

Thawing a Frozen Treaty: Protecting United States Interests in the Arctic with a Congressional–Executive Agreement on the Law of the Sea

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I. Introduction

The steadily shrinking Arctic ice cap has triggered a feverish interest among the five nations whose coastlines border the region concerning their respective rights to the ocean and the seabed below.¹ The possibility of huge reserves of natural gas and oil, and the potential for newly navigable channels have led to competing claims by the United States, Canada, Russia, Denmark, and Norway over large sections of the Arctic.² The United States, however, is in danger of losing out due to the obstructionist efforts of a handful of isolationist Senators who consigned a crucial treaty providing a mechanism to negotiate these claims to the deep freeze of the United States Senate for nearly twelve years.³ While the other Arctic nations have long since ratified the treaty and are proceeding to stake out the future of the region, the United States remains seated on the sidelines.⁴

Despite the unanimous support of the Senate Foreign Relations Committee and the backing of the current administration, Senate leaders, under pressure from a small cadre of anti-internationalist Senators, have declined to schedule a floor vote on the Law of the Sea.⁵ It is time for a

1. Clifford Krauss et al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES, Oct. 10, 2005, at A1.

2. *Id.*

3. *A Place at the Table: U.S. Would Lose as Arctic Area is Divvied Up and Exploited by Other Countries*, OMAHA WORLD-HERALD, Oct. 14, 2005, at 6B [hereinafter *A Place at the Table*]; Krauss et al., *supra* note 1, at A1.

4. *A Place at the Table*, *supra* note 3.

5. See Editorial, *Don't Sink 'Law of the Sea,'* L.A. TIMES, May 3, 2004, at B12; Editorial, *Treaty's Foes Could Scuttle U.S. Interests*, PHILA. INQUIRER, May 5, 2004, available at <http://www.lugar.senate.gov/sfrc/opeds.html#philly>.

new approach that will free this critical law from its icy prison. The president should withdraw the treaty from the Senate and work with both Houses of Congress to foster a Congressional-Executive agreement to ensure that America is not left out in the cold.

II. Renewed Interest in the Arctic Region and a Snapshot of Recent Territorial Claims

Until recently, international strategic concern with the Arctic Ocean was limited to the comings and goings of nuclear submarines.⁶ Over the past decade, however, the steady shrinking of the Arctic ice cap has fueled a renewed economic and political interest in the region. As Dr. Rob Huebert, of the University of Calgary Centre for Military and Strategic Studies in Canada, has observed, now, in the post-Cold War global warming era, “everyone is pitching for action. Climate change is reshaping the Arctic [and] [t]he issues are energy, fish and shipping lanes.”⁷

In September 2005, scientists from the National Snow and Ice Data Center (NSIDC) in Boulder, Colorado, reported that the Arctic ice cap had shrunk to the smallest expanse ever recorded.⁸ Arctic experts predict this melting will continue and eventually create a “seasonally open sea nearly five times the size of the Mediterranean.”⁹ As the ice thins, exploration of ocean oil and natural gas deposits becomes more feasible. The United States Geological Survey estimates that “one quarter of the world’s undiscovered oil and gas resources lies in the Arctic.”¹⁰ While melting ice bodes ill for fragile Arctic ecosystems and could have a deleterious effect on climates on the rest of the planet, with change comes opportunity.¹¹ As temperatures change, pink salmon are colonizing Arctic tributaries, cod are traveling northward, and large-scale commercial fisheries are becoming increasingly viable.¹² Furthermore, lucrative navigable shipping channels, including the famed North West Passage and the lesser-known North East Passage, which both link the European continent with China, appear, for

6. Paul Reynolds, *The Arctic’s New Gold Rush*, BBC NEWS, Oct. 25, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/4354036.stm>.

7. *Id.*

8. Richard Black, *Arctic Ice ‘Disappearing Quickly’*, BBC NEWS, Sept. 28, 2005, <http://news.bbc.co.uk/2/hi/science/nature/4290340.stm>.

9. Krauss et al., *supra* note 1.

10. *Id.*

11. See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (online ed. 2006), <https://www.cia.gov/cia/publications/factbook/geos/ay.html>.

12. Alex Duval-Smith, *Arctic Booms As Climate Change Melts Polar Ice Cap: The Global Hunger for Oil Is Fuelling a New Gold Rush*, OBSERVER (U.K.), Nov. 27, 2005, at 21; Krauss et al., *supra* note 1.

the first time in centuries, to be more than pipedreams.¹³ All of this commotion in the frigid North has attracted the interest of various competing sovereignties, environmentalists, and the energy, fishing, freight, and cruise-line industries, among others.¹⁴

Unfortunately, and somewhat predictably, the opening up of the Arctic is proving far from smooth sailing in the realm of international relations. The Arctic Ocean is unique in that it is the only place on the planet where the borders of five countries—the United States, Canada, Russia, Norway, and Denmark—come together “the way sections of an orange meet at the stem.”¹⁵ As the Arctic region becomes less forbidding, long-held tensions between these nations and competing claims to Arctic waterways are coming to the surface. The United States and Canada are engaged in an ongoing dispute over rights to the North West Passage and the Beaufort Sea.¹⁶ Norway and Russia are fighting over a disputed part of the Barents Sea thought to be rich in oil and gas deposits.¹⁷ In 2001, Russia staked a claim to over half the Arctic, following a tradition set by Stalin who once “simply drew a line from the northern Russian port of Murmansk to the North Pole and declared it to be the Soviet Union’s polar territory.”¹⁸

While the other nations have challenged Russia’s claim,¹⁹ on another front the Russian parliament has so far refused to ratify a 1990 agreement with the United States over rights to fish and other resources in the Bering Sea.²⁰ Not to be outdone, Denmark, an Arctic nation through its colonial possession of Greenland, has laid claim to the North Pole itself.²¹ Finally, in what may qualify as one of the more comical territorial disputes of modern times, Denmark and Canada are now engaged in their own cold war over Hans Island, an uninhabited speck of rock between Greenland and

13. Duval-Smith, *supra* note 12 (“Arctic expert” Olav Fagelund Knudsen considers control of the North East Passage and its “lucrative” shipping between Europe and China “[t]he most exciting development in the region.”); Krauss et al., *supra* note 1; Reynolds, *supra* note 6.

14. Amanda Griscom, *Do the Right Thing: Frist Sides with Right-Wingers to Stymie Widely Supported Sea Treaty*, GRIST, Jun. 17, 2004, <http://www.grist.org/news/muck/2004/06/17/griscom-treaty/>; Krauss et al., *supra* note 1.

15. Krauss et al., *supra* note 1.

16. Duval-Smith, *supra* note 12. The Canadians have long claimed sovereignty over a huge swath of the Arctic archipelago in the north of the country and a big chunk of the surrounding waters. The United States has refused to recognize much of this, declaring the North West Passage to be an international waterway. *Breaking the Ice: Sovereignty Over the Arctic*, ECONOMIST, Aug. 21, 2004.

17. Duval-Smith, *supra* note 12; Reynolds, *supra* note 6.

18. Reynolds, *supra* note 6; accord Krauss et al., *supra* note 1.

19. Krauss et al., *supra* note 1.

20. Duval-Smith, *supra* note 12; Reynolds, *supra* note 6.

21. Reynolds, *supra* note 6.

the Canadian coastline.²² Although control over the rock could one day determine exploration rights, the confrontation thus far has been limited to trips by the countries' respective ministers clad in government-issued parkas, and some surreal incidents where "landing parties from both navies raise their national flag and leave whisky and brandy as signs of their visit"²³

Joking aside, all of the above is evidence of the Arctic nations' jockeying for position in this new "gold" rush. At a time when melting ice portends an influx of new drilling, shipping, fishing, and cruise ship travel, it is imperative that some order be brought to this imminent stampede in order to preserve the environment, and protect economic and national security.²⁴ In fact, such a mechanism already exists in a provision of the Law of the Sea treaty. The problem for United States interests in the Arctic is that a handful of Senators on Capitol Hill continue to find ways to block ratification of this accord, leaving America on the sidelines and the Arctic in danger of "uncontrolled pillage."²⁵

III. Brief History of UNCLOS, the CLCS Provision for Resolving Territorial Disputes, and the Tortuous Path of the Treaty in the Senate

The United Nations Convention on the Law of the Sea ("UNCLOS") is a long-time work-in-progress international maritime law. Initially completed in 1982, the treaty provides for governance and dispute resolution on a multitude of issues involving the world's oceans.²⁶ Chief among these are "navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed . . . , passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment . . . and, a more unique feature, a binding procedure for settlement of disputes between States"²⁷ The United Nations ("U.N.") characterizes UNCLOS as "an

22. Duval-Smith, *supra* note 12; Reynolds, *supra* note 6.

23. Reynolds, *supra* note 6.

24. *Industrialization Threatens the Arctic: Drilling, Mining, Shipping Will Soar When Summer Ice is Gone*, STAR TRIB. (Minneapolis, Minn.), Nov. 22, 2005, at 12A [hereinafter *Industrialization Threatens the Arctic*].

25. *A Place at the Table U.S. Would Lose*, *supra* note 3; *Industrialization Threatens the Arctic*, *supra* note 24.

26. UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A HISTORICAL PERSPECTIVE (1998), available at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm [hereinafter UNCLOS: A HISTORICAL PERSPECTIVE].

27. *Id.*

unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life."²⁸

Of chief significance for the Arctic region is Article 76 of the Convention and Annex II, which establishes a Commission on the Limits of the Continental Shelf to assess each Arctic nation's territorial claims.²⁹ Article 76 appears under Part VI of the Convention, which is concerned with the "continental shelf."³⁰ When the convention's framers debated this topic during the 1970s drafting period, they were pondering the "rich bounty of . . . resources and uses . . . found underneath the waves on and under the ocean floor," including oil, natural gas, minerals, gold, and diamonds.³¹ In particular, they were wrestling with the following questions: "What should be the extent of a coastal State's jurisdiction over these resources? Where and how should the lines demarcating their continental shelves be drawn?"³²

UNCLOS begins to answer these questions in the first section of Article 76. It defines the continental shelf of a coastal state as comprising "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin . . ."³³ In the alternative, "where the outer edge of the continental margin does not extend up to that distance," the continental shelf will be adjudged "a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."³⁴ Furthermore, where the continental margin extends beyond 200 miles, "nations may claim jurisdiction up to 350 miles from the baseline or 100 miles from the 2,500 metre depth, depending on certain criteria such as the thickness of sedimentary deposits."³⁵

28. *Id.*

29. United Nations Convention on the Law of the Sea, art. 76, *opened for signature* Dec. 10, 1982, S. TREATY DOC. NO. 103-39 (1994), 1833 U.N.T.S. 3 [hereinafter UNCLOS]; *see also id.* Annex II (Commission on the Limits of the Continental Shelf).

30. UNCLOS, *supra* note 29, art. 76.

31. UNCLOS: A HISTORICAL PERSPECTIVE, *supra* note 26.

32. *Id.*

33. UNCLOS, *supra* note 29, art. 76, § 1. Clifford Krauss et al. provided more of a layman's understanding of a "continental shelf" in his recent *New York Times* article: "The shelf is the relatively shallow extension of a landmass to the point where the bottom drops into the oceanic abyss. But in many places, the drop-off is a gentle slope or is connected to long-submerged ridges that, if precisely mapped, might add thousands of square miles to a country's exploitable seabed." Krauss et al., *supra* note 1.

34. UNCLOS, *supra* note 29, art. 76, § 1.

35. *Id.* art. 76, § 5; UNCLOS: A HISTORICAL PERSPECTIVE, *supra* note 26.

So why does any of this matter for the realpolitik of the modern Arctic great game? Well, Article 77, the kicker to its immediate numerical predecessor, declares in simple yet powerful language that “[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”³⁶ Of course, if, as is the case in the Arctic Ocean, a seabed appears to be a natural resource treasure trove beyond the standard-issue 200 miles, a coastal state will do its very best to claim jurisdiction all the way up to the 350-mile limit. Icebreaker and nuclear submarines have surveyed only a small fraction of the Arctic to date, and now “various countries are mounting new mapping expeditions to claim the most territory they can.”³⁷

Section 8 of Article 76 provides insight as to how UNCLOS would evaluate such a claim. It indicates that a U.N. entity known as the Commission on the Limits of the Continental Shelf (“CLCS”), established under Annex II to the Convention, will consider “[i]nformation on the limits of the continental shelf beyond 200 nautical miles” which “shall be submitted by the coastal State.”³⁸ CLCS will then review the data and “make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.”³⁹ Section 8 states that “[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.”⁴⁰

Annex II requires that the CLCS “consist of 21 members who shall be experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities.”⁴¹ Annex II also establishes limits on the duties of the CLCS. For example, Annex II requires the CLCS to consider scientific data provided by a coastal state only where it is claiming jurisdiction in excess of 200 nautical miles, to provide scientific and technical advice on information gathering, and to render recommendations to party states on their territorial claims within the limits of Article 76.⁴² Article 76 does not describe CLCS as the final arbiter of international disputes; rather it alludes to the Commission as something of a dispute-resolution forum. If a coastal state accepts a CLCS recommendation and

36. UNCLOS, *supra* note 29, art. 77, § 1.

37. Krauss et al., *supra* note 1.

38. UNCLOS, *supra* note 29, art. 76, § 8.

39. *Id.*

40. *Id.*

41. *Id.* Annex II, art. 2, § 1.

42. *Id.* Annex II, art. 3, § 1.

establishes its continental shelf limit accordingly, it is possible that it could not later argue for enlargement of that limit.⁴³

In the crowded Arctic Ocean region, the CLCS will likely have to analyze competing claims of natural prolongation of competitors' continental shelves. It appears especially problematic in the Arctic because, as Peter Croker, current Chair of the CLCS observed: "It's the only place where a number of countries encircle an enclosed ocean. There is a lot of overlap. If you take a normal coastal state, the issues are limited to adjoining states and an outer boundary. In the Arctic, it is quite different."⁴⁴ In one of its first acts in the frozen North, the CLCS recently ruled against the 2001 Russian submission by rejecting its claim to a greater share of the Arctic and instructing it to "reconsider and resubmit its claim."⁴⁵

When UNCLOS was first completed in 1982 it "reflected longstanding U.S. negotiating objectives" but still "contained provisions on deep seabed mining at odds with U.S. interests."⁴⁶ President Ronald Reagan rejected the treaty due to these concerns but praised its "many positive and very significant accomplishments," and in 1983 issued an Ocean Policy Statement announcing the U.S. intention to generally abide by the terms of UNCLOS.⁴⁷ Four years of negotiations on deep seabed mining began in 1990 and resulted in amendments that resolved the Reagan administration's earlier problems with the Convention.⁴⁸ President Bill Clinton signed the amended UNCLOS on July 29, 1994, and on October 7, 1994 submitted it to the Senate for its "advice and consent" as required under Article II, Section 2 of the Constitution.⁴⁹ On November 16, 1994, one year after Guyana became the sixtieth party to ratify the Convention, UNCLOS officially went into force.⁵⁰

43. *See id.* art. 76, § 8.

44. Reynolds, *supra* note 6.

45. *Id.*

46. David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, 2004 BROOKINGS INST. POL'Y BRIEF 137, at 2, available at <http://www.brookings.edu/comm/policybriefs/pb137.pdf> (the problematic language included "requirements for the mandatory transfer of technologies").

47. *Id.*

48. *Id.*; Senator Richard G. Lugar, Chairman, Senate Comm. on Foreign Relations, *The Law of the Sea Convention: The Case for Senate Action*, Address at the Brookings Institution (May 4, 2004) (transcript available at <http://www.brookings.edu/comm/events/20040504lugar.htm>).

49. President's Message to Senate Transmitting United Nations Convention on the Law of the Sea, S. TREATY DOC. NO. 103-39 (1994), available at <http://lugar.senate.gov/sfrc/presidentialmessage.pdf>.

50. UNCLOS, *supra* note 29, art. 309, § 1; UNCLOS: A HISTORICAL PERSPECTIVE, *supra* note 26.

Nearly twelve years later, all of the Arctic coastal states have ratified UNCLOS and have begun to submit claims to CLCS based on the “natural prolongation” of their respective continental shelves.⁵¹ Despite support from both political parties and the express urging of Presidents Clinton and George W. Bush, the Senate has thus far failed to ratify the Convention by the constitutionally required two-thirds majority.⁵² The Senate Foreign Relations Committee—through the actions of then Chairman Jesse Helms (R.-N.C.), himself a staunch UNCLOS opponent—stalled the Convention for almost a decade.⁵³ Helms, a persistent critic of the U.N. and various international compacts, refused to even hold hearings on the treaty during his tenure.⁵⁴

On February 7, 2002, President Bush designated UNCLOS as one of five treaties in “urgent need for Senate approval.”⁵⁵ Following Helms’ retirement in 2003, vocal UNCLOS supporter Senator Richard Lugar (R.-Ind.) assumed the chairmanship of the Senate Foreign Relations Committee.⁵⁶ Under his stewardship, the Committee finally held hearings on the Convention in 2003 and 2004.⁵⁷ On February 25, 2004, the Committee voted nineteen to zero to recommend ratification of the treaty and submit it to the full Senate for approval.⁵⁸

During this most recent push for ratification, officials from the Department of State, the Office of the Secretary of Defense, the U.S. Navy, the U.S. Coast Guard, and the Commerce Department all testified in support of UNCLOS.⁵⁹ The U.S. Commission on Ocean Policy (appointed by President Bush) “strongly endorsed U.S. accession to the Law of the

51. UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS AS AT 20 SEPTEMBER 2005 (2005), http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (stating that UNCLOS was ratified by Norway on June 24, 1996, by the Russian Federation on March 12, 1997, by Canada on November 7, 2003, and by Denmark on November 16, 2004); Reynolds, *supra* note 1 (noting that Russia became the first to submit an official Arctic claim to CLCS in 2001).

52. U.S. CONST. art. II, § 2, cl. 2 (The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

53. Sandalow, *supra* note 46, at 2.

54. *Id.*

55. Senator Richard G. Lugar, U.S. Leadership in the World and the Law of the Sea, <http://lugar.senate.gov/sfrc/sea.html> (last visited Apr. 27, 2007).

56. Sandalow, *supra* note 46, at 2.

57. *Id.*

58. Lugar, *supra* note 55.

59. Lugar, *supra* note 48.

Sea.”⁶⁰ And Secretary of State Dr. Condoleezza Rice strongly encouraged ratification at her January 18, 2005 confirmation hearing before the Senate Foreign Relations Committee.⁶¹ In the private sector, “every major ocean industry, including shipping, fishing, oil and natural gas, drilling contractors, ship builders, and telecommunications companies that use underwater cables, support U.S. accession to the Law of the Sea and are lobbying in favor of it.”⁶² Finally, several prominent environmental organizations, including the Natural Resources Defense Council and the Ocean Conservancy, formed an unlikely alliance with big oil and gas to support UNCLOS because its provisions “protect and preserve the marine environment and establish a framework for further international action to combat pollution.”⁶³

Despite this apparent vote of confidence during the Republican control of the Senate prior to the congressional elections in November 2006, then Senate Majority Leader Bill Frist (R.-Tenn.) refused to schedule a floor vote on this critical agreement.⁶⁴ Frist remained evasive as to when or even if there will ever be an opportunity for an up-or-down vote, claiming there is an “inadequate understanding of what Law of the Sea Treaty actually is, what it does.”⁶⁵ Apparently, unanimous approval of the Convention by the Senate Foreign Relations Committee was not enough to convince then Senate Majority Leader, that the Senate understood the ramifications of the Convention. Instead, Frist thought that “not enough senators paid adequate attention to it.”⁶⁶ Senator Frist, under pressure from the most conservative members of his party, reprised the role of Senator Helms but from a higher position of power in the Senate. As such, a small band of Republicans held UNCLOS, or “LOST” as its opponents disparagingly call it, hostage in the labyrinthine halls of Senate procedure.⁶⁷ As one congressional aide

60. *Id.*

61. *The Nomination of Dr. Condoleezza Rice to be Secretary of State: Hearings Before the S. Comm. on Foreign Relations, 109th Cong. 25 (2005)* (statement of Dr. Condoleezza Rice), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:22847.pdf.

62. Lugar, *supra* note 48.

63. *Id.*; Griscom, *supra* note 14.

64. Griscom, *supra* note 14; Editorial, *Don't Sink 'Law of the Sea,' supra* note 5.

65. Robert B. Bluey, *Should Senate Ratify Law of the Sea Treaty?*, HUMAN EVENTS, Feb. 7, 2005.

66. *Id.*

67. *Id.* (Senator James Inhofe (R.-Okla.): “I will fight to the bitter end to oppose successful ratification. . . . The only reason everyone seemed to be in favor of the Law of the Sea Treaty was that nobody knew what it was.” Senator Jon Kyl (R.-Ariz.): “I don’t think I could vote in favor of it right now.” Senator Wayne Allard (R.-Colo.): “I have some concerns about it. And the more I find out about it, the more concerned I get to be, let’s put it that way. . . . I am very

observed, “[b]asically, we have a bunch of fringe, armchair, isolationist ideologues who are holding up this treaty”⁶⁸ Another congressional aide noted that “Frist is supposed to be the leader of the Senate Republicans, but he’s doing the bidding of a radical few.”⁶⁹ As to the treaty’s chances, should it ever make it to a floor vote, the latter aide believed “we could get well over the 70 votes necessary to pass this treaty. Guaranteed.”⁷⁰

In fact, since the 2004 committee approval, and in spite of President Bush’s support, UNCLOS has become a bogeyman for many in the conservative movement.⁷¹ Mark Helmke, an aide to Senator Lugar, points out the irony of this: “[T]hese right-wingers have spent decades being vehemently anti-Soviet and now they’re letting Russia take over Santa Claus land.”⁷² It is in this environment the treaty currently languishes, the urgings of the president, the secretary of state, the military, the energy industry, and environmental organizations in favor of ratification notwithstanding. Meanwhile, Senator Lugar continues to spearhead the push for UNCLOS and notes that the CLCS:

[W]ill soon begin making decisions on claims to continental shelf areas that could impact the United States’ own claims to the area and resources of our broad continental margin. Russia is already making excessive claims in the Arctic. Unless we are party to the Convention, we will not be able to protect our national interest in these discussions.⁷³

concerned.” Senator Jeff Sessions (R.-Ala.): “I don’t plan to vote for it. I don’t think it’s critical. If it ain’t broke, don’t fix it. I’ve not seen a lot of big, critical issues that would be solved by it. I mean, you could conjure up things that might happen way out in the future, but they haven’t happened yet. We’re talking, virtually, about an international tax. And I’m not for international taxation.”); *see also* Stephen Dinan, *Skeptical Senate Eyes Sea Treaty*, WASH. TIMES, Mar. 7, 2005, at A15.

68. Griscom, *supra* note 14.

69. *Id.*

70. *Id.*

71. *See, e.g.*, Doug Bandow, Op-Ed., *Law of the Sea Treaty: Covenant Undermines the U.S.*, WASH. TIMES, Mar. 16, 2005, at A21; Carrie E. Donovan, *The Law of the Sea Treaty*, HERITAGE FOUND., Apr. 2, 2004, <http://www.heritage.org/Research/InternationalOrganizations/wm470.cfm>; *see also* Editorial, *Don’t Sink ‘Law of the Sea,’* *supra* note 5 (quoting one anti-internationalist caller to Rush Limbaugh’s radio show in the aftermath of the nineteen to zero Committee vote denouncing UNCLOS as a scheme to “dissolve or diminish U.S. sovereignty and replace it with global governance”); Griscom, *supra* note 14.

72. Griscom, *supra* note 14.

73. Lugar, *supra* note 48.

IV. The Congressional-Executive Agreement As an Alternative to the Article II Treaty in Concluding International Accords

Article II, Section 2, clause 2 of the United States Constitution states that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”⁷⁴ It is the only constitutional provision that expressly provides the United States with a mechanism for making international agreements.⁷⁵ The Treaty Clause is not, however, the exclusive source of executive power in this realm, nor is it the only option for concluding international agreements. As the Restatement (Third) of Foreign Relations Law explains, the United States may make “international agreements other than treaties,” chief among these being the Congressional-Executive agreement.⁷⁶ As numerous scholars have observed, “many international accords, including the North American Free Trade Agreement (NAFTA) and the World Trade Organization, are approved as congressional-executive agreements by simple majorities of both Houses.”⁷⁷ In fact, since World War II, the number of international compacts passed as some form of executive agreement has dwarfed those concluded as traditional Article II treaties.⁷⁸

The Restatement instructs that: “the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution.”⁷⁹ In passing legislation that will create a Congressional-Executive agreement, Congress, with a simple majority in the House and the Senate, may “authorize the President to negotiate and conclude an agreement, or . . . may also approve an agreement already

74. U.S. CONST. art. II, § 2, cl. 2.

75. Phillip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT’L L. 55, 58 (1998).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. a (1987).

77. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801 (1995).

78. Trimble & Koff, *supra* note 75, at 60 (“From 1939 to 1982, the United States concluded 608 Article II treaties and 9,548 executive agreements. In 1982 alone the United States concluded 372 executive agreements and only seventeen Article II treaties.”). Presumably, Professor’s Trimble’s figures include sole-executive agreements in the “executive agreements” category, a different animal in kind from the Congressional-Executive agreement, but nevertheless the essential point—that the treaty is no longer close to being the dominant or sole means of concluding international agreements—remains true

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(2).

concluded by the President.”⁸⁰ Congress itself cannot enter into international agreements, as Article II vests the president with sole power to negotiate with foreign governments on behalf of the United States.⁸¹ Critically, for our purposes, the Restatement explains that:

Since any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty . . . , either method may be used in many cases. *The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.* Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.⁸²

Professor Trimble has outlined the mechanics of choosing whether to conclude an international agreement via a treaty or a Congressional-Executive agreement.⁸³ “Upon successful conclusion of a negotiation, the President must decide which constitutional procedure to use to secure the necessary domestic law authority to support his decision to bring the treaty into force as an obligation of the United States.”⁸⁴ For the most part, the president is constrained to choosing between two procedures: submitting the agreement as an Article II treaty for approval by two-thirds of the Senate, or seeking the assent of the whole Congress through ordinary Article I legislation requiring only a simple majority in the House and the Senate.⁸⁵ While Article II contains the lone reference to concluding international accords, “the Constitution does not require the President to use Article II. The President may alternatively seek congressional authorization of an international agreement by joint resolution or act of Congress, which requires a majority vote of both Houses”⁸⁶ Historically, “the choice of constitutional procedure by the President has been at least in part a political choice.”⁸⁷

Several constitutional scholars, the majority of whom approve of Congressional-Executive agreements, use the text of the Constitution to

80. *Id.* § 303 cmt. e.

81. *Id.*

82. *Id.* (emphasis added).

83. Trimble & Koff, *supra* note 75, at 58.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

defend the legitimacy of the device.⁸⁸ Professors Ackerman and Golove make a convincing case that while the mechanism is a “modern development, departing radically from the constitutional practice of the first 150 years of the Republic,” the Constitution “does permit an interpretation that supports modernist practice.”⁸⁹ These scholars begin by focusing on what the Constitution does not say. Neither the Treaty Clause of Article II, nor any other text in the Constitution, explicitly states that international accords may “only” be ratified by two-thirds of the Senate.⁹⁰ They next point out that this silence “seems more meaningful once the Treaty Clause is situated among other constitutional texts.”⁹¹ Taken as a whole, they argue, it is apparent that the Constitution has no problem with using Congress as a whole to approve international agreements. Under Article I, the authors point out, both Houses have the power to “regulate Commerce with foreign Nations,” to “declare War,” and to “raise and support Armies.”⁹² Further, if Congress finds that legislative approval of an international accord negotiated by the president is “necessary and proper” to exercise such powers, then, the authors conclude, there is no reason Congress should be “barred from approving the agreement merely because two thirds of the Senate could achieve the same end under the Treaty Clause.”⁹³

Scholars also look to historical practice and what are referred to as theories of constitutional “moments” or “increments” to explain the development of the Congressional-Executive agreement.⁹⁴ Some academics see the use of some form of the modern Congressional-Executive agreement as having historical pedigree all the way back to President George Washington.⁹⁵ But while there are a few nineteenth-century antecedents, such as the annexation of Texas and Hawaii (which became possible only through joint resolutions of Congress after the Senate rejected annexation treaties), Ackerman and Golove have made a convincing case that it was not until the New Deal and the aftermath of

88. See Ackerman & Golove, *supra* note 77; Trimble & Koff, *supra* note 75, at 58-59.

89. Ackerman & Golove, *supra* note 77, at 801, 811.

90. See *id.* at 811.

91. *Id.*

92. *Id.*; see also U.S. CONST. art. I, § 8, cls. 3, 11, 12.

93. Ackerman & Golove, *supra* note 77, at 811; see also U.S. CONST. art. I, § 8, cl. 18.

94. See Ackerman & Golove, *supra* note 77; Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); Trimble & Koff, *supra* 75.

95. See Trimble & Koff, *supra* note 75, at 59.

World War II that the modern, interchangeable Congressional-Executive agreement was born.⁹⁶

The roots of an alternative method of concluding international agreements made by the president are found in the Senate's rejection of the Treaty of Versailles in 1921.⁹⁷ Although a majority of the Senate approved of the terms of the treaty ending World War I and establishing the League of Nations—as President Woodrow Wilson requested after negotiating the treaty in Paris—supporters were unable to muster the two-thirds vote required by Article II.⁹⁸ Instead, Congress was forced to pass a joint resolution to officially end hostilities with the war's belligerents.⁹⁹ As is the case today with UNCLOS, a minority of isolationist conservative Senators “blocked American participation in the League of Nations,” leading to what some internationalist intellectuals in the 1930s and 40s argued were disastrous consequences for world peace and security.¹⁰⁰

During the New Deal, and especially during World War II, internationalist scholars and lawyers within the Roosevelt Administration, chilled by the specter of Versailles, sought a new mechanism for concluding international agreements that would not run afoul of isolationist sentiment in the Senate.¹⁰¹ As solutions to Depression-era economic problems were often international in scope, and as it became clear that the post-war world would require numerous international agreements, the Administration and its allies began toying with the idea of the Congressional-Executive agreement as an alternative to the treaty.¹⁰² Legal scholars such as Myres McDougal, Edward Corwin, and Wallace McClure challenged the idea of the treaty as the exclusive means to execute international accords.¹⁰³ They confronted the anti-democratic view of the

96. Ackerman & Golove, *supra* note 77, at 832-33 (observing that the annexations of Texas and Hawaii “involved neither treaties *nor* executive agreements. Both transactions were accomplished entirely through the enactment of ordinary legislation—and thus were merely cases of ‘legislative unilateralism.’”). They also contend that the initial agreements rejected by the Senate could not technically be treaties as neither Texas nor Hawaii would remain “foreign nations” post-annexation and that Congress merely utilized its express constitutional power to admit new states into the Union. *Id.*; *accord* Trimble & Koff, *supra* note 75, at 60.

97. *See* Ackerman & Golove, *supra* note 77; Trimble & Koff, *supra* note 75, at 59.

98. Ackerman & Golove, *supra* note 77, at 861-62 (identifying the Senate vote of forty-nine to thirty-five in favor of the Treaty of Versailles.).

99. Trimble & Koff, *supra* note 75, at 60.

100. *Id.* at 59; *accord* Ackerman & Golove, *supra* note 77, at 861-62.

101. *See* Ackerman & Golove, *supra* note 77.

102. *See id.* at 860-66.

103. *Id.* at 866-72; *see, e.g.*, Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 *YALE L.J.* 181 (1945).

Constitution that would allow a handful of Senators to block the will of a majority of both Houses and the president and, consequently, the American people who elected them.¹⁰⁴

Matters came to a head in May 1944, when “the House of Representatives formally approved a constitutional amendment ousting the Senate from its traditional prerogative.”¹⁰⁵ The amendment sought to alter the Treaty Clause such that “a majority of both Houses would be granted the power to approve treaties.”¹⁰⁶ Seeking to maintain an “emerging internationalist consensus,” Roosevelt adopted a more conciliatory approach whereby some of the World War II-era international agreements would be submitted as traditional Article II treaties and others through the new vehicle of the Congressional-Executive agreement.¹⁰⁷ It was a testing ground and over the next several years the Senate, under great public and institutional pressure, effectively demonstrated its assent to the modern, interchangeable device.¹⁰⁸

In the 1940s, President Roosevelt submitted the United Nations Charter as a treaty but then, along with his successor, President Harry Truman, proceeded to submit a raft of critical international accords as Congressional-Executive agreements.¹⁰⁹ In short order, Congress used this method to approve the Bretton-Woods Agreement (establishing the International Monetary Fund and the World Bank) and the Headquarters Agreement with the United Nations.¹¹⁰ Congress also used this procedure to affirm United States entry into the Food and Agricultural Organization.¹¹¹ Moreover, Congress allowed for United States participation in the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the International Refugee Organization, and the World Health Organization.¹¹² The newly-used and powerful device

104. See Ackerman & Golove, *supra* note 77, at 866-72 (“This antidemocratic bias was especially intolerable in a world in which the line between foreign and domestic policy-making had become arbitrary. If a two-House procedure was good enough for the resolution of fundamental questions at home, why not for those that had implications overseas?”).

105. *Id.* at 865.

106. *Id.*

107. See *id.* at 866, 874.

108. See *id.*

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ n.8 (1987); Ackerman & Golove, *supra* note 77, at 873-74.

110. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ n.8; Ackerman & Golove, *supra* note 77, at 891-92, n.425; Trimble & Koff, *supra* note 75, at 59-60.

111. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ n.8; Ackerman & Golove, *supra* note 77, at 891-92, n.425; Trimble & Koff, *supra* note 75, at 59-60.

112. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ n.8; Ackerman & Golove, *supra* note 77, at 891-92, n.425; Trimble & Koff, *supra* note 75, at 59-60.

gained overwhelming institutional acceptance during this period, creating what Ackerman and Golove refer to as a “constitutional moment” where the American people—the creators of the Constitution—“supported fundamental [constitutional] changes.”¹¹³

In years following Roosevelt’s and Truman’s uses of the Congressional-Executive agreement, almost every other president has utilized Congressional-Executive agreements to conclude a wide array of important international agreements. For example, in 1972, President Richard Nixon used a Congressional-Executive agreement to pass the first Strategic Arms Limitation Treaty (SALT I), “[o]ne of the first major nuclear arms reduction agreements” with the Soviet Union.¹¹⁴ In 1994, President Clinton submitted, and the Congress approved, the landmark North American Free Trade Agreement (NAFTA) as a Congressional-Executive agreement.¹¹⁵ In 1998, the similarly groundbreaking trade agreement that authorized American participation in the World Trade Organization (WTO) was submitted by President Clinton and approved by majorities in both Houses.¹¹⁶

The United States Supreme Court has not directly addressed the constitutionality of the Congressional-Executive agreement as a means to conclude international accords.¹¹⁷ However, in 1936, the Court remarked that the president’s ability to engage in foreign affairs “did not depend upon the affirmative grants of the Constitution,” and in this “vast external realm . . . the President alone has the power to speak or listen as a representative of the nation.”¹¹⁸ In *United States v. Belmont*¹¹⁹ and *United States v. Pink*,¹²⁰ cases involving the use of sole-executive agreements, the Court ruled that such “international compacts and agreements . . . have a similar dignity” to Article II treaties.¹²¹ Furthermore, as Ackerman and

113. Ackerman & Golove, *supra* note 77, at 873, 895, 910-14.

114. Trimble & Koff, *supra* note 75, at 59; *accord* Ackerman & Golove, *supra* note 77, at 901.

115. *See* Spiro, *supra* note 94, at 962.

116. *See id.*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters’ n.9 (“*Preference for Congressional-Executive trade agreements.* Tariffs and other trade matters have been dealt with by treaty, especially treaties of friendship, commerce, and navigation, but agreements on these subjects are now commonly effected by Congressional-Executive agreement, in recognition of the special role of the House of Representatives in raising of revenue. U.S. Constitution, Article I, Section 7.”).

117. *See* Ackerman & Golove, *supra* note 77, at 915.

118. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-19 (1936).

119. 301 U.S. 324 (1937).

120. 315 U.S. 203 (1942).

121. *Id.* at 230.

Golove observed, since World War II “the Court has been extremely deferential on foreign affairs, allowing Congress and the President to fight out their constitutional battles on their own terms.”¹²²

The most recent case implicating the legitimacy of the Congressional-Executive agreement is *Dames & Moore v. Regan*.¹²³ There, the Court upheld the use of a sole-executive agreement by President Carter that secured the release of American hostages held by Iran in exchange for the delivery of frozen Iranian assets to a claims tribunal in The Hague.¹²⁴ In reaching its conclusion, the Court invoked Justice Jackson’s famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹²⁵ and looked to the extent of congressional approval of President Carter’s acts.¹²⁶ The Court found that that Congress had “acquiesced in the President’s action,” noting that Congress had previously approved similar claim settlement agreements and had not objected in this instance.¹²⁷ As Ackerman and Golove suggest, if, as indicated by the *Dames & Moore* Court, the test of the legitimacy of “international agreements other than treaties” depends on the support of Congress, then it seems likely that a Congressional-Executive agreement where both Houses of Congress vote to approve an international accord should easily pass constitutional muster.¹²⁸

While many have accepted the Congressional-Executive agreement as interchangeable with the Article II treaty as a means to conclude international accords, this view is certainly not without its critics. Chief among them is Harvard’s Laurence Tribe, who, following in the footsteps of 1940s opponent Edwin Borchard,¹²⁹ rails against the device as antithetical to the “reasoned and rigorous textual and structural analysis” of constitutional inquiry.¹³⁰ Professor Tribe essentially argues that the text of the Constitution provides only one way of concluding international agreements—the Article II treaty.¹³¹ While acknowledging that “[t]he

122. Ackerman & Golove, *supra* note 77, at 925.

123. 453 U.S. 654 (1981).

124. *Id.* at 674; Ackerman & Golove, *supra* note 77, at 928.

125. 343 U.S. 579 (1952).

126. *Dames & Moore*, 453 U.S. at 668-69.

127. *Id.* at 661, 686.

128. *See* Ackerman & Golove, *supra* note 77, at 928.

129. *See, e.g.*, Edwin M. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1943-44) (denying constitutional legitimacy of congressional-executive agreements); Edwin M. Borchard, *The St. Lawrence Waterway and Power Project*, 43 AM. J. INT’L L. 411 (1949) (same).

130. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1233 (1995).

131. *See id.* at 1249-50.

congressional-executive agreement has recent practice on its side,” Tribe makes several complex textual and structural arguments that a proper reading of the Constitution mandates the treaty as the exclusive device.¹³² He concludes that neither political compromises nor “constitutional moments,” nor the passage of time are substitutes for “the path of rigorous constitutional interpretation.”¹³³ In Tribe’s view, then, all Congressional-Executive agreements offered as alternatives to an Article II treaty are *per se* unconstitutional.¹³⁴

Professor John Yoo also challenges the modern expansive view of the Congressional-Executive agreement.¹³⁵ Instead of completely rejecting the device, Yoo argues that the Constitution, textually and structurally, requires the use of an Article II treaty whenever the subject matter is outside of Congress’ power and where power is shared—for example, in the area of military agreements and arms control.¹³⁶ A Congressional-Executive agreement, in his view, is appropriate only where the agreement implicates “plenary” Congressional powers—for example, international economic issues that implicate the Foreign Commerce Clause.¹³⁷ Other scholars, including Peter Spiro, dispute that the text and structure of the Constitution mandates such a distinction.¹³⁸ Spiro, critical of both Ackerman and Tribe, disputes the notion of full interchangeability between the treaty and the Congressional-Executive agreement, and uses a “constitutional increments” theory of historical practice to identify international accords that may only be properly concluded in treaty form.¹³⁹

In spite of these criticisms, “the prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”¹⁴⁰ While there are the odd “empty senatorial pronunciamientos”¹⁴¹ against the device, and the occasional weak Presidential concession to the demands of the Senate,¹⁴² “the law in this

132. *Id.* at 1250, 1251-72.

133. *Id.* at 1285.

134. *Id.* at 1251-72.

135. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

136. *Id.* at 821-24.

137. *Id.*

138. *See, e.g.*, Spiro, *supra* note 94, at 1006.

139. *Id.* at 993-1003, 1009-10.

140. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1987).

141. Ackerman & Golove, *supra* note 77, at 903.

142. *See* Trimble & Koff, *supra* note 75, at 60-61 (referring to President Clinton’s decision to refrain from submitting the CFE Flank Agreement as a Congressional-Executive agreement under pressure from some members of the Senate).

area remains where it was left by President Truman and the Eightieth Congress: if the President persuades a majority in both Houses to ratify an executive agreement, it gains unquestioned acceptance as a binding international obligation”¹⁴³ As Ackerman and Golove emphasized, “Articles I and II set up alternative systems through which the nation can commit itself internationally—one with, and one without, the cooperation of the House.”¹⁴⁴

V. Historical Precedent for the Withdrawal of a Stalled or Rejected Treaty and Its Resubmission As a Congressional-Executive Agreement

As noted above, the decision as to which procedure to use to conclude an international agreement “is a political judgment, made in the first instance by the President.”¹⁴⁵ As a practical matter, this would seem to suggest that the president will submit an agreement in whichever procedural form is most likely to effectuate its approval with minimal political cost. But does precedent support a president in an attempt to end an uphill battle over a treaty in the Senate by withdrawing the treaty and resubmitting it as a Congressional-Executive agreement?

There is at least one historical analogue to such a circumstance: the protracted tale of the St. Lawrence Seaway. In 1934, the Senate rejected a treaty with Canada which would have enabled the construction of the St. Lawrence Seaway.¹⁴⁶ Strong regional opposition to the proposed construction made it very unlikely that the administration would garner the required two-thirds vote in the Senate.¹⁴⁷ In the following years, this project was floated as a test case for utilizing the Congressional-Executive agreement advocated by internationalist legal intellectuals. President Roosevelt, after signing a new accord with the Canadians, authorized its submission as a Congressional-Executive agreement in 1941.¹⁴⁸ Fierce Senate resistance and the attack on Pearl Harbor forced President Roosevelt to abort this first foray into the Congressional-Executive agreement.¹⁴⁹

143. Ackerman & Golove, *supra* note 77, at 903-04.

144. *Id.* at 920 (“[M]oreover . . . the text prescribes the same super-majoritarian remedy whenever one of the normal law-making institutions is excluded from the process.”).

145. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e.

146. Ackerman & Golove, *supra* note 77, at 875 (noting that the treaty was defeated by a vote of forty-six to forty-two).

147. *Id.*

148. *Id.*

149. *Id.* at 876.

Three years later, in December 1944, supporters of the St. Lawrence Seaway project attempted once again to resurrect the agreement.¹⁵⁰ In the final days of the congressional session, boosters attempted to attach the Seaway accord to a Rivers and Harbors bill on its way through the Congress.¹⁵¹ Opponents in the Senate dealt the amendment a resounding defeat, rejecting it in a vote of fifty-six to twenty-five.¹⁵² Still, the Roosevelt and Truman Administrations, persistent in their support of the agreement, were gaining ground in their push for the interchangeability of treaties and Congressional-Executive agreements. In 1946, the St. Lawrence Seaway accord was submitted as a stand-alone Congressional-Executive agreement—and defeated.¹⁵³ In 1954, however, with the guidance of President Dwight D. Eisenhower, the two Houses of Congress finally approved a Congressional-Executive agreement with Canada to construct the St. Lawrence Seaway.¹⁵⁴

The St. Lawrence Seaway episode is more than a historical aside on the development and acceptance of a new device to conclude international agreements. It provides a concrete example of how a president can salvage a rejected or stalled agreement from the clutches of uncooperative members of the Senate. Regional opposition threatened to doom an engineering endeavor that has proven to be a huge economic boon to both the United States and Canada.¹⁵⁵ Nevertheless, persistent employment of the Congressional-Executive agreement ultimately rescued the agreement from its watery grave. It is time that President Bush and congressional friends of America's Arctic interests utilize the same mechanism to thaw UNCLOS from its senatorial deep freeze.

VI. Application of the Congressional-Executive Doctrine to UNCLOS and the Pressing Issue of Arctic Development

The current status of UNCLOS in the United States Senate provides an unusual and valuable opportunity to consider the full potential of the Congressional-Executive agreement as a means to effectuate international agreements. It is within the president's prerogative, under the executive's Article II foreign relations powers, to withdraw the stalled UNCLOS treaty

150. *Id.* at 887.

151. *Id.*

152. *Id.* at 888.

153. Spiro, *supra* note 94, at 995.

154. *See* Ackerman & Golove, *supra* note 77, at 893.

155. *See generally* Great Lakes St. Lawrence Seaway System, Seaway Facts, <http://www.greatlakes-seaway.com/en/aboutus/seawayfacts.html> (last visited Apr. 27, 2007).

from its interminable languor in the Senate, and resubmit the Convention as a Congressional-Executive agreement. Additionally, while this course of action may have serious political costs and ramifications, they are outweighed by the urgent need for the United States to take its full place at the Arctic table.

As previously discussed, for practical political reasons, a president can normally make a calculated decision whether to submit an international agreement as a treaty or a Congressional-Executive agreement. Generally a smart political operator, the president will usually be able to gauge beforehand which method is likely to obtain the required votes while generating the least political heat. For example, presidents have used their political savvy in determining that the United Nations Charter agreement was best submitted as a treaty but NAFTA and participation in the WTO were best approved as Congressional-Executive agreements.¹⁵⁶ Of course, sometimes a treaty signed by an outgoing president is disavowed by the new administration before it has any chance of being approved in either form. The Bush Administration's opposition to the Kyoto Protocol signed by President Clinton is an obvious example.¹⁵⁷ Further, unpopular treaties without much political attention do get stalled from time to time. The strange circumstances of UNCLOS, however, render it a different animal and require a more radical solution.

President Clinton signed and submitted UNCLOS to the Senate with a reasonable hope and expectation of its passage.¹⁵⁸ On the date of its submission, October 7, 1994, Democrats controlled both the House and the Senate, and a Democrat, Senator Claiborne Pell served as Chair of the Senate Foreign Relations Committee.¹⁵⁹ Hopes for a swift passage were dashed, however, by the dramatic election results of November 1994, which saw Republicans regain control of both Houses of Congress.¹⁶⁰ In a near fatal blow, it soon became clear that arch-conservative isolationist

156. See Ackerman & Golove, *supra* note 77, at 874, 906-07.

157. Though Clinton himself never actually submitted the Treaty to the Senate for ratification presumably because he knew he could never get the required votes to either ratify the treaty under Article II or even get a Congressional-Executive agreement under Article I. See Mark Udall, *Scaling New Heights or Retreating from Progress: How Will the Environment Fare Under the Administration of President George W. Bush?*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 1, 19.

158. See Steven Greenhouse, *U.S., Having Won Changes, Is Set to Sign Law of the Sea*, N.Y. TIMES, July 1, 1994, at A1.

159. Pell, Claiborne de Borda—Biography Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000193>.

160. See R.W. Apple, Jr., *News Analysis, How Lasting a Majority?; Despite Sweeping Gains for Republicans, History Suggests the Power Is Temporary*, N.Y. TIMES, Nov. 10, 1994, at A1; Richard L. Berke, *The 1994 Elections: The Overview; G.O.P. Wins Control of Senate and Makes Big Gains in House*, N.Y. TIMES, Nov. 9, 1994, at A1.

Jesse Helms would become the new Chairman of the Senate Foreign Relations Committee; the gateway through which UNCLOS was required to pass.¹⁶¹

With Helms' retirement, following years of his successful blocking of any progress on the treaty, supporters hoped for a new beginning, especially given the strong support of President Bush.¹⁶² Even so, despite hearings and a unanimous vote out of committee in 2004, a handful of isolationist Senators continue to utilize procedural tactics to prevent a floor vote.¹⁶³

Thus, since its October 1994 submission to the Senate, two presidents of very different political stripes have urged UNCLOS's ratification to no avail. Because an Article II treaty is within the exclusive purview of the Senate, there is a very real danger that UNCLOS could languish there indefinitely, allowing seabed claims and critical decisions regarding the future of the Arctic to be made without the United States having a voice.

The contention that a president has the power to unilaterally withdraw a treaty from the Senate admittedly runs counter to some recent pronouncements from Washington, D.C. For example, during the first year of the current Bush Administration, the president sought to formally withdraw a rejected treaty—the Comprehensive Test Ban Treaty (“CTBT”)—from the Senate, but “State Department lawyers told the White House that a president cannot withdraw a treaty from the Senate once it has been presented for approval.”¹⁶⁴ In that instance, President Bush, who had hoped to kill the CTBT through withdrawal, ultimately “resolved to let [it] languish in the Senate, where its supporters concede they do not have the votes to revive it.”¹⁶⁵ Moreover, earlier that year, the Senate Foreign Relations Committee issued a robust defense of its treaty power that foreshadowed the CTBT advice.¹⁶⁶

161. David E. Rosenbaum, *Control of Law-Making Now Tilts Conservative*, N.Y. TIMES, Nov. 9, 1994, at B1.

162. See Lugar, *supra* note 55.

163. See Griscom, *supra* note 14.

164. Thom Shanker & David E. Sanger, *White House Wants to Bury Pact Banning Tests of Nuclear Arms*, N.Y. TIMES, July 7, 2001, at A1.

165. *Id.*

166. See STAFF OF S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 145 (Comm. Print 2001) (“The President does not have the formal authority to withdraw a treaty from Senate consideration without the Senate’s concurrence. In practice, however, a President can render any pending treaty effectively moot, at least for the duration of his time in office, simply by declaring his unwillingness to ratify it, regardless of whatever action the Senate might take.”).

The State Department's opinion runs counter to the broad sweep of executive power in international relations under Article II.¹⁶⁷ Eminent international law professor Michael J. Glennon has noted that custom apparently supports a requirement that the president seek Senate consent for the withdrawal of a disfavored treaty.¹⁶⁸ However, Glennon also reasoned that:

Given the President's authority to decline to ratify a treaty approved by the Senate, it might nonetheless be argued that he thus possesses, a fortiori, the lesser authority to forestall Senate approval by withdrawing a treaty. No instance has been identified in which an executive request for the return of a treaty has been rejected, however, or in which the Executive "withdrew" a treaty from the Senate without its consent.¹⁶⁹

Even if the State Department lawyers and others are correct in their conclusion that the president lacks the power to withdraw a treaty from the Senate without its consent, consent to the withdrawal of UNCLOS could be achieved in return for a commitment to pursue a Congressional-Executive agreement on the same terms. The Senate opposition to the CTBT's withdrawal was due to the Administration's stated goal of killing the treaty once and for all.¹⁷⁰ Here, the Senate Foreign Relations Committee has unanimously supported the passage of UNCLOS and if promised a Congressional-Executive agreement in its place, would likely consent to its withdrawal. And even if, for some reason, the treaty remained stuck in the Senate, it is not clear why the president could not simply initiate a rival Congressional-Executive agreement by having a sympathetic Representative introduce a bill in the House containing the same terms as the treaty.

If, as a majority of constitutional scholars have maintained, the Congressional-Executive agreement is in itself a constitutional means to make international accords, there can be nothing unconstitutional about using it to replace the treaty form of UNCLOS currently stalled in the Senate. In fact, while there may be other prudential concerns for a

167. See David C. Scott, Comment, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1477 (2002) ("[T]he President of the United States does, and should, have such a power from both a constitutional and historical perspective. . . . President Bush has the authority to withdraw the CTBT, even if the Senate rejects his request for its return. While presidents should continue to request the return of treaties for the purpose of comity, on the rare occasion that the Senate refuses, unilateral withdrawal exists as a final option.").

168. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 175 (1990).

169. Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 277 n.119 (1983).

170. Shanker & Sanger, *supra* note 164.

president, such a move would be constitutionally sound even if the Senate rejected the treaty.¹⁷¹ The president may not relish a confrontation with conservative Senators whose support and assistance may be needed on a range of other matters. Nonetheless, as is clear from the St. Lawrence Seaway saga, when an international agreement like the Law of the Sea is vital enough to the prosperity and security of the United States, the prospect of its successful passage outweighs the political costs of upsetting a small segment of the Senate.¹⁷² Resubmission of UNCLOS in the alternative Congressional-Executive form is an idea whose time has come.

There is also a tactical political rationale behind repackaging UNCLOS as a Congressional-Executive agreement at this juncture: it would create fresh political impetus to get the Convention approved. By resubmitting it under the sponsorship of a supportive Representative, the Administration could generate new media coverage and momentum in the House. With the House's approval, a brighter spotlight and firmer pressure can be brought to bear on the Senate to at least give UNCLOS a full floor vote.

Presidential withdrawal of the stalled UNCLOS treaty and resubmission to Congress as a Congressional-Executive agreement is necessary to protect American interests in the imminent Arctic "gold" rush. While the Senate dithers, America's Arctic competitors are staking out territory while the United States watches from the sidelines.¹⁷³ Now that the cornerstone to proactive Arctic involvement has languished in committee for over a decade, including two years in the hands of a Senate leadership held hostage by a handful of isolationists, the president has to consider fresh options. There is a constitutionally sound, currently available mechanism to thaw this frozen agreement. It is time to turn up the heat and unleash the Congressional-Executive agreement.

VII. Conclusion

As climate change melts the polar ice caps, the world is confronting the prospect of a new great game playing out in the Arctic Ocean. At stake are rights over oil and natural gas, minerals, fish, navigable shipping channels, and a coordinated approach to environmental protection. America's Arctic rivals have ratified and begun utilizing an international accord, the Law of the Sea, that sets forth the rules of the Arctic game and provides a passkey to full participation in the future of the region. The

171. See Trimble & Koff, *supra* note 75, at 58-60.

172. See generally *id.*

173. Krauss et al., *supra* note 1; Reynolds, *supra* note 6.

United States is a signatory to this Convention but is frozen out of its rightful place at the table due to the actions of a few isolationists in the Senate who refuse to permit a vote on the treaty. It is within the president's prerogative to decide whether to submit an international agreement as an Article II treaty or an Article I Congressional-Executive agreement. Even a defeated treaty can reappear and succeed in this latter form. It is not an unconstitutional leap to say that the president can also withdraw an Article II treaty from consideration in the Senate and resubmit it to Congress as a Congressional-Executive agreement. At a time when uncooperative members of the Senate are effectively forcing the United States to sit out the first half of the game, the short-term political costs of resubmitting UNCLOS as a log-jam busting Congressional-Executive agreement are clearly outweighed by America's need to be a full player in the remainder of this Arctic competition.
