

United States Consideration of a Treaty

by Thomas W. Jacobson (2009)

The United States Senate is likely to pursue ratification of the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) this year, and then the UN Convention on the Rights of the Child (CRC). Here are some Constitutional provisions and Senate rules that affect how a treaty is considered in the full Senate.

President Signs Treaty, then Sends to Senate

The first step towards ratification of a treaty is that the President of the United States must sign it. President Jimmy Carter signed CEDAW in 1980. Secretary of State Madeleine Albright signed the CRC on behalf of President Bill Clinton in 1995. Once signed, the President may send the treaty to the U.S. Senate for concurrence. President Carter sent CEDAW to the Senate in 1980, but no President has yet sent the CRC to the Senate for approval.

Senate Foreign Relations Committee Must Approve Treaty First

When the Senate receives a treaty, Senate Rules require that it be referred to the Foreign Relations Committee [Rule XXV.1(j)(1)17]. If the Committee votes on the treaty, and a majority of the Committee members present vote in favor of it, then the treaty is sent to the full Senate for consideration.

The Senate Foreign Relations Committee (SFRC) received CEDAW in 1980, but took no action until 1993, and then the full Senate took no action. The Committee took up consideration of CEDAW again on July 30, 2002, voting in favor 12-7, but again the full Senate took no action.

Senate Consideration of a Treaty Starts Anew Each Congress

Senate Rule XXX.2 says: "all proceedings on treaties shall terminate with each two-year Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon."

Quorum

When a treaty goes to the full Senate, the Constitution requires that "a Majority ... shall constitute a Quorum to do Business" [Art. 1, Sec. 5, par. 1].

A quorum is 51 of 100 Senators. However, the Senate usually ignores this requirement, and proceeds with its business unless a Senator calls for a quorum.

Mr. Jacobson originally wrote this paper in 2009 when he was serving as Representative to the United Nations for Focus on the Family (U.S.A.), from 2001 to 2010.

In a telephone interview, the Senate Parliamentarian office said, “The Senate does a tremendous amount of work without a quorum.”

Concerns: If no Senator calls for a quorum or a recorded vote, it is feasible that CEDAW could pass without a quorum [per Senate Parliamentarian office]. The SFRC Majority staff believes the Senate has approved treaties without a quorum or recorded vote.

Tactics: A Senator may call for a quorum to ensure that all Senators will come to the chamber. A Senator may also call for a recorded vote. It seems imperative that the Senate Minority leadership ensure that a Senator who is aware that CEDAW may be brought up is present in the Chamber to call for a quorum and recorded vote.

Delaying Tactics if CEDAW is Brought Up

Tactic: Objection to resolution will cause 1 day delay. If any Senator objects to the treaty resolution, “its introduction shall ... be postponed for one day” [Rule XIV.1].

Tactic: Question of order. Any Senator may raise a “question of order” (e.g., constitutional objection to CEDAW based on violation of the 10th Amendment). The Presiding Officer is then to make a decision on the point of order, and may submit the question to the Senate. If the Senator who registered the question of order objects to the decision, he may “appeal to the Senate” on his first appeal alone [Rule XX.1; XX.2].

2/3 Majority Requirement

The President has the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur” [Art. II, Sec. 2, par. 2].

Concerns: The 2/3 majority requirement is not 67 of 100 unless 100 Senators are present. If 100 Senators are present, it will take 34 votes to defeat CEDAW. It is vital that 34 Senators oppose CEDAW *and* are present to cast their votes. *If* no quorum is called, and no recorded vote is requested, a majority could be as few as 2 of 3 if only 3 Senators are present. *If* a quorum is called, and only 51 Senators are present to make the quorum, a 2/3 majority vote to approve CEDAW would only require 34 favorable votes.

Concern: Under “unanimous consent,” the Senate often suspends its rules to facilitate or accelerate its business, including consideration of treaties. This requires agreement on both sides of the aisle, but can be prevented with respect to CEDAW if several Senators put “holds” on the resolution (which they did in prior Congressional sessions).

Tactics: Several Senators should put “holds” on the resolution to approve CEDAW as soon as it is introduced. A senator should call for a quorum and recorded vote, and ensure that at least 34 Senators who oppose the treaty are present and voting accordingly.

Final Step of Ratification

If the United States Senate approves a treaty, then the President of the United States may ratify it. In the case of CEDAW, he would send a letter to the United Nations Secretary General notifying him of United States ratification of the Convention.