy, ideology, and education).<sup>286</sup> Central to such an approach is the importance of skilled professional diplomacy to complement a multitude of

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284. HEADQUARTERS, DEPARTMENT OF THE ARMY, COUNTERINSURGENCY 1-24 (2006) [hereinafter COUNTERINSURGENCY FIELD MANUAL].

285. See PERL, *supra* note 14, at 4 (stating that the long-term objectives of the National Strategy for Countering Terrorism "include[;] (1) winning the War of Ideas by advancing effective democracy; (2) promoting international coalitions and partnerships; and (3) enhancing government counterterrorism infrastructure and capabilities.").

286. See COUNTERINSURGENCY FIELD MANUAL, *supra* note 284, at 3-1, 3-3 (explaining the value of political, social, and economic programs in addressing the root causes of conflict and undermining an insurgency).

other possible persuasive initiatives in addition to coercive modalities of action.<sup>287</sup>

Diplomacy should be a bridge in shared nation-building enterprises.<sup>288</sup> This should involve the enormous and unused assets of broader civil society collaboration and communication. This includes cooperation in economic development, the sciences, the humanities, the arts, and, in general, educational cooperation. This will be a more complex but critical investment in long-term U.S. security. The close ties we have, culturally, with states abroad will also provide us as an incident of cooperation with important insights into that state's security strengths and weaknesses, threats, and opportunities for cooperation.

The enormously talented civil society of the United States should therefore be an active partner in the process of representing U.S. values and concerns on a global basis.<sup>289</sup> Perhaps opening up societies to cooperation should use the

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287. *Id.* at xxix; (“The field manual stresses the role of politics and outlines an ideal balance of civil and military responsibilities in COIN. The manual highlights military dependence not simply upon civilian political direction at all levels of operation, but also upon civilian capacities in the field. It asks the U.S. civilian leadership and bureaucracy to take on more of the responsibility and burden.”).

288. *See id.* at xxix–xxx (“In the American civil-military tradition, elected political leaders decide when to use force. Military leaders defer to civilians on the choice of war, and apply their professional military judgment to the conduct of war . . . . Counterinsurgency is different [from conventional military performance] for two reasons. First, the primacy of the political requires significant and ongoing civilian involvement at virtually every level of operations. Political leadership may ultimately deliver a negotiated solution to aspects of the conflict or to the insurgency itself. Civilians are also presumed best able to advise the host nation government about various nonmilitary policies to enhance its legitimacy and marginalize insurgents. Equally important, success in COIN relies upon non-kinetic activities like providing electricity, jobs, and a functioning judicial system. This wide swath of operational capacities for nation-building do not reside in the U.S. armed forces.”).

289. *See generally id.* at xxx (“The Army had avoided developing specialized capacities for peacekeeping in the 1990s. Come Afghanistan and Iraq, then, the military gamely assumed it could rely upon other government agencies for these tasks.” However, “[t]he State Department, the Agency for International Development, the Department of Justice, and other agencies often lack relevant operational competencies. The diplomatic culture is observing and reporting, and most development work involves contracting others for long-term results. And unlike their military counterparts, civil servants cannot be compelled to serve.”).

model of “ping-pong diplomacy”<sup>290</sup> but applied to an educational “ping” and a developmental “pong.” Apart from the importance of American interests in democracy and fundamental rights, economic enterprise, and cultural equity and fairness, there are also the strengths of civil society in the United States in practical development, environmental justice, human rights activism, and educational opportunity. These components of U.S. culture are an important part of the long-term security preparedness of the nation. These civil society groups can facilitate policies of power-sharing, economic justice, and guidance toward good governance and the rule of law foundations of development.<sup>291</sup>

Additionally, U.S. business is global, and the United States should therefore expect that its global representation in this field is reflective of the American values of fairness, equality and responsibility. The corporate presence of the United States in any state should not be complicit in the reproduction of alienation and anger, which may provide an excuse for grievances against the United States that could dissolve into terrorism. In the frontline<sup>292</sup> of the fight against terrorism, what

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290. Public Broadcasting Service, *Ping-Pong Diplomacy*, <http://www.pbs.org/wgbh/amex/china/peoplevents/pande07.html>.

291. However, this approach must take into critical account “a serious imbalance between the authorities, capabilities, and funding for our military institutions, and the support we provide to the civilian instruments of power.” Former Government Official, *supra* note 251, at 3.

Responsibility for diplomacy and foreign assistance is scattered in a ‘diaspora’ of organizations and programs. There are now over [twenty] different federal institutions and departments involved in international activity and foreign assistance; support for post-conflict intervention and reconstruction is provided through at least seven different funding channels; and support for governance and democracy through at least ten programs. Overall, funding and staffing for our civilian global engagement—traditional diplomacy, public diplomacy, and foreign assistance—is inadequate.

*Id.*

292. Global efforts to combat nuclear terrorism are providing an additional focal point for addressing the treatment of detainees taken in the war on terror. The International Convention for the Suppression of Acts of Nuclear Terrorism adopted by consensus by the UN General Assembly on April 13, 2005, arguably helps demonstrate that detainee policies can be shaped within the context of multilateral cooperation to fight terrorism, including terrorism tied to the illicit spread of WMD. Steven C. Welsh, Ctr. For Def. Info., *Nuclear Terrorism & Detainee Policies: Int’l Convention for the*

we should be exporting is U.S. values, reflected in U.S. civil society as a partner for government in universally promoting the long-term goal of humane and honest governance.<sup>293</sup> Diplomacy however, in conventional terms, assumes state-to-state community and cooperation, which is supposed to generate opportunity and restraint.<sup>294</sup> Enhanced diplomacy should be a critical component of a new national security doctrine, but it alone is not sufficient in the effective articulation and grounding of U.S. interests.

The critical issue for U.S. and NATO security interests, as well as the broader interests in global peace and security, is the unpredictability of terrorism and the genuine concern that terror groups may acquire and deliver some forms of WMD. Should this happen, even a retaliatory strike against a state which ostensibly aids and abets the terror group will not undo the damage done. Indeed, it could catalyze a train of unforeseen reactions, leaving all states (including the original victim state) in a much worse position than if the victim state had not even reacted at all. While retaliation provides satisfaction, a strategy of prevention avoids both the original incident and the spiraling engagement in conflict that proceeds from the retribution after the fact. Thus, the critical challenge with regard to U.S. policy and the nuclear arsenal/terrorist problem must be preventive.

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*Suppression of Acts of Nuclear Terrorism*, June 17, 2005, <http://www.cdi.org/news/law/ntc-detainees.cfm>.

293. "As a consequence, in part, of civilian institutional weaknesses, we have asked our military organizations to perform an expanding range of foreign assistance missions normally overseen by the civilian institutions. New programs and directives have expanded the military's mission to include reconstruction and stabilization, humanitarian assistance, foreign security force training, and even economic development. Many of these missions are outside the military's core competence. They include programs that parallel existing programs at State and U.S. Agency for International Development (USAID), further contributing to the diaspora and inadequate coordination of foreign assistance and national security policy planning. Combined with the costs of deployments to Iraq and Afghanistan, we have doubled defense budgets to roughly \$700 billion a year, seriously weakening planning and budgeting discipline in the Defense Department. The result of this trend is an overstretched military, weaker civilian capacity, and a uniformed face on America's global engagement." See Former Government Official, *supra* note 251, at 3.

294. HANDBOOK OF INTERNATIONAL RELATIONS 215–218 (Walter Carlsnaes, Thomas Risse, Beth A. Simmons eds., Sage 2002).

This modest shift in the direction of a new national security doctrine is a critical strategic shift in more effectively protecting homeland and global security.

A preventive strategy is, in fact, broader than simple deterrence.<sup>295</sup> It involves strategies that effectively and exponentially reduce the risk of a nuclear arsenal/terrorist form of attack. A new national security doctrine must significantly enhance the role of diplomacy and civil society and elicit respect for the U.S. global presence based on the most fundamental values of the American experience. A broader approach to communication and collaboration through all the channels of state and society may yield credible information and understandings of long-term value. This strategic information is requisite to prevent terrorism from happening, here and abroad, and to generate a stronger shared interest in combating the terrorist threats. The notion of homeland security must be unambiguously linked to the larger world community and global security.

Regrettably, there is no magic bullet to secure this particular objective. The Bush Administration has opted for a myopic national security policy that seeks to undermine the traditional position of the United States as a leading force in global arms control: the Global Strike Option. These policies are

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295. U.S. policy makers must address holistic requirements for deterrence. "The aim of deterrence has always been to make an adversary fear it will suffer unacceptable consequences if it takes certain actions. Many believe that the U.S.-Soviet deterrent relationship worked during the Cold War because threats were credible and each side understood the consequences of attacking the other. In the post-Cold War, post-9/11 world, many questions arise. Who is to be deterred, by what threats? What weapons are needed to make them credible? Is deterrence dynamic, with constant weapons development needed to respond to changing threats, or is a modest number of nuclear weapons of existing designs, together with U.S. conventional forces and economic might, more than sufficient? Are existing nuclear weapons sufficient to deter North Korea, or are new ones needed that could destroy underground bunkers where leaders might hide, or is the nation so irrational that it is beyond deterrence, or is a North Korean nuclear attack wildly implausible? Is a satisfactory outcome possible through diplomacy? What capabilities are needed to deter Iran or to roll back its nuclear program? Do nuclear forces have any relevance to deterring terrorists or their state sponsors?" Medalia, *supra* note 13, at 4; *see id.* (considering the CTBT and nuclear testing issues that link to these broader issues of deterrence).

a radical change in the U.S. arms control policy.<sup>296</sup>

The increasing danger of lawlessness on the global nuclear market has heightened its threats with the introduction of U.S. military strategies that authorize preemptive strikes using nuclear technology. When the Bush Administration came into office, it was uninterested in the pending status of the CTBT.<sup>297</sup> Ignoring the CTBT, the administration initiated a major review of the nation's nuclear posture and emerged with a highly controversial new doctrine: the Global Strike Option.<sup>298</sup>

The Global Strike Option implies that the United States no longer seriously pursues a policy of nuclear arms control. This implication furthers the unintended message that the United States is no longer deeply committed to nuclear arms control. In the current state of world order (or disorder), an ambiguous position on arms control may generate nuclear slippage.

While the Global Strike Option focuses on state adversaries,

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296. Jonathan Schell, *A Revolution in American Nuclear Policy*, GLOBAL SECURITY INSTITUTE, May 26, 2005, <http://www.ginstitute.org/archives/000268.shtml>.

297. See Blechman, *supra* note 265, at 8 (explaining how the Bush Administration disliked arms control treaties, including the CTBT, and exercised its right to withdraw from the Anti-Ballistic Missile Treaty in 2003).

298. See Jonathan Schell, Op-Ed., *Letter from Ground Zero: A Revolution in American Nuclear Policy*, *Nation*, June 13, 2005, at 12 (Schell is The Nation's peace and disarmament correspondent who describes the Global Strike Option as a "shocking innovation").

For the most part, the Bush [A]dministration has sought to downplay the role of nuclear weapons in U.S. foreign policy, though it has been unsuccessful in conveying this position to much of the world. Its Nuclear Posture Review was completed at the end of 2001 and revamped U.S. doctrine to elevate the role of defenses in U.S. strategy and to open the possibility of utilizing conventional weapons in place of nuclear weapons for offensive strike missions. It also reduced significantly the size of the U.S. arsenal; under current plans, the U.S. stockpile will be halved by 2012 as compared to its size in 2000. At the same time, the [A]dministration has tried to modernize the U.S. nuclear infrastructure, indicating a continuing interest in maintaining weapons indefinitely and to develop two new types of nuclear weapons: during its first term, it sought to develop a low-yield, earth-penetrating warhead that could be used against such underground targets as command centers; more recently, it sought to develop a Reliable Replacement Warhead (RRW) to hedge against the failure of existing warheads.

Blechman, *supra* note 265, at 9.

the real risk to U.S. security interests may be overlooked. Those risks are the ubiquity of non-state terrorist activity. History has shown that it is not easy to predict how an obscure alienated group in some part of the planet will air their grievances. The apparent focal lens of the Global Strike Option misdirects our attention from this threat.

The combination of grievance, alienation, repression, and psycho-pathology makes it important to identify as early as possible the threat or potential threat to security, and deploy a completely comprehensive toolkit of intervention prior to those conflicts gravitating from low intensity to difficult-to-contain high intensity conflicts. It is a reasonable assumption that terrorists will attempt to access the technology and techniques of developing crude devices for ruthless terror operations.<sup>299</sup>

Central to the terrorists' perspective is that there is no deterrence to the sacrifice of both victim and perpetrator. Therefore, it is critical that the U.S. nuclear posture be equipped with flexible strategies and a wider toolkit of diplomatic, ideological, economic, and the plenitude of coercive modalities of action. The objective of a new national security doctrine must therefore develop strategies that enhance the prospect of prevention—in particular, preventing access and deployment (as well as threats and uses) of WMD.

A critical starting point of a new national security doctrine must be the important question of arms control and U.S. leadership in this field.<sup>300</sup> The prospect of arms control hinges

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299. Bunn & Newman, *supra* note 248, at 29 (“Nuclear terrorism is a real and dangerous threat. Some terrorist organizations, particularly [a]l Qaeda, are seeking nuclear weapons. While the overthrow of the Taliban and the disruption of [a]l Qaeda’s old central command structure certainly reduced [a]l Qaeda’s chances of pulling off such a complex operation, [a]l Qaeda is reconstituting in the tribal areas of Pakistan. Making nuclear bomb material from scratch is beyond the plausible capabilities of terrorist groups, but if a sophisticated group got enough highly enriched uranium (HEU) or separated plutonium, it might well be able to make a crude nuclear bomb. Indeed, the U.S. intelligence community assesses that an [a]l Qaeda nuclear bomb effort probably would not require the involvement of more than the number of operatives who carried out the September 11, 2001 attacks, and could be just as compartmented, making it extraordinarily difficult for the intelligence community to detect and stop.”).

300. MATTHEW BUNN, *SECURING THE BOMB* 208 174–75 (2008) (“For better or for worse, there is no substitute for U.S. leadership: the United States is the country most concerned about the nuclear terrorist threat, the country prepared to devote the largest

upon U.S. credibility. Central to U.S. credibility in this field is the U.S. position on the CTBT and the future of nuclear arsenals on a global basis.

The current treaty commitment for which the United States is bound is the obligation of Article VI of the NPT.<sup>301</sup> Under Article VI, the United States “undertakes to pursue negotiations in good faith on effective measures relating to the cessation of the . . . arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”<sup>302</sup> This good-faith obligation is a solemn treaty obligation of the United States, of its new administration, and of its new Senate.<sup>303</sup>

The pact underlying the NPT was a deal between nuclear weapon and non-nuclear weapon states.<sup>304</sup> The deal was that the latter forego acquisition of nuclear weapons and remain non-nuclear.<sup>305</sup> The nuclear weapon states committed themselves to a serious process of arms control in which nuclear weapon systems were to be central in the cessation of the arms race with a view to ultimate nuclear disarmament with all deliberate speed.<sup>306</sup>

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resources to reducing it, the country that invests most heavily in securing its own large stockpiles, and hence the country with the most extensive experience in modern systems-engineering approaches to nuclear material protection, control, and accounting (MPC&A).”).

301. See McNamara, *supra* note 249, at 31. U.S. leaders have acknowledged the country’s ethical obligations. See *id.* (“We pledged to work in good faith toward the eventual elimination of nuclear arsenals when we negotiated the Nuclear Non-Proliferation Treaty (NPT) in 1968.”); see also Grimmett, *supra* note 177, at 264 (quoting Madeline Albright as stating that the United States will “live up to the conditions of the treaty,” even after the Senate rejected the treaty).

302. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T. at 483.

303. See generally *id.* (showing that, because the United States is a signatory, the Treaty and its good faith obligation is binding on the United States, regardless of administration changes).

304. Rebecca Johnson, *Nuclear Weapons Treaty: An Idea Whose Time Has Come*, DISARMAMENT DIPL., Winter 2008, available at <http://www.acronym.org.uk/dd/dd89/89rej.htm>.

305. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T. at 483.

306. *Id.*

The critical importance of the CTBT was its prohibition on testing nuclear arsenals. This is a critical limitation on the ambitions of would-be nuclear power aspirants. Untested arsenals are particularly dangerous to those who might consider using them. The NPT and the CTBT are critical components of the arms control strategy for ridding the world of its most dangerous threat.

Beyond legal representations of global responsibility, the United States must approach the issue of ideological beliefs with the flexibility of a solution-oriented approach to specific problems in which there is respect for engagement that clarifies the similarities and sensible differences between states in terms of mutual respect and peaceful coexistence.<sup>307</sup> The United States must not approach cultural identity or confessional outlook as an impenetrable fact.<sup>308</sup> Instead, specific perspectives of identity and belief must be actively engaged in, understood, moderated, and translated into terms of shared values in peace, security, and dignity.

Additionally, the United States has used, and should continue to use, economic instruments to advance its interest in

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307. The approach has been described as follows:

While the United States has had success in eliminating a number of terrorist leaders and foiling planned attacks, our government has invested less effort, let alone enjoyed success, at preventing the global recruitment and ideological commitment of extremists who might seek to use nuclear or biological weapons against America or its allies. These efforts demand an approach far different from that used to capture or kill terrorists and facilitators. They require the tools of soft power, which include the ability to communicate persuasively about American intentions and to assist in promoting social and economic progress within those countries where the terrorists have a recruiting presence. Government agencies must think creatively to develop and coordinate efforts—ranging from strategic communications to targeted development assistance—to engage those who might otherwise be drawn to terrorist causes.

GRAHAM ET AL., *supra* note 5, at xxvi–xxvii. *See generally id.* (recommending that U.S. counterterrorism strategy must more effectively counter the ideology behind WMD terrorism, and that the United States should develop a more coherent and sustained strategy and capabilities for global ideological engagement to prevent future recruits, supporters, and facilitators).

308. *See* Former Government Official, *supra* note 251, at 3 (listing “[i]dentity conflicts (religion, ethnicity and nationality)” among the five fundamental issues and underlying trends that the Obama Administration would need to deal with).

shared security. Historically, the United States has used economic coercion or incentives to generate a wide and flexible range of foreign policy options.<sup>309</sup> Such economic incentives produce behaviors that combine a state's self-interest with broader values of bilateral and multilateral cooperation.

Finally, the military instrument must remain in a strong condition of high preparedness. Central to this idea is that, the better the perception is of U.S. military capability, the less likely it is that the United States will be challenged to deploy and wield its great powers of military coercion. Even where the expected outcome of U.S. military deployment is to prevail, a critical outcome of such a posture should be its non-use. In fact, military force should provide a wider toolkit of coercive strategies short of actual violent confrontation.<sup>310</sup> U.S. foreign policy must move away from strategies like the Global Strike Option, which, by embracing an aggressive first-strike policy, promotes global insecurity and an incentive to enhance proliferation of nuclear arsenals, with attendant dangers for the security of the United States.

## VI. CONCLUSION

“Every man, woman, and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us.”<sup>311</sup>

A comprehensive test ban treaty will halt the spiraling arms race, obstruct the emergence of new nuclear powers, and prevent further devastation of human health<sup>312</sup> and the global

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309. See How Sanctions Can Affect U.S. Policy Interests, Statement Before the H. Committee on International Relations, 105th Cong. (June 3, 1998) (statement of Daniel Fisk, Bd. of Dirs., Inst. for U.S. Cuba Relations), available at [http://www.fas.org/spp/starwars/congress/1998\\_h/h980603df.htm](http://www.fas.org/spp/starwars/congress/1998_h/h980603df.htm).

310. “There is an urgent need to rebalance our foreign policy and national security toolkit, restructure the institutions and processes, and provide adequate funding for the civilian instruments of power.” Former Government Official, *supra* note 251, at 4.

311. Zia Mian, *Nuclear Promises*, FOREIGN POLY IN FOCUS (June 4, 2009), available at <http://fpif.org/fpiftxt/6166>.

312. Over 2,000 nuclear tests have been conducted and “atmospheric testing

environment.<sup>313</sup> Even though the science fiction nature of arresting any sort of nuclear advancement suggests that human efforts can never return the genie to its bottle, no one will be able to confidently develop advanced new nuclear weapons without testing.<sup>314</sup> This will prevent nuclear proliferation and will also serve as a barrier to current nuclear powers from developing technologically advanced weapons not within their current capability.<sup>315</sup> Perhaps, most importantly, it will fulfill

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directly produced 430,000 fatal human cancers by the year 2000. Eventually that total will be 2.4 million.” Statement of Nongovernmental Organizations to the Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) (Sept. 5, 2003) [hereinafter NGO statement].

313. *Id.* Article XIV conferences are held every other year to discuss methods to obtain the signatures and ratifications of all the necessary states to the CTBT. John R. Burroughs et al., *Arms Control and National Security*, 36 INT’L LAW. 471, 491 (2002); About the Article XIV Conferences: CBTO Preparatory Commission, <http://www.ctbto.org/the-treaty/article-xiv-conferences/about-the-article-xiv-conferences/> (last visited Oct. 24, 2009) (stating that Article XIV conferences are held every other year). The NGO statement was endorsed by a coalition of nongovernmental organizations numbering over 100 and including the Medical Association for Prevention of War, International Physicians for the Prevention of War, Physicians for Global Survival, The Acronym Institute for Disarmament Diplomacy, The Atomic Mirror, Campaign for Nuclear Disarmament (UK), Grandmothers for Peace, International Institute for Peace, International Human Rights Observer, Lawyers Committee on Nuclear Policy, Pax Christi (USA), Women’s International League for Peace and Freedom (WILPF), Women Against Nuclear Power, Trade Union Campaign for Nuclear Disarmament, Peacequest International, The Arms Reduction Coalition, Action for U.N. Renewal, Nuclear Age Peace Foundation, Physicians for Social Responsibility, and Institute for Law and Peace. Letter from Thomas Schoenfeld, Chairperson, NGO Committee on Peace, to Colleagues of the NGO Community (Sept. 10, 2003), *available at* [http://www.ngocongo.org/files/letter\\_about\\_the\\_ctbt\\_conference.doc](http://www.ngocongo.org/files/letter_about_the_ctbt_conference.doc); Letter from Ambassador Paul. H. Nitze, Chairman of the Committee to Support the CTBT, to Senator Helms, (Feb. 4, 1999) (Online with the Comprehensive Test Ban Treaty Site, Coalition to Reduce Nuclear Dangers, *available at* <http://www.clw.org/archive/coalition/laws0299.htm>).

314. Johnson & Kimball, *supra* note 233; Walter Pincus, *U.S. to Seek Options on New Nuclear Tests, White House Worries About Arsenal’s Reliability*, WASH. POST, Jan. 8, 2002, at A4; Lawrence Scheinman, *Comprehensive Test Ban Treaty*, NUCLEAR THREAT INITIATIVE, Apr. 2003, *available at* [http://www.nti.org/e\\_research/e3\\_9a.html](http://www.nti.org/e_research/e3_9a.html).

315. John Shalikhvili Remarks at the Carnegie International Non-Proliferation Conference (Mar. 16, 2000), *available at* <http://usinfo.org/wf-archive/2000/000316/epf414.htm> (“Without testing there is no way to be sure that a new design will function as intended, or perhaps at all.”); NGO Statement, *supra* note 312.

the disarmament commitments the nuclear powers set forth at the signing of the NPT.<sup>316</sup>

No doubt, concerns remain. Proponents of the CTBT must answer these significant questions: Will the CTBT allow the United States to ensure that their current nuclear arsenal will continue to function properly? Will the CTBT allow the United States to maintain its nuclear superiority? Is the United States assured that other states will comply with CTBT obligations? If there are extraordinary circumstances, can we pull out of the Treaty? The answers to all of these questions are yes; and we shall examine each issue in turn.

*Under the CTBT, Can the United States Safely Maintain Current Nuclear Arsenal?*

Yes. After ratifying the CTBT, the United States will maintain the capacity to ensure that its own stockpile of nuclear weapons continues to function properly.<sup>317</sup> The Stockpile Stewardship Program was established to ensure that our current stockpile remains a safe, effective and reliable deterrent without having to rely on nuclear testing.<sup>318</sup> It was designed as a “functional equivalent to nuclear testing.”<sup>319</sup> The science-based program was budgeted at \$6.356 billion in 2008 and attracts

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316. Scheinman, *supra* note 314. A Comprehensive Test Ban Treaty is an objective in the Treaty’s Preamble, and Article VI of the NPT provides for the obligation to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.” Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 16, 21 U.S.T. at 490. The interpretation of this clause specifically calls for a comprehensive test ban treaty. See, e.g., George Bunn & Roland M. Timerbaev, *Nuclear Disarmament: How Much Have the Five Nuclear Powers Promised in the Non-Proliferation Treaty?* in AT THE NUCLEAR CROSSROADS: CHOICES ABOUT NUCLEAR WEAPONS AND THE EXTENSION OF THE NON-PROLIFERATION TREATY 26 (John B. Rhinelander & Adam M. Scheinman eds., 1995); David A. Koplow, *Nuclear Testing and the Non-Proliferation Treaty* in AT THE NUCLEAR CROSSROADS: CHOICES ABOUT NUCLEAR WEAPONS AND THE EXTENSION OF THE NON-PROLIFERATION TREATY 64-68 (John B. Rhinelander & Adam M. Scheinman eds., 1995).

317. *CTBT Facts and Fiction*, BUREAU OF ARMS CONTROL, Oct. 8, 1999, [http://www.fas.org/nuke/control/ctbt/news/fs\\_91008\\_factsnfiction.htm](http://www.fas.org/nuke/control/ctbt/news/fs_91008_factsnfiction.htm).

318. *Id.*; Lawrence Scheinman, *Issue Brief: Comprehensive Test Ban Treaty*, Monterey Institute of International Studies, Apr. 2003, available at [http://www.nti.org/e\\_research/e3\\_9a.html](http://www.nti.org/e_research/e3_9a.html); see also Scheinman, *supra* note 314 (stating that the Stockpile Stewardship Program was “established to ensure that the enduring stockpile remains a safe, effective, and reliable deterrent without having to rely on nuclear testing.”).

319. Scheinman, *supra* note 314.

some of the country's best scientists.<sup>320</sup> The program ensures that the United States could maintain our nuclear deterrent posture under the CTBT.<sup>321</sup> Moreover, the safety of the nuclear stockpile could be sufficiently maintained by a science-based stewardship program.<sup>322</sup>

During the Senate hearings, the Stewardship Program was one of the most hotly debated topics and opponents of the Treaty argued that the Program could not guarantee the reliability of the nuclear arsenal.<sup>323</sup> Since that time, the National Academy of Sciences conducted a study to determine whether the technical concerns raised about the CTBT during the Senate hearings were legitimate.<sup>324</sup> Formed at the request of General John Shalikashvili, former Chair of the Joint Chiefs of Staff and then special adviser to the President and Secretary of State, the committee was chaired by Harvard Professor John P. Holdren

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320. Issues and Arguments, *supra* note 4; SIDNEY DRELL, ET AL., JASON NUCLEAR TESTING STUDY SUMMARY AND CONCLUSIONS (Aug. 3, 1995), *available at* <http://www.fas.org/rlg/jsr-95-320.html> [hereinafter JASON Report].

321. Scheinman, *supra* note 314; *see generally* JASON Report, *supra* note 320.

322. General John Shalikashvili explained that the United States' interests in guarding the United States' nuclear stockpile would be protected with a science-based stewardship program. *See Comprehensive Nuclear Test Ban Treaty: Panels II & III of a Hearing of the S. Armed Servs. Comm.*, 106th Cong. (1999) (statement of Gen. John Shalikashvili, former Chairman, Joint Chiefs of Staff) (supporting the CTBT because it will limit nuclear weapons development, improve detection of nuclear testing, strengthen nonproliferation, and retain the U.S. global leadership role). He predicted in 1999 that by 2005 "the science-based stockpile stewardship program should be sufficiently advanced." *Id.* Secretary of Energy, Bill Richardson, stated in unambiguous terms that the United States could ensure the reliability of the nuclear stockpile without testing: "We can enter into the Comprehensive Test Ban Treaty armed with the knowledge that our nuclear arsenal is reliable, and it will continue to be so . . . . The supercomputer we use today is thousands of times faster than those of a decade ago, and provides the leading edge simulation capabilities needed to assist certification requirement without nuclear testing." *Comprehensive Nuclear Test Ban Treaty: Hearing on the CTBT Before the S. Armed Servs. Comm.*, 106th Cong. (1999) (Statement of Bill Richardson, Sec'y of Energy).

323. Issues and Arguments, *supra* note 4; *see Senate Rejects Comprehensive Test Ban Treaty; Clinton Vows to Continue Moratorium*, ARMS CONTROL ASSOCIATION (1999), *available at* [http://www.armscontrol.org/act/1999\\_09-10/ctbso99](http://www.armscontrol.org/act/1999_09-10/ctbso99).

324. NATIONAL ACADEMY OF SCIENCES, TECHNICAL ISSUES RELATED TO THE COMPREHENSIVE NUCLEAR TEST BAN TREATY vii (2002), *available at* <http://www.nap.edu/html/ctbt> [hereinafter NAS Study].

and filled with respected scientists.<sup>325</sup> They concluded that the main technical concerns of the CTBT were in fact manageable.<sup>326</sup> Provided certain measures are taken, including ensuring a high quality work force and maintaining a rigorous stockpile program, the U.S. has the technical capabilities to maintain confidence in the safety and reliability of its nuclear arsenal without periodic nuclear explosions.<sup>327</sup>

Aside from the study, the CTBT contains a zero yield prohibition on testing; essentially, this prohibits any explosion which yields nuclear explosive energy.<sup>328</sup> This is highly salient for two vital reasons: subcritical testing and virtual testing are permitted.<sup>329</sup> Subcritical experiments are underground explosions that provide the United States with critical insight into our nuclear arsenal without producing a nuclear explosion.<sup>330</sup> As technology advances, virtual testing is proving to be another useful tool in our nuclear stewardship.<sup>331</sup>

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325. *Id.*

326. *See id.* at 34 (concluding that the United States was sufficiently technologically advanced to meet any concerns raised by the CTBT).

327. *Id.*; *see also* JASON Report, *supra* note 320 (concluding that, among other things, as long as the United States is allowed to invoke a supreme national interest clause, there should be no problems in the safety and reliability of its nuclear stockpile); David Hafemeister, *The Case For the Comprehensive Test Ban Treaty*, J. FED'N AM. SCIENTISTS, Jan.–Feb. 1997, at 9–10, available at <http://www.fas.org/faspir/pir0297.htm#testban>; Drell, *supra* note 232.

328. Article 1 provides that “[e]ach State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion.” CTBT, *supra* note 1, 35 I.L.M. at 1444.

329. Asada, *supra* note 115, at 87. The drafting history of the Treaty supports the idea that subcritical testing is permitted; Indonesia proposed prohibiting subcritical tests but later withdrew its request for the sake of compromise. *Id.*

330. *Id.* at 87 n.6; *see also* TARIQ RAUF, TOWARDS NPT 2005: AN ACTION PLAN FOR THE “13 STEPS” TOWARDS NUCLEAR DISARMAMENT AGREED AT NPT 2000 27 (Center for Nonproliferation Studies) (stating that proponents justify subcritical experiments because they provide data to assess the reliability and safety of nuclear explosives). Subcritical experiments are carried out at the Nevada Test Site and they involve “chemical high explosives and fissile materials in configurations and quantities such that no self-sustaining nuclear fission chain reaction can result.” *Id.* at 26.

331. *See Nuclear Testing Goes Virtual*, IEEE SPECTRUM (Dec. 2005), available at <http://www.spectrum.ieee.org/energy/nuclear/nuclear-testing-goes-virtual>.

*Under the CTBT, Will the United States Maintain its Nuclear Superiority?*

Yes. The United States can maintain its nuclear preeminence in the world without engaging in an expensive and dangerous arms race. Currently, the United States holds an unparalleled lead in nuclear technology.<sup>332</sup> The United States has conducted over 1,030 tests, far more than any other state.<sup>333</sup> When the United States ratifies the Treaty, India and Pakistan have hinted that they will follow suit;<sup>334</sup> China has repeatedly expressed its intention of ratification.<sup>335</sup> At this point, nuclear testing will be frozen and the U.S. lead in technology will be guaranteed in perpetuity.<sup>336</sup> Without testing, nuclear states will

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332. Johnson & Kimball, *supra* note 233.

333. Hafemeister, *supra* note 327. The Soviet Union/Russia has conducted 715, the UK 45, France 210, and China 45. JONATHAN MEDALIA, NUCLEAR WEAPONS: COMPREHENSIVE TEST BAN TREATY, (2005), available at <http://www.history.navy.mil/library/online/nucweeps%20test%20ban.htm>.

334. India, Pakistan, and China have declared voluntary moratoriums on testing, and Pakistan and India have said that the signature of the CTBT awaits the development of a “consensus” for such action. NUCLEAR THREAT INITIATIVE, CBT-MAJOR PROVISIONS AND RELATED ISSUES (2009) [http://www.nti.org/f\\_wmd411/f2l1.html](http://www.nti.org/f_wmd411/f2l1.html); Johnson & Kimball, *supra* note 233. After visits to India, Senator Arlen Specter stated that “[i]n my discussions with officials it became evident that securing compliance with the CTBT by these two nations without U.S. ratification would be problematic.” MEDALIA, *supra* note 333. Lalit Mansingh, India’s Foreign Secretary, “expressed his

sentiment that U.S. should not expect India to sign a treaty that the U.S. itself perceives as flawed.” *Id.*

335. *China Assures U.N. of Ratifying CTBT Soon*, DAWN (Pakistan), (Sept. 4, 2003), available at <http://www.dawn.com/2003/09/05/int7.htm>. “We will see a Chinese ratification, rather sooner than later,” Zhang Yan, the Chinese ambassador to Vienna said. “To ratify they need a broad consensus. . . . I feel that this broad consensus is evolving.” *Id.* China has conducted thirty-nine tests and the Chinese government reportedly wrote to the U.N. Secretary General that “after a comprehensive test ban treaty is concluded and comes into effect, China will abide by it and carry out no more nuclear tests.” MEDALIA, *supra* note 333, at 4. “In a white paper of December 2004, China stated its support of early entry into force” and its continued commitment to the test moratorium until that is accomplished. *Id.*

336. See Scheinman, *supra* note 314 (noting that the CTBT will make it “more difficult” for nuclear countries to develop more advanced weapons); see also Coalition to Reduce Nuclear Dangers, *For a Safer America, The Case for a Comprehensive Test Ban Treaty*, available at <http://www.crnd.org> [hereinafter Coalition to Reduce Nuclear Dangers]. The Coalition is a nonpartisan alliance of seventeen of the nation’s leading nuclear arms control and nonproliferation organizations. Their members include: Arms

not be able to upgrade their current nuclear technology, essentially freezing each nuclear state in its current level of proficiency.<sup>337</sup> For China, this would impede modernization of its nuclear arsenal and prevent it from developing smaller warheads that could ride on a MIRVed ICBM.<sup>338</sup> India and Pakistan would be unable to upgrade their rudimentary one-stage fission nuclear devices to more advanced thermonuclear weapons.<sup>339</sup> Even Russia would be unable to develop new types of tactical nuclear weapons.<sup>340</sup> The CTBT allows state parties to pursue strong measures against States that test in violation of the Treaty.<sup>341</sup>

Nonnuclear states would be unable to test weapons and would therefore be prevented from joining the nuclear club with any real confidence in any of their nuclear devices.<sup>342</sup> Although the CTBT is not a panacea to the nuclear problem, there is no magic potion that can solve all global problems. With the NPT and CTBT in force, any rogue state determined to develop

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Control Association, Center for Defense Information, Federation of American Scientist, and Lawyers Alliance for World Security, Peace Action Education Fund, Physicians for Social Responsibility, Union of Concerned Scientists, Plutonium Challenge, Institute for Science and International Security. Adam Eidinger, *Democrats Threaten to Bring Senate to Standstill over Nuclear Test Ban Treaty*, Aug. 31, 2009, <http://www.commondreams.org/pressreleases/august99/083199b.htm>. Nobel Prize Winning physicist and former Director of Theoretical Division of Los Alamos wrote in a letter to the President, “[t]his treaty is uniquely in favor of the United States. We have a substantial lead in atomic weapons technology over all other states . . . we have no interest and no need for further testing.” He concluded with, “[o]ther existing nuclear powers would need tests to make up this technological gap.” 145 CONG. REC. 137, s12354, (daily ed. Oct. 12, 1999) (statement of Sen. Kennedy).

337. Asada, *supra* note 115, at 88; Steve Kirsch, *Ratifying the Comprehensive Test Ban Treaty: Reflection # 2*, KIRSCH FOUNDATION 2000, available at [http://www.kirschfoundation.org/who/reflection\\_2.html](http://www.kirschfoundation.org/who/reflection_2.html).

338. Hafemeister, *supra* note 327.

339. Scheinman, *supra* note 314 (noting that proponents argue a ban would impede new nuclear states from developing advanced two-stage weapons without testing).

340. See NAS Study, *supra* note 324, at 10 (asserting that Russia would not be a threat to U.S. security under the CTBT); see *id.* (asserting that Russia could test and develop new weapons if the CTBT fails).

341. Johnson & Kimball, *supra* note 233.

342. See Asada, *supra* note 115, at 88 (stating that because a test ban would preclude confirming whether a newly developed weapon operates as designed, nonnuclear states would not know if the weapons actually worked).

nuclear weapons does so in the face of enormous international pressure and stands to suffer the full range of reprisals authorized by international law.<sup>343</sup>

*Is the United States Assured that Other States Will Comply with CTBT Obligations?*

Yes. The CTBT Organization has the political, economic, and scientific capability to effectively monitor states and ensure compliance with CTBT obligations.<sup>344</sup> There should be no doubt that a U.S.-backed CTBT will prevent other states from acquiring nuclear weapons (or upgrading current arsenals). A combination of on-site inspections and 300 sensors strategically located around the globe would identify noncompliant states.<sup>345</sup>

Ensuring that states do not improve their nuclear arsenals or create new ones depends entirely on the capabilities of the verification process. The International Monitoring System (IMS) anchors this process, which is complemented by on-site inspections.<sup>346</sup> The IMS system employs over 337 facilities in ninety states around the world and its sole job is to detect nuclear explosions underground, in water, and in the atmosphere.<sup>347</sup> At present, over 246 of the facilities have been built and the Preparatory Commission for the CTBTO oversees the facilities in Vienna.<sup>348</sup>

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343. See Shalikhshvili, *supra* note 315.

344. NAS Study, *supra* note 324, at 5 (“Detection, identification, and attribution of nuclear explosions rest on a combination of methods, some being deployed under the International Monitoring System (IMS), some deployed as National Technical Means (NTM), and some relying on other methods of intelligence collection together with openly available data not originally acquired for treaty monitoring.”).

345. On the issue of nuclear test detection and verifiability, Secretary Richardson explained in his testimony before the Armed Services Committee that “[t]he treaty gives us the right to request challenge inspections, and provides for international monitoring. Under the treaty, we will deploy a network of more than 300 sensors, blanketing the globe, that can detect a nuclear explosion and can help us identify nations that have acquired nuclear capabilities.” *Comprehensive Test Ban Treaty: Hearing Before the S. Comm. on Armed Servs.*, 106th Cong. (1999) (statement of Bill Richardson, U.S. Energy Sec’y), available at <http://armed-services.senate.gov/statemnt/1999/991007br.pdf>.

346. CTBT, *supra* note 1, 35 I.L.M. at 1449.

347. Asada, *supra* note 115, at 90; see CTBT, *supra* note 1, 35 I.L.M. at 1449. The IMS has facilities with four types of monitoring technologies: seismological, hydro-acoustic, infrasound, and radionuclide. *Id.*

348. Tibor Tóth, Editorial, CTBTO MAGAZINE, Apr. 2009, at 2, 12. All relevant data

The National Academy of Sciences Study affirmed the widely held belief that all of these assets could detect nuclear explosions with nuclear yields down to 1 kiloton.<sup>349</sup> A small nuclear weapon, similar in size to the Hiroshima Bomb, yields roughly ten to twenty kilotons.<sup>350</sup> In fact, some studies indicate that explosions well below the 1-kiloton level can be detected.<sup>351</sup> States that test nuclear weapons for the first time would test weapons with a yield somewhere in the 5 kiloton range,<sup>352</sup> as Pakistan did.<sup>353</sup> Conducting tests below the 1-kiloton level is extremely difficult; new-nuclear and nonnuclear states are not able to reliably test below the threshold.<sup>354</sup> Although there is a technique called decoupling which involves underground testing that does reduce the seismic signal of a several kiloton explosion down to below one kiloton, this technique presents Herculean obstacles not easily overcome.<sup>355</sup> Only highly experienced

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regarding the Preparatory Commission are available at its website. CTBTO Preparatory Commission, <http://www.ctbto.org/> (last visited Sept. 29, 2009). The Preparatory Commission is responsible for the global verification regime, ensuring that States do not violate the Treaty by testing. See CTBT, *supra* note 1, 35 I.L.M. at 1444 (giving the CTBTO these responsibilities).

349. NAS Study, *supra* note 324, at 5; *The CTBT: Achievements, Challenges and Opportunities*, ARMS CONTROL ASS'N, Sept. 18, 2007, <http://www.vertic.org/assets/CTBT%20docs/VERTIC%20ACA%20CTBT%20Seminar%20Report.pdf>.

350. NAS Study, *supra* note 324, at 65.

351. Paul G. Richards, Lamont-Doherty Earth Observatory of Columbia University, Seismology and CTBT Verification, <http://www.ldeo.columbia.edu/~richards/SeismoandCTBTVerif.html>.

352. Comprehensive Test Ban Treaty: Hearing Before S. Comm. on Foreign Relations, 106th Cong. (1999) (statement of Dr. Richard Garwin), *reprinted in* THE COMPREHENSIVE TEST BAN TREATY: NEXT STEPS, ROUNDTABLE DISCUSSION 72 (2000), available at <http://www.iis-db.stanford.edu/pubs/11982/CTBT.pdf>. The JASON group used this figure when they advised President Clinton on the CTBT. *Id.*

353. Asada, *supra* note 115, at 115 & n.107. The Pakistani tests yielded one bomb in the thirty to thirty-five range, one at twelve kilotons, and a few others between seven and eight and between one and three. *Id.*

354. See *id.* at 115–16 (stating that proliferating states lack the experience in nuclear testing and that low yield tests are unreliable for making advances in weapons design).

355. See *id.* at 116–17 (noting that although detailed decoupling effects are not known, the maximum decoupling factor often quoted in scientific literature is seventy, making a yield of seven kilotons appear to be 100 tons); Thomas Graham Jr., *Russia, China, and the CTBT* in LAWYERS ALLIANCE FOR WORLD PEACE, WHITE PAPER ON THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY 62 (2000) (concluding that only China and

nuclear states can test below the 1-kiloton level, yet these tests would not significantly add to their nuclear technology.<sup>356</sup> Thus, with the exception of decoupling, nuclear tests by U.S. adversaries with any practical application are detectable.<sup>357</sup>

Aside from the scientific capability of ensuring the enforcement of the CTBT, the United States has the political advantage of encouraging non-signatory members to ratify and join the Treaty regime. The CTBT will not enter into force until all forty-four states with nuclear reactors ratify the Treaty.<sup>358</sup> As we continue testing, we expect less capable states facing potentially well-armed opponents to never test even one nuclear weapon.<sup>359</sup> It is inherently difficult for the United States to argue for others to do what it itself has not done.<sup>360</sup>

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Russia could successfully accomplish the decoupling procedure without detection); See Hafemeister, *supra* note 327, at 12 (“it is widely felt that a clandestine test of a kiloton (or larger), that was decoupled to a degree that enabled the test to escape detection by seismic means and which did not have yield excursions and venting, would require the resources of a very technologically sophisticated nation.”).

356. *Id.* (“[T]he Shalikhshvili report points out that: ‘Nuclear weapon states could not make a major qualitative breakthrough without testing above several kilotons.’”); see Shalikhshvili, *supra* note 315; NAS Study, *supra* note 324, at 68 (very-low-yield testing will allow proof tests of compact weapons with yield up to 1–2kt, and only partial development of primaries for thermonuclear weapons); Kirsch, *supra* note 337.

357. See INDEPENDENT COMMISSION ON THE VERIFIABILITY OF THE CTBT: FINAL REPORT (The Verification Research, Training and Information Centre 2000), <http://www.ctbtcommission.org/FinalReport.pdf> (“The three most credible evasion scenarios that have been proposed to foil monitoring networks are decoupling, hiding a nuclear explosion in another event, and evading attribution. There are no credible examples of the latter two scenarios, and thus, the focus has been on decoupling.”); While there may be some cheating, the committee concluded, “[t]he worst-case scenario under a no-CTBT regime poses far bigger threats to U.S. security interests—sophisticated nuclear weapons in the hands of many more adversaries—than the worst-case scenario of clandestine testing in a CTBT regime, within the constraints posed by the monitoring system.” NAS Study, *supra* note 324, at 78.

358. CTBT Article 14 specifies that the CTBT will not enter into force until 180 days after the forty-four states listed in Annex 2 to the Treaty ratify the treaty. CTBT, *supra* note 1, 35 I.L.M. at 1457, 1478. Annex 2 includes Pakistan, Israel, India, N. Korea, United States, France, and others. *Id.* at 1478.

359. McNamara, *supra* note 249.

360. Interview by Bernard Gwertzman with Strobe Talbott, Former Deputy Sec’y of State (Mar. 6, 2006) available at <http://www.cfr.org/publication/10052/talbott.html> (“One of [the Administration’s] benchmarks, so called, in dealing with the Indians was to try to get them . . . to sign and ratify the CTBT. Well when the U.S. Senate said, ‘Well, we’re not going to ratify the CTBT,’ it was a little hard for us to insist that somebody else

In 1995 the mayor of Nagasaki described the aftermath of the nuclear explosion (a bomb considered small by today's standards) to the International Court of Justice.

Nagasaki became a city of death where not even insects could be heard . . . countless men, women, and children began to gather for a drink of water at the banks of the nearby Urakami River, their hair and clothing scorched and their burnt skin hanging off in sheets like rags. Begging for help they died one after another in the water or in heaps on the bank.<sup>361</sup>

Within four months, over 704,000 people had died.<sup>362</sup>

This scene may be repeated on a much larger scale if the United States does not take the lead and ratify the CTBT.<sup>363</sup> We are both politically and legally obligated to do so.<sup>364</sup> If the United States does not ratify the CTBT, nuclear proliferation will happen exponentially.<sup>365</sup> States that have not signed it will

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do it.”).

361. McNamara, *supra* note 249 (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8)).

362. *Id.*

363. *See id.* (“If the United States continues its current nuclear stance, over time, substantial proliferation of nuclear weapons will almost surely follow.”).

364. “Under Article VI of the NPT, each party to the NPT agrees to pursue good faith negotiations on nuclear prevention measures aimed towards eventual comprehensive disarmament.” Lalla, *supra* note 91, at 112–13; *see* Helen M. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT’L L.J. 407, 417 & n.53 (1994). “In addition, all Review Conferences convened to determine the effectiveness of the NPT have called for the CTBT to be implemented, stating that it is the most effective measure to halt a nuclear arms race.” *See* Lalla, *supra* note 91, at 113; Ambassador Thomas Graham, President of the Lawyers Alliance for World Security and former Special Representative of the President for Arms Control, Non-Proliferation, and Disarmament stated: “The U.S. succeeded in achieving the indefinite extension of the Nuclear Non-Proliferation Treaty in 1995 on the basis of the commitment of the nuclear weapons states to conclude the Test Ban Treaty. This is a good bargain that must honored.” *See generally* Koplow, *supra* note 51.

365. A future in a non-CTBT world has been described as follows:

A future no-CTBT world, then, could be a more dangerous world than today's, for the United States and for others. In particular, the directions from which nuclear attack on the United States and its allies would have

continue to abstain and states that have ratified it will stop honoring their legal obligations not to test.<sup>366</sup> Without U.S. ratification, the Treaty cannot enter into force.<sup>367</sup> With the passage of too much time, the CTBT may be considered a failure, lose its moral force and currency, and effectively end over fifty years of nonproliferation progress.<sup>368</sup>

Without a test ban treaty, the NPT becomes irrelevant; states such as Japan, Egypt, Saudi Arabia, Syria, and North Korea will surely develop nuclear weapons.<sup>369</sup> China, Russia,

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become conceivable—and the means by which such attack might be carried out (meaning not only intercontinental ballistic missiles (ICBM) but also, among others, . . . truck bombs . . .)—would have multiplied alarmingly.

NAS Study, *supra* note 324, at 8; “The arms race which could well ensue (if no ratification of the CTBT) would be extremely dangerous.” Former Ambassador to Pakistan Robert B. Oakley in a letter to Senator Biden.

366. NAS Study, *supra* note 324, at 8 (stating that a breakdown in the NPT regime due to nations not ratifying the CTBT might lead to more widespread nuclear testing).

367. CTBT, *supra* note 1, 35 I.L.M. at 1457, 1478. CTBT Article 14 specifies that the CTBT will not enter into force until 180 days after the forty-four states listed in Annex 2 to the Treaty ratify the treaty. *Id.* at 1457.

368. “Regarding the status of the U.S. obligation in the wake of the Senate’s rejection of the treaty, Secretary of State Madeleine Albright said in October 1999 that the United States will ‘live up to the conditions of the treaty.’” FOREIGN RELATIONS, *supra* note 147, at 264. A fundamental principle of the law of treaties states that the provisions of the treaty will not have any legal binding effect until its entry into force. *But see* United Nations: Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 24, Mar. 20, 1986, 25 I.L.M. 543, 560 (stipulating that the provisions of a treaty regulating the manner or date of its entry into force, reservations, and other matters arising necessarily before the entry into force of the treaty apply). However, under Article 18 of the Vienna Convention, if a signatory takes an act which would defeat the object and purpose of the Treaty, then the treaty is no longer binding on them. *See Asada, supra* note 115, at 94–95. The Senate’s rejection could qualify as such an act. *See id.* at 101 (discussing the complications the international community has faced “since the CTBT ratification was rejected by the U.S. Senate.”). For a discussion of the legal applicability of the Treaty prior to entry into force via customary international law, or the rule of law of treaties regarding obligations imposed on signatories of treaty yet to enter into force, see *id.* at 92–101.

369. NAS Study, *supra* note 324, at 8 (“Plausibly larger than the direct effects . . . is [the] breakdown of the NPT regime, manifested in more widespread testing (by such countries as North Korea, Iraq, Iran for example), which could lead in turn to nuclear weapons acquisition by Japan, South Korea, and many others.”); *see also* McNamara, *supra* note 249 (claiming that if the United States continues on its current trend, substantial proliferation of nuclear weapons will almost surely follow in some, or all of nations like Egypt, Japan, Saudi Arabia, Syria, and Taiwan).

Pakistan, and India may improve their nuclear arsenals, creating deadlier bombs while closing the gap between them and U.S. nuclear superiority.<sup>370</sup> These two scenarios could lead to a nuclear exchange destroying land, killing hundreds of thousands, if not millions, of people.<sup>371</sup> Such an exchange may result from accident or from asymmetrical activity that is not under the control of a sovereign state. The fewer arsenals there are around the globe, the safer we all are.

All of this can be avoided if the United States ratifies the CTBT.<sup>372</sup> Although the CTBT will not completely prevent all nuclear advances or development, the alternative is a world where more states have more advanced nuclear weapons and the possibility of a nuclear launch becomes a dangerous reality.<sup>373</sup> Consider the success of the NPT. In 1963, prior to its entry into force, the Kennedy Administration conservatively predicted that without the NPT, more than fourteen states would have developed nuclear weapons.<sup>374</sup> When former Soviet Republics, the Middle East, and Latin American totalitarian regimes are added to the list, the number exceeds thirty.<sup>375</sup> The

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370. NAS Study, *supra* note 324, at 7–8 (stating that China, Russia, India, and Pakistan would be able to improve their nuclear capabilities if allowed to test).

371. See, e.g., Bruce G. Blair, *The Folly of Nuclear War-Gaming for Korea and South Asia*, BRUCE BLAIR'S NUCLEAR COLUMN, Apr. 30, 2003, available at <http://www.cdi.org/blair/nuclear-folly.cfm> (stating that the use of nuclear weapons may escalate to all out war that inflicts the maximum possible casualties worldwide); Medalia, *supra* note 13 (stating that a cascade of nuclear proliferation might occur); DISCOURAGING A CASCADE OF NUCLEAR WEAPON STATES 9 (International Security Advisory Board) (2007), available at <http://belfercenter.ksg.harvard.edu/files/ISAB-Nuclear Cascade Report.pdf> (showing that even states that are not “rogue” may become involved in a cascade).

372. The Weapons of Mass Destruction Commission, an international commission organized in Sweden, issued a report in June 2006 stating that “[t]he Commission believes that a U.S. decision to ratify the CTBT would strongly influence other countries to follow suit. It would decisively improve the chances for entry into force of the treaty and would have more positive ramifications for arms control and disarmament than any other single measure.” WEAPONS OF MASS DESTRUCTION COMMISSION, WEAPONS OF TERROR: FREEING THE WORLD OF NUCLEAR, BIOLOGICAL AND CHEMICAL ARMS 107 (2006), available at [http://www.wmdcommission.org/files/Weapons\\_of\\_Terror.pdf](http://www.wmdcommission.org/files/Weapons_of_Terror.pdf).

373. See *id.* (stating that if the United States does not ratify the CTBT, then the current lack of nuclear testing will not last much longer).

374. See Bunn, *supra* note 74.

375. *Id.* (enumerating countries that, if they acquired nuclear weapons, would

NPT established a nonproliferation norm, locked in the nuclear club at five, and utilized international incentives to prevent proliferation.<sup>376</sup> As a result of the NPT's success, only four states (including North Korea) have developed nuclear weapons since 1963.<sup>377</sup>

India acquired nuclear arms in 1998; yet its leaders have asserted that they would ratify the CTBT given the proper circumstances.<sup>378</sup> Although India is not a signatory to either the NPT or the CTBT,<sup>379</sup> the proverbial cat is out of the bag. It has nuclear weapons and has tested them.<sup>380</sup> However, India is a stable democracy, a key U.S. ally, it has imposed a moratorium on testing,<sup>381</sup> and its arsenal was created as a deterrent against neighboring enemies Pakistan and China.<sup>382</sup> The last Administration offered India a nuclear deal that would conceivably violate the NPT, yet this is outside the scope of this

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cause their rivals or neighbors to do the same, bringing the count up to thirty).

376. *Id.*

377. *See id.* (subtracting the five countries permitted to have nuclear weapons from the nine total and counting North Korea but not Iran). *See generally* MITCHELL REISS, BRIDLED AMBITION: WHY COUNTRIES CONSTRAIN THEIR NUCLEAR CAPABILITIES (1995).

378. *Rationality on Pakistan and India*, WASH. TIMES, Dec. 7, 1998, at A18; Kenneth J. Cooper, *India Rejects Some Weapons Restraints: U.S. Praises Premier's Promise to Embrace Nuclear Test Ban, Tighten Controls*, WASH. POST, Dec. 16, 1998, at A37.

379. Lalla, *supra* note 91, at 104.

380. *Id.* at 103.

381. *Id.* at 132; *see* Press Release, Physicians for Social Responsibility, India Declares Commitment to Nuclear Weapons (Mar. 3, 1999) (reporting that India agreed to a moratorium on testing); James Bennet, *Summit Talks Shift Focus to Atom Tests by New Delhi*, N.Y. TIMES, May 17, 1998, at A10 ("Mr. Clinton said India had 'the world's largest middle class and 50 years of vibrant democracy to its credit,' and hoped that 'the United States and India [c]ould be close friends and partners for the 21st century.'").

382. Lalla, *supra* note 91, at 132; Press Release, India Declares Commitment to Nuclear Weapons, *supra* note 381 ("Pakistan built nuclear weapons as a deterrent against India. India wanted them as a deterrent against China. China built them as a deterrent against the U.S. and Russia."). In 1999 the National Security Advisory Board declared its policy of limiting its nuclear arsenal as a "minimum credible nuclear deterrent" with only the Prime Minister being able to decide on whether to strike or not. P. Jayaram, *Nation Unveils Draft of its Nuclear Doctrine*, INDIA ABROAD, Aug. 27, 1999, at 6. *See generally* Praful Bidwai & Achin Vanaik, *India Nuclear Daze: The Domestic Politics of Nuclearization*, in TESTING THE LIMITS: THE INDIA-PAKISTAN NUCLEAR GAMBIT 17 (1998).

article.<sup>383</sup> The deal may not garner approval in India, and regardless whether it is signed by both states, the CTBT still has a role to play.<sup>384</sup> If India signs the CTBT, it will not be allowed to test nuclear weapons; without testing, it will be unable to upgrade their nuclear arsenals from simple one stage fission devices to more advanced thermonuclear bombs, effectively freezing its nuclear capabilities at a rudimentary level.<sup>385</sup>

The Iran conflict presents a more complicated dilemma. Iran is a signatory to both the NPT and the CTBT (1996), but it has not yet ratified the CTBT.<sup>386</sup> Iran's ratification is required for the Treaty to enter into force,<sup>387</sup> but it has recently threatened

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383. Jimmy Carter, *A Dangerous Deal With India*, WASH. POST, Mar. 29, 2006, at A19; Dafna Linzer, *Rice to Lay Out U.S.-India Nuclear Deal Before Some Skeptical Lawmakers*, WASH. POST, Apr. 5, 2006, at A17.

384. *India Rejects U.S. Proposal on Nuclear Test Ban*, TIMES OF INDIA, Apr. 17, 2006, <http://timesofindia.indiatimes.com/articleshow/1493730.cms> (stating India does not agree with a provision in the bilateral agreement that would discontinue cooperation if India were to detonate a nuclear weapon); K. Subrahmanyam, *Things Change, Times Change*, INDIAN EXPRESS, Apr. 18, 2006, <http://www.indianexpress.com/news/things-change-times-change/2678/> ("The issue of India being entrapped into a bilateral commitment in an agreement with the U.S. on nuclear cooperation not to carry out nuclear tests has proved to be a flash in the pan.")

385. NAS Study, *supra* note 324, at 8 ("India and Pakistan could use their option of testing, as non-parties [sic] to the Non-Proliferation Treaty, to perfect boosted fission weapons and thermonuclear weapons, greatly increasing the destructive material and the destructive power deliverable by a given force of aircraft or missiles."); *see also* Rami Lakshmi, *Key Indian Figures Call for Nuclear Tests Despite Deal with U.S.*, WASH. POST, Oct. 5, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/04/AR2009100402865.html> (suggesting that India's 1998 nuclear testing did not provide sufficient results and that the consequences of a universal test ban would mean that India could not complete the further testing necessary to create a weapon); as long as India "stays outside the NPT regime, . . . the[y] remain[] a serious risk of illicit proliferation." Kevin M. Brew, *The Re-Emergence of Nuclear Weapons as "The Coin of the Realm" and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles Still Hangs by a Thread*, 52 NAVAL L. REV. 177, 190–91 (2005).

386. Arms Control Association, *The Status of the Comprehensive Test Ban Treaty: Signatories and Ratifiers*, <http://www.armscontrol.org/factsheets/ctbtsig> (last visited on Sept. 15, 2009) (showing that Iran signed the CTBT on Sept. 24, 1996); Daniel Robicheau & Philippa Winkler, *Iran, the US, and the Nuclear Non-Proliferation Treaty*, PEACE MAGAZINE, Oct.–Dec. 2007, at 24, *available at* <http://archive.peacemagazine.org/v23n4p24.htm> ("Iran has long been a signatory to the NPT.")

387. CTBT, *supra* note 1, 35 I.L.M. at 1457. CTBT Article 14 specifies that the

to pull out of the NPT after refusing to allow on-site IAEA inspectors.<sup>388</sup> Iran maintains its uranium production is exclusively for peaceful purposes, completely consistent with the NPT.<sup>389</sup> The United States and other members of the Security Council believe otherwise and consequently are trying to pass a U.N. Security Council resolution imposing sanctions on Iran.<sup>390</sup> If Iran pulls out of the NPT, it will be able to proliferate nuclear weapons without fear of international legal reprisal via the NPT. Even worse, this may spark a Middle East arms race with both Egypt and Saudi Arabia involved.<sup>391</sup>

The United States is in a delicate and somewhat hypocritical situation. The United States has demanded that Iran comply with the NPT and international law yet the United States has failed to follow its own obligations under the NPT (ratifying the CTBT).<sup>392</sup> With Iran threatening to destroy Israel, the situation is explosive.<sup>393</sup> U.S. demands lack the requisite credibility when

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CTBT will not enter into force until 180 days after the forty-four states listed in Annex 2 to the Treaty ratify the treaty. *Id.* at 1478. Annex 2 includes Iran. *Id.*

388. Christine Hauser, *Iran Says It Will Spurn Any U.N. Nuclear Edict*, N.Y. TIMES, May 8, 2006, at A8 (“President Mahmoud Ahmadinejad said yesterday that international treaties became ‘invalid’ as soon as they failed to secure the rights of nations. He said that if a nation’s rights under the Nuclear Non-Proliferation Treaty were violated, ‘Then that nation would revise its decision and the treaty would become invalid,’ the Iranian news agency reported.”).

389. *Id.* (“The remarks were the latest that Iran had issued in defending what it says is its right to develop its nuclear program, which it says is for generating power.”).

390. *Id.* (“Britain and France circulated a draft Security Council resolution last Wednesday demanding that Iran give up its nuclear program, which the West believes Iran is using to develop nuclear weapons. The measure was drafted under Chapter VII of the United Nations Charter, which makes compliance with resolutions mandatory and opens the way to penalties or military action against nations that defy them. But imposing penalties would require a second resolution.”).

391. David E. Sanger, *Suppose We Just Let Iran Have the Bomb*, N.Y. TIMES, Mar. 19, 2006, § 4, at 1.

392. See ARJUN MAKHIJANI & NICOLE DELLER, NATO AND NUCLEAR DISARMAMENT: AN ANALYSIS OF THE OBLIGATIONS OF THE NATO ALLIES OF THE UNITED STATES UNDER THE NUCLEAR NON-PROLIFERATION TREATY AND THE COMPREHENSIVE TEST BAN TREATY 9 (Institute for Energy and Environmental Research, 2003), available at <http://www.ieer.org/reports/nato/fullrpt.pdf> (“[T]he United States has abandoned . . . its longstanding commitment to ratify and adhere to a CTBT.”).

393. Nazila Fathi, *Iranian Leader Renews Attack on Israel at Palestinian Rally*, N.Y. TIMES, Apr. 15, 2006, at A7 (“President Mahmoud Ahmadinejad said Friday that Israel was a ‘constant threat’ and predicted it was on the verge of ‘being eliminated.’”).

the United States advocates international law in one breath and then disregards it in the other. If the United States, with the strongest conventional military in the history of the world and the largest and most sophisticated nuclear arsenal cannot commit to a test ban, why should weaker states, especially those hostile to the United States, agree to be nuclear free?<sup>394</sup>

*Once Committed to the CTBT, Can the United States Pull Out of the Treaty?*

Yes. In extraordinary circumstances, the United States can withdraw from the Treaty.<sup>395</sup> Article IX of the CTBT—the “Supreme National Interests” clause—provides that a state party may withdraw from the Treaty if it determines that “extraordinary events” related to the subject matter of the Treaty have jeopardized its supreme interests.<sup>396</sup> This safeguard allows the President, in consultation with the Congress, to withdraw from the CTBT if the Secretaries of Defense and Energy inform the President that a high level of confidence in the safety or reliability of a nuclear stockpile could no longer be certified without testing.<sup>397</sup> Authority to withdraw from the CTBT derives from the Vienna Convention on the Law of Treaties (VCLT) article 54, as well as the withdrawal provision of the Treaty itself.<sup>398</sup>

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These comments “echoed his remark last year about ‘wiping Israel off the map’ . . .” *Id.*

394. See Johnson & Kimball, *supra* note 233 (“The United States, which had played a leadership role in negotiating the CTBT, is now one of the major hold-out states.”). “[T]he United States has deployed approximately 4,500 strategic, offensive nuclear warheads. Russia has roughly 3,800. The strategic forces of Britain, France and China are considerably smaller, with 200–400 nuclear weapons in each state’s arsenal. The new nuclear states of Pakistan and India have fewer than 100 weapons each.” McNamara, *supra* note 249.

395. CTBT, *supra* note 1, 35 I.L.M. at 1456.

396. *Id.* “This is a rather standard withdrawal clause for an arms control treaty and is similar to the withdrawal clause in the NPT.” Jonas, *supra* note 33, at 1041.

397. Jonas, *supra* note 33, at 1019–20; see McNamara, *supra* note 249, at 34 (stating the Bush Administration will be seen as breaking with the CTBT); see also Issues and Arguments, *supra* note 4, at 16 (stating that President Clinton acknowledged the possibility of the United States withdrawing from the CTBT).

398. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 8 I.L.M. 679, 699 [hereinafter VCLT]. VCLT article 54 provides that termination or withdrawal from a treaty may occur either according to the provisions of the treaty or with the consent of all the parties to the treaty after consultation. *Id.* at 699. However, the United States has

The United States' ability to remove itself from international legal obligations is not theoretical. President Bush announced the U.S. withdrawal from the Anti-Ballistic Missile (ABM) Treaty<sup>399</sup> on December 13, 2001; and the withdrawal became effective on June 13, 2002 pursuant to the terms of the treaty.<sup>400</sup> Anyone who continues to question the ability of a state to withdraw from treaties (on the basis of that state's perception of the treaty's impact on its supreme national interests) should note that even North Korea had the legal authority to withdraw from the NPT.<sup>401</sup>

The control and regulation of nuclear weapons for the maintenance of homeland security, as well as international peace and security, is the most critical foreign policy and national security issue of our time. Support for the Treaty is overwhelming; the public, public officials, military commanders, scientists, and academics comprise the broad support base.<sup>402</sup> More importantly, perhaps, the Senate has already committed a bipartisan commission to a careful review of the Treaty.<sup>403</sup>

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yet to ratify the VCLT (although "the United States played a leading role in negotiating the Vienna Convention at a conference of more than 100 nations and signed it with almost fifty other countries on May 23, 1969."). *Treaties and Other International Agreements*, *supra* note 19, at 20. Nevertheless, the Restatement (Third) on Foreign Relations Law reinforces that authority using similar language. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 332(1) (1987).

399. Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.–U.S.S.R., May 26, 1972, 23 U.S.T. 3435.

400. *Id.* at 3446; *see* Press Release, Office of the White House Press Secretary, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), *available at* <http://www.state.gov/t/ac/rls/fs/2001/6848.htm> (highlighting the change in circumstances and citing the withdrawal provision in article XV(2) of the ABM).

401. *See* Press Release, U.N. Conference on Disarmament Debates Middle East, North Korean Withdrawal from Nuclear Non-Proliferation Treaty, Other Topics (Jan. 30, 2003), *available at* <http://www.un.org/news/press/docs/2003/df422.doc.htm> (indicating the Democratic People Republic of Korea's withdrawal from the treaty was well within its right to do so). UN Security Council Resolution 1718 specifies that North Korea must retract its withdrawal from the NPT, but North Korea has not yet done so. *See* S.C. Res. 1718, para. 3, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

402. *See* Daryl G. Kimball, *Prospects for the Comprehensive Test Ban Treaty*, ARMS CONTROL ASSOCIATION, [http://www.armscontrol.org/subject/ctbt/Daryl'sRemarks\\_Bunn\\_04?print](http://www.armscontrol.org/subject/ctbt/Daryl%27sRemarks_Bunn_04?print) ("The results of a recent national public opinion poll . . . show that 87% of those surveyed support U.S. participation in the CTBT.").

403. WILLIAM J. PERRY ET AL., AMERICA'S STRATEGIC POSTURE: THE FINAL REPORT

While it has been nine years since the CTBT's defeat in the Senate, the world still looks to the United States for leadership in the nuclear arena. As the world's only superpower,<sup>404</sup> the burden of leadership, both moral and ethical, falls on the United States. For over half a century the world has been working towards disarmament and the United States has always been the driving force behind that worthy objective. In 1999, partisan politics unapologetically undermined that progress. When the entire global community comes together to tackle an issue as delicate and ubiquitous as nuclear disarmament, when the very survival of humanity hangs in the balance, it is a tragedy when partisan politics destroys all that has been so nobly achieved.<sup>405</sup>

#### VII. POSTSCRIPT

*Subsequent to the original submission of this piece, and prior to its publication, there have been a number of salient developments in national and international politics regarding the CTBT. These developments could prove highly influential in terms of the U.S. posture on arms control and, in particular, its posture regarding the regime of nonproliferation of nuclear*

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OF THE CONGRESSIONAL COMMISSION ON THE STRATEGIC POSTURE OF THE UNITED STATES 81 (2009), *available at* [http://www.usip.org/files/America's\\_Strategic\\_Posture\\_Auth\\_Ed.pdf](http://www.usip.org/files/America's_Strategic_Posture_Auth_Ed.pdf). The Commission on the Prevention of WMD Proliferation and Terrorism supports the review conducted by the bipartisan Congressional Commission on the Strategic Posture of the United States. BOB GRAHAM ET AL., *supra* note 5, at 54. "That review includes consideration of the long-term reliability, safety, and effectiveness of the U.S. nuclear arsenal. The review also covers the effectiveness of the international monitoring system that is designed to identify and locate underground nuclear tests in order to evaluate the potential reconsideration of the CTBT." *Id.* at 53-54 (recommending that the current moratoria on nuclear testing (observed independently by each of the five nuclear-weapon states under the NPT) be maintained and recognizing that the issue of a CTBT is likely to be reconsidered by the Obama Administration but taking no position on the CTBT in its report out of deference to the Commission on the Strategic Posture).

404. *Country Profile: United States of America*, BBC NEWS, Aug. 20, 2009, [http://news.bbc.co.uk/2/hi/americas/country\\_profiles/1217752.stm](http://news.bbc.co.uk/2/hi/americas/country_profiles/1217752.stm).

405. The research upon which this report relies was provided in part by law students who seek to participate fully in the complex and value-sensitive world of policy decision-making. If this report has value in the public interest then credit should fall to them: Enita Kushi, Erin Slemmens, Justin McCormack, Kurt Zaner, Charles Douglas, Jarrett Deluca, Zachary Warren, Ryan Koslosky, Nadia Darkazalli, Daniel Dawson, Kateryna Mikhno, Matthew Belisle, and Dmitri Goubarkov.

*weapons.*

In September 2008, then Presidential-Candidate Obama indicated that, “[a]s president, I will reach out to the Senate to secure the ratification of the CTBT at the earliest practical date and will then launch a diplomatic effort to bring onboard other states whose ratifications are required for the treaty to enter into force.”<sup>406</sup> When President Obama took office, he indicated that he would aggressively pursue the process to secure the ratification of the CTBT. In January of 2009, Secretary of State-Nominee Hillary Clinton confirmed that:

The President-Elect and I are both strongly committed to Senate approval of the CTBT and to launching a diplomatic effort to bring on board other states whose ratifications are required for the treaty to enter into force. A lesson learned from 1999 is that we need to ensure that the administration work intensively with Senators so they are fully briefed on key technical issues on which their CTBT votes will depend.<sup>407</sup>

Secretary of Defense Gates has indicated that, with modest qualifications on verification, the United States “probably should” ratify the CTBT.<sup>408</sup> To that end, the Chairman of the Senate Foreign Relations Committee, Senator John Kerry, has indicated that he intends to take action in the Senate, stating that he will “begin working to build the necessary bipartisan support for U.S. ratification of the Comprehensive Nuclear Test Ban Treaty . . .”<sup>409</sup> “[S]uccess,” Kerry stated, “would be the single greatest arms control accomplishment for the new Senate and it would reestablish America’s traditional leadership role on

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406. *Arms Control Today 2008 Presidential Q & A: President-elect Barack Obama*, ARMS CONTROL TODAY, Dec. 2008, at 31, available at [http://www.armscontrol.org/system/files/Obama\\_Q-A\\_FINAL\\_Dec10\\_2008.pdf](http://www.armscontrol.org/system/files/Obama_Q-A_FINAL_Dec10_2008.pdf).

407. *Nomination of Hillary Rodham Clinton Department of State Secretary of State: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 26 (2009), available at <http://www.foreignpolicy.com/files/KerryClintonQFRs.pdf>.

408. Robert Gates, U.S. Sec’y of Def., Address to the Carnegie Endowment for International Peace: Nuclear Weapons and Deterrence in the 21st Century (Oct. 28, 2008), available at [http://www.carnegieendowment.org/files/1028\\_transcrip\\_gates\\_checked.pdf](http://www.carnegieendowment.org/files/1028_transcrip_gates_checked.pdf).

409. John Kerry, Editorial, *New Directions for Foreign Relations*, BOSTON GLOBE, Jan. 13, 2009, at A13.

nonproliferation.”<sup>410</sup>

On April 5, 2009, President Obama addressed thousands of people in a square outside Prague Castle, and reaffirmed his attempt to push the United States to sign the international CTBT.<sup>411</sup> The President acknowledged that nuclear weapons remain one of the greatest threats to human survival and human security.<sup>412</sup> First, addressing the bilateral treaty between the United States and Russia, President Obama declared that the United States would negotiate a new strategic arms reduction treaty with the Russians this year.<sup>413</sup> Then, Obama indicated that, consistent with the treaty obligation in the NPT, the CTBT is an important step toward completely ridding the world of nuclear weapons in the future.<sup>414</sup>

Ten years have passed since the Senate defeated the CTBT. The critical question for the administration’s strategy to secure the advice and consent of the Senate is, “What conditions might enhance the prospect of a successful advice and consent vote in the Senate?” During the ten year period, there have been political changes in the Senate, and there have been political transformations in the technological capacity to secure the integrity of the Treaty. In addition, a significant number of states have endorsed the Treaty. We will briefly restate these changes.

The first major issue of change upon a proposed policy of non-testing is the assured reliability of the U.S. nuclear arsenal. In the last ten years (and even in the last few months), reports have been released assuring that non-testing will have no serious effect on the integrity and reliability of the U.S.

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410. *Id.*

411. Press Release, Office of the White House Press Sec’y, Remarks by President Barack Obama (Apr. 5, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered).

412. *See id.* (stating that nuclear weapons stockpile reduction is “fundamental to the security of our nations and to the peace of the world”).

413. Press Release, The White House Office of the Press Sec’y, Joint Statement by President Dmitry Medvedev of the Russian Federation and President Barack Obama of the United States of America (Apr. 1, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Joint-Statement-by-President-Dmitriy-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America/](http://www.whitehouse.gov/the_press_office/Joint-Statement-by-President-Dmitriy-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America/).

414. *Id.*

arsenal.<sup>415</sup> Today's stockpile of U.S. nuclear weapons is composed of proven designs that are beyond the stage of possible production anomalies.<sup>416</sup> The issue of safety and reliability normally implicate nonnuclear subsystems.<sup>417</sup> This means that these nonnuclear systems can be rebuilt and tested without violating the CTBT.<sup>418</sup> Studies indicate that the Stockpile Stewardship Program can ensure the reliability of the stockpile into the foreseeable future—provided, of course, that the program is properly funded.<sup>419</sup> Its current level of funding is 6.6 billion dollars a year.<sup>420</sup> In addition, nuclear technology under a testing moratorium has significantly increased the technical competency of specialists, since researchers now study weapons physics in great depth without the demands imposed by an explosive testing program.<sup>421</sup>

The second major issue of change is the weakening in substance of the argument of senators who object to the CTBT on the basis of concerns about the regime of verification. In the ten years that have elapsed, much has happened to improve the capacity for verification.<sup>422</sup> These improvements are particularly relevant to counter what had been the most compelling argument of the Republicans during the stunted hearing.

The topic of partisanship leads us to the third major issue of change—the political composition of the Senate itself and the

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415. See, e.g., Kurt Gottfried, *Sowing Nuclear Misconceptions*, NATURE, Jan. 13, 2000, at 131, available at [http://www.ucsusa.org/nuclear\\_weapons\\_and\\_global\\_security/nuclear\\_weapons/policy\\_issues/the-weapons-labs-role.html](http://www.ucsusa.org/nuclear_weapons_and_global_security/nuclear_weapons/policy_issues/the-weapons-labs-role.html) (stating that tests were conducted to evaluate new designs, not necessarily to test the reliability of existing weapons); see CHRISTOPHER PAINE, *FACING REALITY: RESUMING NUCLEAR TEST EXPLOSIONS WOULD HARM U.S. AND INTERNATIONAL SECURITY* (National Resources Defense Council, 2009), available at <http://www.nrdc.org/nuclear/acato.asp> (“[T]he current arsenal is ‘safe’ in that it meets modern ‘one point’ safety standards against accidental nuclear detonation.”).

416. SEAN DUNLOP & JEAN DU PREEZ, *THE UNITED STATES AND THE CTBT: RENEWED HOPE OR POLITICS AS USUAL?* (Nuclear Threat Initiative 2009), available at [http://www.nti.org/e\\_research/e3\\_ctbt\\_united\\_states.html](http://www.nti.org/e_research/e3_ctbt_united_states.html).

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. See *infra*.

degree of possible antipathy toward the CTBT. Many of those senators originally opposing the treaty are Republican and are still in the U.S. Senate. These senators may also be seen to hold a strong ideological antipathy to international law and, in particular, to the binding nature of an international treaty implicating national security concerns. However, many originally opposed to the treaty have come to view it differently.<sup>423</sup> Nevertheless, the power of the Senate vote is undetermined.<sup>424</sup>

It is of great political significance that the President and the Democratic majority in the Senate insist upon ratification as a bipartisan issue, since the vote of ratification will require two-thirds of the Senate's vote. As a bipartisan issue, it is linked to the pre-existing bipartisan consensus that, as a practical matter, has not seen U.S. nuclear testing in almost twenty years.<sup>425</sup> Indeed, even though the Senate failed to ratify the CTBT, there has been no subsequent nuclear testing by the United States.<sup>426</sup>

The consensus on the banning of nuclear tests has invariably been linked to the bipartisan character of arms control policy of this nation. The critical point of division, therefore, will be the political implications and the diplomatic effects of an acceptance of the treaty. The central concern here is a longstanding issue with senators on the extreme right of the political spectrum. National security, as they see it, is essentially a matter of exclusive national sovereignty. A treaty dealing with national sovereignty will therefore be seen as encroaching on U.S. sovereignty in an area that is quintessentially a matter of internal sovereign competence.

A response to this is that every international agreement or understanding generally contains benefits, which means an

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423. DUNLOP & PREEZ, *supra* note 416 (“[T]here have been significant changes in attitude among several highly influential former Republican secretaries of defense and state who opposed the Treaty in 1999 but support it today.”).

424. *Id.* (stating that only eight votes are needed from outside democratic caucus for treaty ratification in 2009, compared to the twenty-two votes needed in 1999).

425. OnlineNevada.org, *Underground Nuclear Testing at the Nevada Test Site*, [http://www.onlinenevada.org/Underground\\_Nuclear\\_Testing\\_at\\_the\\_Nevada\\_Test\\_Site](http://www.onlinenevada.org/Underground_Nuclear_Testing_at_the_Nevada_Test_Site) (last visited Sept. 15, 2009).

426. *Id.*

extension of sovereignty and obligations, which implies limitation. The critical question is—are the benefits that accrue to U.S. national security interests more important than the obligations assumed under the Treaty? In general, the practice of the United States under both the Republicans and Democrats has indicated a longstanding bipartisan commitment to using the treaty mechanism for control and regulation of U.S. national security interests regarding the proliferation and possible expansion of nuclear weapon systems. The general consensus with regard to the CTBT is that the treaty is in the national security interests of the United States, and that the obligations it generates are *de minimis* compared to the rights that accrue to the United States.<sup>427</sup>

At the foundational level, there is the link between ideology and national security. A number of senators perceive this link to be impermeable. Those senators may never support a U.S. agreement on nuclear arms control, even if such an agreement can be clearly shown to support the national security interest of the United States. The Republican Whip, Senator Kyl, “warned that arms control does nothing but constrain the United States, while allowing evil states’ nuclear-arms programs to grow unchecked.”<sup>428</sup> “Which is the real threat?” he asked. “Thousands of nuclear weapons in the American and Russian arsenals, or a nuclear Iran and North Korea?”<sup>429</sup>

While this approach does not hold together from a policy standpoint—witness the early Bush Administration’s total lack of success at stopping nuclear proliferation to Iran and North Korea—it is intuitively compelling. Obama’s vision of a world where the United States gives up some of its own nuclear arsenal in order to strengthen the Non-Proliferation Treaty, and then uses that goodwill to fend off proliferation in the Middle

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427. See KAEGAN MCGRATH, BATTLE LINES BEING DRAWN IN THE CTBT DEBATE: AN ANALYSIS OF THE STRATEGIC POSTURE COMMISSION’S ARGUMENTS AGAINST U.S. RATIFICATION (Nuclear Threat Initiative, 2009), available at [http://www.nti.org/e\\_research/e3\\_us\\_ratification.html](http://www.nti.org/e_research/e3_us_ratification.html) (“[T]here is an emerging consensus that U.S. ratification is within reach.”).

428. Barron Young Smith, *The War On Obama’s Nuclear Agenda*, NEW REPUBLIC, Apr. 29, 2009, <http://www.tnr.com/blog/the-plank/the-war-obamas-nuclear-agenda>.

429. *Id.*

East and Northeast Asia, is far less clear-cut than Kyl's vision, in which we build impregnable missile defenses and keep as many nukes as possible in order to threaten our enemies.<sup>430</sup>

Nevertheless, it is the case that the diplomatic effect of not adopting the CTBT will have long-term effects on the credibility of U.S. leadership in areas of global security and peace. In 1999, when the Senate defeated the treaty, only fifty-one states had in fact ratified it.<sup>431</sup> Today, 182 states have signed the Treaty, and 151 states have ratified it.<sup>432</sup> The states outside of the treaty include North Korea, China, India, Egypt, Iran, Pakistan, and Israel.<sup>433</sup> Thus, the United States is diplomatically identified with regimes that are disrespected internationally for their nuclear arms policies. It should be noted as well that the United States was the principal proponent of the CTBT and, in fact, its first signatory.<sup>434</sup> It should also be noted that the other great nuclear power—Russia—joined the treaty in 2000, in the face of right-wing skeptics who said that Moscow would not ratify it.<sup>435</sup> In addition, this Treaty cannot come into force unless the United States ratifies it.<sup>436</sup>

Thus, globally, the United States is seen as a stumbling block preventing the success of the Treaty. Moreover, states that have not ratified the Treaty will be under enormous compulsion to do so, once the United States has ratified it and it has come into force. Thus, there are compelling and diplomatic reasons for the Senate to give its advice and consent for the ratification of the CTBT.

In 2007, Senator Lugar was asked what he thought the prospects were for the ratification of the CTBT.<sup>437</sup> He replied,

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430. *See id.*

431. DUNLOP & PREEZ, *supra* note 416.

432. *Id.*

433. *Id.*

434. *See* William Clinton, President, Remarks by the President to the 52nd Session of the U.N. General Assembly (Sept. 22, 1997), [http://www.state.gov/www/issues/970922\\_clinton\\_unga.html](http://www.state.gov/www/issues/970922_clinton_unga.html) (calling the CTBT “the longest-sought, hardest-fought prize” in arms control history); *see also* CTBTO PREPARATORY COMM’N, 1977–94 RENEWED TEST-BAN COMMITMENTS, <http://www.ctbto.org/the-treaty/history-1945-1993/>.

435. *Id.*

436. *Id.*

437. Senator Richard G. Lugar, A Conversation on Russia at the Brookings

“[. . .] I think they are not good, in large part because I have not seen a change in constituencies that debated the issue the last time.”<sup>438</sup> However, there are enough nonpartisan voices in the Senate on this issue that appropriate political communication could seal their commitment to provide the two-thirds vote required for advice and consent.<sup>439</sup> Even among influential Republican interest groups, several prominent Republicans now call for ratification—including Henry Kissinger, George Schultz, and William Perry.<sup>440</sup> In fact, many Republicans who voted against ratification in 1999 may be persuaded that ratification now is, in fact, in the U.S. national security interest.<sup>441</sup> Indeed, policy makers from all backgrounds have begun to drop a rigid ideological or dogmatic view of the nation’s national security and tentatively move in the advantageous direction of the rule of international agreements.<sup>442</sup>

For example, Senator Kyl has “argued that the CTBT is unverifiable—meaning that the United States might somehow ‘fall behind’ while other nations cheat on the treaty, setting off small, secret nuclear blasts that we cannot detect in order to improve their nuclear arsenals.”<sup>443</sup> He also argued that the

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Institution 36 (Oct. 8, 2007), available at <http://www.brookings.edu/~media/Files/events/2007/1008lugar/20071008.pdf>.

438. *Id.*

439. See Samuel R. Berger, Sam Nunn & William J. Perry, Case for Ratifying Nuclear Test Ban, *POLITICO*, June 2, 2009, <http://www.politico.com/news/stories/0609/23191.html>.

440. See George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, Op-Ed., *Toward a Nuclear-Free World*, *WALL ST. J.*, Jan. 15, 2008, at A13.

441. See Berger, *supra* note 439 (assessing significant progress towards CTBT ratification). “[F]ormer Secretary Shultz recently noted that Republicans ‘might have been right voting against it some years ago, but they would be right voting for it now, based on these new facts.’” *Id.*

442. See Shultz, *supra* note 440 (issuing a call for a bipartisan review to examine the scientific and technological improvements in the capability of the Treaty’s monitoring systems and to evaluate advances that will assure the reliability and safety of the U.S. stockpile); see also Berger, *supra* note 439 (worrying that “the stage is being set for another calamitous showdown—one that will set back not only America’s national security but our leadership in a dangerous world,” and urging that “[w]e have to build a bipartisan path forward on CTBT).

443. The War on Obama’s Nuclear Agenda, [http://blogs.tnr.com/tnr/blogs/the\\_plank/archive/2009-04/29/the-war-on-obama-s-nuclear-agenda.aspx](http://blogs.tnr.com/tnr/blogs/the_plank/archive/2009-04/29/the-war-on-obama-s-nuclear-agenda.aspx) (Apr. 29, 2009, 23:56 EST).

“United States—which has abided by the test ban’s terms for almost two decades, even though it hasn’t been ratified—cannot maintain its nuclear arsenal without violating the ban.”<sup>444</sup> Yet, developments have taken place since 1999—including advances in research and technology—that strengthen the rational argument for ratification and may be persuasive to Republican moderates.<sup>445</sup> In light of these advances, many previously opposed to the CTBT may perceive new value in the CTBT as a cornerstone of the international nonproliferation regime. Perhaps the most important development in favor of ratification is the successful regime of effective verifiability.

Through the CTBT’s regime of verification, scientists of the treaty organ essentially police states to ensure that “if the other side moves beyond the limits of the treaty in any militarily significant way, we would be able to detect such a violation in time to respond effectively, and thereby deny the other side the benefit of the violation.”<sup>446</sup> In the past, one of the most important objections to the CTBT has been that a country may employ a form of decoupled nuclear tests.<sup>447</sup> Yet, despite the use of this detection-evading technique, the National Academy of Sciences has concluded that a decoupled test with a yield of larger than one to two kilotons could not be hidden.<sup>448</sup> Tests below this yield are not of use to the testing state, nor would they have the capacity to affect the strategic balance regarding the United States.<sup>449</sup> The Senate, in fact, accepted a similar analysis regarding STARTI—yet that bilateral agreement was

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444. *Id.*

445. DUNLOP & PREEZ, *supra* note 416.

446. *Id.* (internal quotation marks omitted). This was the definition of Paul Nitze, who served as President Ronald Reagan’s chief negotiator for the Intermediate Range Nuclear Forces (INF) Treaty and was appointed as Special Advisor to the President and Secretary of State on arms control. Academy of Achievement, Paul Nitze Biography, <http://www.achievement.org/autodoc/page/nit0bio-1> (last visited Sept. 25, 2009).

447. See NAS Study, *supra* note 324, at 46 (noting the difficulty of monitoring underground, or “cavity decoupl[ed],” nuclear tests). Using this technique to avoid detection, a nuclear-testing state could reduce the measurable yield of the test by a factor of seventy. *Id.*

448. *Id.* at 46–48.

449. DUNLOP & PREEZ, *supra* note 416.

ultimately ratified.<sup>450</sup> The NAS concluded its study as follows:

Very little of the benefit of a scrupulously observed CTBT regime would be lost in the case of clandestine testing within the considerable constraints imposed by the available monitoring capabilities. Those countries that are best able to successfully conduct such clandestine testing already possess advanced nuclear weapons of a number of types and could add little, with additional testing, to the threats they already pose or can pose to the United States. Countries of lesser nuclear test experience and design sophistication would be unable to conceal tests in the numbers and yields required to master nuclear weapons more advanced than the ones they could develop and deploy without any testing at all.

The worst-case scenario under a no-CTBT regime poses far bigger threats to U.S. security—sophisticated nuclear weapons in the hands of many more adversaries—than the worst-case scenario of clandestine testing in a CTBT regime, within the constraints posed by the monitoring system.<sup>451</sup>

Since 1999, there has been considerable progress in the capacity to monitor radionuclide and noble gas emissions from an underground nuclear explosion.<sup>452</sup> The CTBTO Preparatory Commission has already put into place three new radionuclide noble gas measuring systems.<sup>453</sup> These technologies permit the detection of abnormal levels of noble gases and are able to plot atmospheric transport modeling to identify the time and location of the source of the emissions.<sup>454</sup> Today, 80% of the IMS are

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450. *Id.*

451. NAS Study, *supra* note 324, at 10–11.

452. DUNLOP & PREEZ, *supra* note 416.

453. *Id.*

454. See Peter Chen, Gerhard Wotawa & Andreas Becker, *The Importance of Atmospheric Transport Modeling: Over Ten Years of Cooperation Between the World Meteorological Organization and the CTBTO*, CTBTO SPECTRUM, Sept. 2008, at 24, 25–27 (explaining the enhanced capabilities of detection since the WMO-CTBTO cooperation agreement in 2000).

certified either as operational or in their testing phase.<sup>455</sup> In short, enormous strides have been made in both the technology and the science of verification. These developments are vastly in advance of the situation in 1999.<sup>456</sup>

It should be noted that the United States benefits currently from the monitoring process under both the NPT and the CTBT.<sup>457</sup> In particular, the United States benefits from the monitoring stations in China, Russia, Iran, and other security-sensitive venues.<sup>458</sup> Moreover, the U.S. Air Force cooperated with the Agency to build an eighteen million dollar hydro-acoustic facility on Wake Island.<sup>459</sup> The Wake Initiative rounded out a hydro network of eleven stations enabling the agency to listen to all of the oceans with the confidence of detecting even a micro-level explosion.<sup>460</sup>

The monitoring system of the CTBT is “operating on a provisional basis.”<sup>461</sup> If the Treaty enters into force, it will also authorize on-site inspections of suspicious activity.<sup>462</sup> The Treaty Organization believes that, with inspections, the Organization will be able to detect any possible nuclear test that is militarily important.<sup>463</sup> At present, three-quarters of the planned 320 monitoring centers are built, certified, and on-line.<sup>464</sup> They each use “one of four technologies: seismic, sensing the shock waves of an underground blast; hydro-acoustic, listening for underwater explosions; infra-sound, picking up low-frequency sound of . . . atmospheric test[ing]; and radionuclide detection, sampling the air for the radioactive byproducts [of the

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455. DUNLOP & PREEZ, *supra* note 416.

456. *Id.*

457. Charles J. Hanley, *Obama Treaty Push Hinges on Global ‘Listening’ Net*, U.S. NEWS & WORLD REP., May 19, 2009, available at <http://www.usnews.com/articles/science/2009-05/19/obama-treaty-push-hinges-on-global-nuclear-listening-net.html>.

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. Hanley, *supra* note 457.

464. *Id.*

testing].”<sup>465</sup>

The intervening ten years have witnessed developments that respond to senatorial concerns about the CTBT. In particular, the technological developments and improvements on issues of verification as well as the integrity of U.S. arsenals provide a promising background for the campaign to secure ratification of the CTBT.<sup>466</sup> Beyond the developments in senate opinion, regimes of verification, and stockpile effectiveness, there have also been developments in global expectations regarding leadership in nuclear control and divestment.<sup>467</sup> For example, at NATO’s April 3–4 Summit in France and Germany last year (2009), where many had expected NATO to endorse the entry into force of the CTBT (as NATO had done prior to the Bush Administration), NATO declined to address the role of nuclear deterrence on alliance security.<sup>468</sup> It would seem that even U.S. international alliances will now decline to make legal arguments on behalf of an uncommitted United States.

From a juridical perspective, the critical importance of the CTBT is that it gives efficacy to international law and international agreements concerning the control and regulation of nuclear weapons systems. The treaty-based method for securing controls over nuclear weapon systems has been and remains one of the most important techniques for the responsible management of nuclear arsenals in the world community. U.S. ratification would speed up the entry into force of the CTBT and would bring the authority of the U.N. Security Council squarely behind the ban on testing worldwide.

Clearly, the Democratic leadership is committed to ratification. The Chairman of the Senate’s Foreign Relations Committee, John Kerry, stated that “the new president should urge the Senate to ratify a treaty banning nuclear weapons testing . . . there needs to be a massive, new commitment to the

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465. *Id.*

466. *Id.*

467. See Oliver Meier, *Steinmeier Calls for U.S. to Withdraw Nukes*, ARMS CONTROL TODAY, May 2009, available at [http://www.armscontrol.org/act/2009\\_5/Steinmeier](http://www.armscontrol.org/act/2009_5/Steinmeier) (asking the U.S. leadership, including President Obama and Hillary Clinton, to lead the way in reducing the role of nuclear arms in national security).

468. *Id.*

counter proliferation and testing ban efforts . . . the nuclear issue has to be much more front and center in the next administration.”<sup>469</sup> Secretary of State Hillary Clinton called the CTBT “a critical proliferation tool.”<sup>470</sup> She also recognized the diplomatic effects of ratification.<sup>471</sup> Namely, she believes that ratification is “essential to restoring American leadership.”<sup>472</sup>

Nevertheless, there is no guarantee that the CTBT will be given the advice and consent of the Senate. As many have noted, it will take time and carefully orchestrated efforts to ensure that the vote on U.S. ratification does not break down evenly along party lines.<sup>473</sup> The proceedings for the Senate must be comprehensive and detailed. It will be important that the proceedings are seen to be bipartisan and thorough. These hearings should generate public awareness, and involve NGO advocacy networks, as well as public opinion, to build support for the Treaty. The President’s own social network could be a critical ally in this work. It would be of value if the President appointed a White House liaison to the Senate in order to monitor and facilitate the orchestration of the CTBT process.

By many estimates, the Senate is likely to vote again on the CTBT as early as this year.<sup>474</sup> In the time until that vote, a great deal of political skill, public awareness, and citizen advocacy will be critical to the ratification of this important treaty. U.S. ratification of the CTBT protects U.S. national interests and, in doing so, provides for the peace and security of humankind.

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469. DUNLOP & PREEZ, *supra* note 416 (internal quotation marks omitted).

470. *Id.*

471. *Id.*

472. *Id.*

473. *See, e.g., id.* (noting that forty-one Republican Senators have already stated that they oppose the language of the CTBT, while it only takes thirty-four votes to defeat the treaty).

474. John Issacs & Kingston Reif, *Will the Senate Support New Nuclear Arms Reductions?*, BULLETIN OF ATOMIC SCIENTISTS ONLINE, June 23, 2009, [http://www.armscontrolcenter.org/-policy/nuclearweapons/articles/062309\\_senate\\_support\\_reductions/](http://www.armscontrolcenter.org/-policy/nuclearweapons/articles/062309_senate_support_reductions/).