President Obama, the Senate, and the Polarized Politics of Treaty Making*

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Objective. We examine President Obama’s use of international agreements as he pursued his foreign policy agenda during his first three years in office. While President Obama uses executive agreements at similar levels as previous presidents, he has used the treaty mechanism far less often. This presents an interesting puzzle: Why has Obama used so few treaties when his own party controls the Senate? Methods. We address this puzzle by analyzing Obama alongside other presidents in analyses of treaty use and in presidents’ experience with treaty delay employing ordinary least squares (OLS) and maximum likelihood estimation regression techniques. We also utilize the New Strategic Arms Reduction Treaty (START) and Obama’s use of treaty priority lists as qualitative case studies. Results. The various findings together suggest that the rise of partisan polarization, including conservatives’ propensity to oppose significant treaties, factors into Obama’s decisions to use treaties when completing major diplomacy. Conclusions. The partisan context of the Senate provides a substantial constraint on presidents looking to cement important new foreign policies through international agreements.

When President Barack Obama and Vice President Joseph Biden took office in January 2009, they had good reasons to be optimistic about their prospects for foreign-policy-making influence in the U.S. Senate. The governing context at the time suggested that the new White House team had reason to be positive about the possibilities. For the first time since 1960, the new president and vice president were sitting U.S. Senators immediately prior to beginning their administration. Perhaps more than any democratic legislative assembly in the world, the U.S. Senate, owing to its size of just 100 members and tradition of individual legislator rights, has a closeness or club feel that spawns many friendships, even across the partisan political aisle.¹ Moreover, Vice President Biden had been a long-time leadership force on the Senate Foreign

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¹Note, for example, staunchly conservative Senator Tom Coburn’s (R-OK) friendship with President Obama, which has spawned hugs on camera, despite their considerable disagreement on most matters of public policy and federal spending.

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Relations Committee (SFRC) and President Obama had been a member. With those institutional positions in the Senate and SFRC came many important relationships to call upon for key interbranch constitutional processes, such as treaty advice and consent. In Biden’s case, given his long tenure in the Senate and on the SFRC, so too came a vast institutional memory of foreign policy processes of the legislative, executive, and bureaucratic variety. Obama and Biden also brought to the White House some of the top staff of the SFRC and State Department. Hence, staffers deeply involved in the international agreement process were now mainstays of the White House foreign policy team. Add to all of this the fact that the Democrats had 60 senators in their caucus and the Obama Administration was not exactly irrational to think that much was possible in the interbranch area of international agreements. Before delving further into what has transpired during the Obama administration and why, we first provide some general background on the topic of presidential-congressional relations on international agreements.

**Focusing on International Agreements**

The power to negotiate and conclude international agreements on behalf of the United States is a critically important power of the American presidency. As Franck and Weisband (1979:135) note: “Of the various foreign relations initiatives open to a country, the most crucial are the making of war and the undertaking of solemn commitments.” The president and Congress, in particular the Senate, play a major role in both areas of foreign policy making. However, while political scientists have written extensively on the domestic politics of war, comparatively little has been written on the domestic politics of treaties. International agreements represent significant foreign policies, from the creation of formal alliances and ending major conflicts to the solidification of foreign trade relationships and the sharing of nuclear knowledge. In what is seemingly clear language, the Constitution sets out a formal process of Senate advice and consent on international agreements in its treaty clause (Article 2, Section 2), which states that the president “shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”

Despite this constitutional clarity, political practice and international demands have led to a very different process dominating the way presidents complete their international agreements. Rather than seeking Senate approval

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2 See Krutz and Peake (2009) for a more thorough discussion of these many processes, including the critical, but understudied processes of the U.S. State Department with regard to treaties and executive agreements.

3 The staff included Brian McKeon, Biden’s former aide on the SFRC, who was made Deputy National Security Advisor. The White House also brought on another key staff member to the Office of White House Counsel and National Security Council, attorney Avril Haines. Haines had prior experience in the State Department’s Office of Treaty Affairs and the SFRC.
for most of their international agreements, modern presidents have turned to the executive agreement, a much more efficient and less cumbersome policy tool than the treaty. Over the last 60 years, just 6 percent of international agreements were completed as treaties. While treaties require super-majority consent in the Senate, executive agreements do not, and in many cases enter into force upon the signature of the president or his agent.

This important change in the way presidents bind the United States to international agreements has led to numerous charges by scholars of modern presidents trampling the Constitution at the expense of congressional powers (e.g., Crenson and Ginsberg, 2007; Margolis, 1986; Nathan and Oliver, 1994). Scholars of presidential power often point to the rise of executive agreements as exemplary of unilateral authority (Howell, 2003; Moe and Howell, 1999; Shull, 2006) and as a component of the “imperial presidency” (Rudalevige, 2005; Schlesinger, 1973). Others argue that the rise in executive agreements is indicative of constitutional construction and delegation of power by Congress to the executive. For example, Krutz and Peake (2009) argue that, rather than a trampling of constitutional principles, the increased use of executive agreements vis-à-vis treaties stems from the political system’s need for efficiency and predictability in completing international agreements (also see Ackerman and Golove, 1995).

Despite the apparent option to evade the treaty requirement of the Constitution by using executive agreements, presidents have not abandoned the treaty altogether. In fact, modern presidents complete a substantial portion of important international agreements as Article II treaties. Moreover, when presidents take important treaties to the Senate, they are often met with rancorous opposition, especially from conservatives. Conservative opposition to a variety of important treaties has increased markedly in recent years, in conjunction with increasing rates of partisan polarization. Moreover, the super-majority requirement for finalizing treaties in the Senate heightens the significance of partisan polarization in the process. Given that President Obama currently must work with the most polarized Congress in history, how has he gone about codifying international agreements? As a result of record-level partisan polarization in Congress, have relations between the president and Congress on international agreements been taken in a new direction?

The United States faces a number of difficult international problems that require the use of international agreements. The Obama administration has negotiated a number of critical international agreements involving the use of American military power and solutions to global problems, including nuclear proliferation, a global financial crisis, and climate change. In attempting to find solutions to these global problems, presidents must negotiate important international agreements and seek their codification through constitutional

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4When the set of international agreements is narrowed to include only the significant agreements, the percentage that is treaties increases substantially, to roughly 44 percent for the period 1949 to 2000 (see Krutz and Peake, 2009:84).
processes. Hence, understanding Obama’s record on international agreements in the context of recent presidencies and polarized politics is important for understanding how presidents might tackle these critical policy issues. More generally, it allows us to assess the difficulties of making critical foreign policies during an era of heightened partisan polarization.

In this article, we update data on treaties and executive agreements through the first three years of the Obama presidency (2009–2011). In doing so, we compare President Obama to past presidents and discuss how changing political circumstances, in particular increasing partisan polarization in the Congress, limit the president’s freedom to act in the realm of international agreements. We assess the degree to which partisan polarization in the Senate structures the president’s use of Article II treaties and contributes to gridlock in the Senate treaty consent process. We then present a case study of the highly dramatic and partisan fight in the Senate over the U.S.-Russian New Strategic Arms Reduction Treaty (START), which was narrowly given Senate consent in December 2010, during the lame duck session of the 111th Congress. We conclude the article with a discussion of the domestic institutional context faced by President Obama and his successors as they attempt to tackle major foreign policy problems through the use of international agreements in an era of record-level partisan polarization.

Placing Obama in Historical Context

An important trend recognized in prior research on treaties and executive agreements is the rarity of treaties vis-à-vis executive agreements during the modern era (e.g., Johnson, 1984; Krutz and Peake, 2009; Margolis, 1986; Martin, 2000; Moe and Howell, 1999; Prins and Marshall, 2009; Shull, 2006). According to Louis Fisher’s (2001:39) accounting, 1937 marks the last year that the number of treaties surpassed the number of executive agreements. Since the end of World War II, the number of treaties concluded has remained relatively stable, averaging about 32 treaties per two-year Congress from 1947 to 2008, whereas the number of executive agreements has exploded to an astonishing average of 524 per Congress. Thus, during an average two-year period, only 6 percent of international agreements were completed via the formal treaty route. Prior to WWII, treaties were a much larger share of all international agreements. According to Fisher’s data, treaties represented 36 percent of international agreements from 1889 to 1939 and 51 percent of international agreements from 1789 to 1889.

5 The data from Fisher (2001) differ slightly, as he computes the number of treaties concluded each year. His count averages 16.5 per year from 1946 to 1999. We have updated his account using the number of treaties transmitted by the president to the Senate for advice and consent each year. Our count yields an average of 15.3 treaties per year.
The explosion of executive agreements following WWII caused alarm within the legal community and among conservative legislators. Despite their efforts to curb the rise in executive agreements, which culminated in the fight over the Bricker Amendment during the 1950s, the use of executive agreements continued. Executive abuse of the process, specifically regarding secret military agreements and controversial basing agreements, led to attempts in Congress to curtail the president’s freedom in this realm during the 1970s (Johnson, 1984). This discussion led to passage of the Case-Zablocki Act of 1972, which requires the State Department to regularly report executive agreements to the foreign policy committees of each chamber of Congress. The continued use of executive agreements and the weak reporting requirements have led scholars and other critics of the process to include executive agreements as part of the unilateral tool chest of an “imperial presidency” (see Crenson and Ginsburg, 2007; Rudalevige, 2005; Schlesinger, 1973). As stated above, despite having this unilateral tool, modern presidents have continued to use the constitutional treaty process for a large percentage of their most significant agreements. Thus, while treaties are relatively rare in the modern era, presidents still use them to complete major international agreements.

Given the relative freedom provided modern presidents in their use of executive agreements vis-à-vis treaties and the recent uptick in imperialistic behavior on the part of the executive as a result of continuous war since September 11, 2001 (see Pfiffner, 2008; Rudalevige, 2005), have President George W. Bush and now President Barack Obama, in practice, abandoned the use of treaties? For the four Congresses during the Bush Administration (2001–2008), the average number of treaties transmitted by the president to the Senate was 24. While 24 treaties per Congress is a significantly lower average than the postwar average of 32, the number is comparable to other modern periods (e.g., the 1960s and late 1980s). However, President Obama transmitted just eight treaties to the Senate during the111th Congress (2009–2010), and just four during the first year of the 112th Congress. Thus, despite his party having control of the Senate, Obama has submitted an average of just four treaties per year.

When we look at the use of executive agreements by Bush and Obama, we see that both presidents used executive agreements in comparable numbers to their predecessors. President Bush completed an average of 417 executive agreements per Congress, which is nearly 100 fewer than the average Congress over our time period. President Obama’s use of executive agreements during his

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6See Ackerman and Golove (1995) and Krutz and Peake (2009:Ch. 1) for a thorough history of international agreements during this period.

7Depending on which version of the Bricker amendment examined, the proposed constitutional amendment would have banned executive agreements outright, required congressional approval of all executive agreements, or significantly curtailed their use (see Tananbaum, 1988).

8In May 2012, Obama transmitted four additional treaties to the Senate, for a total of eight for the 112th Congress, as of August 20, 2012 (http://thomas.loc.gov/home/treaties/treaties.html).
first three years is comparable. During the 111th Congress, Obama completed 407 executive agreements. He completed 191 in 2011, the first year of the 112th Congress. Bush completed 5.6 percent of all of his agreements as treaties, whereas the comparable figure for Obama (2009–2011) is just 2 percent. This is due to the shift by Obama away from using treaties to complete his international agreements. While it is difficult to make firm conclusions from the descriptive data, the relative paucity of treaties during the Obama presidency is perplexing.

**Explaining Presidential Treaty Usage**

Why did President Obama use so few treaties during his first three years in office? Understanding Obama’s behavior on treaties requires a more general understanding of when presidents are likely to use treaties in order to complete their international agreements when the more efficient tool of the executive agreement is available in most instances.

Because treaties require super-majority support in the Senate, our explanation should focus on the prospects for receiving Senate consent. This, after all, is the basis for the popular evasion hypothesis that states that as prospects for ratification diminish, presidents will use fewer treaties. Thus, as the number of presidential partisans increase, presidents should use more treaties due to the increased prospects for ratification (Margolis, 1986). Research on the use of treaties and executive agreements, however, indicates that the basic partisan component of the evasion hypothesis is not supported in the data. Depending on which set of agreements are analyzed, the number of presidential partisans in the Senate either has no impact on the use of treaties vis-à-vis executive agreements or the statistical effect is in the opposite direction of the expectation of the evasion hypothesis (Krutz and Peake, 2009; Martin, 2005; Shull, 2006). According to Howell’s (2005:433) reasoning, presidents are less inclined to use their unilateral powers during divided government because the majority party in Congress is more likely to challenge the president’s use of

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9 Whereas much of the prior research has focused on the percentage of treaties (or executive agreements) as a share of all international agreements (Johnson, 1984; Krutz and Peake, 2009; Margolis, 1986; Martin, 2005; Prins and Marshall, 2009; Shull, 2006), we focus our analytical lens on the number of treaties transmitted to the Senate. In following Martin (2000), our reasoning has to do with the limited variation in the use of executive agreements and the greater variation evident in the use of treaties. Moreover, Obama’s use of executive agreements is very similar to his predecessors, whereas his use of treaties indicates a significant alteration in presidential behavior.

10 Setear (2002), among others, argues that presidents are unconstrained, legally, in their use of executive agreements, though there is much disagreement on this point in the legal field (see Ackerman and Golove, 1995; Hathaway, 2008; Spiro, 2001; Tribe, 1995). However, research in political science demonstrates that domestic and international politics constrain presidents considerably in this realm (Krutz and Peake, 2009; Martin, 2000, 2005).
unilateral authority. As a result, presidents may use fewer treaties as the number of their partisans in the Senate increases. This is based primarily on the fact that presidents have a unilateral option at hand (executive agreements) and are provided greater leeway when their party controls the Senate (Krutz and Peake, 2009).

Even though the partisan story is likely to be more complicated than suggested by the evasion hypothesis, presidents are still very likely to consider the prospects for Senate consent when deciding on treaties. The super-majority requirement substantially increases the opportunities for opponents in the Senate to delay or even kill a president’s treaty. The need for a two-thirds vote to pass a treaty and 60 votes to overcome a filibuster has emboldened conservative opposition to a wide range of far-reaching treaties, especially in the realms of human rights, the environment, and arms control, leading to considerable delay in the process (DeLaet and Scott, 2006; Hersman, 2000; Johnson, 2006; Kaufman, 1990; LeBlanc, 1991).

As Senate rules embolden the minority party, party cohesiveness allows members of the minority party to more effectively gum up the works in the Senate. The two-thirds constitutional requirement for treaty consent, by definition, stipulates that the president must build a large bipartisan coalition in order to successfully shepherd a treaty through the Senate. When conditions are poor for building bipartisan coalitions, the prospects for speedy consent in the Senate are substantially diminished (Krutz and Peake, 2009:161). As a result, partisan polarization is likely to play an important role as an explanation for the president’s use of treaties. As polarization increases, treaty gridlock is likely to increase and presidents may be less inclined to transmit treaties to the Senate for advice and consent. Thus, we hypothesize that increased partisan polarization in the Senate will decrease the number of treaties transmitted by the president.

Additionally, Krutz and Peake (2009) maintain that presidents are cognizant of the likely response in the Senate to their decisions to use (or not use) treaties. Important senators are likely to voice concern if they see presidents abusing the process. The most important senator in the treaty process is the chair of the SFRC, the committee responsible for processing treaties. If delay is to occur in the ratification process, the SFRC is most responsible once a treaty has been transmitted to the Senate (Prins and Marshall, 2009). Conservatives are most inclined to oppose far-reaching international agreements, given their historical hostility to internationalism (Auerswald and Maltzman, 2003; DeLaet and Scott, 2006). Krutz and Peake (2009) demonstrate that

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11 There is disagreement in the literature regarding the effects of party control on the use of unilateral powers. For example, in the case of executive orders, Howell (2005) finds presidents are less inclined to rely on executive orders during divided government control. However, Fine and Warber (2012) find that the relationship disappears when major policy orders are examined separately from all orders and symbolic or routine executive orders.

12 For the 850 treaties analyzed by Krutz and Peake (2009:220, n. 10), the median number of days to the SFRC positively reporting on a treaty was 192, whereas the median number of days to Senate consent was 216. Thus, the SFRC accounts for 89 percent of the duration in the typical case.
conservative committee chairs substantially increase delay in Senate consent. They also find that presidents use more treaties as a share of all agreements when the SFRC chair is conservative, indicating that presidents avoid inflaming senatorial opposition to their use of executive agreements and treaties, more generally. **We hypothesize an increased use of treaties when the SFRC chair is conservative.**

Below, we estimate a statistical model to explain the number of treaties presidents transmit to each Senate for the 81st (1949–1950) to the 111th (2009–2010) Senates.\(^1^\) Because the dependent variable is a simple count variable of the number of treaties per Senate, we use negative binomial regression.\(^2^\) In the model, we regress the number of treaties transmitted per Senate on the number of presidential partisans in the Senate, the SFRC chair’s ideology,\(^3\) and partisan polarization for the particular Senate.\(^4\) Each of these independent variables corresponds with the hypotheses presented above. We also include three control variables: the president’s average approval rating in the Gallup Poll during the two-year Senate, a dummy variable indicating the president’s party (Democrat = 1), and a dummy variable for Senates occurring after the Case-Zablocki Act of 1972.\(^5\)

The results are presented in Table 1. The findings clearly support our partisan polarization hypothesis. As polarization increases, presidents transmit

\(^{1}\)The dependent variable is simply the number of treaties transmitted to each two-year Senate. The number of treaties sent to each Senate is determined through use of the data set provided by Krutz and Peake (2009), updated through the 111th Senate using the Thomas website (http://thomas.loc.gov/home/thomas.php). Before the Senate can begin the advice and consent process on a particular treaty, the president must transmit the treaty to the Senate. Senate rules state that all treaties transmitted to the Senate are immediately sent to the SFRC, which must report the treaty prior to full consideration by the Senate.

\(^{2}\)There is evidence of significant overdispersion (\(G^2 = 6.03, p < 0.01\)), thus negative binomial regression is preferred to the Poisson regression model (see Long and Freese, 2006:377). Given the time series nature of our dependent variable, we tested for autocorrelation and stationarity. The series is stationary and no autocorrelation is present.

\(^{3}\)To measure the SFRC chair’s ideology, we used their first dimension Common Space (CS) Nominate score provided by Dr. Keith Poole at the following website: <http://voteview.org/downloads.asp>. Nominate scores range from −1 (most liberal) to +1 (most conservative). CS-Nominate scores are most appropriate when comparing individuals’ ideologies across time and space, as they do not change for an individual from one Senate to the next. Senator Jesse Helms (R-NC) is the most conservative SFRC chair during our time frame.

\(^{4}\)We use the standard measure of partisan polarization in the Senate, which is computed using DW-Nominate scores available from the Vote View website (McCarty, Poole, and Rosenthal, 2006). The polarization score is computed by taking the absolute difference between the DW-Nominate scores for the median Republican and median Democratic member of the Senate. The mean of the variable over our time period is 0.641, with a standard deviation of 0.102, a minimum of 0.462 (83rd Senate), and a maximum of 0.830 (111th Senate).

\(^{5}\)Although we have no prior theoretical expectations regarding each of these control variables, we include them in the analysis in order to account for the overall political capital of the president and for the period after the Congress acted to curb the president’s use of executive agreements. We do not include a Cold War indicator variable because it is highly correlated with partisan polarization. Keeping Cold War and partisan polarization out of the model, in turn, does not alter the results for the other variables and Cold War is insignificant when included in the model without polarization.
fewer treaties to the Senate. The marginal effects of polarization are substantively significant, such that a standard deviation increase in polarization decreases the expected number of treaty transmittals by about 17 percent. We graph the expected count of treaties given changes in polarization in Figure 1, and the effects are quite dramatic. The most polarized Senate of the period, the 111th, is predicted to have fewer than 20 treaties transmitted to it, which is much lower than the mean number of treaties (31). The actual number of treaties for the 111th was much lower (8) than the expected count, indicating that other factors are playing a role here as well.

The findings indicate that the SFRC chair’s ideology is also an important factor. A one standard deviation increase in the chair’s ideology (more conservative) increases treaty transmittals by 13 percent. Presidents appear to be cognizant of likely responses to their decisions on how to complete their international agreements and the SFRC chair plays an important role in constraining the president’s inclination to avoid the Article II treaty process.

As the share of presidential partisans increases in the Senate, presidents transmit fewer treaties. This finding runs counter to the evasion hypothesis,

18Interpreting the effects of independent variables is not as straightforward in count models as it is in OLS regression. We use the listcoef command in Spost, which is an add-on package to Stata provided by Scott Long (http://www.indiana.edu/~jslsoc/spost.htm). See Long and Freese (2006:378).
19Given the very low number of treaties during the 111th Senate, and the fact that the 111th experienced record levels of partisan polarization, we reran the model excluding the 111th. The results of the model presented in Table 1 do not change.

### TABLE 1

Negative Binomial Regression Analysis of Number of Treaties Transmitted per Congress, 1949–2010

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>z Score</th>
<th>Percentage of ΔY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party polarization</td>
<td>−1.84∗</td>
<td>0.66</td>
<td>−2.82</td>
<td>−17.2</td>
</tr>
<tr>
<td>SFRC chair ideology</td>
<td>0.37∗</td>
<td>0.18</td>
<td>2.04</td>
<td>12.9</td>
</tr>
<tr>
<td>Number of presidential partisans</td>
<td>−0.10∗</td>
<td>0.01</td>
<td>−2.51</td>
<td>−10.2</td>
</tr>
<tr>
<td>Presidential approval</td>
<td>−0.01∗</td>
<td>0.01</td>
<td>−2.40</td>
<td>−8.2</td>
</tr>
<tr>
<td>President’s party</td>
<td>0.38∗</td>
<td>0.10</td>
<td>3.67</td>
<td>46.0</td>
</tr>
<tr>
<td>Case-Zablocki Act</td>
<td>0.28∗</td>
<td>0.12</td>
<td>2.39</td>
<td>31.9</td>
</tr>
<tr>
<td>Constant</td>
<td>5.36∗</td>
<td>0.54</td>
<td>9.88</td>
<td>−</td>
</tr>
</tbody>
</table>

N = 31
Log-likelihood = −105.23
Model chi-squared = 34.65∗
Pseudo R-squared = 0.10
LR test against the poisson
  X-squared = 6.3∗

∗p < 0.05 (one-tailed).
but is consistent with other research on treaties and executive agreements (e.g., Martin, 2005). Popular presidents also send fewer treaties to the Senate. Taken together, these results indicate that as presidential leadership resources increase, presidents use fewer treaties, which runs counter to the logic of the evasion hypothesis. Rather, presidents may be emboldened and less constrained in foreign policy making when their political resources increase and they are better positioned to rely on their unilateral powers, given the greater leeway provided by a friendly Senate and popularity with the public. Our control variables (the Case-Zablocki Act and Democratic president) are both significant in the model. Following the Case Act, presidents completed more treaties on average than before its passage. Democratic presidents are also more inclined to use treaties than their Republican counterparts, a finding that fits with previous research (Martin, 2005).

**Treaty Gridlock**

The analysis, thus far, indicates that partisan polarization is an important consideration as presidents consider whether or not to submit treaties to the Senate. It is likely that presidents expect a polarized Senate to be less able to complete action on treaties, even if their party is in the majority. Does
partisan polarization contribute to treaty gridlock? It is clear that any sign of gridlock in the treaty process will be found in the proceedings of the SFRC, as a treaty will spend the vast majority of its Senate lifespan in committee. In order to capture the nature of treaty gridlock, we calculated the length of time between a treaty’s transmittal to the Senate by the president and the date the treaty was reported to the Senate floor by the SFRC. An aggregate measure of treaty gridlock for a given Senate was then calculated by finding the median number days it took for treaties transmitted during that Senate to be reported out of committee.\textsuperscript{20} For reasons outlined above, we hypothesize that party polarization will increase treaty gridlock. We also hypothesize that treaty gridlock will increase as the ideology of the SFRC chair becomes more conservative. We include a measure of yearly presidential approval and the number of presidential partisans as controls in the regression model.

In Table 2, we present results from an OLS regression model where the median days to SFRC report is regressed on partisan polarization, the SFRC chair’s ideology, number of presidential partisans in the Senate, and average yearly presidential approval. In order to normalize the dependent variable, we logged the median days to report variable.\textsuperscript{21} The results indicate party polarization has a statistically significant and positive effect on treaty gridlock.

\begin{table}[ht]
\centering
\caption{Ordinary Least Squares Regression Analysis of Median Days to Committee Report per Congress, 1949–2010}
\begin{tabular}{llll}
\hline
Independent Variable & Coefficient & Standard Error & \textit{t} Statistic \\
\hline
Party polarization & 2.62\textsuperscript{*} & 0.89 & 2.95 \\
SFRC chair ideology & 0.18 & 0.28 & 0.65 \\
Number of presidential partisans & 0.01 & 0.01 & 0.50 \\
Presidential approval & \textit{−0.01} & 0.01 & \textit{−0.46} \\
Constant & 3.43\textsuperscript{*} & 0.92 & 3.71 \\
\hline
\end{tabular}
\textit{N} = 31 \\
Model F statistic = 2.95\textsuperscript{*} \\
Adjusted \textit{R}-squared = 0.21
\end{table}

\textsuperscript{*} \textit{p} < 0.05 (one-tailed).
FIGURE 2
Effect of Party Polarization on Time to Committee Report

Clearly, treaties take longer to process at the committee level as the chamber becomes more polarized. Figure 2 represents the marginal effects of polarization on treaty delay while holding the other variables in the model at their respective means. The graph illustrates the strong, positive effect of partisan polarization on treaty gridlock. According to Figure 2, the maximum effect of party polarization is nearly three times stronger than the minimum effect. Clearly, party polarization is driving treaty delay in a significant manner. This is especially pertinent considering the 111th Senate is the most polarized Senate in the time series. The ideology of the SFRC chair does not appear to affect treaty delay in the aggregate. Thus, while the ideology of the committee chair looms large when individual treaties are the unit of analysis (Krutz and Peake, 2009), the effects are less apparent when examined in the aggregate.

Treaty Priority Lists and President Obama’s Treaties

Common practice is for presidents to send a treaty priority list to the Senate at the beginning of each new Senate. The document lists the treaties on which

22 The predicted values of the dependent variable were exponentiated for ease of interpretation.
the president would like to see Senate action. It also lists those treaties that the president believes should not see Senate action, which signals his opposition to the treaty. Given that the president decides whether or not to ratify a treaty following Senate consent, the SFRC focuses its attention on the first set of treaties. Thus, treaty priority lists provide important signals to the SFRC regarding which treaties the president supports. Analysis of priority lists may provide some additional insight into presidential-senatorial relations on treaties.

Unfortunately for our purposes, only the most recent treaty priority lists are public. We have been able to find documents listing the president’s priorities for the three most recently completed Congresses: the 109th through the 111th. For the 109th, the Bush Administration listed 16 treaty priorities in a letter dated April 5, 2005. Twelve of those treaties, or 75 percent, were given Senate consent during the 109th Senate. A 13th treaty was given consent during the 110th Senate. The treaty priority list delivered by the Bush Administration on February 7, 2007 listed 25 treaty priorities. Twenty-two of those treaties, or 88 percent, were ratified prior to the end of the 110th Senate. The Obama Administration delivered its treaty priority list on May 11, 2009. It listed 17 treaties. As of this writing, only five (29 percent) have been ratified.

This brief analysis indicates that President Obama has been less successful getting his priority treaties through the Senate than his most immediate predecessor. However, the story is actually more complicated. President Obama’s priority list includes a number of highly controversial treaties, including the three treaties on Bush’s lists that were left unratified (see note 25). Obama also

23While Senate advice and consent is typically considered the final stage of the treaty process, presidents technically ratify treaties after the Senate gives consent, which may include reservations, understandings, or declarations. Senate alterations to treaties may be substantial enough, however, that the president may refuse to ratify the treaty or U.S. treaty partners may refuse to conclude the altered treaty (see Lindsay, 1994).

24While President George W. Bush submitted a treaty priority list in 2001 for the 107th Congress, we have not been able to obtain a copy of the list. His administration failed to submit a priority list in the 108th, but did submit one during the 109th and 110th. President Obama submitted his first treaty priority list in May 2009. He did not submit a priority list for the 112th Congress in 2011. For an in-depth comparison of Bush’s last priority list and Obama’s first priority list, see <http://opiniojuris.org/2009/06/04/comparing-obama-and-bushs-treaty-priorities/>. The priority lists for the 110th and 111th are provided on the State Department’s Treaty Affairs website (http://www.state.gov/documents/organization/116355.pdf and http://www.state.gov/documents/organization/153474.pdf). The list for the 109th was found in testimony before the SFRC and can be found here: (http://www.gpo.gov/fdsys/pkg/CHRG-109shrg32518/html/CHRG-109shrg32518.htm).

25Three treaties on Bush’s priority lists appear on both of his lists, including two originally transmitted by President Clinton. These include the UN Convention on the Law of the Sea and the Rotterdam Pesticides Convention. The third is the Stockholm Convention on Persistent Organic Pollutants, originally transmitted by Bush in 2002. The three treaties were left unratiﬁed by the Senate at the end of the Bush presidency and Obama included them in his 2009 priority list. The SFRC held hearings on the Law of the Sea Treaty in June 2012. However, it is doubtful much movement will occur on that important treaty given conservative opposition in the Senate, which derailed the treaty in 2007, despite the Bush Administration’s efforts to secure ratification (see Krutz and Peake, 2009:194–95).

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included a number of controversial treaties originally transmitted to the Senate by his Democratic predecessor, Bill Clinton. These included the Comprehensive Test Ban Treaty (CTBT), which was voted down on the floor of the Senate in the fall of 1999, the International Labor Organization Convention (No. 111), an Inter-American Convention on gun trafficking (CIFTA), which faces opposition from the National Rifle Association, and the Convention on the Safety of UN and Associated Personnel. Obama also included the Convention on the Elimination of Discrimination against Women (CEDAW) originally transmitted by President Carter in 1980, which is unpopular with conservatives. Finally, Obama included several treaties that were originally transmitted by Bush after his February 2007 treaty list but were left unratified when he left office, including two defense trade cooperation treaties, three environmental treaties, two tax treaties, and the Hague Child Support Convention. Only one treaty transmitted by President Obama appears on his 2009 priority list: an environmental emergencies protocol to the Antarctic Treaty, which was transmitted April 2, 2009, but has been ignored by the SFRC.

We can safely assume that Obama supports ratification of treaties he has transmitted to the Senate since his May 2009 priority list. The list of such treaties is short, however. For the 111th Senate, they include four tax treaties, a mutual legal assistance treaty with Bermuda, and the New START with Russia, which we discuss at length below. The 111th Senate gave consent to just seven treaties, the lowest level of treaty productivity in our data set (1949 to 2010). Of those seven treaties, one was New START. The remaining six lacked controversy, and four of these were transmitted by Bush. Such treaties constitute “low-hanging fruit,” as they are unlikely to draw significant opposition from conservatives.

President Obama, through July 2012, has only transmitted eight treaties to the 112th Senate, including two regional nuclear free zone treaties, four tax treaties, a fishing treaty, and the Convention on the Rights of Persons

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26 If these eight treaties are included among Bush’s priority treaties during the 110th, Bush’s final rate of success for treaty priorities is reduced to 67 percent, which is still substantially higher than Obama’s rate.

27 A fifth tax treaty was transmitted to the 111th Senate on January 15, 2009 by President Bush, giving the 111th a total of eight treaty transmittals.

28 For the period including the 81st through 111th Senates, the mean number of treaty ratifications is 28.3, with a standard deviation of 11.4.

29 Both treaties were signed by President Clinton in 1996, but given Clinton’s failure to secure ratification of the CTBT in 1999, the likely opposition each of the treaties would face in the Senate, and internal policy differences within the Clinton Administration, neither treaty was transmitted to the Senate by Clinton. The treaties are important components to the nuclear nonproliferation regime and would commit the United States to not hold nuclear tests in the impacted regions, as well as the promise not to use or threaten the use of nuclear weapons upon member states. See <http://armscontrolnow.org/2011/02/18/ratifying-nuclear-weapons-free-zone-protocols/> for more information on the significance of these treaties. More information on the African Nuclear Free Zone treaty is located here: <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc3/pdf/CDOC-112tdoc3.pdf>. More information on the South Pacific Nuclear Free Zone treaty is located here: <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc2/pdf/CDOC-112tdoc2.pdf>.
with Disabilities (Treaty Doc. 112-7). The 112th Senate, to the date of this writing (August 2012), has approved only two treaties, including a tax and investment treaty with Rwanda (transmitted by Bush) and the mutual legal assistance treaty with Bermuda transmitted in the 111th Senate. Three tax treaties were reported by Senator Kerry (D-MA), the SFRC chair, in August 2011 and the aforementioned disabilities convention was reported in July 2012. The four treaties may see ratification at some point prior to the end of 2012. Even if all four of these treaties are ratified during the 112th Senate, the total of six treaty ratifications would set a new record low for treaty ratifications in the modern Senate.

Thus, President Obama has met with limited success on treaties he has supported during his first term in office. Adding together the treaties listed on his priority list, the treaties he has transmitted, and the treaties he has seen ratified, we obtain a sum of 34 treaties, of which only nine (26 percent) have been ratified. Assuming the four treaties reported by the SFRC during the 112th Senate are ratified, the percentage of ratification successes would increase to just 38. This is despite his party having control of the Senate. While at the outset of the Obama Administration, it looked like a propitious time for the Senate to work through a variety of languishing important treaties, the record indicates this was not so. Our findings vis-à-vis partisan polarization provide an explanation for the difficulty Obama has faced on treaties. Below, we assess an important test case for treaty making under the conditions of a polarized Senate, the New START treaty, which was ratified in 2010.

The New START

Let me also say that this new START Treaty is completely in line with a tradition of bipartisan cooperation on this issue. This is not a Democratic concept; this is not a Republican concept. This is a concept of American national security that has been promoted by Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and now my administration.

President Barack Obama, November 18, 2010

In late 2010, in the lame duck legislative session that took place after the mid-term elections, President Obama found himself sweating out final floor passage on the New START. President Obama’s point in the quote above (Obama, 2010) is borne out when one takes a look at previous START consent processes. Over a series of START votes over two decades, only a total of 10 no votes had been cast, representing less than 4 percent of votes cast over the series of votes. The three prior outcomes, completed under Republican and Democratic presidents, featured vote breakdowns of 93 to 6 on the original START in 1992, 87 to 4 on START II in 1993, and 95 to 0 on the Moscow Treaty, or SORT, in 2002, which replaced START II (Congressional Quarterly, Inc. 1993–1994, 1997, 2004, 2011).
Yet, while New START was arguably the most modest update of the original START framework, significant opposition to Senate consent emerged in the Republican caucus. The challenge on this issue was surprising given the previous bipartisan approach on bilateral arms control matters with Russia and the institutional ties that Obama and, especially, Vice President Joseph Biden enjoyed in the Senate. Conservative Republican Senators, led by Jon Kyl (R-AZ), opposed the treaty. Senator John McCain (R-AZ) also vocally opposed the treaty and used his venue on the Armed Services Committee for informational hearings that called into question many aspects of New START (Congressional Quarterly, Inc., 2011). Richard Lugar (R-IN), the ranking minority member of the SFRC, championed the treaty but was rebuffed by the majority of the Republican caucus. After much lobbying by the president and his staff, and various assurances to Republicans about modernizing the nuclear stockpile, New START was approved with a final vote of 71–26. Only Republicans voted against the treaty, with just 13 joining the majority in order to approve the treaty by six more votes than the necessary two-thirds requirement.

The difficulty that Obama and Biden had getting New START through the Senate suggests a tougher, more partisan state of affairs in treaty politics. In many ways, the case of New START tells us that the prospects for other major, and perhaps more controversial, arms control agreements and other important treaties would face a good deal of uncertainty if pursued through the traditional Article II treaty consent process. Senator Kyl and other GOP members forewarned that the Senate will be a tough place for arms control treaties and Senator Kerry, the current chair of the SFRC, agreed that it would be difficult to pass the CTBT, an Obama priority, prior to the 2012 elections (Rogin, 2010; Starks, 2011).

In an attempt to further delve into the factors driving Republican opposition to the treaty, we conducted an analysis of individual senator roll call votes on New START. The dependent variable is coded 1 if the senator voted in support of the consent to ratification and 0 if he or she voted against it. One problem we faced is that all the Democrats voted in favor of the treaty. Hence, party affiliation predicts the outcome perfectly. We excluded Democrats from the analysis and focused on the variation between Republicans who supported New START and those who opposed it. To explain the variation, we included independent variables to capture a senator’s ideology, his or her presence on the SFRC and the Armed Services Committee, the president’s approval rating for the senator’s state at the point closest to the December 22, 2010 vote, and whether the senator was to face reelection in 2012. Given our discussion above regarding partisan polarization and recent research on arms control treaties in the Senate (DeLaet and Scott, 2006), we expected that more
conservative senators would be more likely to vote no on New START (negative relationship), SFRC members to vote yes (positive), Armed Services Committee members to vote no, senators from states where President Obama is more popular to votes yes, and senators up for reelection in the next election cycle to vote no. Table 3 shows the results of the analysis.

Generally, the model works well, with a pseudo-$R^2$ of 0.61 and a proportional reduction of error of 0.38. Looking to the independent variables, we see that the ideological divide and the Armed Services opposition detailed above are borne out systematically as well. More conservative Republican senators were more likely to oppose the treaty. The substantive impact is $-0.17$, meaning that as a Republican senator’s ideology moves from the mean to one standard deviation above the mean (more conservative), the senator was 17 percent less likely to support the treaty. The predicted probability for Republicans supporting New START is plotted against changes in ideology in Figure 3. The graph clearly shows the impact ideology had on how Republican senators voted. SFRC members were 59 percent more likely to support the treaty than Republicans who do not sit on the committee. Armed Services members were 15 percent less likely to support the treaty than other Republicans. The other variables, while in the expected direction, fall well short of statistical significance. Having traced opposition to New START to more conservative Republicans not on the SFRC, we will now take stock of our various partisan findings and what they might portend for President Obama and future presidents.

**Conclusion**

We began this article with the observation regarding the alignment of favorable governing circumstances for President Obama in foreign policy making...
in Congress as he took office in January 2009. Foreign policy making, in particular the process of completing international agreements, is a Senate-driven process in Congress and the Obama Administration enjoyed the prospect of 60 members of its party’s Senate caucus. Moreover, both President Obama and, especially, Vice President Biden had numerous connections with the foreign-policy-making principals in the Senate. Hence, there was a prevailing optimism to what was possible.

As we have shown in this article, however, there was little reason to be optimistic. Owing to an increasingly polarized policy-making process in the Senate, President Obama’s opportunities to shape foreign policy through the treaty process was significantly constrained during his first three years in office. While successful, the president met with substantial partisan opposition from Republicans in order to obtain the Senate’s consent to a seemingly uncontroversial New START with Russia. There has been very little movement in completing Senate action on an array of significant treaties, ranging from much needed conventions on pesticide use to a UN treaty on the law of the sea. Prospects for ratifying the CTBT, seen by the president as a critical leg of the nonproliferation regime, appear nonexistent.

Why has President Obama met with such limited success in the treaty process when compared to his predecessors? Our primary answer to this question, supported by the quantitative analyses presented above, relates to
the polarized partisan context in the current Senate. Presidents tend to transmit fewer of their own agreements to the Senate and their treaties tend to take longer to process under conditions of partisan polarization. Thus, partisan polarization has clearly played a factor in Obama’s decision to use (or not use) the treaty process, as well as his overall prospects for success in obtaining Senate consent. Add to this the opportunity for conservative Republicans to play politics with a Democratic president’s treaties, something that is less apparent with a Republican president, and treaty politics appear far from bipartisan in today’s Senate. Politics, rather than principles, are likely to come into play (Lee, 2009), and the treaty process is but one example of the failure of the Senate with regard to policy making.

While, like his predecessors, President Obama has the option to avoid using treaties and instead use executive agreements, it is highly doubtful, as shown by prior research, that he can skirt senatorial influence on significant international issues with impunity (Kruz and Peake, 2009; Martin, 2000, 2005). President Obama and his successors will be required to engage the Senate on important treaties going forward, as many of the major problems facing the United States may require Senate action on international agreements.

REFERENCES


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32In general, Republican presidents have had greater success in recent decades getting controversial treaties that are opposed by conservatives through the Senate. Examples include a number of arms control treaties completed by Reagan and George H. W. Bush and the Genocide Convention, ratified at the request of Reagan.


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