SENATE ADVICE AND CONSENT TO THE CONVENTION AGAINST TORTURE

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UNANIMOUS-CONSENT AGREEMENT

Mr. SANFORD.

Mr. President, as in executive session, I ask unanimous consent that when the Senate proceeds to consideration of Executive Calendar No. 12, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it be considered as having been advanced through the various parliamentary stages up to and including the presentation of the resolution of ratification. Provided further, That the resolution be considered under a time limitation of 10 minutes, to be equally divided and controlled by the chairman and ranking member of the Committee on Foreign Relations, or their designees; that the reservations, understandings and declarations recommended in Senate Executive Committee Report 101-30 be considered as having been adopted and treated as original text for purposes of further amendment; that the following four amendments to be offered by the Senator from Rhode Island, Mr. PELL, for himself, and Mr. HELMS, be considered en bloc and be the only amendments in order: An amendment to strike the first reservation dealing with Federal-State issues; and amendment to insert an understanding on the same subject; an amendment to part C of the first understanding dealing with lawful sanctions; and an amendment to the resolution dealing with the deposition of the instrument of ratification; that the time for the amendments offered by the Senator from Rhode Island <Mr. PELL> be provided from the time on the resolution; that following the using or yielding back of time on the amendments and resolution, the Senate conduct two vote back-to-back votes, one on the en bloc amendments if a rollcall vote is ordered and on the resolution of ratification; that no motions to recommit be in order; that after the completion of the votes or vote, the Senate return to legislative session.

The PRESIDING OFFICER.

Without objection, it is so ordered.

The PRESIDING OFFICER.

The clerk will report the resolution of ratification.

The assistant legislative clerk read as follows:

Resolved, (two-thirds of the Senators present concurring therein) that the Senate advise and consent to the ratification of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of

the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988, Provided That:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention.

(2) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or furnishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(3) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

> (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (3) the threat of imminent death; or
>
> (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

The PRESIDING OFFICER.

Debate on the resolution will be 10 minutes equally divided between the Senator from Rhode Island and the Senator from North Carolina.

The Senator from Rhode Island is recognized.

Mr. PELL.

Mr. President, this convention is the product of some 7 years of intense negotiation in which the United States played an active role. The convention was unanimously adopted by the U.N. General Assembly on December 10, 1984, the 36th anniversary of the Universal Declaration of Human Rights. It has now been ratified by or acceded to by 51 States and signed by 21 others.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment represents a major step forward in the international community's campaign to combat torture because it makes torture a criminally punishable offense and obligates each State party to prosecute alleged torturers or extradite them for prosecution elsewhere.

The Reagan administration submitted the convention to the Senate in May 1988 with 19 proposed U.S. conditions, many of which were of concern to the human rights community, the American Bar Association, and others. After consulting with these groups, the Bush administration substantially reduced and revised the proposed list of conditions. I appreciate and applaud this effort.

The Foreign Relations Committee held a hearing on the treaty on January 30 of this year. On July 19, the committee voted 10 to 0 to report favorably the convention with a resolution of ratification containing the reservations, understandings and declarations proposed by the Bush administration.

In categorizing the treaties pending before the Senate, the administration listed the Convention Against Torture as one for which there is an urgent need for Senate action. At the appropriate time, I will be offering four amendments en bloc on behalf of myself and Senator HELMS. The first three amendments would make changes in the language of the resolution of ratification dealing with the issue of Federal-State relations as it impacts on our obligations under the treaty and with the lawful sanctions issue in article 1. These have been worked out with the administration and the administration supports their adoption. The fourth amendment would add a new proviso to the resolution of ratification regarding deposition of the instrument of ratification by the President. This proviso will not be included in the instrument. The administration accepts this amendment. The administration strongly supports ratification of the convention with its proposed conditions, as modified by the committee amendments.

In 1984 Congress enacted a joint resolution, which I sponsored along with Senator Percy, reaffirming the U.S. Govenment's opposition to torture. By ratifying this convention, the United States will demonstrate that it is determined to take concrete steps to eradicate this evil and inhumane practice.

I yield the floor.

Mr. HELMS.

Mr. President, I commend the distinguished Senator from Rhode Island for his cooperation and courtesy in working out the problems in developing the proviso package to the convention. He has been unfailingly cooperative and understanding in coordinating the negotiations between our respective staffs and the Department of State. I commend him for his contribution to the negotiation process.

We now have worked out an agreement that all sides support. The State Department is satisfied that the United States will adhere to its obligations under the convention. The distinguished chairman has my assurance that the sovereignty proviso will be attached only to the resolution of ratification and not to the instrument of ratification.

Finally, I am satisfied that U.S. constitutional principles will prevail under this convention, and therefore I support its adoption with the proviso package offered by the distinguished chairman of the Foreign Relations Committee, my good friend from Rhode Island, Mr. PELL.

Mr. President, I happen to be one of those Senators who believes that the Constitution of the United States is the best form of government ever devised by the mind of man. As my late great friend and Senate mentor, Sam Ervin, often said, the Constitution should be in all of our thoughts all of the time. I feel that I would be derelict in my duties as a U.S. Senator sworn to uphold the Constitution were I to disregard the potential conflict between what the Constitution actually says and those who try to say what the Constitution says.

But all of that has been worked out. I thank my friend again.

THE U.N. CONVENTION ON TORTURE

Mr. President, we are here today to consider two lofty ideals. The first has to do with the expression of the revulsion of civilized nations against torture. The second has to do with the protection of the noblest legal expression of the human, the U.S. Constitution. After much debate and discussion about the U.N. Convention Against Torture, I believe that we have devised a way to implement the ideals of the Torture Convention and fundamental principles of the U.S. Constitution.

In the past, multilateral conventions dealing with criminal law and procedure on the international level have raised a number of difficulties when they were sought to be

applied to U.S. law. The U.S. domestic legal system is based on the U.S. Constitution. Our Constitution is unique. It does and must take precedence over any other international legal regime.

During the past decade, starting with the Genocide Convention, the Senate attached either a reservation or an understanding to eight different treaties and conventions dealing with the subject of international criminal law putting on record the primacy of the Constitution. The Senate did this because case law is not clear and convincing on the subject of constitutional sovereignty.

In the case of Ware versus Hilton, at the end of the 18th century, Justice Iredell stated that treaties were equal to the Constitution. That case has never been overruled. In the famous Curtiss-Wright decision of 1936, Justice Sutherland strongly implied that the chief executive, in matters of foreign policy, was above the Constitution. That case also has never been overruled. In the case of Reid versus Covert, nearly two generations ago, in 1952, Justice Douglass, in a two sentence expression of dicta, did assert the supremacy of the Constitution. This statement was challenged in a concurring opinion by Justice John Marshall Harlan, widely acknowledged to have been the best scholar on the Court, who flatly stated that the Constitution was not necessarily supreme over treaties. The subject matter of that case dealt with an executive agreement, not with a treaty.

Now, I happen to be one of those Senators who believes that the Constitution of the United States is the best form of government ever devised. As my great friend and Senate mentor, Sam Ervin, often said, the Constitution should be in all of our thoughts all of the time. I would be derelict in my duties as a U.S. Senator sworn to uphold the Constitution were I to disregard the potential conflict between what the Constitution actually says and those who say what the Constitution says.

Were the Senate to omit this proviso from the resolution of ratification, potential harm could be done to those constitutional safeguards guaranteed by the Bill of Rights. There could also be problems of due process, the presumption of innocence, and the right to confront one's accusers, just to name a few examples. However, I have agreed to place this proviso only on the resolution of ratification since it accomplishes international notification-the same end that would be accomplished by being included in the articles of ratification.

For the past 6 years, ever since Senate approval of the Genocide Convention, the Senate has attached to international criminal law instruments a sovereignty reservation or understanding which clearly acknowledges the supremacy of the U.S. Constitution. If, as its opponents claim, the sovereignty proviso is meaningless, then no harm is done. If, however, as I and many other Senators believe, the sovereignty clause is meaningful, then it is of the highest legal importance to have it attached to the resolution of ratification where it will put future administrations on notice as to the primacy of the Constitution in U.S. domestic law.

In addition, Mr. President, the Reagan administration had developed a reservation which exempted the United States out of the jurisdiction of the Committee on Torture, which has the responsibility of investigating alleged complaints, both by individuals and by states, of torture and other forms of cruel punishment. I believe that the Bush administration has made a serious mistake in dropping that reservation. To see why this is a mistake one only has to look at the current membership of the Committee on Torture, which includes a representative from the Soviet Union and a representative from Bulgaria.

The Soviet Union and Bulgaria have their own particular expertise in the matters of torture. This Convention's Committee on Torture is a farce, and it may be a dangerous farce. One could well say in this case that the lunatics are indeed running the asylum. I do not want those folks poking their noses into the operation of the U.S. legal system. They have plenty to do with the notorious injustice exemplified by the two countries I have just mentioned.

Therefore, Mr. President, although I am reluctantly accepting the exclusion of the Torture Committee from the proviso package I have worked out with the distinguished chairman of the Foreign Relations Committee, I am also pointing to the possibility of future difficulties caused for the United States by this Torture Committee. I believe that the Reagan administration was right in its more cautious approach.

However, since this Convention is primarily symbolic, it is not necessary to engage in a superfluous debate. Let us hope that the symbolism of the evils of torture will be enough to end that scourge of mankind.

AMENDMENT NO. 3200
(Purpose: To clarify ambiguities in the Federal/state system)

AMENDMENT NO. 3201
(Purpose: To clarify ambiguities in the Federal/state system)

AMENDMENT NO. 3202
(Purpose: To clarify relationship between domestic law and international law)

AMENDMENT NO. 3203
(Purpose: To add a new proviso regarding deposition of the instrument of ratification)

Mr. PELL.

Mr. President, I send to the desk now the floor amendments and ask that they be considered en bloc.

The PRESIDING OFFICER.

The clerk will report the amendments.

The assistant legislative clerk read as follows:
The Senator from Rhode Island <Mr. PELL>, for himself and Mr. HELMS, proposes amendments en bloc numbered 3200 to 3203.

Mr. PELL.

Mr. President, I ask unanimous consent that the reading of the amendments be dispensed with.

The PRESIDING OFFICER.

Without objection, it is so ordered.

The amendments are as follows:

AMENDMENT NO. 3200

Strike the first reservation dealing with Federal/State issues in part I of the resolution of ratification.

AMENDMENT NO. 3201

Insert the following understanding on Federal/state issues in part II of the resolution of ratification: "That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention."

AMENDMENT NO. 3202

In part c of the first understanding under part II of the resolution of ratification, strike everything after the world "law" on line 5 and insert in lieu thereof the following: "Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture."

AMENDMENT NO. 3203

At the end of the resolution of ratification, add the following:

"IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

“The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”.

Mr. PELL.

Mr. President, the first amendment strikes the first reservation dealing with the federal-state issue in the resolution of ratification.

The second amendment adds a new understanding on this matter to part II of the resolution. This new language is designed to clarify ambiguities in the original federal-state reservation and to hone in on those specific articles of the convention where the federal-state system could affect U.S. compliance.

The third amendment modifies the language in part C of the first understanding related to lawful sanctions. Under article 1 of the convention, pain or suffering resulting from lawful sanctions does not constitute torture. The resolution of ratification stipulates that sanctions, to be lawful, would have to be permitted under U.S. law and not be prohibited under international law.

The amendment that I am offering would replace the reference to international law with a reference to the object and purposes of the convention itself.

This amendment is designed to overcome concerns raised by my distinguished colleague, Senator HELMS, about the relationship between domestic and international law in determining the lawfulness of sanctions. The language of these three amendments has been worked out in consultation with the administration and the administration supports these revisions.

The fourth amendment would add a new proviso to the resolution requiring the President to notify all present and prospective parties to the convention that nothing in the convention requires or authorizes any legislation or other action prohibited by the Constitution.

The amendment makes clear that this proviso is not to be included in the instrument of ratification.

This proviso does not constitute a reservation. It will not alter our obligations under the convention.

Because it is not a reservation, other countries cannot invoke it on a reciprocal basis to limit or eliminate their obligation to comply with the convention.

The only obligation in this amendment is for the President to notify other countries that the convention does not authorize or require action inconsistent with the Constitution-a view that the administration shares.

I believe that the President can and will comply with this proviso by simply notifying all countries of our position.

The purpose of this amendment is to address concerns raised by the distinguished ranking minority member of the committee, Senator HELMS, about the legal relationship between multilateral conventions and the Constitution.

The administration's view, which I share along with the America Bar Association and Amnesty International, is that this proviso is unnecessary because nothing in this convention requires or authorize legislation or other action prohibited by the Constitution. Also, it is well settled constitutional law that the Constitution is supreme law over a treaty, as held in Reid versus Covert.

Nevertheless, the administration is willing to accept this proviso because it is not a reservation, it will not be included in the instrument of ratification, and it will not in any way alter U.S. obligations under the convention.

Mr. President, the amendments that I am offering address all of the concerns raised vis-a-vis this treaty. I move adoption of the amendments en bloc.

I yield the floor and yield back such time as I may have.

SOVEREIGNTY AMENDMENT ON TORTURE CONVENTION

Mr. HELMS.

Mr. President, there should be no controversy regarding the proviso which I call the sovereignty proviso. Similar language has been approved by the Senate either as a reservation or as an understanding to be attached to eight different international conventions which impact upon the subject of domestic criminal law.

Today we are considering another convention which purports to undertake obligations relating to our domestic criminal law. The Senate, if it wishes to preserve the supremacy of the Constitution, should once again attach this language.

Specifically, the amendment adds to the Senate Resolution of Ratification by requiring that the President, before he deposits the articles of ratification, to notify all pertinent parties that nothing in this convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

It puts other countries on notice that should a conflict arise in this country between obligations imposed by this convention, and obligations imposed by the U.S. Constitution, that our country shall follow the Constitution.

It puts other countries on notice that our Constitution is the supreme law of the land, a law which can never be invalidated or modified in any degree by an international obligation.

The issue is as clear-cut as that.

I take it as a given principle that the underlying object of U.S. diplomacy is to protect and enhance, both in the short run and in the long run, the sovereignty and independence of the United States. This sovereignty is both *S17489 inherent in, and symbolized by, the Constitution of the United States.

It follows as a necessary corollary that international law is a mere subordinate agent to the U.S. Constitution. When the President of the United States concludes a treaty with another nation or group of nations, he does so independently of any regime of international authority. A treaty is a contract between two independent parties; but unlike domestic contracts which are subordinate to the U.S. Constitution and customary law, a treaty is without sanctions other than the good faith, prestige and power of the contracting parties.

This means that the President retains full authority to interpret the treaty in any manner consistent with the U.S. Constitution, despite any interpretation placed upon it by any other party. The President, for reasons of prudence or policy, may choose to submit a dispute to arbitration; but he is neither required to do so, nor to accept the results of any arbitration. The sovereignty of the U.S. Constitution must be his ultimate guide, even if enforcing that sovereignty derogates from any system of international law. International law is merely a combination of codification and basic international customary practice leading to expectations of action by a nation state, but it can in no way be determinative of any such act.

Moreover, the U.S. Constitution is something unique among legal systems in the world. No other country allows its sovereignty to repose in its Constitution. For most nations, a constitution is merely a basic statement of positive law intended to guide subsequent delineations of specific regulations. The U.S. Constitution is not a statement of positive law. It is a charter of permitted Federal actions, providing a framework leaving intact the legal systems of the several states. Without the Constitution, the Federal Government would have no sovereignty.

Therefore, the relative positions of the United States versus other nations are not comparable.

I think we should all agree that the Constitution is the supreme law of the land, and neither a treaty nor an executive agreement can authorize action inconsistent with it. I

know that there are some who argue that the supremacy of the Constitution was unambiguously established by the Supreme Court with Reid versus Covert (1957). Although the general purport of that case would tend to support the principle, the fact is that even the affirming justices wrote several opinions, disagreeing with the reasons of the others for supporting the principle. For every distinguished jurist whom you can name who believes the matter is settled, another distinguished jurist can come forward to say that it is not settled. If the chances are only 50-50 that it is settled, the gamble is too great. The State Department agreed only reluctantly with my proviso because they argued that my proposal becomes very damaging at the international level. Such an assertion makes sense only if you believe that the international level is superior in authority to U.S. sovereignty. Since I take an oath to uphold the U.S. Constitution, I am required to believe that the integrity of U.S. Constitution is a matter superior to any damages which might or might not result in subordinate concerns such as the international level.

The Torture Convention is by and large a rhetorical gesture, expressing the revulsion which every decent nation has against torture. Obviously, there is no way that a sovereignty clause can upset the object and purpose of a rhetorical gesture.

But if the convention is meant in itself to be anything more than a rhetorical gesture, or to lay the basis to go beyond a rhetorical gesture, then it may present a clear and present danger to U.S. sovereignty and to the people of the United States. When even nations notorious in the annals of torture such as the Soviet Union and Bulgaria, piously sign such a treaty, it cheapens the consensus.

Finally, there is the question of how the judiciary in the United States might treat the convention. If, in the future, a so-called creative judiciary here in the United States began to interpret the standards of the convention as superseding U.S. customary and constitutional law, then we will wish that the U.S. Senate had upheld its obligation to protect the U.S. Constitution by adding this proviso.

For the last 6 years, since Senate approval of the Genocide Convention, the Senate has attached to all international instruments which impinge upon domestic criminal law a sovereignty reservation or understanding which clearly acknowledges the supremacy of the U.S. Constitution. If, as its opponents claim, the sovereignty proviso is meaningless, then no harm is done by its approval. If however, conflicts arise between U.S. obligations under this convention and under the Constitution, then this proviso will be of paramount importance in protecting the Constitution. The Senate has approved this language eight times before, and it should do so again today.

Mr. PELL.

Mr. President, I ask for a division vote.

The PRESIDING OFFICER.

The question is on agreeing to the amendments, en bloc.

Those in favor of the amendments will rise and stand until counted. (After a pause.) Those opposed will rise and stand until counted.

The amendments (No. 3200 through No. 3203) were agreed to.

Mr. PELL.

Mr. President, I thank the Senator from North Carolina for his support this afternoon. I thank him very much indeed. We worked very hard to craft this present agreement to enable Senate action on this convention.

I would also like to express my appreciation to the committee staff director, Beryld Christianson, the minority staff director, Dr. James Lucier, and the two professional staff members most responsible for the work on this convention, Dr. Nancy Stetson and Dr. Robert Friedlander.

Mr. MOYNIHAN.

Mr. President, the Senate will shortly vote to give its advice and consent to the ratification of the U.N. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment. This is an important day for the Senate for two reasons. First, because we will be giving our consent to the ratification of a very important international agreement. The United States has invested enormous resources in this convention. For 7 years our diplomats labored to make the convention more than just words on paper. They made its obligations concrete, meaningful, and, as never before, enforceable. I believe that this is an important step in the continuing battle to end man's inhumanity to man.

This is an important day for another reason. Some years ago the Senate made a mistake. An important international agreement, the Genocide Convention, had languished on the Senate Calendar literally for decades. In order to move forward with the convention, the Senate agreed to attach a reservation to its consent to ratification. This was the so-called sovereignty reservation. It seems innocuous. It states that the convention does not require or authorize any unconstitutional legislation.

The problem with this reservation is that it renders our obligations uncertain. It is quite different from a reservation which states that the United States will not abide by this article or that. It says to every other nation in the world that they must figure out for themselves whether we adhere to a particular provision or not. It purports to condition every provision of the treaty on the entire corpus of constitutional jurisprudence.

Not surprisingly, various nations objected. Strenuously. Our closest allies objected. By sharp contrast, however, nations which felt that the convention might be invoked against them did not object. They could see the advantage of being able to invoke their own domestic legislation to avoid their obligations and then claim that they had done no more

than had the United States. In short, the sovereignty reservation distressed our allies and gave comfort to our adversaries.

Subsequently, many Senators began to realize the magnitude of this mistake. The dangers of the reservation became especially obvious when it was attached to several bilateral mutual legal assistance treaties. The United States found to its chagrin that other nations were drawn to the advantages of the reservation like moths to a flame, invoking their own domestic legislation in efforts to avoid their obligations. International agreements of this type are specifically intended to prevent other nations from invoking their domestic legislation and the Sovereignty Reservation directly undermines this objective.

Ironically, the reservation is also completely unnecessary. The Supreme Court emphatically resolved this point over three decade ago. In Reid versus Covert, decided in 1957, Justice Black wrote:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights-let alone alien to our entire constitutional history and tradition-to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined. There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.

Thus, the reservation does no more than state established constitutional law as regards our domestic legal system. It is clear that the U.S. Government cannot carry out any action which would violate the Constitution even if it is obligated by a treaty to do so. If a treaty obligation violates the Constitution, the U.S. Government will be in violation of its international obligations when it fails to comply. But it cannot-it does not have the constitutional authority-to rectify that fact.

Let me be clear. Neither the Genocide Convention nor the Torture Convention require the United States to undertake any unconstitutional acts. Were that to be the case, the Senate would not give its consent to ratification or would insist upon a specific reservation stating that the United States would not agree to be bound by that specific unconstitutional obligation.

In the case of this convention the Senate is not adopting a sovereignty reservation. The Senate is not insisting upon a reservation. This is not an understanding. It will not be attached to our instrument or ratification. The Senate is simply stating a constitutional truism. Namely: as a matter of domestic law, the Convention does not-as, indeed, it could not-authorize any unconstitutional legislation. The Senate is simply stating that the

President will not deposit the instrument of ratification until it has informed other states of this fact of our constitutional system.

This does not, in any way, alter the legal obligations of the United States as a matter of international law. The United States will not be able to invoke this statement as a defense to its obligations under the convention and no other state will be able to invoke this statement on a reciprocal basis against the United States.

I remain concerned that this statement will create a political and diplomatic problem for the United States and provide a rhetorical device which nations using torture can employ to defend their actions. This will not, as I have stated, be a sound legal defense to their conduct. Nonetheless, it will inevitably and unfortunately be used. I continue to oppose this wholly unnecessary statement and will oppose even this type of proviso in the future. It is only because the United States has invested so much in this convention and because the failure of the United States to ratify during this Congress would be so very unfortunate and would so damage our reputation in international circles that I have reluctantly agreed to this arrangement. It has no legal effect whatsoever. It is unwise and unnecessary. But it is a step in the right direction.

Mr. President, I ask unanimous consent that a letter concerning the sovereignty reservation signed by a bipartisan group of eight Senators be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,

Washington, DC, October 5, 1990.

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

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

The reservation-which states that the Convention does not authorize unconstitutional laws-is superfluous because it is already established constitutional law that a treaty cannot override the Constitution (*see* Reid v. Covert, 354 U.S. 1, 16-17 (1957)). Moreover, the Convention simply does not require unconstitutional legislation.

The reservation is unnecessary-it also has the potential to do great harm. The "sovereignty reservation" will protect human rights abusers because it can be invoked on a reciprocal basis by every state abusing human rights pursuant to its domestic legal

system. Our Constitution does not allow human rights abuses, but that is not true for every nation. In fact, it is not uncommon for other nations to permit "exceptions" to the normal protection of human rights during emergencies. If we attach the reservation to the Torture Convention states like the People's Republic of China which permit "reeducation" and forced labor can reject complaints based on the Convention by invoking our own reservation. The Administration, the ABA, Amnesty International and other human rights groups strongly oppose the reservation for that reason.

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

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

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

We strongly urge you to vote to reject the "sovereignty reservation" if it comes before the Senate.

Sincerely,

Daniel Patrick Moynihan, Claiborne Pell, John Kerry, Alan Cranston, Richard Lugar, Nancy Kassebaum, Mark Hatfield, Joseph R. Biden, Jr.

Mr. LUGAR.

Mr. President, the Convention Against Torture that is before the Senate is an important international treaty that merits the Senate's approval. Senator PELL and Senator HELMS have proposed a package of four amendments to the resolution of advise and consent to the Convention as a response to various concerns that have been expressed about the Convention. I would like to briefly comment on the fourth amendment in this package.

The amendment in question is being offered by the distinguished chairman and ranking member of the Foreign Relations Committee in order to help clarify the issue of the constitutionality and sovereignty as they relate to the Convention. They propose adding a

new proviso to the resolution of advise and consent-not to the instrument of ratification-that would, in their view, make this clarification. They have made it clear that this proviso does not constitute a reservation to the convention.

Mr. President, I believe it would be preferable if the Senate did not adopt this proviso. Nonetheless, I can accept the proposed amendment with the knowledge that throughout the entire review process here in the Senate no one in the administration, and no one speaking in this body has ever suggested that the Convention requires or authorizes legislation or other actions prohibited by the U.S. Constitution. No one has ever suggested that the convention in any way is in violation of the protection and guarantees in our Constitution. It could be argued, therefore, that it is not necessary to include this proviso in the resolution of advise and consent since the Convention does not, in any way, authorize action inconsistent with our Constitution.

I know that it is not the intention of the sponsors of this amendment to question or weaken the protection against torture in the Convention, but I fear that we might be inadvertently doing that very thing. We must make clear that adoption of this proviso in no way provides other countries, which might be less inclined to protect citizens from torture than are we, a way to wiggle out of the prohibition against torture in the convention.

Mr. President, I understand that this proviso is not a reservation to our treaty obligations. It will not be included in the instrument of ratification. It does not permit other countries, under international treaty law, to invoke reciprocal arguments that they need to abide by the Convention's provisions against torture.

The sole requirement of this amendment would be that the President inform other states of the inclusion of this proviso and that it does not violate or is in any way inconsistent with our Constitution. This is a good convention. It is worth supporting. I believe circumstances before us are such that we should support this amendment and the resolution of advise and consent to the Convention.

Mrs. KASSEBAUM.

Mr. President, I rise today to express my strong support for ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. I am sure my colleagues would agree that the United States can no longer wait to join with other countries who have made this treaty binding.

Last July, Amnesty International released its 1990 report documenting the incidence of torture of thousands of individuals in more than 100 countries. Though we do live with the reality of state-sanctioned torture in some countries, as well as its random occurrence, amnesty's statistics were nothing less than shocking.

Our ratification of the Convention Against Torture will, in itself, lead us closer to the goal it represents. The convention makes legitimate the right of nations to be concerned

and to intercede regarding the behavior of another country toward its citizens. The findings of the Committee Against Torture, the overseeing body created by the convention, will aid human rights work throughout the world.

The convention reinforces the international definition of torture and forces each state party to take steps to prevent the practice in each country. Every state party to the convention must make torture a punishable offense and require that torturers be prosecuted or extradited.

Mr. President, some may ask why we should agree to accept the force of this treaty when other countries that are known to condone the practice of torture have accepted it as well. Mr. President, I believe that the fact that these countries want to be seen as opposed to torture is at least a step in the right direction.

Critics of this convention also say it may give other countries opportunity to make charges against the United States. I do not agree with this because I believe we have nothing to fear about our compliance with the terms of this treaty. Torture is simply not accepted in this country, and never will be.

Though I see it as unnecessary, I can accept the provision offered by Senator HELMS in the package of committee amendments. My colleague from North Carolina continues to insist that this convention be amended to indicate that nothing in it authorizes or requires action prohibited by the U.S. Constitution. This provision we have agreed upon is acceptable because it in no way modifies our obligations under the convention. The compromise does not undercut the purpose and nature of the treaty, nor does it make our stance ambiguous to the other states party to the convention. I must say, however, that in general I oppose the concept of a sovereignty clause. Such a clause was added to the Genocide Convention, and in the year since its ratification, some 12 countries, all European allies, have formally registered objections to it. I agree with the Bush administration's view that the sovereignty clause is not harmless but, instead, threatens to undermine the whole purpose of the convention, which is the establishment of an effective international legal prohibition against torture.

Mr. President, I would note that the United States is the only permanent member of the U.N. Security Council which has not ratified the convention. The climate of international cooperation supporting Operation Desert Shield makes ratification at this time ideal and necessary. It is important that the United States be consistent in its condemnation of human rights violations.

The Torture Convention, as it is presented to the Senate today, is an agreement in which we should take part. At the very least, it would send a powerful signal to torturers around the world that the United States will not tolerate its practice. As we near the end of the 20th century, let us take this step to help bring the world closer to ending practices which deny individuals basic human dignity.

The PRESIDING OFFICER.

Is all time yielded back on the resolution?

Mr. PELL.

I yield back the remainder of my time.

Mr. HELMS.

I also yield back the remainder of my time.

The PRESIDING OFFICER.

The question occurs on the resolution.

Is there a division requested on the resolution of ratification?

Mr. PELL.

Yes.

The PRESIDING OFFICER.

A division is requested. Senators in favor of the resolution of ratification will rise and stand until counted. (After a pause.) Those opposed will rise and stand until counted.

On a division, two-thirds of the Senators present and voting having voted in the affirmative, the resolution of ratification is agreed to.

The resolution of ratification, as agreed to, is a follows:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988: Provided, That:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

(1) the intentional infliction or threatened infliction of severe physical pain or suffering;

(2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) the threat of imminent death; or

(4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Mr. PELL.

Mr. President, I move to reconsider the vote.

Mr. HELMS.

I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. PELL.

Mr. President, I am very pleased that the Senate has given its advice and consent to ratification of this very important convention. I believe that we have moved a step closer to the elimination of the inhumane practice of torture. I urge the President to ratify this convention as quickly as possible.

Mr. HELMS.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER.

Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER.

Without objection, it is so ordered.