

# Background

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## Remember the Jay Treaty: START Behaving Like Senators

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**Abstract:** *Secretary of State Hillary Clinton and the Obama Administration have touted the New Strategic Arms Reduction Treaty (START) as a beneficial and necessary negotiation, and urged for its immediate ratification. However, the negotiating record of New START—which contains critical information—has not been released to the U.S. Senate. Because of the importance of strategic nuclear arms and due to the ambiguity of this treaty’s implications, the lack of the negotiating record prevents an informed debate and deliberation in the Senate, obstructing the Senate’s constitutionally mandated role to provide “advice and consent” on all U.S. treaties. Senators ought, therefore, to demand access to all essential information in order to effectively discharge their duties as enumerated by the Constitution.*

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The United States Senate has a constitutional responsibility to provide “advice and consent” on the New Strategic Arms Reduction Treaty (START),<sup>1</sup> but the lack of needed information regarding the treaty’s negotiating record is obstructing the Senate’s task. The Senate has historically been privileged with such information; United States Senators must reassert their constitutionally mandated role to deliberate the merits of proposed treaties by demanding that the Obama Administration provide access to the negotiating record. To do any less is to undermine the Senate’s constitutional role in the conduct of American foreign policy.

There are well-founded concerns over the provisions in the New START Treaty and their implications

### Talking Points

- The United States Senate has a constitutionally mandated duty to provide “advice and consent” on all U.S. treaties.
- The Senate’s function is essential to U.S. separation of powers and was put to the test early in U.S. history during deliberations over the Jay Treaty, where the negotiating record was available to the Senate.
- The Obama Administration has withheld the negotiating record of the New START Treaty from the Senate, despite explicit requests made by Republican Senators three months ago.
- The refusal to provide such information on this important and ambiguous treaty impairs the Senate’s ability to carry out its constitutional responsibility to deliberate and provide “advice and consent.”
- The Senate should demand access to all pertinent information regarding the New START Treaty in order to have a comprehensive debate and reach an informed decision.

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for U.S. security.<sup>2</sup> Some Senators were surprised by reference to defensive anti-missile weapons in the treaty, since New START is supposed to address only offensive nuclear weapons. The implications of this treaty could affect the ability of the U.S. to deploy defensive missile systems and point to larger security issues that also involve potential threats emanating from Iran and North Korea. In an effort to better understand the provisions of this bilateral agreement, six Republican Senators formally requested the negotiating record of the New START Treaty from the Obama Administration on May 6, 2010.<sup>3</sup>

At present, however, the Obama Administration and the Democrat Members of the Foreign Relations Committee have withheld access to this vital information. This denial is tantamount to refusing the Senate an honest debate and undermines the Senate's role in providing advice and consent. For many on the Left, however, the lack of debate is not a problem since the virtues of arms control are assumed and any debate is viewed as divisive partisanship. But Senators and the American people should not accept this misunderstanding of the Senate's function. Policy arguments are not disruptive to the legislative process; informed debate is essential to deliberation.

Since it first convened in 1789, the United States Senate has fulfilled its constitutionally mandated

role as a deliberative body, possessing the power of "advice and consent"<sup>4</sup> on all U.S. treaties which, if approved by two-thirds majority, become "the supreme law of land."<sup>5</sup> Yet, the New START Treaty is not America's first controversial treaty or the first time that access to a treaty's negotiating record played a vital role in the Senate's deliberation.

### Remember the Jay Treaty

The Jay Treaty of 1794 was hotly debated and caused deep divisions in American politics. It involved several territorial disputes between the U.S. and Great Britain, which had remained unresolved since America won its independence. The treaty also had tremendous implications for America's relations with France—America's military ally—since France was then at war with Britain.<sup>6</sup> The ratification of the Jay Treaty was an early test of separation of powers and of the Senate's constitutionally mandated role in U.S. foreign policy.

The negotiations over Jay's Treaty were conducted in the midst of rising tensions between the United States and Great Britain.<sup>7</sup> British ships had been violating America's neutrality by capturing U.S. ships of commerce. These incidents understandably reignited anti-British sentiment in Congress and among the American public. Representative James Madison led an effort to restrict British trade,<sup>8</sup> but others—including Alexander

1. The New START Treaty was signed by President Barack Obama and Russian President Dmitri Medvedev on April 8, 2010, in Prague, Czech Republic. President Obama submitted the nuclear reduction treaty to the Senate on May 13, 2010, for approval. The 1991 START I Treaty expired in December 2009.
2. Many of these concerns are identified by the New START Working Group. See "An Independent Assessment of New START," Heritage Foundation *Background* No. 2410, April 30, 2010, at <http://www.heritage.org/Research/Reports/2010/04/An-Independent-Assessment-of-New-START-Treaty>.
3. Steven Groves. "President Obama Should Give the Senate Access to the Negotiating History of New START," Heritage Foundation *Background* No. 2429, June 24, 2010, at <http://www.heritage.org/Research/Reports/2010/06/President-Obama-Should-Give-the-Senate-Access-to-the-Negotiating-History-of-New-START>.
4. 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; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors...." U.S. Constitution, Article II, Section 2.
5. "... [A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...." U.S. Constitution, Article VI.
6. For a comprehensive account of the Jay Treaty, see Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New Haven: Yale University Press, 1962).
7. Alexander DeConde, *Entangling Alliance: Politics and Diplomacy Under George Washington* (Durham: Duke University Press, 1958), pp. 101–140.

Hamilton—realized that a break in trade would be disastrous for American prosperity. In order to prevent further conflict, President George Washington sent Chief Justice John Jay to England to negotiate a diplomatic solution. Jay returned with a “Treaty of Amity Commerce and Navigation, between His Britannic Majesty; and The United States of America,” which offered a peaceful solution to the crisis and encouraged commercial interaction between the U.S. and England.

At the earliest opportunity, Washington delivered to the Senate the “treaty, and other documents connected with it.” Washington requested that the Senators, “in their wisdom decide whether they will advise and consent that the said treaty be made between the United States and His Britannic Majesty.”<sup>9</sup> Although Washington himself had submitted the treaty for approval, ratification was not assumed—the Senators still had a decisive role to play. The Founding Fathers understood separation of powers to be a central aspect of ensuring a sensible and accountable process of making laws and conducting foreign policy.

Years before Jay’s Treaty, while expounding on the treaty powers of the Senate in *The Federalist Papers*, John Jay expressed his belief that Senators’ “virtue” and “integrity” would enable their soundest judgment on matters of high national importance: “We have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made.” Although the Constitution grants the President the power to negotiate treaties and possess privileged diplomatic information, Jay also acknowledged that sometimes “useful intelligence” pertaining to a treaty under consideration could be vital to the Senate’s function.<sup>10</sup> In keeping with this understanding, Washington had submitted to the Senate “all the papers

affecting the negotiation with Great Britain” when Jay’s Treaty was “communicated for their consideration and advice.”<sup>11</sup> This privileged information provided the facts for the congressional debate that preceded a vote.

After a heated debate, the Senate approved Jay’s Treaty by a vote of 20 to 10—one less vote in favor and the treaty would have failed.<sup>12</sup> The Senate, however, rejected Article 12 of the treaty, which restricted American ships in the West Indies from carrying certain commodities. As a result of Jay’s Treaty, the United States did have to make a few concessions to Britain and the treaty was disruptive to U.S.-French relations. But the U.S. achieved its most important security concerns—avoiding certain war with Britain at a time when America was unprepared militarily and protecting its trade.

Even after Jay’s Treaty was ratified, the public debate continued, prompting a defense not only of the Jay Treaty but of the constitutional checks and balances of the American government. “I have weighed with attention every argument,” Washington wrote to a critic of the Jay Treaty in 1795:

But the Constitution is the guide, which I never can abandon. It has assigned to the President the power of making treaties, with the advice and consent of the Senate. It was doubtless supposed, that these two branches of government would combine, without passion, and with the best means of information, those facts and principles, upon which the success of our foreign relations will always depend; that they ought not to substitute for their own conviction the opinions of others, or seek truth through any channel but that of a temperate and well informed investigation.<sup>13</sup>

8. Samuel Flagg Bemis, *John Quincy Adams and the Foundations of American Foreign Policy* (New York: Alfred A. Knopf, 1969), p. 44.

9. George Washington’s communication to the Senate, June 8, 1795, in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1876, American State Papers*, 3rd Cong., 2nd Sess., Foreign Relations, Vol. 1, p. 470.

10. *The Federalist Papers*, No. 64.

11. George Washington, “Message to the House Regarding Documents Relative to the Jay Treaty,” March 30, 1796, at [http://avalon.law.yale.edu/18th\\_century/gw003.asp](http://avalon.law.yale.edu/18th_century/gw003.asp) (August 13, 2010).

12. *U.S. Congressional Documents and Debates, 1774–1875, Annals of Congress, Senate*, 4th Cong., 4th Sess., p. 861.

The checks and balances of the U.S. government are not meant to make government impractical, but are intended to ensure that only the best policies become the supreme law of the land. When it comes to making treaties, the Senate shares the burden of guaranteeing that America's interests and political principles are respected in U.S. foreign policy.

In the decades following the Jay Treaty, lions of the American Senate such as John Quincy Adams, Andrew Jackson, John C. Calhoun, Daniel Webster, John Randolph, Henry Clay, William Borah, and Henry Cabot Lodge, among others, rose to passionately debate the important treaties of their day. They knew that the success of the American experiment in self-government depended in part on their fulfilling the role of U.S. Senator.

### Advice and Consent

Regrettably, the Senate has lost some of its luster. Senators now shrink from full on debate and have diminished the importance of argumentation. Yet the Senate is not a rubber stamp for the President's diplomatic initiatives—a fact George Washington discovered with the Jay Treaty. The Obama Administration should not be surprised that some Senators are attempting to do their job by offering “advice and consent” on the New START Treaty.

The Senators who requested the negotiating record are attempting to carry out a “well informed investigation” in order to fulfill the Senate's role as established by the Constitution, explained in *The Federalist Papers*, and exemplified early in the Senate's history. The time required for proper advice and consent will vary from treaty to treaty, but in this case it is clear that a fuller deliberation is required. Due to ambiguities in the text of the New START Treaty and conflicting accounts of its security implications, the treaty's negotiating record

appears to fulfill George Washington's and John Jay's understanding of “those facts” and “useful intelligence” necessary to the Senate's deliberation.

In order to reach the two-thirds majority necessary for Senate ratification, eight Republican Senators will have to vote in favor of the treaty. The Senate Foreign Relations Committee has postponed a vote on the treaty until September, in an effort to gain more support, which also provides time for the Senate to examine documents related to the treaty. The Obama Administration should stop obstructing the Senate and provide all pertinent information. Senators should demand that they have access to the negotiating record before they are expected to vote.

Of course, there is every possibility that after a full, informed debate the Senate will actually reject the New START Treaty. Former Ambassador to the United Nations John Bolton has pointed out that if the Senate rejects the treaty, it is not the end of negotiations with Russia. Indeed, if the submitted text of the treaty is rejected, it merely requires that the negotiators “return to the bargaining table” with instructions to arrive at a treaty that is more compatible with U.S. interests. “That is, after all, what the ‘advice’ portion of the Senate's ‘advice and consent’ power actually means.”<sup>14</sup>

The American system of government depends on Senators discharging their duties, as established by the Constitution and entrusted to them by the American people. In this case, access to the negotiating record is vital. The Senate must not abdicate its critical responsibility on this important treaty.

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13. Jared Sparks, *The Life of George Washington* (Boston: 1839), p. 466.

14. John Bolton, “A Treaty For Utopia,” *National Review*, May 3, 2010, at <http://article.nationalreview.com/431722/a-treaty-for-utopia/john-r-bolton> (August 12, 2010).