

2. Treaties and Other International Agreements

FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION

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Chapter VII

TREATIES, THE TREATY POWER, AND EXECUTIVE AGREEMENTS

TREATIES

For the Constitutional Fathers, the foreign relations of the new Republic depended heavily on treaties to be concluded (or not concluded) with other countries; therefore, who should have the power to make treaties, and the status of the treaties when made, were questions of special concern to them. [A distinction between treaties and 'Agreements or Compacts' with foreign states is implied in the limitations imposed on the states, Art. 1, sec. 10.] The Framers were eager to abandon treaty-making by Congress, which, under the Articles of Confederation, determined whether to negotiate and with whom, appointed negotiators, wrote their instructions, followed their progress, approved, modified or rejected their product. Because they took treaties and international obligations seriously, the Framers were not eager for the United States to conclude treaties lightly or widely. And were disposed to render it difficult to make them. They were concerned to end the anarchy that prevailed under the Articles of Confederation and to assure that treaties made by the United States would be honored by the individual states.

And so, after dispute and compromise, the Framers gave the power to make treaties to the President, but only with the advice and consent of the Senate, and provided two-thirds of the Senators present concur (Article II, section 2); they provided that, like the Constitution itself and the laws of the United States, treaties shall be the supreme law of the land and binding on the states (Article VI, clause 2); they expressly forbade treaty-making to the states (Article I, section 10). The Framers did not stop to distinguish treaties from other international agreements or commitments.

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THE TREATY-MAKING PROCESS

Article II, section 2 of the Constitution provides 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’.

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The President’s part in treaty-making seems clear. He decides whether to negotiate with a particular country (or countries) on a particular subject. He appoints and instructs the negotiators and follows their progress in negotiation. If he approves what they have negotiated, he seeks the consent of the Senate, and if he obtains it he can ‘make’ the treaty. [The Senate gives consent to making the treaty, the President makes it. If it had been previously signed for the United States (by authority of the President), the President later ratifies it for the United States (after he obtains Senate consent).]

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It is the Senate’s part in treaty-making that has raised questions and generated issues. As originally conceived, no doubt, the Senate was to be a kind of Presidential council, affording him advice throughout the treaty-making process and on all aspects of it – whether to enter negotiations, who shall represent the United States, what should be the scope of negotiations, the positions to be taken, the responses to be made, the terms to be accepted. Almost from the beginning, however, Presidents found that conception of the Senate’s function uncongenial, perhaps unworkable; the Senate, for its part, also rejected it, seeking to deliberate and pass judgment later and independently, rather than to advise. ... In a word, ‘advice and consent’ has effectively been reduced to ‘consent’.

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The requirement of Senate consent introduces ‘slippage’ but also provides opportunity for second thoughts. Presidents have refused to send to the Senate treaties already negotiated, or have refrained from pressing for Senate consent to treaties submitted by their predecessors; they have withdrawn treaties from the Senate before it acted; they have refused to ratify treaties to which the Senate consented. President Carter did not press for a Senate vote on SALT II with the Soviet Union when there appeared to be a significant likelihood of its defeat; later President Reagan withdrew the treaty from Senate consideration. For years, subsequent Presidents did not press the Senate to act on human rights covenants and conventions which had been transmitted by President Carter.

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Reservations and Other Conditions

In many cases the Senate has given its consent subject to conditions. Whether the Senate insists on a modification in the terms of a treaty, or on a particular interpretation of it, or on some limitation of its consequences, Senate conditions may require renegotiation, to the dismay of Presidents and the impatience of other governments. But all have long recognized this additional obstacle in the United States treaty process.

In the latter part of the twentieth century, Senate conditions on its consent to a treaty have commonly taken the form of ‘reservations’, ‘understandings’, or ‘declarations’, but the terms are not always used with care and with attention to the differences among them. [In the last decades of the twentieth century, a ‘package’ of reservations, understandings, and declarations, (‘R.U.D.s’) became a common attachment

to major treaties, e.g. when the Senate consented to the Panama Canal treaty, to arms control agreements with the USSR, or to multilateral human rights conventions.... Strictly, the Senate cannot 'amend' a treaty; it can refuse consent unless the parties amend it.]

A reservation is a condition imposed by a state upon its adherence to a treaty, usually to a multilateral treaty, modifying or limiting its obligation under the treaty or under some particular provision. Strictly, the Senate cannot itself enter a 'reservation'; it is the President who might enter a reservation on behalf of the United States, upon U.S. adherence to a treaty. But as a condition of its consent to U.S. adherence, the Senate can insist on change in the treaty.

...

The Senate has sometimes imposed conditions that seek not modification of the international obligations of the United States under a treaty but some control of its effect in the United States. ... On several occasions the Senate declared that nothing in the treaty shall enhance the powers of the President, or that nothing in the treaty shall add to, or subtract from, the reach of the powers of Congress.

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Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it. Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; nor has the Senate any authoritative voice in interpreting a treaty after it is in effect, or any part in terminating it. Of course, in its legislative capacity as one of the two houses of Congress (as distinguished from its executive role as one of the treaty-makers) the Senate participates in whatever Congress can do as to the legal effect of treaties in the United States.

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TREATIES AS LAW OF THE LAND

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Self-executing and Non-self-executing Treaties

In some constitutional systems, treaties are only international obligations, without effect as domestic law; it is for the parliament to translate them into law, and to enact any domestic legislation necessary to carry out their obligations. The U.S. Constitution established a different regime. The Supremacy Clause (Article VI, clause 2) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

That clause, designed principally to assure the supremacy of treaties to state law, was interpreted early to mean also that treaties are law of the land of their own accord and do not require an act of Congress to translate them into law. Chief Justice Marshall said:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of legislature, whenever it operates of itself without the aid of any legislative provision.

Not all treaties, however, are in fact law of the land of their own accord. Marshall continued:

But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. [*Foster v. Neilson* 27 U.S. 253, 314 (1829)]

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[Other parties to a treaty, of course, prefer that a treaty be self-executing in the United States in order that they may enjoy rights under it immediately upon proclamation of the treaty ... without awaiting legislative implementation. Whether a treaty is self-executing or not, the obligation of the United States becomes effective with exchange of ratifications, and if the treaty is not self-executing the President is obliged to seek any required legislative implementation promptly.]

In recent years, the President, on his own initiative or at the behest of the U.S. Senate by declaration attached to its consent, has sometimes purported to declare non-self-executing treaties that by their terms and by their character are (or could well be) self-executing, could 'operate of themselves' and be given effect as law of the land. The Executive branch and the Senate have pursued that practice in particular in relation to U.S. adherence to human rights covenants and conventions.

In my view, that recent practice, accepted without significant discussion, is 'anti-Constitutional' in spirit and highly problematic as a matter of law. In the Supremacy Clause, the Constitution declared treaties – generally, presumably all treaties – to be the law of the land. John Marshall read an exception into that Article in respect of treaties that by their character could not be self-executing; nothing in the Constitution, or in Chief Justice John Marshall's opinion, suggested that treaties which the Constitution declares to be law of the land need not be "faithfully executed" by the President, or enforced by the courts, because the President or the Senate (or both) so decided. If the treaty-makers thought it was necessary or desirable to include a role for Congress in special cases, such as in taking the United States into war pursuant to the North Atlantic Treaty, there was no suggestion – until the human rights conventions of recent date – that there was a general power for one or both of the treaty-makers to do so for any treaty, at will.

[Congress has also declared non-self-executing some trade agreements concluded as Congressional-Executive agreements. There, however, the Supremacy Clause is not directly implicated and the role of the Senate not prejudiced; and requiring implementation does not complicate the process: Congress can authorize or approve the agreement and implement it simultaneously.]

Some obligations, it is accepted, cannot be executed by the treaty itself. A treaty cannot appropriate funds: the Constitution expressly provides that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law', and a treaty is apparently not law for this purpose; any financial undertaking by the United

States, then, requires implementation by appropriation from Congress. A treaty, it is accepted, cannot itself enact a criminal law: enforcement of a treaty obligation to criminalize certain acts – say genocide or torture – or the enforcement of other treaty obligations by penal sanction can be effected only by Congress. It has often been said, too, that the United States cannot declare war by treaty, only by resolution of Congress.

The difference between self-executing and non-self-executing treaties is commonly misunderstood. Whether a treaty is self-executing or not, it is legally binding on the United States. Whether it is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said, it is not ‘a rule for the Court’; he did not suggest that it is not law for the President or for Congress. It is their obligation to see to it that it is faithfully implemented; it is their obligation to do what is necessary to make it a rule for the courts if the treaty requires that it be a rule for the courts.

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At the end of the twentieth century, the power of Congress to enact laws that are inconsistent with U.S. treaty obligations, and the equality of treaties and statutes in domestic U.S. law, appear to be firmly established.

BREACH AND TERMINATION OF TREATIES

The United States sometimes has the right to terminate a treaty by its own terms, at will or at some prescribed time after giving notice of intention to do so. The international law of treaties permits termination for fraud or coercion in making the treaty or for important breach by the other party; a party may lawfully refuse to carry out its obligation because of a fundamental change in circumstances.

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No doubt, the federal government has the constitutional power to terminate treaties on behalf of the United States in all these ways and circumstances: neither the declaration in the Supremacy Clause that treaties are law of the land, nor anything else in the Constitution, denies the United States these powers which countries generally have under international law. But the Constitution tells us only who can make treaties for the United States; it does not say who can unmake them.

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Important controversy as to who has constitutional authority to terminate a treaty arose in 1979. President Carter announced U.S. recognition of the People’s Republic of China and withdrew recognition from the government of the Republic of China (on Taiwan). The State Department informed Taiwan that the 1955 Mutual Defense Treaty – which permitted termination by either party on one year’s notice – would be terminated effective January 1, 1980. A number of Senators, led by Barry Goldwater, brought suit to challenge the President’s termination of the treaty without the agreement of the Senate or of Congress. The Court of Appeals sustained the President’s power to terminate the treaty, ‘insofar as it rests upon the President’s well-established authority to recognize, and withdraw recognition from, foreign governments’. On appeal, the Supreme Court dismissed the suit, four of the Justices declaring the issue to be a non-justiciable political question ‘because it involves the authority of the President in the conduct of our national foreign relations’. Only Justice Brennan reached the merits and would have affirmed the

decision of the Court of Appeals upholding the President's authority to terminate the treaty.

If issues as to who has power to terminate treaties arise again, it seems unlikely that Congress will succeed in establishing a right to terminate a treaty (or to share in the decision to terminate). At the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty, whether such action on behalf of the United States is permissible under international law or would put the United States in violation. With termination by the President, the treaty no longer exists in international law and ceases to be law in the United States.

The power to terminate a treaty is a political power: courts do not terminate treaties, but they may interpret political acts or even political silences to determine whether they implied or intended termination. Courts do not sit in judgment on the political branches to prevent them from terminating or breaching a treaty.

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EXECUTIVE AGREEMENTS

Since our national beginnings Presidents have made some 1600 treaties with the consent of the Senate; they have made many thousands of other international agreements without seeking Senate consent. Some were 'Congressional-Executive agreements', made by the President as authorized in advance or approved afterwards by joint resolution of Congress. Many were made by the President on his own constitutional authority ('sole executive agreements').

The Constitution does not expressly confer authority to make international agreements other than treaties, but such agreements, varying widely in formality and importance, have been common from our early history. The authority to make such agreements and their permissible scope, and their status as law, continue to be debated. Where do the President and Congress find constitutional authority to join to make international agreements? Can the President, by authority of Congress (acting by majority vote of both houses), conclude as a Congressional-Executive agreement any international agreement he might have made by treaty with the consent of two-thirds of the Senate? Where does the President find constitutional power to make any agreements on his own authority? How does one distinguish an agreement which can be made by the President alone from one requiring Senate consent or the approval of both houses of Congress? Are executive agreements subject to the same constitutional limitations as treaties, or to others? Do they have the same quality as law of the land, the same supremacy to state law, the same equality with acts of Congress?

CONGRESSIONAL-EXECUTIVE AGREEMENTS

Agreements made by joint authority of the President and Congress have come about in different ways. Congress has authorized the President to negotiate and conclude international agreements on particular subjects – on postal relations; foreign trade; 'lend-lease' (to allies during Second World War); foreign assistance; nuclear reactors. During the years following the Second World War, Congress authorized the President to

conclude particular agreements already negotiated, for example the Headquarters Agreement with the United Nations, and various multilateral agreements establishing international organizations, e.g., the International Bank for Reconstruction and Development ('the World Bank'), and the International Monetary Fund. In some instances Congress has approved Presidential agreements already made, by adopting implementing legislation or by appropriating funds to carry out the obligations assumed by the United States.

Constitutional doctrine to justify Congressional-Executive agreements is not clear or agreed.

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The Congressional-Executive agreement has had strong appeal. By permitting approval of an agreement by simple majority of both houses, it eliminates the 'veto' by one-third-plus-one of the Senators present which in the past had effectively buried important treaties. It gives an equal role to the House of Representatives which has long resented the 'undemocratic' anachronism that excludes it from the treaty-making process. Especially since so many treaties require legislative implementation (if only by appropriation of funds), the Congressional-Executive agreement assures cooperation of both houses, virtually eliminating the danger that the House of Representative might later resist enacting the implementing legislation or appropriating funds.

...

[In approving a Congressional-Executive agreement, Congress can limit its effect as law of the land. In the Uruguay Round Agreements Act, Congress provided that 'No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.' Sect. 102 of the Uruguay Round Agreements Act. ... Congress also provided that no person other than the United States 'shall have any cause of action or defense under any of the Uruguay Round Agreements' or challenge 'any action or inaction of ... the United States, any State, or any political subdivision of a state on the ground that such action or inaction is inconsistent' with one of those agreements. Sect. 102(c)(1).

...

When the United States decided to conclude the Uruguay Round Agreements in 1994, it was assumed that it would do so by Congressional-Executive Agreement. However, there was a flurry in the academy and in the halls of Congress, with some denying that the Congressional-Executive agreement was the full equivalent of a treaty, and insisting in particular that the United States could properly, constitutionally, adhere to the new World Trade Organization only by treaty, with the consent of two-thirds of the Senate. Opponents of U.S. adherence in particular argued that approval by treaty was constitutionally required because the agreement would impinge on states' rights. The Uruguay Round Agreements would seem to have been a particularly strange occasion for reopening the question since trade agreements had long been a principal use for Congressional-Executive Agreements. In the end, the United States adhered by approval of both houses.]

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SOLE EXECUTIVE AGREEMENTS

Without the consent of the Senate (or authorization or approval by both houses of Congress,) Presidents ... have made many thousands of agreements. [Since the Second World War there have been numerous sole agreements for the establishment of U.S. military bases in foreign countries, for example.]

Periodically, members of the Senate – the body denied a constitutional role when the President makes a sole agreement instead of a treaty – have objected to a particular agreement as beyond the President’s constitutional authority. On several occasions, the Senate has sought to define and limit the President’s authority to make sole agreements. The power to make such agreements remains vast and undefined, and its constitutional foundations remain uncertain.

No one has doubted that the President has the power to make some ‘sole’ executive agreements. His power to execute treaties may include authority to do so by supplemental executive agreement. As Commander in Chief, for example, he can make armistice agreements, and, viewed broadly, that power might support many other agreements as well, including war-time commitments on territorial and political issues for the post-war, as at Yalta and Potsdam. But the Supreme Court has found Presidential authority to make international agreements that would reach much farther. In *United States v. Belmont*, speaking of the ‘Litvinov Assignment’ on the occasion of U.S. recognition of the Soviet Union, Justice Sutherland said:

The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article II, §2), require the advice and consent of the Senate.

A treaty signifies ‘a compact made between two or more independent nations with a view to the public welfare’ ... But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations.

Belmont involved an agreement incidental to recognition of the Soviet Union, and Sutherland’s opinion gave some emphasis to that fact. Recognition of a foreign government is indisputably the President’s sole responsibility, and for many it is an ‘enumerated’ power implied in the President’s express authority to appoint and receive ambassadors. *Belmont*, then, might hold only that the President’s specific and exclusive powers (principally his power to recognize governments and his authority as Commander in Chief) support agreements on his sole authority.

Belmont may also be seen as representing an additional category of agreements that the Supreme Court later established as within the President's power to make on his own authority. That case involved an agreement to settle claims by the United States and by U.S. citizens against the Soviet Union. Before and after that settlement, many Presidents have concluded numerous agreements settling international claims. In 1981, in *Dames & Moore v. Regan*, the Supreme Court upheld Presidential authority to make such agreements and gave effect to the President's agreement to resolve the Iran Hostage crisis. By that settlement – among other provisions – the United States and Iran agreed to cancel certain claims between them and to establish a special tribunal to resolve other claims, including large numbers of outstanding claims by U.S. nationals against Iran. The United States also agreed to close its courts to those claims, as well as to suits by U.S. citizens against the Government of Iran for damages arising out of the Hostage crisis. The Supreme Court upheld the settlement as within the President's extensive powers in foreign affairs, noting that Presidents had settled international claims by sole executive agreement throughout our history, and that Congress had acquiesced in that practice and had implemented many such agreements.

...

There have indeed been suggestions, claiming support in *Belmont*, that the President is constitutionally free to make any agreement on any matter involving our relations with another country, but that, for prudential reasons – especially if he will later require Congressional implementation – he will often seek Senate consent (or approval by both houses). As a matter of constitutional construction, however, that view is unacceptable, for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution. One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland nor any one else has told us which are which.