BALANCING TRADEOFFS:

ADAPTABILITY AND FLEXIBILITY IN THE U.S. LEGAL APPROACH TO NUCLEAR ARMS CONTROL AND NON-PROLIFERATION

Master of Arts in Law and Diplomacy Thesis

Submitted by Rizwan Ladha

Thesis Advisor: Prof. William C. Martel

NOVEMBER 2, 2011

http://fletcher.tufts.edu

THE FLETCHER SCHOOL

TUFTS UNIVERSITY

ABSTRACT

The United States has, over the past forty years, used a full spectrum of legal vehicles to overcome domestic political obstacles and advance its arms control and nonproliferation agenda. Namely, the United States has employed the formal treaty (in the cases of START I and New START), the executive agreement (in the case of SALT I), the non-legally binding pledge (in the case of the Proliferation Security Initiative), and the unilateral action (in the case of the Presidential Nuclear Initiatives). Each of these vehicles offers certain benefits and constraints that can be judged on the basis of objective arms control and nonproliferation-specific criteria; at the same time, because international agreements are generally subject to some type of domestic approval process by a national legislative body, each mechanism presents a separate set of challenges with respect to the likelihood that an agreement would find domestic acceptance.

This paper will argue that the United States has leveraged this full spectrum of legal mechanisms to overcome domestic political hurdles and continue making progress on arms control and nonproliferation. The legal flexibility of the U.S. approach to these issues has allowed it to insulate its arms control agenda from domestic politics; although that protection has sometimes come at the expense of the strength of individual agreements, the multi-pronged legal approach taken by the United States in its arms control and nonproliferation endeavors has been the most prudent one in the long term.

TABLE OF CONTENTS

A. **Abstract**……2

B. **Introduction**…….. 4

C. **Explanation of Correlations**…….6
Caveats and Exceptions……..8

D. **Mechanism I: The Formal Treaty**……10
Case Study: START I…… 15

E. **Mechanism II: The Executive Agreement**……....19
Case Study: SALT I……...22

F. **Mechanism III: The Unilateral Executive Action**……29
Case Study: Presidential Nuclear Initiatives……32

G. **Mechanism IV: The Non- Legally Binding Pledge**……..36
Case Study: Proliferation Security Initiative……38

H. **New START: Struggle and Success**……...45
Why New START Could Only Be a Formal Treaty……...49

I. **Conclusion**……... 54

J. **Bibliography**……58

INTRODUCTION

Over the past five decades, the United States has had significant measurable success in arms control, nuclear weapons reductions, and nonproliferation. Together, Russia and the United States, which between them possess 95 percent of the world's nuclear weapons, have lowered their combined nuclear forces from a high of nearly 70,000 warheads in the 1980s to fewer than 21,000 today.[1] In addition, the international nonproliferation regime has been strengthened since the September 11, 2001 attacks, with countries such as Libya relinquishing their desire to achieve a nuclear weapons capability. For the United States, these successes have been achieved not through the repeated application of one legal formula or framework, but rather through the employment of a diverse set of legal approaches to arms control and nonproliferation, including the formal treaty, the executive agreement, the unilateral action, and the non-legally binding pledge. Each of these vehicles offers certain benefits and disadvantages that can be judged on the basis of objective criteria, such as the depth of the agreement, the robustness of its verification provisions, and its enforcement mechanisms. At the same time, because an international agreement signed by the United States is then generally subject to a domestic approval process, each of these four mechanisms presents a separate set of advantages and disadvantages with respect to the likelihood that the agreement would be accepted by U.S. policymakers.

In examining the history of arms control and nonproliferation initiatives in the United States and the political environment corresponding to each agreement,

[1] Hans M. Kristensen, Federation of American Scientists, *Status of World Nuclear Forces 2011*, June 7, 2011 (accessed October 31, 2011); available from http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html.

this paper will argue that the significant legal innovations exhibited by the United States in arms control and nonproliferation demonstrate its prioritization of making progress on these agendas, even if they are less than perfect, over always striving for a gold standard in international agreement-making. That is, the legal flexibility of the U.S. approach to arms control and nonproliferation has allowed it to insulate its arms control agenda from domestic politics, even if that protection has sometimes come at the expense of the strength of individual agreements.

This paper will examine the legal precedent and operational efficiency of the four mechanisms mentioned above, taking into account the relative strengths and weaknesses of each vehicle. This paper will then contextualize each mechanism through the following four case studies: START I for the formal treaty; SALT I for the executive agreement; the Presidential Nuclear Initiatives for the unilateral action; and the Proliferation Security Initiative for the non-legally binding pledge. Finally, this paper will conclude with implications of the central argument in the context of the recent signing and ratification of the New START Treaty.

EXPLANATION OF CORRELATIONS

Within the context of United States domestic law and its interpretation of international legal precedents, the four mechanisms listed above present themselves on a legal spectrum, wherein the formal treaty is the most legally binding mechanism and the unilateral executive action is the most non-binding (see Figure 1).

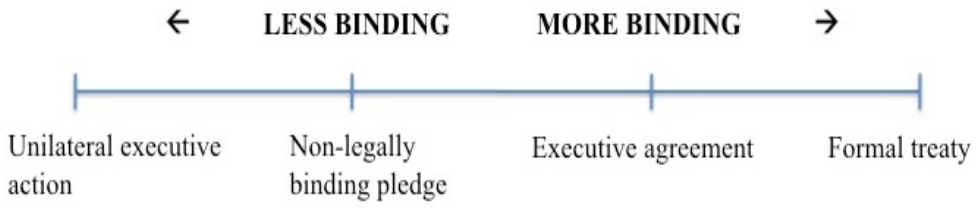

Figure 1. Legal binding spectrum

In the context of this paper, two separate but related direct correlations are found to exist. The first is between the strength of the agreement's verification measures and the legal form the agreement takes: As the verification and compliance measures included in the agreement become more robust and intrusive, the legal form of the agreement moves towards the formal end of the spectrum – that is, in the direction of the treaty.

The second correlation is between the legal form of the agreement and the U.S. domestic approval process for that agreement: As the agreement moves towards the formal end of the spectrum and becomes more legally binding on the parties to the agreement, it faces an increasingly substantial barrier to domestic approval. As explained further below, this relationship is grounded in Article II of

the U.S. Constitution. The inverse correlation also holds true, whereby an agreement that would be approved domestically with relative ease moves on the spectrum away from the formal treaty.

Therefore, these two correlations, when combined, yield a direct relationship between the strength of the verification measures in an arms control agreement and the difficulty of passing that agreement domestically. That is, as the set of verification measures in an arms control agreement becomes more robust, the process of domestic approval becomes more difficult. This relationship is represented visually in Figure 2, with the four mechanisms examined in this paper plotted on the graph.

Figure 2. Strength of verification measures vs. difficulty of domestic approval process

Caveats and Exceptions

Although the above relationship between verification measures and U.S. domestic approval process generally holds true, there are some notable caveats and exceptions. First, the relationships encompassed in the above graph do not necessarily hold in reverse. That is, the strength of verification measures, represented along the horizontal axis, should be considered the independent variable, with the difficulty of domestic approval, represented along the vertical axis, being the dependent variable. The opposite, as a rule, does not always hold true: An arms control agreement that encounters significant opposition to domestic approval may not necessarily have very robust verification mechanisms, and the approval of the agreement may be delayed or defeated for other, unrelated reasons.

Additionally, it is important to clarify that while the reasoning around the first correlation (strength of the verification measures and legal form of the agreement) is that the inclusion of increasingly intrusive verification measures in an arms control agreement necessitates a move on the spectrum towards the formal treaty, the inverse does not hold true. That is, a formal treaty must not always comprise strict verification measures; in fact, it is entirely possible that an arms control agreement in treaty form not include any verification measures at all. For proof of this, one should look no further than the 2002 Strategic Offensive Reductions Treaty (SORT), also known as the Moscow Treaty. Unlike any other

U.S. arms control agreement in treaty form, SORT encompasses no verification measures at all whatsoever. [2]

With these relationships in mind, we first examine the most binding legal vehicle, the formal treaty.

[2] At the same time, it is important to note that the Moscow Treaty was drafted, signed and ratified as a bilateral formal treaty only after Russia insisted that the agreement take the form of a treaty. Until that point, the Bush administration had intended to make SORT a fairly unstructured set of non-legally binding unilateral actions, akin to the 1991-1992 Presidential Nuclear Initiatives. This helps to explain the complete lack of verification measures in the agreement. *Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (the Moscow Treaty)*, May 24, 2002 (accessed October 31, 2011); available from http://www.state.gov/t/isn/10527.htm.

MECHANISM I: THE FORMAL TREATY

Broadly defined, the treaty is a legally binding written agreement, undertaken by two or more states, that commits the parties to an explicitly defined set of principles. The 1969 Vienna Convention on the Law of Treaties[3, 4] defines the formal treaty as:

> … an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[5]

As demonstrated in the above section, this type of agreement is considered the legally strongest and most binding of the various mechanisms explored in this paper. It derives its binding nature from the requirement of domestic acceptance by a dualist signatory state, which usually takes the form of ratification by the signatory state's national legislature. In the case of the United States, this process of ratification requires the advice and consent of at least two-thirds of the Senate. This rule is a domestic mechanism enshrined in Article II, Section II of the United States Constitution, which declares that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[6]

Therefore, the peculiar nature of the U.S. ratification process presents the first complication of using the formal treaty mechanism to enter into an

---

[3] *Vienna Convention on the Law of Treaties*, May 23, 1969 (accessed October 31, 2011); available from http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[4] It is of tangential interest that the United States, despite having not ratified the Vienna Convention, abides by it in large part – a behavioral phenomenon in treaty compliance described by Beth Simmons as a "false negative." Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge, UK: Cambridge Univ. Press, 2009), 67-80.

[5] *Vienna Convention on the Law of Treaties*, 3.

[6] *Constitution of the United States* (accessed October 31, 2011); available from http://www.archives.gov/exhibits/charters/constitution_transcript.html.

international agreement. The challenge of U.S. ratification, by which a precise sixty-seven percent of the upper house of the domestic national legislature is Constitutionally mandated to grant its approval of a treaty governing the relations of the state with the international community, is also what Robert Putnam calls the "two-level game:"

> At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures while minimizing the adverse consequences of foreign developments.[7]

This complication may also be called the collision of domestic politics with international diplomacy, which ensures that regardless of the issue area, Congress will not accept blindly and without question any treaty negotiated and signed by the executive branch. This failsafe has been useful in the past as a mechanism to ensure that no international treaty signed by the United States violates the tenets of the U.S. Constitution or the country's political sovereignty or territorial integrity. At the same time, however, it presents on occasion a significant challenge to ratification in the form of domestic politicking by U.S. Senators, who might pander to their domestic constituents for the sake of reelection or to gain support in another policy issue area, rather than weigh the treaty under consideration purely on its merits and take a decision accordingly.

As was evidenced most recently by the Senate experience over the New START Treaty in 2010 and 2011, there is an additional complicating factor to the procedure of ratification within the United States. When debating a treaty, it may

[7] Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization* 2, no. 3 (Summer 1988): 427-460.

be the case that some Senators object to parts of the agreement, and the task then falls to the Senate Foreign Relations Committee, which is responsible for deliberating and approving an international agreement prior to submitting it to the full Senate, to allay the concerns of those dissenting voices. As the Congressional Research Service explains in a 2001 study:

> When the [Senate Foreign Relations] committee reports a treaty to the Senate, it does so with a proposed *resolution of ratification* [emphasis added]. Proposed conditions usually are incorporated as provisions of this resolution. By contrast, any amendments to the text of the treaty, which seldom are proposed, are reported as freestanding proposals for the Senate to consider. Technically, neither the committee nor the Senate actually amends the text of a treaty; rather, the Senate identifies those amendments that would be necessary to gain its favorable advice and consent. However, the committee initially and the Senate subsequently can amend the resolution of ratification.[8]

In other words, a resolution of ratification serves to clarify the position of the U.S. Senate on the substance of the treaty in question, and does not alter the terms of the treaty itself. That is, the text of the resolution is not binding on the parties to the treaty under international law, and is applicable only in the domestic context of Senate ratification. Once the Committee deliberates on the treaty and its accompanying resolution, making any amendments to the latter document as it sees fit, the treaty and resolution are then presented to the full Senate for a vote.

Finally, in the context of arms control specifically, the Senate majority approval rule often makes a treaty especially difficult to ratify. As will be detailed later in this paper, the absolute strongest method to ensure compliance with an arms control treaty is the on-site inspection (OSI), which aims to place foreign

[8] Congressional Research Service, Library of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (Washington, D.C.: U.S. Government Printing Office, 2001), 136.

weapons inspectors within another country's sensitive nuclear facilities. The OSI therefore is of particularly high value and utility in the context of arms control, which necessarily seeks to constrain a country's nuclear weapons stockpiles, fissile materials, delivery systems and weapons development complexes. The challenge, however, is that the very notion of the on-site inspection could be construed by a country's populace to constitute an infringement on state sovereignty, and thus understandably would require the consent from the highest elected representative legislators.

However, despite these challenges to ratification, and precisely because the inclusion of on-site inspections in an arms control agreement necessitates the utilization of the formal treaty, this legal mechanism can be particularly effective. Various passive methods, commonly called national technical means of verification (NTMV), do exist to unobtrusively ensure compliance with a treaty by relying on such tools as satellite imagery and reporting requirements. While these passive means are utilized regularly in arms control agreements of other legal forms, inactive observation and monitoring alone are often insufficient to guarantee nuclear weapons reductions, and only intrusive OSI can provide the highest degree of confidence that parties to an arms control treaty are complying with their obligations.

An additional advantage presented by the formal treaty makes it a robust and effective instrument in any country's international agreement toolbox. Due to the intense amount of effort that is required to negotiate, draft, sign and ratify a legally binding treaty, there is arguably a generally high probability that once

ratified, the treaty's provisions will be upheld by its signatories. Since the parties to the treaty have invested considerable time, resources (financial and human) and political capital to see the treaty through to acceptance, not complying with the provisions of the treaty would invalidate the efforts that were taken to achieve that acceptance. Of course, there are exceptions to this rule: Abram Chayes and Antonia Handler Chayes outline in *The New Sovereignty* a number of reasons why states may choose not to comply with a treaty, or may choose to withdraw from it, even after ratification.[9] Indeed, this even happened once in the history of U.S. arms control, when in 2002 the George W. Bush administration, after thirty years of compliance with the 1972 Anti-Ballistic Missile (ABM) Treaty, decided to abrogate it.[10] However, in general and particularly with respect to arms control, states that sign and ratify a formal treaty governing some aspect of nuclear weapons and/or delivery systems tend to abide by their obligations.

The formal treaty mechanism has been employed successfully by the United States in multiple arms control measures in the past. The case study taken here is that of START I.

---

[9] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), 197-228.

[10] Wade Boese, Arms Control Association, *U.S. Withdraws From ABM Treaty; Global Response Muted*, July/August 2002 (accessed October 3, 2011); available from http://www.armscontrol.org/act/2002_07-08/abmjul_aug02.

Case Study: START I

The Strategic Arms Reduction Treaty[11], first proposed by Ronald Reagan in the 1980s and finally signed by U.S. President George H.W. Bush and Soviet President Mikhail Gorbachev in July 1991, continued the momentum established by SALT I (1972) and SALT II (1979),[12] and set a legally binding ceiling upon each country of 1,600 strategically deployed delivery vehicles carrying a maximum combined total of 6,000 warheads. Additionally, under the provisions of the treaty, which was ratified by the United States in October 1992, excess delivery vehicles would be destroyed, and – in accordance with Ronald Reagan's famous mantra, "Trust but verify" – would be confirmed through intrusive on-site inspections and the use of telemetry and satellite technology to ensure that neither country would cheat on its commitments under the treaty.

In the history of U.S. arms control initiatives, START I was groundbreaking because the verification regime codified in the agreement was the most stringent and robust set of measures to date in a bilateral arms control treaty between the United States and Russia. Those mechanisms were codified in Articles IX and XI of the treaty, as well as in the add-on Inspection Protocol. Article IX was the more basic set of provisions, mandating the use of "national technical means of verification" [NTMV] in order to ensure "verification of

[11] *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms*, July 31, 1991 (accessed October 31, 2011); available from http://www.state.gov/www/global/arms/starthtm/start/start1.html.

[12] It is of interest to note that SALT II was never ratified – primarily, from the American perspective, due to the Soviet invasion of Afghanistan six months after the treaty was signed. Nonetheless, the U.S. and USSR by and large adhered to the provisions of the treaty under the letter of international law and in the spirit of continuing mutual nuclear force reductions; this commitment arguably paved the way for the successful signing and ratification of START I.

compliance with the provisions of this Treaty." The U.S. State Department currently uses this term to refer to "those systems for collecting information useful in such monitoring. Examples include reconnaissance satellites, ships and aircraft that are used to monitor missile tests, and ground stations."[13] These forms of arms control compliance verification are relatively straightforward, and rely on technological advances to collect information on weapons-related activities that can be observed passively and from a distance – that is, unobtrusively. However, the true and heretofore unprecedented strength of START I came from Article XI and the Inspection Protocol. Article XI, which granted both parties the right to conduct on-site inspections, as well as continuous monitoring activities, translated into the ability of both countries to physically send their own weapons inspectors to the other country's nuclear weapons-related facilities. The Inspection Protocol detailed precisely the terms and conditions under which all Article XI verification measures would be implemented.

An analysis of the international and domestic political landscape at the time is crucial to understanding why the legal mechanism of a formal treaty, with its binding obligations and difficult ratification process, was nonetheless utilized successfully in the case of START I. In 1991, international politics were evolving rapidly, and the end of the Cold War seemed imminent. The Berlin Wall had fallen in 1989, finally raising the Iron Curtain and releasing the stranglehold on East Germany. Mikhail Gorbachev had risen to power as the General Secretary of the Soviet Communist Party and, since March 1990, as the President of the Soviet

[13] U.S. Department of State, *Article-by-Article Analysis of the Treaty Text* (accessed October 31, 2011); available from http://www.state.gov/www/global/arms/starthtm/start/abatext.html#IX.

Union. In the United States, the 1988 national elections had granted the Republican Party another term of control of the White House with the inauguration of George H.W. Bush. A moderate Republican and former Vice President under outgoing President Reagan, he understood that the collapse of the USSR and the end of the Cold War would potentially usher in a new era of global peace and prosperity, but only if managed appropriately.

Domestically, the 102nd Congress, which was in its first session at the time START I was signed and in its second session when the treaty was ratified, maintained a Democratic majority of Congress, with a 56 percent majority in the Senate[14] and a 61 percent majority in the House of Representatives.[15] Historically, this combination of Democratic control over Congress and a Republican presidency yields, according to Joe Cirincione, a higher chance of success for arms control agreements. Writing a decade ago in the *Bulletin of the Atomic Scientists*, Cirincione devised an "election matrix" to examine what combination of party control of the White House and the Capitol yield the greatest progress on arms control; he determined that arms control agreements, regardless of legal type, have the highest chances of success when domestic political circumstances yield the precise combination of a Republican-controlled White House with a

[14] U.S. Senate, *Party Division in the Senate, 1789-Present* (accessed October 31, 2011); available from http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.

[15] The House of Representatives of the 102nd Congress, as of election day 1990, comprised 267 Democrats and 167 Republicans, with 1 Independent. Office of the Clerk of the U.S. House of Representatives, *102nd Congress (1991-1993)* (accessed October 31, 2011); available from http://artandhistory.house.gov/house_history/index.aspx?cong=102.

Democratic-controlled Congress.[16] This model, therefore, helps explain why START I was ratified soon after being signed.

Ultimately, the end of the Cold War established an international political landscape in which both the United States and the USSR could agree to intrusive and robust verification mechanisms for the sake of international security and peace. Because of this understanding, therefore, the inclusion of strict provisions and stringent verification measures in the bilateral agreement necessitated the employment of a formal and legally binding treaty. Domestically, the mix of a Republican President and Democratic-controlled Congress set the stage for easy digestibility of a bilateral arms control agreement of the most binding nature, and led to the ratification of START I fourteen months after it was signed.

History has demonstrated, however, that even with a favorable executive-legislative mix, an arms control agreement can be held hostage by domestic politics. What options aside from the formal treaty mechanism, therefore, can the U.S. executive branch exercise to continue advancing its arms control agenda, especially in the face of divisive partisan politics?

[16] Joe Cirincione, "Republicans Do It Better," *Bulletin of the Atomic Scientists* 56, no. 5 (September/October 2000): 17-19.

MECHANISM II: THE EXECUTIVE AGREEMENT

Broadly defined under U.S. law, the executive agreement is any international accord negotiated by the President of the United States that requires not the Constitutionally mandated two-thirds majority approval of the Senate, but instead a simple majority approval by both houses of Congress. This attribute, then, immediately emphasizes the fundamental difference between the formal treaty and the executive agreement.

In U.S. law, there are three distinct subtypes of the executive agreement, as defined by the *Restatement of the Foreign Relations Law of the United States*: (1) congressional-executive agreements; (2) executive agreements pursuant to treaty; and (3) Presidential or "sole" executive agreements, which are made by the President on his or her independent authority.[17] Since neither sole executive agreements nor those pursuant to treaty have been used by the United States in arms control, we will consider here the role and function only of the congressional-executive agreement.

Defined by the Congressional Research Service as international agreements "sanctioned by the joint authority of the President and both Houses of Congress,"[18] executive agreements in international law are operationally synonymous with treaties and are accorded the same domestic legal power as formal treaties. However, domestic U.S. law draws a distinction between treaties and executive agreements with respect to how they are granted domestic approval. That is, unlike the treaty, which cannot be ratified by the President and brought

[17] American Law Institute, *Restatement of the Law, the Foreign Relations Law of the United States* (St. Paul, MN: American Law Institute Publishers, 1987).
[18] Congressional Research Service, 77.

into force until at least two-thirds of the Senate gives its approval, the executive agreement requires only a simple majority vote in both Houses of Congress. This vehicle therefore can allow arms control negotiators to bypass or at least mitigate substantially the dilemma posed by Putnam's two-level game, and may in certain circumstances provide a more amenable avenue than the formal treaty to securing domestic approval of an international accord.

However, the domestic legality of the executive agreement is unclear, as there is no unified consensus in the U.S. legal community on its true legitimacy. In 2003, the Supreme Court did judge the mechanism to fall within the President's Constitutionally derived executive powers under Article II, noting, "…our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."[19] However, in this statement the Supreme Court does not make a distinction between congressional-executive agreements and sole executive agreements; it is safe to conclude from the text of the Court's statement that it refers implicitly to the latter.

Additionally, there is considerable discord amongst Constitutional law scholars over the legality and applicability of executive agreements, particularly vis-à-vis the formal treaty. David Golove and Bruce Ackerman, writing in February 1995, consider treaties and executive agreements to be fully interchangeable, based on their interpretation of the U.S. Constitution. Citing the

[19] *American Insurance Association et al. v. Garamendi, Insurance Commissioner, State of California,* 539 U.S. 396 (2003).

Restatement (Third), they write: "…there is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two thirds of the Senate."[20] Laurence Tribe provides a counterweight to this perspective by conducting a structural analysis of the text of the U.S. Constitution and concluding, "Constitutional scholars should no longer treat as a foregone conclusion the interchangeability of the congressional-executive agreement with the treaty form."[21] This type of disagreement amongst leading Constitutional scholars highlights the uncertainty within the legal community on the constitutionality, and therefore the true power, of the executive agreement.

Finally, it is important to note that there is considerable resistance to the sustained use of executive agreements in lieu of formal treaties, as some argue that increased reliance on the former would contribute significantly to the erosion of treaty power. Writing in 2001, the Congressional Research Service noted:

> Not only would it [the executive agreement] circumvent the method set out in the Constitution that deliberately made entering treaties more difficult than passing legislation, but it would indirectly reduce the influence of states whose interests were seen to be protected by requiring a two-thirds majority of the Senators voting.[22]

Nonetheless, the President makes use of this legal mechanism frequently in many policy issue areas. This is evidenced by the fact that more than 90 percent of the international accords concluded by the United States in the period since

---

[20] Bruce Ackerman and David Golove, "Is NAFTA Constitutional?," *Harvard Law Review* 108, no. 4 (February 1995): 799-929.

[21] Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108, no. 6 (April 1995): 1221-1303.

[22] Congressional Research Service, 25.

1939 have been executive agreements.[23] However, the United States has employed this mechanism only once in the arms control arena, as in the case of SALT I, below. This peculiarity raises a key question: Given that an executive agreement would by its nature face a lower barrier to ratification domestically, and that it has been utilized so extensively in other foreign policy areas, why then is it not used more frequently in arms control?

Case Study: SALT I

The Strategic Arms Limitation Talks Interim Agreement (SALT I),[24] signed by Richard Nixon and Leonid Brezhnev in May 1972, was the first bilateral nuclear arms reduction agreement between the two Cold War superpowers. Along with the Anti-Ballistic Missile (ABM) Treaty of 1972, it was the product of nearly three years of negotiations between the U.S. and USSR. Until talks finally began in November 1969, the leaders and top diplomats of both countries had been signaling to each other for years that they were ready to enter into arms control negotiations, but were unable to do so because of the deployment of ballistic missile defense systems by both countries in 1966 and 1967. Although there was some promise the following year when President Johnson stated at the signing of the Nuclear Non-Proliferation Treaty (NPT) that the United States and the Soviet Union were finally ready to enter talks, the effort again collapsed when the USSR invaded Czechoslovakia less than two months

[23] Ibid.

[24] *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Certain Measures With Respect to the Limitation of Strategic Offensive Arms*, May 26, 1972 (accessed October 31, 2011); available from http://www.fas.org/nuke/control/salt1/text/salt1.htm.

later.[25] Finally, after the election of Richard Nixon in November 1968, Moscow made a statement on the day of Nixon's inauguration, signaling the Soviet Union's willingness to discuss strategic arms limitations.[26] Negotiations began in the fall of 1969 and culminated in 1972 with two deliverables: the first was the ABM Treaty, a formal treaty tangentially related to nuclear weapons reductions, and the second and more important was the SALT Interim Agreement, a congressional-executive agreement.

As discussed above, the benefit of the executive agreement is that it circumvents the treaty impasse of domestic ratification by the U.S. Senate. In the case of SALT I, a group of influential Senators, led by Democrat from Washington Henry "Scoop" Jackson, played a pivotal role in convincing President Nixon to pursue an alternate route to the formal treaty. Benjamin Loeb writes, "Because of opposition spearheaded by Sen. Henry M. Jackson, there was doubt it [SALT I] could achieve the necessary two-thirds Senate vote if submitted as a treaty."[27] The Stanford Arms Control Group explains: "Hints of dissent were contained in news reports that Senator Henry Jackson, a Democrat from Washington, would work with several powerful Republicans to attach reservations to the Interim Agreement." Therefore, "The President had decided to submit the Interim Offensive Arms Agreement [SALT I] to both houses; not

[25] Neil Sheehan, "Atom Pact Faces Senate Inaction," *The New York Times*, September 6, 1968, 1.

[26] U.S. Department of State, *Strategic Arms Limitation Talks (SALT I) (narrative)* (accessed October 31, 2011); available from http://www.state.gov/t/isn/5191.htm.

[27] Benjamin S. Loeb, "Amend the Constitution's treaty clause," *Bulletin of the Atomic Scientists* 43, no. 8 (October 1987): 38-41.

being a formal treaty, it did not require a two-thirds vote in either house."[28] Hence, the efforts of Senator Jackson and other vocal Senators to stonewall any progress on SALT I helped force its conversion by U.S. and Soviet negotiators from a formal treaty into an executive agreement.

Arguably, there is at least one other reason why SALT I was not conceived as a formal treaty, which also helps explain why the executive agreement has only been used once by the United States in arms control: its verification measures were extremely limited. According to Article V of the Interim Agreement, the sole method to be used by both parties to ensure compliance with the provisions of the agreement would be "national technical means of verification [NTMV] … consistent with generally recognized principles of international law." The only additional verification provision outlined by the treaty was to prohibit what it ambiguously referred to as "concealment measures" that could somehow constrain the processes of verification: "Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Interim Agreement."[29]

National technical means of verification certainly do comprise some level of guaranteeing compliance with the terms of an arms control agreement, and certainly are preferred to having no verification measures at all. However, NTMV are by their nature unobtrusive: Neither the United States nor the Soviet Union,

---

[28] John H. Barton and Lawrence D. Weiler, eds., *International Arms Control: Issues and Agreements* (Stanford, CA: Stanford University Press, 1976), 208.

[29] "Article V," *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Certain Measures With Respect to the Limitation of Strategic Offensive Arms*.

operating within the framework of SALT I, had the right to sustain within the other country's territory a physical presence in the form of expert inspectors, who would be able to confirm compliance through firsthand observation. These experts and their right to conduct inspections, had they been included in the agreement, would have provided the additional benefit of nullifying to a significant extent the "concealment" clause in Article V, since the degree of confidence provided by their presence and activities would have augmented and even superseded any confidence provided through unobtrusive, passive NTMV. Compared to START I, therefore, the verification requirements included in SALT I were not quite as robust or stringent because of the lack of physical, on-site inspections provided for in the agreement.

It is important to remember that START I also included NTMV; therefore, a counterargument could be made that because SALT I was negotiated and signed two decades prior to START I, the former agreement was not as robust as the latter since the technological ability of both countries to implement means of verification was not as advanced in the 1970s as in the early 1990s. However, while this argument certainly has merit, it again does not account for the lack of on-site inspections built into the terms of SALT I. No method to confirm compliance with the terms of an arms control agreement is as effective as intrusive, on-site inspections, and the ability of inspectors to verify personally that nuclear arms reductions are indeed being carried out is not fundamentally conditioned on access to or advances in technology. The lack of stringency in SALT I, therefore, was a function not of technological inadequacy in the 1970s,

but of the legal form of the agreement itself, which did not create the precursor conditions to allow on-site inspections to be a part of the agreement.

Ultimately, SALT I was negotiated, drafted, signed and passed by both Houses of Congress, and eventually brought into force as the first bilateral arms control agreement between the United States and the Soviet Union. It is argued here that the domestic political success of SALT I was due to a combination of five factors. First, when the agreement was submitted to the 92nd U.S. Congress for approval in May 1972, the Democratic Party held a 54% majority in the Senate[30] and a 58.6% majority in the House of Representatives.[31] The resultant combination of Democratic control of Congress and Nixon's Republican control of the White House lends itself easily to the previously discussed "election matrix," corroborating the theory put forth by Cirincione that this precise balance of power between the legislative and executive branches facilitates ease of passage through Congress of an arms control agreement. Second, the introduction of Richard Nixon into the White House presented Brezhnev with the opportunity to launch fresh discussions with a new President; this sentiment is evidenced by the timing of the message from Moscow, which coincided with Nixon's inauguration.

Third, the mutual signing of the Nuclear Non-Proliferation Treaty by the USSR and the United States in 1968 sent a strong signal to both countries that they shared similar concerns over the evolving importance of nuclear weapons in

[30] U.S. Senate.

[31] The House of Representatives of the 92nd Congress, as of election day 1970, comprised 255 Democrats and 180 Republicans. Office of the Clerk of the U.S. House of Representatives, *92nd Congress (1971-1973)* (accessed October 31, 2011); available from http://artandhistory.house.gov/house_history/index.aspx?cong=92.

national and international security. More importantly, this signaling demonstrated to Soviet and American leaders that, after many years of failed discussion attempts, they finally were ready to discuss what rule nuclear weapons would play in the future: In a speech delivered at the United Nations upon U.S. approval of the NPT in 1968, President Lyndon B. Johnson said the United States would "as a major nuclear weapon power promptly and vigorously pursue negotiations on effective measure to halt the nuclear arms race and to reduce the existing nuclear arsenals."[32] One week later, it was reported in the *New York Times* that General Secretary Brezhnev "gave full endorsement … to efforts for disarmament and arms control."[33]

These three factors all relate to signaling and power balance, whether within the U.S. federal government or between the United States and the Soviet Union; while they were absolutely helpful in bringing SALT I to fruition, they alone cannot explain why the first bilateral arms control agreement between the United States and the Soviet Union passed through Congress with such relative ease. The final two reasons relate to the legal structure of the agreement itself, and arguably were more vital to the success of SALT I.

First, once negotiations were underway and an agreement was being drafted, the Nixon administration perceived significant domestic opposition to SALT I if it were to be submitted as a formal treaty, and hence lowered the barrier to domestic acceptance by utilizing the executive agreement mechanism, which crossed the simple-majority threshold in both Houses with relative ease. Second,

[32] "U.S. encouraged by Gromyko speech," *The Leader-Post*, July 4, 1968, 19.
[33] Raymond H. Anderson, "Efforts for Disarmament Endorsed by Brezhnev," *The New York Times*, July 9, 1968, 11.

SALT I encompassed no stringent verification measures beyond NTMV. Had such intrusive provisions as on-site inspections been included in the agreement, it arguably would have been submitted as a formal treaty instead, as was the case with START I.

The SALT I and START I case studies above demonstrate that this sacrifice of lenience in verification must be balanced against the all-important political factor of domestic acceptance by the legislative branch of the agreement, and that this inherent tradeoff creates challenges for both executive branch negotiators and elected officials in Congress. With this idea in mind, we now look at how this tradeoff may be bypassed altogether.

MECHANISM III: THE UNILATERAL EXECUTIVE ACTION

As a foreign policy instrument, the unilateral action is a commitment on behalf of the President of the United States to undertake a set of national actions that are completely independent of another country. However, it is likely that such a unilateral action could have significant foreign policy implications and accordingly may influence another country's behavior. As such, the United States has used the unilateral executive action multiple times across many foreign policy issue areas.

From an American legal perspective, the U.S. Constitution, owing to the American system of checks and balances among the legislative, executive and judicial branches, does not explicitly grant the President the power to make law, domestic or international, independent of the legislature. As Terry Moe and William Howell argue, however, it is precisely the ambiguity accorded by the Constitution's lack of clear guidelines that has, first, given rise to the unilateral executive action, and second, permitted successive Presidents to rely upon it increasingly:

> … the Constitution is especially ambiguous on the broad nature and extent of presidential authority. In sweeping language, it endows the president with the "executive power" and gives him responsibility to "take care that the laws be faithfully executed," but it doesn't say what any of this is supposed to mean.[34]

Since the unilateral action requires the White House to draft no legislation to submit to Congress, which under normal law-making circumstances would provide its approval of a foreign policy action the President wishes to take, the

[34] Terry M. Moe and William G. Howell, "The Presidential Power of Unilateral Action," *Journal of Law, Economics, & Organization* 15, no. 1 (March 1999): 132-179.

executive branch has employed and continues to utilize this mechanism regularly to advance the foreign policy agenda of the United States.

While the President may use the unilateral executive action at any time to conduct initiatives independent of and without respect to any other country, there are some international issue areas in which it is of benefit to undertake a unilateral action that is loosely in tandem with the actions of another country. In other words, the two states may decide, independently of each other, to carry out similar measures under a particular set of political circumstances that may not permit them to achieve the same objective through a formal, bilateral process.

One of the issue areas in which this type of foreign policy approach may work, and has been used successfully in the past, is in arms control and nuclear force reductions. A successful coordinated unilateral approach, which we may call "equal but separate," would first and foremost be based on mutual trust. If the head of state of a country makes rhetorical overtures indicating his or her intent to lower that country's number of nuclear weapons and/or related delivery systems, the head of state of another country may follow suit. However, in this instance there is no guarantee that either country's action would follow its rhetoric and that the two heads of state would indeed follow through on their verbal commitments. Additionally, because they would be operating independently of each other and not entering into a formal bilateral agreement of any sort, the two countries would not be legally bound to their verbal commitments, much less to any mechanisms of transparency, honesty or accountability. Therefore, in order to minimize

feelings of misgiving and prevent duplicity, a significant degree of trust must exist as a precondition to any coordinated unilateral action.

Domestically, since the United States would not be entering into an agreement of any form with the other country, the benefit to pursuing an equal but separate approach is that such a move would not need any Congressional approval. Whereas both the formal treaty and the executive agreement, as discussed above, require some form of consent from the legislative branch, the unilateral action bypasses this obstacle, increasing the value of the tool itself when the domestic political landscape is particularly tenuous and difficult to negotiate.

Nonetheless, this mechanism would not carry the same weight as a treaty in domestic law, nor would it be legally binding in international law. In the very best of circumstances, it would amount to nothing more than a set of rhetorical statements, to which the two countries may or may not commit independently of each other. Additionally, in the arms control arena specifically, there would be no verification measures, no method to detect non-compliance, and no enforcement mechanisms to stop and reverse the behavior of a state that chooses to undertake action that is contrary to its rhetorical, stated pledge. This reality emphasizes that a set of unilateral actions undertaken by two heads of state independently must be based ultimately on mutual trust.

Yet interestingly, despite the lack of legal strength of this mechanism and the uncertainty inherent in attempting to coordinate unilateral actions vis-à-vis another country, the United States has employed this mechanism successfully

once before in arms control, and with arguably impressive results. That instance was the Presidential Nuclear Initiatives of 1991-1992, which is examined below.

Case Study: Presidential Nuclear Initiatives

On September 27, 1991, U.S. President George H.W. Bush announced that his administration would undertake a set of unilateral actions intended to reduce the tactical nuclear weapons arsenal of the United States.[35] He also proposed a set of measures designed to accelerate the progress of commitments made by both the United States and the Soviet Union under START I, which had been signed not even two full months prior to this announcement.

One week later, Soviet President Mikhail Gorbachev announced that the USSR would undertake its own set of unilateral measures intended to reduce the role of tactical nuclear weapons in the Soviet arsenal, and committed the Soviet Union to eliminating one thousand nuclear warheads in addition to what was required under START I.[36] Sustaining this commitment after the Cold War ended, Gorbachev's successor, Boris Yeltsin, declared in January 1992 that all arms control obligations undertaken by the now-dismantled Soviet Union would continue to be upheld by the Russian Federation:

> Russia regards itself as the legal successor to the USSR in the field of responsibility for fulfilling international obligations. We confirm all obligations under bilateral and multilateral agreements

[35] Courtney Keefe, Arms Control Association, *The Presidential Nuclear Initiatives (PNIs) on Tactical Nuclear Weapons At a Glance* (accessed October 31, 2011); available from http://www.armscontrol.org/factsheets/pniglance.

[36] Eli Corin, Nuclear Threat Initiative, *Presidential Nuclear Initiatives: An Alternative Paradigm for Arms Control* (accessed October 31, 2011); available from http://www.nti.org/e_research/e3_41.html.

> in the field of arms limitation and disarmament which were signed by the Soviet Union and are in effect at present.[37]

None of these statements – which, to reiterate, were made by Bush and Gorbachev / Yeltsin independently of each other – were legally binding, nor would there be any method to ensure that either country would actually carry out the initiatives declared publicly. Additionally, because data on tactical nuclear weapons for both nations were and still are for the most part classified, it is difficult to determine the degree to which either state actually conformed to its declarations; therefore, it would seem difficult or at least premature to declare conclusively that the Presidential Nuclear Initiatives were successful.

However, more recent analysis has demonstrated that to a significant extent, the United States and Russia did indeed fulfill their commitments. According to preliminary data compiled in 2001 by Joshua Handler at Princeton University,[38] as well as separate extrapolations by Courtney Keefe and Daryl Kimball of the Arms Control Association on data from a variety of sources,[39] the United States lowered its total number of tactical nuclear weapons from between five and seven thousand in 1991 to less than two thousand in 2001. For its part, Russia had between twelve and nearly twenty-two thousand tactical nuclear weapons in 1991, but within a decade had reduced its arsenal to less than four thousand.

---

[37] Quoted in Thomas Graham, Jr., *Disarmament Sketches: Three Decades of Arms Control and International Law* (Seattle, WA: University of Washington Press, 2002), 182.

[38] Joshua Handler, "The September 1991 PNIs and the Elimination, Storing and Security Aspects of TNWs" (presented at the conference on Time to Control Tactical Nuclear Weapons at the United Nations, New York, NY, September 24, 2001).

[39] Eli Corin, endnotes 3 and 4.

Keeping in mind that no other arms control agreements were negotiated between the United States and the Soviet Union in the decade following START I, and despite the fact that the Presidential Nuclear Initiatives were not legally binding, these numbers indicate the effort was an overall success. Although it is true that a more formal bilateral agreement would have imposed some degree of legal obligation on the effort, the coordinated unilateral approach was able to bypass for both countries the barrier to domestic acceptance. Further, it continued the momentum and mutual trust that were established by the negotiation and signing of START I earlier in 1991.

However, the unilateral action form of the Presidential Nuclear Initiatives meant that any verification and transparency measures, which are always crucial to giving strength to any arms control agreement, were necessarily absent in this instance. Since the United States and Russia did not enter into a bilateral agreement of any sort and were acting unilaterally and independently of each other, they had no opportunity to negotiate the terms of any tools or methods that could be used either to confirm compliance or to detect noncompliance. This aspect of the Presidential Nuclear Initiatives makes the unilateral executive action a legal mechanism that can only be used in specific circumstances – namely, when mutual trust between two heads of state is relatively strong, and when those heads of state can be relied upon to commit to and fulfill their verbal declarations without having to guarantee compliance through the use of verification measures.

The above case studies demonstrate that the United States has taken a unique approach to arms control, utilizing a diverse set of legal mechanisms to

balance its arms control agenda vis-à-vis other countries with any domestic political obstacles it may encounter or anticipate. These legal innovations are not limited only to the arms control arena; indeed, as the following section demonstrates, the United States has been creative in its approach to international nuclear nonproliferation efforts as well.

MECHANISM IV: THE NON-LEGALLY BINDING PLEDGE

The non-binding pledge is a rudimentary application of agreed principles between or amongst countries, codified loosely in a written document of uncertain legal applicability. In domestic U.S. law, the pledge is a mechanism with no constitutionally derived legitimacy, as opposed to the formal treaty or even perhaps the executive agreement. However, as the U.S. Department of State explains, a non-binding pledge can carry "significant moral or political weight. Such instruments are often used in our international relations to establish political commitments."[40]

In most cases, the primary objective of the pledge is not to impose legally binding restrictions on states parties, but rather to gain widespread consensus on a sensitive and urgent manner, which may facilitate future cooperation in a time of crisis. In order to gain as much international support for the agreement as possible, the pledge places states parties under no specific legal obligations through the use of vague, loosely interpretable and often unenforceable language.

It is precisely because of this non-binding nature of the pledge as a legal instrument that the United States has not used it in arms control, and only once to date in the field of nonproliferation. The non-binding pledge has a limited arms control application, since like the unilateral executive action it does not necessitate the negotiation, signing and ratification of any international agreement. Therefore, by its very nature the pledge can incorporate no robust enforcement mechanisms. As demonstrated by the models and case studies above,

[40] U.S. Department of State, *Guidance on Non-Binding Documents* (accessed October 30, 2011); available from http://www.state.gov/s/l/treaty/guidance/.

any verification measures agreed to by states parties in an arms control agreement cannot be most effectively implemented and enforced while outside the context of a legal structure or framework.

The pledge is generally better suited to nonproliferation and counterproliferation measures. Since it seeks to achieve international agreement on a fairly time-sensitive and urgent matter, it requires parties to commit to future action when necessary. However, it places this obligation on pledge members in an ambiguous manner, which gives states the opportunity to support the pledge nominally without facing any repercussions later if they choose not to adhere to the pledge principles. Thus, the pledge enjoys widespread appeal internationally, since states face little to no domestic resistance to committing themselves to an agreement under which they have no defined and enforceable obligations.

Given this information, the non-legally binding pledge is being considered here because it demonstrates the penchant of the United States for legal innovation not only in the field of arms control, but also in nonproliferation. Additionally, the Proliferation Security Initiative (PSI), examined below, has a unique structure that combines non-binding pledge principles with legally binding contractual agreements amongst certain countries. As such, this case study will provide insight on: how the combination of legally binding and non-binding tools within one framework impacts the breadth and depth of multilateral nonproliferation agreements; and the implications of such legal innovation for the future development of U.S. nonproliferation policy.

Case Study: Proliferation Security Initiative

Launched in 2003 by the George W. Bush administration, the PSI[41] is a measure spearheaded by the United States that is intended to prevent, through the interdiction of ships on the high seas, the illicit transfer of sensitive nuclear-related technology and equipment around the world. The effort comprises a two-tiered structure, where the first tier comprises the acceptance of a non-legally binding pledge and set of "interdiction principles" amongst the United States and 97 other countries.[42] These states provide nominal support to the United States and its allies in counterproliferation efforts by agreeing to:

> Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, *to the extent their national legal authorities permit* [emphasis added] and consistent with their obligations under international law and frameworks.[43]

These non-binding principles are girded by the second tier: a set of eleven legally binding bilateral ship-boarding agreements, concluded between the United States and key open registry states, that are built off previously concluded counternarcotics trafficking agreements with these same countries. Known as "flags of convenience" countries, these eleven states include: Antigua and Barbuda; Bahamas; Belize; Croatia; Cyprus; Liberia; Malta; Marshall Islands; Mongolia; Panama; and Saint Vincent and the Grenadines.[44] These open registry countries provide access to a large majority of ports along major global maritime

[41] U.S. Department of State, *Proliferation Security Initiative* (accessed October 31, 2011); available from http://www.state.gov/t/isn/c10390.htm.

[42] U.S. Department of State, *Proliferation Security Initiative Participants* (accessed October 30, 2011); available from http://www.state.gov/t/isn/c27732.htm.

[43] U.S. Department of State, *Proliferation Security Initiative: Statement of Interdiction Principles* (accessed October 31, 2011); available from http://www.state.gov/t/isn/c27726.htm.

[44] U.S. Department of State, *Ship Boarding Agreements* (accessed October 31, 2011); available from http://www.state.gov/t/isn/c27733.htm.

shipping routes, and register a disproportionately large number of ships that engage in global maritime shipping, many of which come from countries that are actual known or potential proliferators.[45] Therefore, any of these eleven states would be of special value to international nonproliferation and counterproliferation efforts because it has legal jurisdiction over any ships in international waters that fly its flag.

Because of the non-binding pledge nature of the PSI, many countries worldwide are able to support this effort, at least nominally if not in action, without being forced to commit themselves to any legally binding provisions. At the same time, however, the PSI is forward-looking in how its principles might be implemented and enforced at the domestic level for any given country; therefore, the third Interdiction Principle calls on member states to:

> Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.[46]

This relatively low legal and political barrier to acceptance of the Proliferation Security Initiative is evidenced by the numbers: As of the most recent U.S. State Department update on September 10, 2010, the effort has found at least nominal support from 97 countries in addition to the United States. The value to partner countries of the PSI, thanks to its non-legally binding form, lies precisely in its rapidity: it is designed to mobilize countries to act in a timely

[45] Emma Belcher writes, "These treaties [ship-boarding agreements with the eleven open registry countries] cover over 70 percent of the world's shipping tonnage, and include many of those states traditionally associated with illicit smuggling." Emma Belcher, "Regime Change of a Different Kind: Exploring Adaptation in the Nuclear Nonproliferation Regime" (Ph.D. diss., Fletcher School of Law and Diplomacy, Tufts University, 2010), 260.

[46] U.S. Department of State, *Proliferation Security Initiative: Statement of Interdiction Principles*.

manner, utilizing all legal and law enforcement tools available, to stop in real time the transfer of illicit weapons of mass destruction and related delivery systems and materials. If it had taken the form of a legally binding formal treaty, the PSI almost instantaneously would be rendered operationally invalid, since countries would have required considerable time to ratify or accede to the agreement. This desire to achieve a negotiated, signed and implementable agreement as quickly as possible, held by key Bush administration officials including President Bush himself, drove the formation of the PSI as a non-binding pledge from the outset in 2002-2003.[47]

In addition, the Initiative has no secretariat, no office and little protocol. Had these formal institutions been put into place through a more structured, hierarchical system codified in a negotiated and signed multilateral agreement, countries ready to take action against a ship on the high seas en route to a port of concern would be required to submit requests and permissions through those institutions. In the meantime, the opportunity to interdict the ship of concern would pass, and the PSI very likely would be largely unsuccessful. By contrast, the ship-boarding agreements the United States has signed with the eleven flags of convenience countries allow a time span of only two to four hours to deny U.S. authorities the right to board a ship.[48]

---

[47] Belcher, 215-216.

[48] U.S. Library of Congress, Congressional Research Service, *Proliferation Security Initiative (PSI)*, by Mary Beth Nikitin, Congressional Rep. RL34327 (Washington, D.C.: The Service, January 18, 2011), 3 (accessed October 31, 2011); available from http://opencrs.com/document/RL34327/2011-01-18/download/1005/.

In examining the Proliferation Security Initiative, it is important to understand the international environment into which the effort was born, and consider the catalyst for the formation of the initiative. In 2002, fifteen SCUD missiles were discovered hidden amongst bags of cement aboard the *So San*, a Cambodian freighter ship bound for Yemen from North Korea. After U.S. intelligence tracked the movement of the ship from the Korean Peninsula to the Arabian Sea, a Spanish navy ship boarded the freighter, at which time the missiles were discovered. Ultimately, however, and after Yemeni President Ali Abdullah Saleh indicated the missiles were intended for him, U.S. President George W. Bush signed a directive authorizing the Spanish navy to allow the freighter to continue on its way.[49] While the rationale for the final U.S. decision was that Yemen was a strong ally in the U.S. war on terror, some within the Bush administration argued that such an event could never be allowed to occur again, in which the U.S. might locate and seize a shipment of illicit arms, only to be forced, as a function of international law or politics, to relinquish them.

Domestically, when President Bush formally announced the PSI in Poland on May 31, 2003,[50] the domestic political landscape fairly closely mirrored public opinion, as it had still been less than two years since the attacks of September 11, 2001; as such, any substantive discussion of the initiative in the United States was colored through the prism of the attacks, which encompassed angry public

[49] Belcher, 208-209.

[50] George W. Bush, *Remarks by the President to the People of Poland*, Krakow, Poland, May 31, 2003 (accessed October 31, 2011); available from http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html.

sentiment and an important paradigm shift in U.S. homeland and national security.

At the time President Bush announced the Proliferation Security Initiative, there was fairly little media coverage on the effort until later that year, when the German-owned ship *BBC China* was interdicted on its way to deliver centrifuge parts to Libya. This interdiction, and Libya's decision shortly thereafter to renounce its nuclear ambitions, was cited quickly by Bush administration officials as concrete evidence of the effectiveness and utility of the PSI; speaking in 2004 at a conference in Washington, D.C., then-Undersecretary for Arms Control and International Security John Bolton said with respect to the Proliferation Security Initiative, "The seizure of that ship and the equipment on it, we think, had a major, perhaps dispositive role in Libya's decision to give up the pursuit of weapons of mass destruction last year."[51]

The PSI has gained widespread support not only internationally, but also within the U.S. government, transcending both party lines and presidencies. Although initially the brainchild of a Republican-controlled White House in 2003, the PSI was championed by Democrat President Barack Obama almost immediately upon taking office. In a speech delivered in Prague in April 2009, he indicated his desire to continue the legacy of his predecessor, stating he would seek to turn the PSI into "a durable international institution."[52]

---

[51] John R. Bolton, "The International Atomic Energy Agency: The World's Enforcer or Paper Tiger?" (presented at a conference at the American Enterprise Institute, Washington, D.C., September 28, 2004).

[52] Barack Obama, *Remarks by President Barack Obama in Prague as Delivered*, Prague, Czech Republic, April 5, 2009 (accessed December 8, 2010); available from http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered.

For the purposes of this paper, and as compared to the other three legal mechanisms discussed here, the Proliferation Security Initiative specifically should be understood in its own context, given three important factors. First, the domestic and international circumstances at the time of its inception lent themselves easily to the creation of a multilateral yet fairly unstructured approach to preventing the spread of weapons of mass destruction. The urgency of the Bush administration's desire to avoid another embarrassing situation, in which it was forced to give up confiscated weapons, was reflected in the rapidity with which the PSI was established.

Second, the unique two-tiered structure of the PSI, combining non-binding principles with legally binding provisions, was a novel approach that has guaranteed not only breadth of participation amongst nearly one hundred countries, but also depth or strength of participation by securing the legally binding partnership of critical flags of convenience countries. Third, the non-binding nature of the Proliferation Security Initiative, enabling states to mobilize resources in a time-efficient manner, made it more suitable for nonproliferation and counterproliferation measures, as opposed to arms control and nuclear force reductions, which usually are undertaken bilaterally.

As a legal mechanism, therefore, the non-legally binding pledge has demonstrably been used by the United States to form broad solidarity amongst states on a highly time-sensitive matter, without having to submit to any domestic approval process for such an international agreement. In particular, the Proliferation Security Initiative demonstrates a high degree of legal innovation,

combining the need for quick, real-time response to proliferation threats with a legal underpinning that not only helps facilitate that rapidity of response, but also provides legal and political credibility to the initiative.

NEW START: STRUGGLE AND SUCCESS

Having examined these four legal mechanisms – the formal treaty, the executive agreement, the unilateral action and the non-binding pledge – we turn now to the most recent U.S. experience with the New START Treaty. This case study is unique in that it presents a contemporary application of these vehicles to the decision-making processes of U.S. administration officials, as they have weighed the merits and strength of the treaty itself against the domestic political environment in which they operate.

The New Strategic Arms Reduction Treaty[53] (New START) is a follow-on agreement to START I that: reduces the number of nuclear weapons for the United States and Russia from a ceiling of 2,200 to 1,550 strategic warheads each; limits deployed intercontinental ballistic missiles (ICBMs), submarine-launched ballistic missiles (SLBMs) and heavy bombers to 700; and limits both deployed and non-deployed ICBMs, SLBMs and heavy bombers to 800. More importantly, it includes a robust stringent verification system. Article X of the agreement requires both the United States and Russia to "use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law,"[54] while the full terms and conditions of conducting on-site inspections are captured in Article XI of the treaty,[55] Parts

[53] *Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, April 8, 2010 (accessed October 31, 2011); available from http://www.state.gov/documents/organization/140035.pdf.

[54] Ibid., 13.

[55] Ibid., 14-15.

Two and Five of the Protocol to the Treaty,[56] and the Annex on Inspection Activities.[57]

Negotiations between the United States and Russia to draft a follow-on treaty to START I began in April 2009, shortly after Barack Obama declared in his "Prague Speech" the commitment of the United States to a world free of nuclear weapons.[58] Those negotiations concluded one year later on April 8, 2010, when President Obama and Russian President Dmitry Medvedev signed the treaty, which was then submitted to the Senate Foreign Relations Committee for consideration. An eighteen-member Senate panel jointly chaired by Democrat John Kerry (Massachusetts) and Republican Richard Lugar (Indiana), the Foreign Relations Committee debated New START for five months, finally approved the treaty on September 16, 2010 by a vote of fourteen to four,[59] and then submitted the agreement and its accompanying resolution of ratification to the Senate for consideration.

However, despite the vocal support of the Joint Chiefs of Staff,[60] Secretary of Defense Robert Gates,[61] and other former administration officials for the treaty,

---

[56] *Protocol to the Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, April 8, 2010 (accessed October 31, 2011); available from http://www.state.gov/documents/organization/140047.pdf.

[57] *Annex on Inspection Activities to the Protocol to the Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, April 8, 2010 (accessed October 31, 2011); available from http://www.state.gov/documents/organization/141293.pdf.

[58] Obama.

[59] Susan Cornwell, "Senate panel OKs new arms treaty with Russia," *Reuters*, September 16, 2010 (accessed October 30, 2011); available from http://www.reuters.com/article/2010/09/16/us-nuclear-usa-start-idUSTRE68F41V20100916.

[60] Amanda Terkel, "Joint Chiefs Of Staff Chairman Mike Mullen: New START Treaty Should Be Ratified In The Lame Duck Session," *The Huffington Post*, November 21, 2010 (accessed October 31, 2011); available from http://www.huffingtonpost.com/2010/11/21/mike-mullen-new-start_n_786507.html.

New START encountered immediate, unexpected and substantial resistance on the Senate floor. The 111th United States Senate was composed in 2010 of a Democratic majority of 57 Senators, with 41 Republicans and two Independents.[62] With a minimum of 67 votes required to pass the treaty, the White House needed eight Republican votes, since all Democrats and Independents were expected to support New START. In the final months of 2010, there was a sense of especially dire urgency to ratify the treaty before the end of the year, due to the outcome of the November 2010 midterm elections, in which the Democratic Party lost six seats to the Republicans. However, these changes would not come into effect until January 2011, at which point the White House would need to secure the support of fourteen Republican Senators rather than only eight. Hence, the Obama administration, in order to capitalize on its immediate opportunity, lobbied vigorously to secure the support of at least nine Republicans and pass the treaty before the end of calendar year 2010.

In doing so, however, the White House encountered significant resistance in the form of key Republican Senators who brazenly questioned the prudence of the agreement and declared their intent to prevent the ratification of New START at all costs. Prominent Republican Senators Jon Kyl (Arizona) and Jim DeMint (South Carolina) led others in blocking floor debate on New START and delaying a call for a vote for as long as possible, claiming more time was needed in the new year to carefully examine and deliberate on the treaty. In addition, Senator Kyl

---

[61] David Cloud, "Gates warns of 'significant consequences' if Senate fails to ratify New START treaty," *Los Angeles Times*, November 21, 2010 (accessed October 31, 2011); available from http://articles.latimes.com/2010/nov/21/world/la-fg-start-treaty-20101121.

[62] U.S. Senate.

voiced multiple times his concern that the ability of the United States to modernize its nuclear arsenal would be severely hampered if the treaty were ratified.

The Obama administration, despite having stated repeatedly that New START would not in any way impede U.S. modernization efforts, nevertheless arrived at an agreement with Senator Kyl in November 2010 as a show of good faith and in order to placate him: In exchange for his support on New START, the White House would request an additional $14 billion to U.S. nuclear weapons complex upgrades, on top of the $84 billion already promised.[63] This staggering sum of money in itself amounted to a nuclear weapons budget that former Director of the National Nuclear Security Administration, Linton Brooks, said he "would have killed for."[64] However, in spite of this deal, Senator Kyl two weeks later declared that he still was not in support of New START, and thereafter stated that he would "work very hard" to ensure the treaty would not be passed in the last few weeks of the calendar year.[65]

Ultimately, however, Senator Kyl's efforts to rally other Republicans to his partisan cause and prevent the passage of the New START Treaty for purely domestic political reasons were fruitless. Although the bargain made by the Obama administration to key Republican Senators was very financially and politically costly, and despite the unwillingness of influential Republican Senators

[63] Jill Dougherty, "Jump START?," *CNN World*, December 5, 2010 (accessed October 31, 2011); available from http://edition.cnn.com/2010/POLITICS/12/02/start/.

[64] Quoted in John K. Warden, Center for Strategic and International Studies, *Ambassador Linton Brooks on New START and the next treaty*, April 16, 2010 (accessed October 31, 2011); available from http://csis.org/blog/ambassador-linton-brooks-new-start-and-next-treaty.

[65] Ken Strickland, "Kyl 'will work very hard' to kill START this year," *NBC News*, December 14, 2010 (accessed October 31, 2011); available from http://firstread.msnbc.msn.com/_news/2010/12/14/5650483-kyl-will-work-very-hard-to-kill-start-this-year-?.

to commit to that bargain the White House offered, New START was successfully passed. After much debate, the treaty was brought to a vote on the Senate floor on December 22, 2010, and was approved by a vote of 71 to 26, with three abstaining. The Russian Federation Council gave its approval of New START on January 26, 2011,[66] and on February 5, the instruments of ratification were exchanged by the United States and the Russian Federation, thereby bringing New START into force.[67]

Why New START Could Only Be a Formal Treaty

The curiosity of the events from April to December 2010 over the New START arms control agreement is that, despite the blessings and endorsement of the treaty from the U.S. military and from former and current Defense and State Department officials, a handful of determined legislators demonstrated their ability to hold the treaty hostage and prevent its ratification. This challenge could have been circumvented if New START were not a formal treaty and instead had taken the form of some other, less binding legal mechanism, such as the unilateral action or even the executive agreement.

Certainly, the level of resistance New START encountered in the Senate was not expected, and the Obama White House did not anticipate investing quite as much time and political capital as it ultimately was forced to expend in order to

[66] Fred Weir, "With Russian ratification of New START, what's next for US-Russia relations?," *The Christian Science Monitor*, January 26, 2011 (accessed October 31, 2011); available from http://www.csmonitor.com/World/Europe/2011/0126/With-Russian-ratification-of-New-START-what-s-next-for-US-Russia-relations.

[67] U.S. Department of State, *New START Treaty Entry Into Force*, February 5, 2011 (accessed October 31, 2011); available from http://www.state.gov/r/pa/prs/ps/2011/02/156037.htm.

win passage of New START. By all indications, the Obama administration did not plan to spend months deadlocked with Republican Senators, since New START was never intended to be a drastic and sweeping agreement. Rather than make deep cuts in American and Russian nuclear arsenals, it sought to be a sensible agreement by making modest nuclear cuts, reinstating inspectors in both countries' nuclear facilities, and restarting the bilateral Russian-American strategic dialogue.

Indeed, from its inception, New START was part of a White House strategy intended to "press the reset button on relations between the United States and Russia," according to President Obama.[68] If the objective, then, was to improve bilateral U.S.-Russian relations, was the formal treaty truly the best legal mechanism to employ? Even after it became clear that New START would encounter significant resistance in the Senate for purely political reasons, why did the Obama administration rigorously maintain the form of the agreement as a treaty, rather than replicating the Nixon administration's experience with SALT I and converting the agreement to something less binding?

First, the stringency of the verification regime as codified in New START is reflected in the mutual intrusive on-site inspections, as well as the use of continuous monitoring, telemetry, satellite, and radar to guarantee compliance with the treaty. An attempt to reset U.S.-Russian relations would need to involve reestablishing a level of mutual trust between the two countries that had nearly disintegrated during the presidency of George W. Bush from 2000 to 2008; as a

[68] U.S. White House, *Interview of the President by ITAR-TASS/Rossiya TV*, July 2, 2009 (accessed October 31, 2011); available from http://www.whitehouse.gov/the-press-office/interview-president-itar-tassrossiya-tv-7-2-09.

result, rebuilding that trust necessitated the implementation of transparency and confidence-building measures that could only come about through strong verification mechanisms. The presence and robustness of the on-site inspection specifically as a verification tool meant the agreement could not take the form of an executive agreement or anything less binding.

Second and concurrently, the right for both parties to conduct on-site inspections translates into not only a U.S. ability to place inspectors on the ground in Russian nuclear facilities, but also the Russian ability to do likewise. The opportunity for Russian scientists and government officials to cross U.S. borders and enter top-secret American nuclear weapons labs and facilities is of the utmost national security concern; hence it was determined that permission for these necessarily intrusive activities should come not from the President or a designated authority, but from the American people via their elected officials. It is precisely for this reason, and so that U.S. authorities would have the ability to conduct parallel activities within Russia, that New START was negotiated, drafted, signed, submitted to the Senate, and ultimately ratified as a formal treaty.

Finally, New START was intended to rededicate the United States to the principles and frameworks of the global non-proliferation regime. It is important to keep in mind that, with the exception of the 2002 Moscow Treaty, the penchant of the George W. Bush administration was to adopt an isolationist U.S. approach to international agreements of any kind. Therefore, upon taking office in 2009, President Obama sought to recommit the United States to the framework of the formal treaty in general, and specifically in the arms control arena. Hence, the

new administration had no choice but to submit its first arms control agreement with Russia as a formal treaty, since the utilization of any other legal mechanism would have been contrary to the rhetoric of the President during and after the 2008 election campaign, and moreover would have undermined the credibility of the President, both at home and abroad.

Therefore, New START could have been signed and approved only as a formal treaty, since no other mechanism would have provided for, as is argued here, the most compelling reason to use the formal treaty: the inclusion of thorough, stringent and intrusive verification measures to ensure mutual compliance with the provisions of the treaty and to detect non-compliance. An executive agreement, as the case of SALT I has shown, would have severely curtailed the ability of the United States to generate transparency from within the Russian nuclear complex, despite any advantages offered by a less difficult domestic approval process. Similarly, a non-legally binding pledge would have had no traction at the bilateral level, since this mechanism is effective in the nonproliferation arena and only when it has broad multilateral support, as in the case of the Proliferation Security Initiative. Finally, the utilization of unilateral action concurrently with Russia, as was the case in 1991-1992 with the Presidential Nuclear Initiatives, would have been a risky strategy that arguably could only have succeeded in the correct circumstances, wherein the heads of state of Russia and the United States would have had a sustained high level of mutual trust. Unfortunately, that precondition was virtually nonexistent in 2009 and 2010, due to the previous eight years of the George W. Bush administration.

Hence, the Obama administration took the appropriate approach by negotiating, drafting and signing New START as a formal treaty, despite the multitude of obstacles it faced during the Senate ratification process. Although an inaccurate assessment of the domestic U.S. political environment convinced administration officials that the treaty would pass with relative ease, the stark realities of the international security environment and a renewed need for intrusive verification mechanisms necessitated the utilization of the formal treaty as a legal vehicle.

CONCLUSION

The above five case studies demonstrate that a fundamental tradeoff exists between the strength of an arms control or nonproliferation agreement, as measured by the robustness of its verification measures, and the difficulty of winning domestic approval of that agreement. That is, as the verification system in an agreement becomes stronger, the difficulty of securing domestic approval for the agreement increases. This correlation, then, may lead negotiators at times to deliberately weaken an agreement's verification regime for the sake of facilitating domestic approval.

Herein lies the challenge for any arms control and nonproliferation expert: to determine the circumstances under which verification should take precedence over domestic approval, and conversely, to decide when domestic approval should become more important than strength of verification. In the case of the recent U.S. experience with the New START agreement, Obama administration officials underestimated the level of domestic political resistance to their aims, and ultimately exerted more political capital and effort to achieve their objectives than previously thought necessary. At the same time, even after White House officials recognized the domestic political challenges confronting them, they refused to convert New START to a less binding form during negotiations in order to guarantee domestic approval. Rather than lose the right to conduct on-site inspections in Russia, which they perceived to be the ultimate long-term benefit to New START, they took a risk and signed New START as a formal treaty, then lobbied intensively to achieve domestic acceptance of the agreement, often

making concessions along the way. Fortunately, the risk paid off and New START was approved by the U.S. Senate just weeks before the end of term.

On the other hand, as demonstrated in the case of SALT I, the prioritization by arms controllers of domestic political circumstances over the robustness of an arms control agreement's verification system can come at the expense of the strength of the agreement. That is, an arms control initiative may take a different form for the express purpose of winning domestic approval, but in the process loses some of its stringency. This important tradeoff has the potential to slow the overall advancement of the U.S. arms control agenda if not managed effectively.

The ideal combination of factors, it seems, has come about in the immediate aftermath of a world event of such proportions that it has the potential to completely reestablish the global order. The inclusion of strong verification measures in the START I agreement did not conflict with the ease with which it passed through Congress. Similarly, although the Presidential Nuclear Initiatives were completely unilateral though parallel efforts, they achieved their objectives. Both of these examples were successful because the collapse of the Soviet Union presented the leaders of both countries the opportunity to reestablish bilateral relations and develop a shared vision of the future. This desire to work together on matters of international security led to the signing and ratification of START I, while the trust and momentum created from that experience in turn paved the way for the Presidential Nuclear Initiatives a few months later.

In a similar manner, the Proliferation Security Initiative quickly came into existence in the wake of a failed interdiction and not even a full two years after the September 11 attacks. Its unique legal approach, placing a widely accepted set of non-binding principles upon a more solid foundation of legally binding bilateral ship-boarding agreements, demonstrates how the United States can adapt to changing political circumstances, as well as how it can navigate the domestic approval process while still building a strong and robust counterproliferation tool, all within a very short period of time.

The primary observation to be drawn from the case studies in this paper, then, is that the United States has at its disposal a variety of legal mechanisms, which can be leveraged strategically over time to overcome domestic political obstacles and continue making progress on arms control and nonproliferation. These tools allow the executive branch to find room for maneuverability in often-difficult political climates, in order to strengthen the nonproliferation regime and continue making progress on arms control.

These case studies also demonstrate that ultimately, in the U.S. legal framework, the political obstacles inherent to the domestic approval process must be overcome or somehow otherwise addressed if arms control and nonproliferation efforts are to be advanced and strengthened. Because of the unique nature of the U.S. political system as codified in the Constitution, domestic political factors can easily form the primary driver in arms control and nonproliferation proceedings, and negotiators must always be cognizant of this reality.

In the end, the multi-pronged legal approach taken by the United States in its arms control and nonproliferation endeavors has been the most prudent one in the long term. Putnam's "two-level game" model serves as a reminder that all international agreements require domestic approval, which at its most difficult takes the form of the Senate ratification process. Arguably, if those domestic hurdles cannot be cleared, then the entire process of negotiating, signing and bringing into force an international agreement has not been successful.

Some progress on arms control arguably is better than no progress at all. Because the United States utilizes the full spectrum of tools in its international negotiations and agreements toolbox, it is able to adapt its initiatives to evolving domestic political circumstances, in order to continue making steady progress on arms control and nonproliferation.

BIBLIOGRAPHY

Ackerman, Bruce and David Golove. "Is NAFTA Constitutional?" *Harvard Law Review* 108, no. 4 (February 1995): 799-929.

American Law Institute. *Restatement of the Law, the Foreign Relations Law of the United States*. St. Paul, MN: American Law Institute Publishers, 1987.

Annex on Inspection Activities to the Protocol to the Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms. April 8, 2010. Accessed October 31, 2011. Available from http://www.state.gov/documents/organization/141293.pdf.

Barton, John H. and Lawrence D. Weiler, eds. *International Arms Control: Issues and Agreements*. Stanford, CA: Stanford University Press, 1976.

Belcher, Emma. "Regime Change of a Different Kind: Exploring Adaptation in the Nuclear Nonproliferation Regime." Ph.D. diss., Fletcher School of Law and Diplomacy, Tufts University, 2010.

Boese, Wade, Arms Control Association. *U.S. Withdraws From ABM Treaty; Global Response Muted*. July/August 2002. Accessed October 3, 2011. Available from http://www.armscontrol.org/act/2002_07-08/abmjul_aug02.

Bolton, John R. "The International Atomic Energy Agency: The World's Enforcer or Paper Tiger?" Presented at a conference at the American Enterprise Institute, Washington, D.C., September 28, 2004.

Bush, George W. *Remarks by the President to the People of Poland*. Krakow, Poland. May 31, 2003. Accessed October 31, 2011. Available from http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html.

Chayes, Abram and Antonia Handler Chayes. *The New Sovereignty: Compliance With International Regulatory Agreements*. Cambridge, MA: Harvard University Press, 1995.

Cirincione, Joe. "Republicans Do It Better." *Bulletin of the Atomic Scientists* 56, no. 5 (September/October 2000): 17-19.

Constitution of the United States. Accessed October 31, 2011. Available from http://www.archives.gov/exhibits/charters/constitution_transcript.html.

Corin, Eli. *Nuclear Threat Initiative, Presidential Nuclear Initiatives: An Alternative Paradigm for Arms Control*. Accessed October 31, 2011. Available from http://www.nti.org/e_research/e3_41.html.

Graham, Jr., Thomas. *Disarmament Sketches: Three Decades of Arms Control and International Law*. Seattle, WA: University of Washington Press, 2002.

Handler, Joshua. "The September 1991 PNIs and the Elimination, Storing and Security Aspects of TNWs." Presented at the conference on Time to Control Tactical Nuclear Weapons at the United Nations, New York, NY, September 24, 2001.

Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Certain Measures With Respect to the

Limitation of Strategic Offensive Arms. May 26, 1972. Accessed October 31, 2011. Available from http://www.fas.org/nuke/control/salt1/text/salt1.htm.

Keefe, Courtney, Arms Control Association. *The Presidential Nuclear Initiatives (PNIs) on Tactical Nuclear Weapons At a Glance*. Accessed October 31, 2011. Available from http://www.armscontrol.org/factsheets/pniglance.

Kristensen, Hans M., Federation of American Scientists. *Status of World Nuclear Forces 2011*. June 7, 2011. Accessed October 31, 2011. Available from http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html.

Loeb, Benjamin S. "Amend the Constitution's treaty clause." *Bulletin of the Atomic Scientists* 43, no. 8 (October 1987): 38-41.

Moe, Terry M. and William G. Howell. "The Presidential Power of Unilateral Action." *Journal of Law, Economics, & Organization* 15, no. 1 (March 1999): 132-179.

Obama, Barack. *Remarks by President Barack Obama in Prague as Delivered.* Prague, Czech Republic. April 5, 2009. Accessed October 31, 2011. Available from http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered.

Office of the Clerk of the U.S. House of Representatives. *92nd Congress (1971-1973)*. Accessed October 31, 2011. Available from http://artandhistory.house.gov/house_history/index.aspx?cong=92.

Office of the Clerk of the U.S. House of Representatives. *102nd Congress (1991-1993)*. Accessed October 31, 2011. Available from http://artandhistory.house.gov/house_history/index.aspx?cong=102.

Protocol to the Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms. April 8, 2010. Accessed October 31, 2011. Available from http://www.state.gov/documents/organization/140047.pdf.

Putnam, Robert D. "Diplomacy and Domestic Politics: The Logic of Two-Level Games." *International Organization* 2, no. 3 (Summer 1988): 427-460.

Simmons, Beth. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge, UK: Cambridge Univ. Press, 2009.

Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms. April 8, 2010. Accessed October 31, 2011. Available from http://www.state.gov/documents/organization/140035.pdf.

Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (the Moscow Treaty). May 24, 2002. Accessed October 31, 2011. Available from http://www.state.gov/t/isn/10527.htm.

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms. July 31, 1991. Accessed October 31, 2011. Available from http://www.state.gov/www/global/arms/starthtm/start/start1.html.

Tribe, Laurence H. "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation." *Harvard Law Review* 108, no. 6 (April 1995): 1221-1303.

U.S. Senate. *Party Division in the Senate, 1789-Present*. Accessed October 31, 2011. Available from http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.

U.S. Department of State. *Article-by-Article Analysis of the Treaty Text*. Accessed October 31, 2011. Available from http://www.state.gov/www/global/arms/starthtm/start/abatext.html#IX.

U.S. Department of State. *Guidance on Non-Binding Documents*. Accessed October 30, 2011. Available from http://www.state.gov/s/l/treaty/guidance/.

U.S. Department of State. *Interdiction Principles for the Proliferation Security Initiative*. Accessed October 31, 2011. Available from http://www.state.gov/t/isn/c27726.htm.

U.S. Department of State. *New START Treaty Entry Into Force*. February 5, 2011. Accessed October 31, 2011. Available from http://www.state.gov/r/pa/prs/ps/2011/02/156037.htm.

U.S. Department of State. *Proliferation Security Initiative*. Accessed October 31, 2011. Available from http://www.state.gov/t/isn/c10390.htm.

U.S. Department of State. *Proliferation Security Initiative Participants*. Accessed October 31, 2011. Available from http://www.state.gov/t/isn/c27732.htm.

U.S. Department of State. *Ship Boarding Agreements*. Accessed October 31, 2011. Available from http://www.state.gov/t/isn/c27733.htm.

U.S. Department of State. *Strategic Arms Limitation Talks (SALT I) (narrative)*. Accessed October 31, 2011. Available from http://www.state.gov/t/isn/5191.htm.

U.S. Library of Congress, Congressional Research Service. *Proliferation Security Initiative (PSI)*, by Mary Beth Nikitin. Congressional Rep. RL34327. Washington, D.C.: The Service, January 18, 2011. Accessed October 31, 2011. Available from http://opencrs.com/document/RL34327/2011-01-18/download/1005/.

U.S. Library of Congress, Congressional Research Service. *Treaties and Other International Agreements: The Role of the United States Senate*. Washington, D.C.: U.S. Government Printing Office, 2001.

U.S. White House. *Interview of the President by ITAR-TASS/Rossiya TV*. July 2, 2009. Accessed October 31, 2011. Available from http://www.whitehouse.gov/the-press-office/interview-president-itar-tassrossiya-tv-7-2-09.

Vienna Convention on the Law of Treaties. May 23, 1969. Accessed October 31, 2011. Available from http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

Warden, John K., Center for Strategic and International Studies. *Ambassador Linton Brooks on New START and the next treaty*. April 16, 2010. Accessed October 31, 2011. Available from http://csis.org/blog/ambassador-linton-brooks-new-start-and-next-treaty.