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Multilateralism à la Carte: The Consequences of Unilateral 'Pick and Pay' Approaches

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Abstract

The 1999 Congressional season, the penultimate of the century, ended with President Clinton's grudging acquiescence to the terms set by House Republicans for forwarding the bulk of money claimed due by the United Nations. In return, the Clinton Administration agreed not to veto a rider to the UN funding bill which would withhold US funding to organizations urging foreign governments to adopt birth control measures. Lost in the shuffle of domestic politics was the issue of whether the United States in fact owed the United Nations what it claimed, and whether America's efforts at selective withholding indeed constituted a fall from grace, as critics charged. The legal issues were always far from clear. The UN dues standoff does not represent the hijacking of the American multilateralist vision by isolationist-minded Republicans on Capitol Hill. In fact, the United States has never claimed unwavering loyalty to a literalist interpretation of the principle of 'collective financial responsibility' of Article 19 of the UN Charter insofar as that meant acquiescence to the will, no matter how unreasonable, of the UN General Assembly majority on budgetary matters. Here, rhetoric impeded a negotiated solution.

It has become fashionable to speak of America's fall from grace as exemplified by its refusal to pay all the back-dues claimed by the United Nations. By definition, grace is an inclusive spirit, mindful of the views of others. Its antithesis, or so it is alleged, is contempt for the viewpoint of the UN majority by the arrogant assertion of America's power to choose which bills it will pay, and which bills it will not. This is deemed unilateralism at its worst.

I would like to suggest that the case against America is enormously exaggerated. Herein lies the essence of the problem. It is assumed that once in America's romanticized past a multilateral ideal flourished which has now been abandoned by

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neanderthal Republicans on Capitol Hill. But in fact little has been renounced. There never was an unwavering American commitment to ‘collective financial responsibility’, cited in Article 19 of the UN Charter, as constituting American blanket acquiescence to the will of the UN General Assembly majority on budgetary matters no matter how unreasonable that position might be. Nor, with regard to the corollary charge of rampant unilateralism as exemplified by the recent US action in Kosovo, has there ever been an American commitment to not undertake NATO regional enforcement action without prior Security Council authorization.

It is the UN arrears issue that has led to the sharpest criticism of American ‘unilateralism’. Much of it has been self-inflicted. President Clinton has characterized Congressional reluctance to pay in full the over \$1 billion claimed by the UN as the action of ‘deadbeats’. The term denotes a particular type of deviant. Webster’s International Dictionary defines ‘deadbeats’ as ‘those not paying their way, getting a free ride, and thus sponging off of others in not paying their debts’. Not unexpectedly, others, who can usually be expected to be more circumspect, have picked up the ‘deadbeat’ refrain. UN Secretary-General Kofi Annan opined in a *New York Times Magazine* interview of 29 March 1998: ‘Americans don’t like to be deadbeats. I feel frustrated and saddened because this is not the America I know. Americans are a generous people, and they like to keep their commitments.’

Some inclined to putting US behaviour in historical context have taken to citing the seventeenth-century Italian jurist and philosopher Giambattista Vico. Vico characterized the life of states as bound by periods of intellectual progress (*corsi*) followed by periods of regress (*ricorsi*). In this model, *ricorsi*, or regression, is deemed to characterize America’s current state of affairs. Interestingly, Vico, who conceived of his historical cycles as following one another yet (much like the US stock market) marked with one continuous upward movement as with a slow spiral ascent, might have taken a more beneficent view.

It is tempting to discuss Kosovo also insofar as America’s unilateral action ‘under the cloak of NATO’ is deemed symptomatic of the same arrogance that leads to a ‘pick and choose’ policy at the UN. This is not the time to enter into that fray other than to say that as in the UN dues issue, Kosovo presents international life in its full complexity. Would it be wise to overlook the fact that Russia and China were pleased by an outcome that they formally condemned insofar as it avoided a showdown at the Security Council? In these circumstances is not a functional construction of the law of the Charter that takes into account the reality of power politics and pressing humanitarian problems preferable to a formalistic interpretation? In truth, Kosovo and the UN dues issue have this in common: neither can be properly understood or evaluated without appreciating the power politics and power realities behind ostensible ‘unilateral’ actions.

Congress has always been involved in major issues of US foreign policy. And the US Congress was never content to place America’s global financial obligations in the hands of the majority of the General Assembly. True, American foreign policy has been marked by contrary strains: the view associated with Founding Father James Madison saw America as an exceptional state; Woodrow Wilson eschewed unilateral

action in favour of the collective will. These contending views have tended to lead to Congressional soul-searching as to how to balance the responsibilities of a dominant world power with those of one concerned with setting precedents for the rest of the world. That same soul-searching which acts as a brake on cavalier 'unilateralism' has affected Congressionally inspired selective withholding from the UN assessed budget.

In this regard, my personal experience becomes relevant. Even before I was formally sworn in as Counsel to the US Delegation to the United Nations shortly before the opening of the 1981 General Assembly session, I had been notified that Congressman Mickey Edwards of Oklahoma was outraged with the United Nations' action in voting not to have an American representative on the UN Economic and Social Council's Statistics Committee. Since its creation an American had always been appointed to sit on the Statistics Committee, whose work is influential in budgetary matters. In response, Congressman Edwards proposed that the United States withhold 10 per cent of the annual assessed UN budget, to which it contributed 25 per cent, until such time as an American was reinstated to the post. It fell upon me, as the newly appointed legal counsellor, to implement that proposal.

In the end, however, I informed Congressman Edwards, and my superior, Ambassador Jeane Kirkpatrick, that it simply could not be done — not while maintaining US fidelity to the rule of law and in particular to Article 19 of the UN Charter which imposed the duty of collective financial responsibility. After all, nothing in the Charter or any other legal instrument compelled the appointment of a US representative to the Statistics Committee. Nor could we legally withhold funding for UN activities simply to signal displeasure with the other's political agenda. The only exception for selective withholding under international law was action intended to further or protect the aims and purposes of the UN Charter against an unmindful UN General Assembly majority. That exception was carved out by the International Court of Justice ruling in the 1962 *Certain Expenses* case.

What followed was a more difficult issue and one that was to represent America's first Executive Branch withholding from the UN assessed budget. But it too came only after much soul-searching, balancing America's commitment to freely exercise appropriate power and maintain allegiance to the rule of law.

Congress had already mandated selective withholding from the UN-assessed budget during the Carter Administration. A 1978 bill required withholding of the US proportionate share of the UN-assessed budget that might fund activities of the PLO — then considered a terrorist organization. It had been done without a peep of protest. It was quite different when in 1982 the Reagan Administration threatened not to pay its share of expenses for the LOS Preparatory Conference. The events and reasoning that led up to that decision is worthy of review as it explains the origins of Executive Branch selective withholding and remains reflective of ongoing American attitudes.

In a memorandum for the President the key argument for withholding was that payment would set a 'dangerous' precedent for all future cases of the improper use of assessed funds. That concern centred on legal as well as political implications. We were against a precedent that placed the final say over financial matters in the hands of the majority of the United Nations General Assembly. Accordingly, we contended

that where the GA had acted improperly, going beyond its authority in authorizing expenditure for programmes extraneous to UN purposes, selective withholding, within limits, was an appropriate remedy. In this case, where the United States chose not to be a member of the LOS Convention, the GA could not, we contended, properly assess the United States for its costs. The fact that it had voted to do so by a vote of no less than 132–4 in favour was, we argued, irrelevant.

Our central argument, made in a memorandum to the President and in our subsequent explanation to the United Nations, was that to create collective obligations, expenses must be legitimate. Hence, an expense apportioned by the GA was not automatically valid absent legitimacy. The ICJ *Certain Expenses* case was cited as authority for the proposition that for the expense to be legitimate its relationship to implementation of the fundamental and universal principles of the UN Charter must be established. Thus, in the *Certain Expenses* case the Soviets were deemed bound to contribute to UN peace-keeping operations because that was held to be an essential activity tied to the UN Charter's primary purpose of maintaining international peace and security. In contrast to peace-keeping operations, we pointed out that LOS Prep Com concerned implementation of a treaty regime separate from the UN Charter, and indeed one not even answerable to the United Nations.

In this light withholding *in protest* did not constitute a deviation from America's traditional support for the principle of collective financial responsibility. While concerned that the US action might conceivably encourage other nations to engage in some selective withholding, that concern would not be allowed to derogate from our overwhelming concern that there must be some way for a Member State to *protest* what it considered to be an unlawfully assessed expense imposed by the majority. This followed from recognition of the fact that individual states do not have access to the ICJ as an alternative to self-help. And, while the UN Secretary General or the GA could seek an ICJ Advisory Opinion, it was unlikely that either would do so in the absence of the actual withholding of funds. Moreover, the ICJ in the *Certain Expenses* case did not hold, we pointed out, that the Soviets had acted inappropriately in withholding payment for UN peace-keeping operations; only that it was improper for them not to pay their assessed share after the ICJ had ruled that UN peace keeping was an essential function tied to the UN's primary purpose of maintaining international peace and security.

Thus the Reagan Administration saw US selective withholding in the instance of the LOS Prep Com as advancing the rule of law, not deviating from it. It would put the UN on notice that it would not acquiesce to the growing irresponsibility of the UN majority, particularly in its practice of funding activities of separate entities through UN assessed contributions. In this way it was seen as a forward step in ending the growing disparity between those who pay the bills and those who have the votes. At the time, the majority of UN Member States — 85 of a total of 157 — paid an aggregate of only 1.75 per cent of the total UN budget while the US which paid 25 per cent of the budget had only a 1/157th of the decision-making power.

To put in context the matter of 'pick and pay' which the LOS Prep Com withholding decision represented, in 1982 — and the figure has gone up since — 30 nations

intentionally withheld parts of their UN contributions for activities they deemed improper. The list included most Eastern bloc countries; leading non-aligned states like India, Algeria, Jordan, Syria and Cuba as well as four of the five permanent members of the UN Security Council (the UK was the lone exception). And the practice of selective withholding spanned the life of the UN from its earliest days up to 1978 when the US first withheld based on a Congressionally mandated policy. In this context, the US could have, if it wished, employed the Goldberg Reservation of 1965 whereby 'the United States reserves the same option to make exceptions to the principles of collective financial responsibility, if in our view strong and compelling reasons exist for doing so. There can be no double standard among members of the organization.' The United States never chose to invoke the reservation although under the circumstances there was precedent for doing so.

Finally, then as today, there were domestic considerations at play. The LOS Treaty had not been ratified by the US Senate, and that being the case, under the US Constitution the treaty was not part of the 'law of the land' recognized by the Constitution and hence the expenditure of government funds to carry out the provisions of such a treaty could have been treated as illegal by the US courts.

Nor was the US decision to withhold payment a take-it-or-leave-it proposition. The United States, in effect, invited the GA or Secretary General to seek an advisory ICJ opinion on the matter. At the time, the US was convinced that it was acting in good faith over a relatively insignificant sum of about \$1 million and was prepared to risk an adverse ICJ opinion. What the US would have done had the ICJ ruled against it is, of course, pure conjecture, other than to say it would have considered all of its options.

This history of the first presidentially-mandated selective withholding is recounted here in some detail to make clear that it was done with enormous regard, not dismissal, of legal obligations. It stood for the principle that withholding under protest in extreme situations, where there is no other remedy, is appropriate — especially where the international organization is invited to bring the matter before the ICJ for a ruling.

The reader can contrast for himself this withholding as opposed to that which was proposed by Congressman Edwards and which was turned down. The subsequent Kassebaum Amendment authorizing US withholdings pending UN financial reform has in fact much more to do with the LOS Prep Com exigency than that pressed by Congressman Edwards insofar as it concerned not mere discretionary financial reform but stopping the ship of world government from sinking rapidly under the weight of its own mismanagement. Whatever conclusion the reader draws about the appropriateness of withholding to enable financial reforms, the salient point is that no US selective withholdings were cavalierly undertaken; or worse, that they were the action of 'deadbeats' who would choose to cheat on financial obligations.

With regard to the full scope of current US withholdings, Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, and other Congressmen in the forefront of current Congressional efforts at withholding, have often pointed out that costs incurred by the Department of Defense in implementing supporting resolutions of the UN Security Council with regard to Iraq and Yugoslavia are in excess of \$4

billion, and that not a penny of this has been charged as an offset to the UN. Regarding the \$658 million claimed due in UN peace-keeping expenses, which is the bulk of the arrears claimed by the UN, the US is hardly alone in money owed. France is deemed to be in arrears of \$148 million, the UK by \$71 million, the Netherlands by \$72 million, Canada by \$47 million and Germany by \$37 million. Most importantly, there is a nearly \$500 million dollar discrepancy between UN and US figures. Indeed, it was President Clinton who two years ago signed a bill which would limit the total US contribution to peace keeping to 25 per cent, not 31 per cent as assessed by the UN General Assembly under an arcane formula which, for example, assesses China only 1 per cent of the total peace-keeping budget.

Of course America's Congress could do more to show respect for international law. But there are several constraints which need be recognized.

The first is the absence of an institutional pro-international law proponent in Congress the way there is at the State Department through the Office of the Legal Advisor. Any Congressman can quickly introduce any bill he or she wishes without checking for conformity with international law. Legislative counsel on the Hill rarely addresses this issue in the way they might address conformity with domestic law.

Secondly, there are limits to what Congress can do. It reflects the sentiments of the American public, which is predominantly Madisonian rather than Wilsonian in its approach: suspicious of reaching out to act in unison with others, and more cynical than accepting of the better angles of our international natures or systems. Still, the tug of Wilsonianism comes in a close second to Madisonianism, even among Republican voters, and provides fertile ground for those who want to move in the direction of greater attention to international law.

Indeed, the term, 'pick and choose', with regard to US withholdings has a pejorative ring. US actions might better be likened to civil disobedience. In this light, principled withholding as a matter of last resort against perceived illegality of the majority is not to be condemned. The ICJ can be the final arbiter, although it must be recognized that decisions which impact on vital national interests are rarely brought to the ICJ. Within the ambits of power realities, a general advancement of the rule of law with regard to assessing legitimate withholdings is possible.

Seen in this broader perspective, American attitudes — as perceived by the Executive Branch and by the Congress — toward principles of collective financial responsibility show no fall from grace. On the contrary, they demonstrate that America continues to struggle to create a balance between its commitment to use its power wisely, and unilaterally if necessary, and its commitment to advance the rule of law. That struggle does not take place in a political vacuum. There are inevitable temptations. Riders may be added to legislative proposals which may not seem germane. But politics is the art of the possible, which is the art of compromise. In the debate over UN dues there has been little focus on negotiation and compromise, and much on name-calling.