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Brandon C. Prins and Bryan W. Marshall

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Senate Influence or Presidential Unilateralism?

*An Examination of Treaties and Executive Agreements from Theodore Roosevelt and George W. Bush**

BRANDON C. PRINS

University of Tennessee, USA

BRYAN W. MARSHALL

Miami University, USA

Treaty-making involves the constitutional struggle for policy control. Both the Executive and Senate are defined as official actors in establishing international commitments and both closely guard their constitutionally defined roles. Yet most research concludes that Congress rarely matters when defining US commitments abroad. We explore the Senate's role in treaty-making during the administrations of Theodore Roosevelt (1901–1909) and the first term of George W. Bush (2001–2005). Our evidence confirms that even recent studies showing greater Senate influence on treaty-making significantly underestimate the upper chamber's role in defining US commitments abroad. Rather than killing treaties with a formal floor vote, the Senate exerts influence at the committee stage by refusing to act on controversial agreements negotiated by presidential administrations. President Bush has responded to such congressional oversight by establishing more international commitments through executive agreements rather than treaties, particularly when it comes to issues of security.

KEY WORDS: executive agreements, executive–legislative relations, international commitments, unilateral presidential power, US treaty process

Introduction

Treaty-making involves the constitutional struggle for policy control. Both institutions are defined as official actors in the making of international commitments,

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and both closely guard their constitutionally defined roles. Yet most scholarship generally concludes Congress rarely matters in establishing US formal commitments abroad. Indeed, it is frequently pointed out that only 21 treaties have been voted down by the US Senate in its 230 year existence.¹ While true, such a figure presents an incomplete picture of congressional influence. Presidents may covet greater institutional capacity to direct US foreign policy unilaterally, but opposition in both the House and Senate frequently reins in an uncompromising White House.

This analysis explores the Senate's role in crafting international commitments during the administrations of Theodore Roosevelt (1901–1909) and the first term of George W. Bush (2001–2005). By examining two administrations defined by efforts to extend American power and influence abroad, while at the same time seeking to limit congressional input into such foreign policy decision-making, we show that Congress, the US Senate more precisely, continues to act as an important check on executive authority. While we recognize that such a limited sample impedes our ability to draw inferences about US treaty-making more generally, we do consider the data culled from these two presidencies only the first step in a larger research effort to document the extent of congressional influence over the making of commitments abroad. Whereas extant research only explores Senate influence on treaties that eventually go into force, we consider all treaties and agreements negotiated by these two administrations regardless of their ultimate fate in the domestic-political arena.

Our work contributes in two important ways. First, we include both treaties and executive agreements in our analyses. Both represent formal and binding commitments and thus have the force of law, and yet one should expect differences in how presidents use them as well as the congressional response. Second, our treaty data for the Roosevelt Administration include both unperfected and perfected compacts. That is, we include the full universe of treaties negotiated by Roosevelt and not just treaties that received Senate advice and consent.² While we presently cannot compare the two administrations on treaties that did not go into force, we are able to assess how including the unperfected treaties alters one's conclusions about Senate influence during the Roosevelt Administration. In addition, we propose to establish the domestic-political authority under which presidents negotiate executive agreements. Most scholars conclude that such international agreements signal unilateral presidential power. However, many are negotiated pursuant to congressional

¹ In the post-World War II period only three treaties have been formally voted down by the US Senate: Law of the Sea Convention in 1960, Montreal Aviation Protocols in 1983, and the Comprehensive Test Ban Treaty in 1999 (US Senate Website: <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5>).

² Presently the data on unperfected treaties does not extend past 1976 and thus we could not include such observations for the Bush Administration.

statutes or previously ratified treaties. In both instances, Congress maintains influence over the process.³

The paper proceeds as follows. First, we discuss the division of treaty-making power established by the US Constitution. This involves the constitutional division of power between the executive and legislative branches in the USA, but also the important distinction between treaties and international agreements. Then, we discuss the constitutional, political, and electoral bases for executive foreign policy power. Not only do presidents seek to avoid congressional constraints on foreign policy decision-making, but Congress itself has its own institutional limitations that inhibit vigorous challenges of presidential authority. We next discuss the treaty and international agreement data collected for Presidents Bush and Roosevelt. Our evidence confirms that even recent studies showing greater Senate influence on treaty-making significantly underestimate the upper chamber's role in defining US commitments abroad. Rather than killing treaties on the floor, the Senate's imprint can result from the Foreign Relations Committee's refusal to act on controversial agreements negotiated by presidents. Moreover, we observe that President Bush has responded to such congressional oversight by establishing more international commitments through executive agreements rather than treaties, particularly when it comes to issues of security. We conclude by offering some direction for future research.

Treaty-Making in the US Constitution

Constitutional ambiguity in treaty-making authority reflects early uncertainty about how foreign policy power should more generally be distributed within a republic. Records of the constitutional convention in Philadelphia of 1787 show that the treaty-making requirements finalized in the governing document received little debate (Holt, 1933). While an early draft of the Constitution conferred treaty-making power entirely to the Senate, the framers eventually agreed that this power, like so many others, should be shared among institutions (Farrand, 1967). Indeed, apprehension quickly emerged among the delegates about the disproportionate influence states would have over the treaty-making process under such a system. Subsequent drafts therefore enhanced the role of the executive (a more national perspective) even as the House of Representatives remained excluded from this policy arena (Holt, 1933).⁴ Still, Hamilton was careful to strike a balance of power among institutions to allay fears of power concentration. The framers also eliminated the distinction between foreign and domestic policy, making both the law of the land and both subject to institutional limitations.

³ Our data regarding the source of legal authority used to negotiate such agreements are incomplete. However, the limited assessment we can make points to Congress's important role.

⁴ The framers generally agreed that the House could not satisfy the demands of secrecy and expediency involved in treaty-making (Slomanson, 2007: 375; also see Holt, 1933: 7). This in no way means that members of the House accepted their second-class status in foreign policy. Any funds appropriated for the implementation of an international commitment must be signed off by the House of Representatives.

The distinction between treaties and executive agreements also received little if any debate in Philadelphia. However, since then, it seems that an ambiguity in constitutional language has provided ample opportunity to generate foreign policy controversy. Article II, Section 2 clearly states presidents negotiate with the advice and consent of the Senate. Yet, Article I, Section 10 appears to suggest that there is more than one form of international contract, thus opening the constitutional door to executive agreements (Murphy, 2006).⁵ The third clause of the section reads, “No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any *Agreement or Compact with another State*, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay” (emphasis added). While Section 10 of Article I deals exclusively with powers prohibited of states, the language used does arguably recognize that pacts with foreign countries may come in multiple forms, with the treaty being only one type of agreement (Murphy, 2006: 210; also see CRS, 2001).⁶ Importantly, though, it is never explicitly stated whether agreements not of the treaty-type can be made by the president or without congressional consent.

The controversy additionally arises from the framers’ failure to anticipate institutional and partisan conflict over international commitments. The delegates at the Constitutional Convention did not even consider the possibility of an impasse between a president and the Senate over control of foreign policy (Holt, 1933: 12). The primary issue of importance was preventing the accumulation of power in any single branch of government and not a consideration of whether such institutional protections would effectively preclude treaty-making. Both the ratification of SALT II and the reinterpretation of the ABM treaty, for example, became intensely partisan and as a result both also became issues in presidential elections.⁷ While executive agreements, rather than treaties, may be negotiated by presidents for a number of reasons, arguably the anticipation of Senate opposition influences the ultimate foreign policy path chosen.

Despite the constitutional competition, or perhaps because of it, clear criteria have yet to be accepted by both the president and the Senate as to when advice and

⁵The controversy also stems from the failure of the framers to define the term “treaty” in the founding document (Slomanson, 2007: 375).

⁶ In the United States, only international agreements that go to the Senate for advice and consent signify treaties. Any other deals negotiated by the president with foreign nations are identified as executive agreements and do not require Senate participation. This distinction, while meaningless to international law, is clearly critical in the USA since it implicitly establishes a constitutional understanding about the distribution of foreign policy power among the political branches of government.

⁷ Support for the Comprehensive Test Ban Treaty (CTBT) also broke down along party lines. President Clinton was the first leader to sign the treaty in 1996, but Senate Republicans killed the treaty in 1999. No Democrats opposed the treaty, while 51 of 55 Republicans voted it down.

consent is legally and or politically required.⁸ The State Department has admittedly generated a set of principles for determining whether a foreign commitment should be established using an executive agreement or treaty, with congressional preferences ranked number five on the list (CRS, 2001). However, the White House can ignore these criteria as well as the State Department's recommendation. While the State Department advises frequent consultation with Congress in the establishing of foreign commitments, presidents have increasingly negotiated compacts using executive agreements and this seemingly has only exacerbated the constitutional struggle.

The Politics of Unilateral Action in Foreign Policy: Trends in Executive Agreements

Presidents have both the opportunity and incentive to exploit constitutional ambiguity with unilateral action, especially in the realm of foreign policy. As we have mentioned, the constitution does not offer enough explicit clarification as to the circumstances in which the president's power ends and Congress's begins in the making of international commitments (and other powers for that matter). Instead, this is determined through the ongoing practice of politics (Moe and Howell, 1999). And although the president has the responsibility to carry out laws assigned by the legislature, this charge does not make him Congress's agent. Congress does not have the ability to hire or fire and cannot take away or restructure the powers of the executive to make him do its bidding. The president's authority is independent and coequal to that of Congress (Moe, 1985; Moe and Howell, 1999). Add to this the extraordinary advantage in resources and expertise that presidents enjoy in foreign policy through the departments of State and Defense, the NSC, and the Intelligence Community, to name just a few. Moreover, the nature of executive power means that presidents maintain direct discretion over decisions and the operation of government. This discretion works to the president's advantage best in foreign policy. The relative lack of codification and regulation in foreign policy (as compared to domestic policy) offers the president far greater latitude to exert power independently of Congress (Smith, 1994). If Congress aspires to control the executive, it could hardly have been dealt a more difficult hand.

Presidents also have a stronger incentive to accrue power. Inevitably, presidents must actively pursue re-election and policy. But their emphasis tends to be on establishing a positive historical legacy as strong leaders. They have relatively little time to reign over an immense executive office and affect outcomes, so they must pursue and expand their power more aggressively than other office holders. Not surprisingly, the most important currency for presidents comes from policy movement,

⁸ The US Senate objects to language in the Vienna Convention on the Law of Treaties (which President Nixon signed), since it does not distinguish treaties from international agreements. The Senate insists that its advice and consent to this multilateral deal would enable presidents to circumvent the upper chamber when negotiating foreign commitments and thus obliterate a critical constitutional process designed to check power (Chayes and Chayes, 2006: 65; also see Slomanson, 2007: 374–379).

while for Congress the currency of position-taking can often serve re-election just as well (Mayhew, 1974). In addition, as the country's economic and political roles grew more complex during the 20th century, the public increasingly demanded proactive governmental responses (Moe and Howell, 1999). Presidents expanded their office and powers to meet these public expectations more so than other institutions.

With this set of opportunities and incentives, presidents have been increasingly inclined to use unilateral action to achieve their political goals. The power of unilateral executive action allows the president to act alone without the need of congressional cooperation (Howell, 2005). Moreover, by making the first move the president exercises control over the agenda in order to establish a new status quo. In terms of executive agreements, the president can initiate policy commitments with little concern for congressional preferences. Once a commitment is made by executive agreement, Congress is faced with a *fait accompli* from which it can either acquiesce or take on the collective burden of a statutory response (Johnson and McCormick, 1977). Even more, presidents know Congress is open to multiple veto points in which they need to find support in only one to successfully block a congressional challenge.

The signing of international agreements seemingly presents a policy arena where presidents have unfettered control. Not only do the institutional and informational advantages of the executive continually place Congress on the defensive when it comes to commitment-making, but presidents can seemingly circumvent the Senate by using executive agreements if there is any expectation of controversy (Johnson and McCormick, 1977). Indeed, Johnson's (1984) classic study suggests that the treaty procedure is no longer the primary instrument of international commitments. Rather, presidents mostly sign deals with foreign governments without requesting any congressional input. Further, use of the treaty procedure no longer signals the salience of an international commitment as even critical military/security compacts are negotiated without Senate involvement. In the 19th century, for example, treaties were as common, if not more common, than executive agreements. The US State Department reports 60 treaties and 27 executive agreements between 1789 and 1839 (Slomanson, 2007). More to the point, however, the agreements negotiated in the 19th and early 20th centuries were rarely employed for substantively important contracts. By the 20th century, however, presidents such as McKinley, Taft, and Theodore Roosevelt had increasingly begun to use executive agreements on matters of significant importance (Margolis, 1986: 38).⁹

In the second half of the 20th century, US foreign commitments proliferated along with America's increased responsibilities in managing the international system.¹⁰ Not

⁹ Admittedly, some executive agreements in the 19th century covered significant matters. President Monroe negotiated a compact with Great Britain to reduce armaments on the Great Lakes in 1817. Monroe, however, inquired with the Senate about whether advice and consent was required. The Senate later gave it (McClure, 1941).

¹⁰ Actually, one of the most notable executive agreements occurred at the outset of World War II (Church, 1969). Through executive agreement, Roosevelt traded 50 outdated destroyers in exchange for 99-year leases on key British naval bases in the Western Hemisphere.

only do the numbers of treaties and executive agreements explode after World War II, but increasingly the Senate is removed from the process. In 1942, for example, six treaties and 52 executive agreements were signed (US Department of State). By 1976, the numbers soar to over 400 executive agreements and 13 treaties. Notably, the executive agreements now are more substantively important and increasingly based on a president's sole constitutional authority as commander in chief. Status of forces agreements, relocation of US military personnel abroad, and defense commitments to foreign governments have all been established and justified through a president's unique constitutional charges (also see Johnson and McCormick, 1977).

Despite an attempt by Congress to reign in presidential authority by passing the Case-Zablocki Act in 1972 (which required the State Department to report all executive agreements to Congress within 60 days), the reliance on executive agreements continues to grow. Indeed, it appears that the value of these tools in terms of making commitments far outweighs any costs in reporting by presidents. Figure 1 provides an illustration of this trend by combining data from Roosevelt (1901–1909) and Bush (2001–2004) that bookend measures from five presidential administrations collected by Johnson (1984: 25). The bars in the figure represent proportions calculated from the number of executive agreements divided by the number of treaties plus executive agreements.¹¹ While there is a large jump in executive agreement activity going from Theodore Roosevelt to Harry Truman and then increasing steadily during the Cold War period, by the first administration of George W. Bush fewer than 10% of US foreign commitments are established through the treaty procedure. This figure appears to present a process of treaty-making very different from that envisioned by the framers, as presidents deliberately ignore Senate constitutional prerogatives.

Congress, however, may have more influence over international commitments than previously acknowledged. While the president's first-move advantage, greater levels of information, and an ability to use the bully pulpit to rally public support all provide institutional leverage in establishing agreements that meet presidential preferences, the Senate has alternative ways of influencing treaties other than formal floor votes. At times the Senate will attach amendments, reservations, understandings, declarations, or provisos to treaties to ensure the language in the document reflects its members' preferences. Some of these conditions may require resubmission to the other party for acceptance, while others simply express the Senate's interpretation or opinion of US obligations.¹² As early as 1803, for example, the Senate killed a treaty by attaching an amendment Great Britain refused to accept. More recently, when the US Senate gave its advice and consent to the Chemical Weapons Convention in 1997, it made sure to attach conditions protecting the civil

¹¹ The Executive Agreement Index, formulated by Johnson (1984), can theoretically range from 0 to 1. The proportion provides an indicator of the use of executive agreements relative to treaties.

¹² The Senate has repeatedly made clear that any interpretation of a treaty must conform to the "common understanding shared by the President and the Senate at the time the Senate gave its advice and consent to ratification" (CRS, 2001: 14). President Reagan met stiff Senate opposition when he tried to reinterpret the 1972 ABM Treaty.

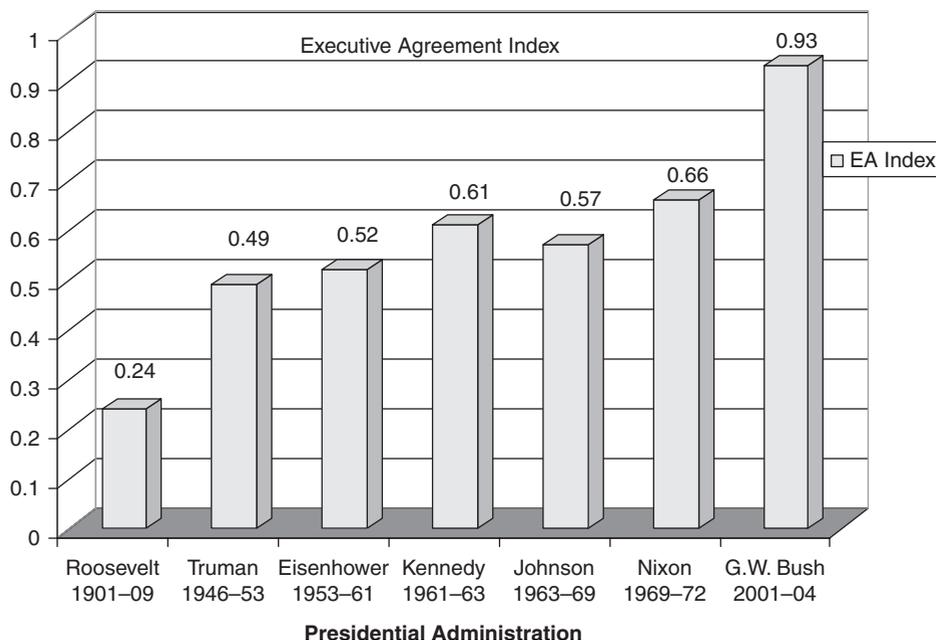


Figure 1. Proportion of International Agreements Signed as Executive Agreements Rather than Treaties

liberties of American citizens (CRS, 2001).¹³ The Senate also may kill treaties by failing to act on the document submitted by the president. The agreement then languishes in the Senate Foreign Relations Committee until it is renegotiated by the president or sent back to the State Department by the Senate (Murphy, 2006). President Woodrow Wilson signed a treaty for the advancement of peace with the Dominican Republic in 1917. While the Senate Foreign Relations Committee reported the treaty favorably to the Senate, no final action was taken and the treaty was sent back to the Secretary of State in 1935 (Wiktor, 1979).

Even executive agreements may not always be evidence of unilateral presidential power. Many, if not most, executive agreements are based at least in part on previous treaties or statutes passed by Congress (Murphy, 2006; also see CRS, 2001). In fact, Johnson's (1984) analysis demonstrates that a vast majority (87%) of such agreements are made on statutory grounds. Accession of new members to multilateral treaties, for instance, is typically accomplished through an executive agreement, but authorized by the original treaty. Similarly, many foreign assistance programs are established through executive agreement but pursuant to the 1961 Foreign Assistance Act legislated by Congress. Further, presidents at times seek to define foreign commitments through congressional-executive agreements, rather

¹³ Given the potential for intrusive inspections under the convention and the possible seizure of property, the Senate expressed a concern for 4th and 5th amendment protections guaranteed to US citizens (see Library of Congress, THOMAS, CRS Summaries).

than treaties (Slomanson, 2007). With these types of international agreements, both houses of Congress get a say, but importantly only a bare majority in each chamber is required for ratification and not the two-thirds needed for a treaty. Many free-trade agreements are established with this process to avoid narrow economic interests gathering one-third of the Senate to oppose reductions in tariffs (Murphy, 2006: 209). It appears that only a small percentage of agreements may actually be signed pursuant to a president's sole constitutional powers or obligations.

Expectations

The previous discussion leads to a number of testable conjectures, some that can be examined with the data available and some that must wait for further data collection. First, we anticipate a dramatic increase in the use of executive agreements relative to treaties moving from the administration of Roosevelt to Bush. This change in foreign policy tools not only flows from the leadership role the USA took up after World War II, but also results from presidents seeking fewer constraints on its commitment-making. The second and third hypotheses relate more directly to Senate influence in commitment making. We view the concept of Senate influence in admittedly broad terms. In our view, influence represents any behavior(s) that demonstrate the Senate is having a discernable effect over commitment outcomes. Recent research shows increasing reservations added to treaties by the US Senate (see Auerswald, 2006). So, for the second hypothesis, we expect more treaties to have reservations introduced by the Senate during the Bush rather than the Roosevelt Administration. While such add-ons to treaties signal Senate influence, we also consider most datasets examining such a relationship incomplete. That is, few if any studies include treaties that did not ultimately go into force. Without these cases, however, a skewed picture of Senate behavior is presented. With unperfected treaties (the vast majority of which are killed in pre-floor decision-making) included in the dataset, we expect Senate influence to be considerably greater than extant scholarship reports. Third, we expect Senate influence to be greater on issues of national security. These types of commitments are much more likely to be viewed as salient to Senators and constituents alike.

H1: We expect executive agreements to increase absolutely in number and relative to treaties going from the administration of Theodore Roosevelt to George W. Bush.

H2: We expect Senate influence on treaties to increase dramatically when unperfecteds are counted and therefore when pre-floor activity is considered.

H3: We expect Senate influence to be greater on military/security issues than other types of issues.

We had hoped to explore the constitutional foundations for executive agreements, expecting that most would be pursuant to congressional statutes, but unfortunately the data required to address this inquiry remain exceedingly difficult to acquire. However, we present preliminary evidence below on executive agreements that demonstrates considerable congressional influence even over these types of unilateral commitments and is consistent with Johnson's (1984) conclusions.

Data and Methods

The data used in the following analyses comes from many sources.¹⁴ First, a compilation of treaties and agreements collected by William Malloy (1910) for the US Senate is used for the administration of Theodore Roosevelt. This two-volume manuscript published by the government printing office in 1910 covers treaties and international agreements signed by presidents and other representatives of the US government from 1776 until 1909. This document provides the primary source of all treaties and agreements entered into by the USA during the Roosevelt Administration (1901–1909). Treaties that failed to enter into force are recorded by Christian Wiktor (1979). His many-volume set of unperfected treaties contains basic information on compacts negotiated by the United States, but for one reason or another did not become the law of the land. Wiktor includes the actual text of the unperfected treaties and a brief summary of how and why the negotiated pact did not get proclaimed by the president. The entire compilation extends from 1776 until 1976 and includes hundreds of treaties that failed to enter into force.

The US State Department provides information on current treaties and international agreements. From its website, one can obtain a list of international agreements organized by foreign power and a very brief explanation of the commitment entered into. These agreements can be found in the link to Treaty Actions under the Office of the Legal Adviser at the US Department of State. While limited, treaty actions for 1997 through 2005 are available in electronic format. The Library of Congress website (THOMAS) supplements the international agreements found at the State Department with treaties signed and submitted to the US Senate by presidents. The easy to use search engine makes available all treaties transmitted to the US Senate from the 90th through the 109th Congresses. Information on committee and floor action is included and whether the treaty received the advice and consent to ratification. The one drawback of this data source is that THOMAS only records treaty actions once they have been transmitted to the Senate by the president. Therefore, any treaties negotiated but not yet in Senate hands seemingly are absent from the THOMAS database. In practice, however, this limitation should not be much of a problem since the time from signing to Senate transmittal is typically short. Still, it is possible that a few treaties do not make it into the dataset used in the analyses below because, while negotiated and signed by the president, the documents have yet to reach the US Senate.

Variables

Senate Influence. The primary theoretical purpose of the analyses below is to document Senate influence on treaties and executive agreements. First, for both the Bush and Roosevelt Administrations we provide a measure of influence based on

¹⁴ Our intent is to record every treaty and executive agreement negotiated by Presidents Roosevelt and Bush (first term only). Since presidents sign agreements without Senate input, there should be few if any executive agreements that did not go into force. For treaties, however, many signed by an administration do not ultimately go in force. These unperfected treaties need to be included in a dataset assessing Senate influence.

the number of reservations, understandings, and amendments attached to treaties by the Senate. Although we record the actual number of add-ons, given our limited sample we opted to dichotomize our measure (any add-ons is coded 1, while none is 0). Second, for the Roosevelt years, information on treaties that did not go into force is also included. Wiktor (1979) includes a discussion of the signed treaties and executive–senate interactions. Thus, the reason for these treaty failures is recorded in the dataset in an attempt to once again gauge Senate influence. For example, a treaty killed by the Senate Foreign Relations Committee’s refusal to act is coded as evidence of Senate influence.¹⁵ We compare Senate influence on perfected and unperfected treaties to show that any analysis limited to only treaties that went into force can significantly underestimate the role played by the Senate. Third, in documenting influence, we establish that issues represent a critical factor affecting the Senate’s decision to challenge a president on international commitments.

Issues. Two issue codings have been created for treaties and agreements included in the dataset. The codes provided by the Library of Congress (THOMAS) form the basis for this variable. However, additional issue areas were generated for treaties and agreements that did not fall easily into the THOMAS categories. From this set of 34 issue codes, a second variable collapses multiple issue categories into the following four broad issue areas: military/security, economic, cultural, and consular. Admittedly it is difficult to assign single issue codes for treaties or agreements that may be multi-dimensional. We use the title of the treaty or commitment as a first cut at an issue coding. Next, a reading of the text of the international commitment provides further information about the primary issue code. To give an example, arms control, terrorism, defense cooperation, foreign aid, arbitration, amity and cooperation, and the UN were coded as pacts fundamentally dealing with security. Shipping, trade, copyright, taxation, monetary policy, and debt were defined as economic in nature. Cultural treaties included archaeological and scientific agreements, while infectious disease, environment, consular relations, outer space, education, and extradition fell into an “other” category. Our expectation is that security issues will evince the greatest Senate attention.

Results

Table 1 demonstrates not only that US commitments abroad have increased dramatically in the early 21st century compared to the early 20th, but also that these

¹⁵This type of influence is critical to our study here. A measure that relies solely on amendments, reservations, and understandings attached by the Senate remains incomplete. For example, during the Roosevelt Administration a number of arbitration treaties were killed by the Senate with its amending pen. These unperfected treaties (since they never entered into force) are not included in any extant study of Senate influence in treaty-making. Further, though, Roosevelt later submitted these same arbitration treaties to the Senate with the language the Senate desired. These treaties then were unanimously approved by the Senate. Without having observed the unperfected treaties, one would not have assigned any influence to the Senate on these arbitration pacts. This would be an incorrect assessment of the Senate role. So, even though the later versions of these arbitration treaties were not amended by the Senate, we code Senate influence since the language used was ultimately forced on Roosevelt by the Senate.

Table 1. Treaties and Executive Agreements Concluded by the United States during the Administrations of Theodore Roosevelt and George W. Bush

<i>Administration</i>	<i>Treaties</i>	<i>Executive Agreements</i>
Roosevelt (26)	97	44
Bush (43)	45	612
Total	142	656

$\chi^2 (1) = 304.5 (p < .000)$.

Table 2. Military/Security Concerns in Treaties and Executive Agreements

<i>Administration</i>	<i>Non-Military/Security Issues</i>	<i>Military/Security Issues</i>	<i>Total</i>
Roosevelt (26)	85	56	141
–Row %	60.3%	39.7%	
Bush (43)	377	280	657
–Row %	57.4%	42.6%	
	462	336	798

$\chi^2 (1) = .401 (p < .527)$.

commitments are now predominately negotiated using executive agreements without the advice and consent of the Senate, thus supporting Hypothesis 1. From 1901 to 1909, Roosevelt’s Administration negotiated 97 commitments that went to the Senate and 44 that did not. Compare these numbers to Bush’s first term: 45 treaties and 612 executive agreements. Yearly averages reinforce this increase in commitment-making. Roosevelt averaged 4.87 executive agreements per year and 10.78 treaties, while Bush averaged 153 executive agreements per year and 11.25 treaties. As is evident, yearly treaties do not change all that much comparing administrations from the early 20th and 21st centuries. Although our data provide just a snapshot of commitment-making from two distinct presidencies a century apart, the patterns in commitment-making do suggest that executive agreements have become a primary mechanism to establish such pacts.

Security concerns have remained a relatively constant matter of US diplomacy. Nearly 40% of the international commitments made by the Roosevelt Administration involved security concerns, such as arms control, defense cooperation, international law, and terrorism. For the first term of Bush, 42.6% of commitments involved security or military concerns. What is different is the manner in which these commitments were made. While Roosevelt was much more likely to sign security and military pacts with advice and consent of the US Senate, Bush has overwhelmingly chosen to use executive agreements for the same purpose. So, the aggregate evidence in Table 2 hides an important pattern. In fact, Roosevelt negotiated 12 (out of 56 or only 21%) security arrangements with foreign countries using executive agreement. Bush, in contrast, used executive agreements for 98% (274 out of 280) of the security accords signed during his first term in office.

Table 3. Senate Influence on Treaties during the Bush and Roosevelt Administrations

Administration	No observable Senate influence on treaty	Observable Senate influence on treaty	Total
Roosevelt (26)	68	29	97
–Row %	70.1%	29.9%	
Bush (43)	23	12	35
–Row %	65.7%	34.3%	
	91	41	132

$\chi^2 (1) = .231 (p < .631)$.

This table excludes the 45 unperfected treaties during the Roosevelt administration, most of which show signs of Senate influence.

Senate Influence in Treaty-Making

Auerswald and Maltzman (2003: 1099) argue that “the process of treaty ratification formally begins when the president submits a treaty to the Senate for advice and consent.” However, like most research evaluating the US Senate’s influence on treaty-making, Auerswald and Maltzman consider only Senate reservations to treaties that ultimately received advice and consent. Clearly such alterations to treaty documents indicate Senate influence and thus support Auerswald and Maltzman’s contention that extant research downplays the role of the Senate in foreign policy. Nonetheless, by ignoring the Senate committee stage of the treaty-making process, Auerswald and Maltzman (2003) also disregard a critical stage of Senatorial influence.

For treaties that eventually went into force, we observe Senate influence on about 30% in both administrations (see Table 3). Twenty-nine of 97 treaties during Roosevelt’s presidency show signs of Senate influence, while 12 of 35 treaties during the Bush Administration show similar signs of Senate influence. These numbers demonstrate two important things. First, one-third of treaties that ultimately received the advice and consent of the US Senate were affected by the preferences of members of the upper chamber. Second, one-third is a much larger number of treaties than most analyses report, although it supports Auerswald’s (2006) findings. Further, when we look at Senate reservations, understandings, and/or amendments to treaties, we actually see signs of increasing Senate pressure. Only 8% of treaties during the Roosevelt presidency received Senate attachments, while over 30% of the treaties negotiated by the Bush Administration witnessed such emendations.¹⁶

With treaties in force, Senate influence is likely underestimated. During the Roosevelt Administration, for example, 45 unperfected treaties were negotiated by US authorities. Of these treaties, two-thirds show signs of Senate influence, thus supporting Hypothesis 2. Including the unperfected treaties in the dataset increases the overall impact of the Senate to over 40% of negotiated contracts with foreign countries (see Table 4). This represents a 39% increase in the percentage of treaties

¹⁶While in general our measure of influence is based on Senate add-ons to treaties (similar to Auerswald, 2006), we also code influence when Roosevelt submitted new versions of treaties containing language demanded by the Senate.

Table 4. Senate Influence on Perfected and Unperfected Treaties during the Roosevelt Administration

Treaty type	No observable Senate influence on treaty	Observable Senate influence on treaty	Total
Perfected treaties	68	29	97
–Row %	70.1%	29.9%	
Unperfected treaties	15	30	45
–Row %	33.3%	66.7%	
	83	59	142

$\chi^2 (1) = 17.11$ ($p < .000$).

affected by the upper chamber and clearly leads to a different conclusion about the role the Senate plays in treaty formation. For example, the US Senate killed 10 arbitration treaties with its amending pen during the Roosevelt presidency. These treaties were designed to preserve peace between the signatories by providing for arbitration of legal differences that might arise. However, each arbitration treaty contained a short but unacceptable clause, enabling the president through executive agreement to establish the arbitrator's powers. The Senate struck the word agreement from the treaty and replaced it with treaty, forcefully indicating its unwillingness to allow the president, without Senate influence, the power to set such rules. The amendment received a bipartisan 50–9 vote in the Senate and thus all 10 arbitration treaties were so amended.¹⁷

Senate influence is further demonstrated with the Hay-Bond Treaty signed by the Roosevelt Administration in November of 1902. The treaty attempted to establish a level playing field for commercial interests in the USA and Newfoundland. After prodding from the Roosevelt Administration, the Senate took up the treaty in 1905, but New England fishing interests successfully amended the treaty to death. Later, public officials in Newfoundland used the failed treaty as a justification to punish New England fishermen. Senator Henry Cabot Lodge actually demanded that Roosevelt send a US naval cruiser to the area to ensure American rights (Holt, 1933: 199–200). Here we see the US Senate, for domestic political purposes, killing a negotiated treaty not through an up or down vote on the Senate floor, but by amending the document in such a way as to make it offensive to the other party.¹⁸

Issues and Senate Influence

Data from the Roosevelt and Bush Administrations also show evidence of changing issues in US commitment-making. A much larger percentage of the treaties signed by

¹⁷ One additional arbitration treaty with Japan was never sent to the Senate by Roosevelt owing to the Senate's actions (Holt, 1933: 204).

¹⁸ Currently, similar data on unperfected treaties do not exist for the Bush Administration and so it is difficult to assess trends at this time.

Table 5A. Senate Influence on Non-Security Treaties during the Bush and Roosevelt Administrations

<i>Administration</i>	<i>No observable Senate influence on treaty</i>	<i>Observable Senate influence on treaty</i>	<i>Total</i>
Roosevelt (26)	46	7	53
–Row %	86.8%	13.2%	
Bush (43)	23	7	30
–Row %	76.7%	23.3%	
	69	14	83

$\chi^2 (1) = 1.40$ ($p < .237$).

This table excludes the 20 unperfected non-security treaties during the Roosevelt administration, most of which show signs of Senate influence.

Table 5B. Senate Influence on Security Treaties during the Bush and Roosevelt Administrations

<i>Administration</i>	<i>No observable Senate influence on treaty</i>	<i>Observable Senate influence on treaty</i>	<i>Total</i>
Roosevelt (26)	22	22	44
–Row %	50.0%	50.0%	
Bush (43)	0	5	5
–Row %	0%	100%	
	22	27	49

$\chi^2 (1) = 4.54$ ($p < .033$).

This table excludes 25 unperfected security treaties during the Roosevelt administration, most of which show signs of Senate influence.

President Bush involve economic issues, while fewer involve military/security issues (see Table 6). More importantly, however as Tables 5A and 5B demonstrate, Senate influence appears much greater on security and military issues. For Roosevelt, 50% of security treaties that went into force show signs of significant Senate involvement. Compare this to only 13% for non-security-related treaties. For Bush, all security treaties that entered into force received serious Senate attention. Indeed, the Senate attached reservations and/or amendments to all five security treaties signed by Bush. This evidence provides further support of Hypothesis 3 suggesting that Senate influence varies significantly by issue area.

Given Senate attention to issues of security, the Bush Administration appears to have consciously chosen to circumvent the upper chamber when it comes to these types of international commitments. While Roosevelt was much more likely to use executive agreements on economic deals, the Bush team has tended to push through military/security compacts without seeking the advice and consent of the Senate. We observe nearly 50% of the Bush Administration's executive agreements dealing with military/security issues compared to only 27% of Roosevelt's (see Table 6). Perhaps the more relevant comparison relates to economic contracts. Over 60%

Table 6. Treaties, Executive Agreements, and Issues

Commitment type		Military/Security	Economic	Science/Cultural	Other
Treaty	Roosevelt	44	19	0	33
	–Row %	45.8%	19.8%	0%	34.4%
	Bush	6	21	0	18
	–Row %	13.3%	46.7%	0%	40.0%
Executive Agreement	Roosevelt	12	28	0	4
	–Row %	27.3%	63.6%	0%	9.1%
	Bush	274	88	62	175
	–Row %	45.7%	14.7%	10.4%	29.2%

of Roosevelt's executive agreements dealt with economic issues compared to only 15% of Bush's.

As mentioned above, acquiring accurate information on executive agreements is challenging.¹⁹ The State Department description of these pacts remains cursory and incomplete. It is particularly difficult to assess the constitutional authority under which a president signs an executive agreement. Presently we have only limited data for both administrations. In fact, of the 656 executive agreements in our dataset, we have recorded information on constitutional authority for only 233 of them (or 36%). Neither Malloy (1910) nor the State Department Office of the Legal Adviser consistently offers a discussion of the constitutional authority of executive agreements. Sometimes such authority is recorded, while other times the descriptions are silent. For the agreements where we have information on constitutional authority, about 45% are based on either a congressional statute or a previous treaty. Another 46% are based on a previous executive agreement. Thus, only a small percentage appears to be pursuant to a president's unique constitutional powers. And this pattern seems consistent with Johnson's (1984) findings showing that executive authority makes up a relatively small percentage of such agreements. It is difficult to draw any conclusions from the limited data we have, but it does initially appear that Congress has greater influence over these executive agreements than previously acknowledged.

Conclusion

We have argued that extant scholarship does not sufficiently address congressional influence on US commitment-making. Earlier phases of Senate participation in treaties suggest much greater control than simple evaluations of floor decision-making have denoted. Yet, we also insist that commitment-making by the US government has shifted over time. The shift not only involves the use of one foreign policy tool more

¹⁹ Constitutional authority includes previous treaties, congressional legislation, and sole executive authority. At present, however, these data remain incomplete. A later search through the United States Code will be necessary to determine more completely and accurately whether agreements are signed pursuant to statutory legislation approved by Congress.

than another, but more importantly involves a transformation in the interpretation of constitutional authority. Presidents increasingly use executive agreements, rather than treaties, to negotiate foreign compacts. Nonetheless, Congress has fought back and retains influence over most international commitments.

The evidence presented above demonstrates significant Senate influence on US treaty-making. One-third of treaties that entered into force during the Roosevelt and Bush Administrations show signs of Senate power. This is much greater when military/security compacts are being negotiated. Fifty percent of Roosevelt's security treaties and 100% of Bush's bear evidence of Senate attention. These numbers, however, underestimate the role played by the upper chamber in commitment-making. For the Roosevelt Administration, 45 treaties negotiated by US authorities did not ultimately go into force and two-thirds of these commitments were sunk largely due to Senate opposition. As far as we know these data on unperfected treaties have not been considered at all in the extant research.

Admittedly, our study remains incomplete. These initial steps, however, suggest a couple of different paths to take for future research. First, it seems obvious and essential that existing datasets on US treaties must include signed pacts that did not enter into force. These data are available and likely will indicate much greater Senate influence over treaty-making than one can establish with only treaties that received advice and consent. Second, any research on US international commitments must address executive agreements. These signed contracts with other countries are treaties according to international law. More importantly, though, more attention must be given to the legal authority under which these agreements are signed. We are unable to comment yet on whether presidents increasingly sign executive agreements under sole executive authority or whether Congress continues to authorize such pacts through statutes. But we can say that such a distinction must be made in any attempt to assess the relative power in commitment-making of Congress and the president.

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BRANDON C. PRINS is Associate Professor of Political Science at the University of Tennessee, Knoxville. His areas of specialization include conflict processes, US foreign policy, and quantitative methods and modeling. He has recently published articles in *British Journal of Political Science*, *Legislative Studies Quarterly*, *Journal of Peace Research*, and *Journal of Conflict Resolution*.

BRYAN W. MARSHALL is Associate Professor of Political Science at Miami University. His areas of specialization include Congress, congressional–executive relations, and quantitative methods and modeling. Bryan’s book on Congress, *Rules for War* (2005) looks at the effects of legislative rules on policy-making. He has recently published articles in *Legislative Studies Quarterly*, *Journal of Theoretical Politics*, *American Politics Research*, and *Social Science Quarterly*. He is currently APSA’s Steiger Congressional Fellow (2008–09) working in the Office of the House Majority Whip for the Honorable Jim Clyburn.