TREATY POWER

The US government’s authority to ratify and enforce bilateral and multilateral treaties is one of its most deeply rooted historical powers, and one of its least well defined. Article II of the US Constitution gives the president of the United States the power “by and with the Advice and Consent of the Senate, to make treaties provided two-thirds of the Senators present concur.” The Constitution’s supremacy clause provides that such treaties, alongside the Constitution and statutes enacted by Congress, are the “supreme law of the land.” But whereas the US Supreme Court has resolved several key questions about the scope of the government’s treaty power, many of the most significant disputes remain unresolved in the twenty-first century.

TREATIES AS THE LAW OF THE LAND

Treaties become the “supreme law of the land” through a procedure somewhat different from that of statutes. Whereas statutes must satisfy the bicameralism and presentment requirements of Article I, Section 7, treaties must only be signed by the president and ratified by two-thirds of the Senate (as of 2015, sixty-seven senators). In essence, then, the principal difference between treaties and statutes is the reverse order in which they are approved and the trade-off between the House’s approval (necessary for statutes) and the approval of an extra one-sixth of the Senate (for treaties). As a result some scholars, such as Akhil Reed Amar (2005), have argued that treaties are constitutionally inferior to federal statutes, and that a conflict between a treaty and a statute should always be resolved in the statute’s favor. The Supreme Court has disagreed. The Court made it clear that treaties are functionally equivalent to statutes for constitutional purposes and thus have the same force of law and relationship to other statutes. To that end, whenever a treaty conflicts with a statute, courts will do their best to resolve the conflict; if the conflict is irreconcilable, whichever of the two came later in time prevails. Like statutes, treaties will trump any and all state laws in cases in which they directly conflict.

To similar effect the Supreme Court has made clear that, like statutes, treaties may not violate the Constitution. As Justice Hugo Black wrote for the plurality in Reid v. Covert, 354 U.S. 1 (1957), “[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints in the Constitution” (354 U.S. at 16). But the Court has otherwise failed to identify any other limits on the permissible substantive scope of treaties.

Instead the Court has articulated a controversial distinction between self-executing and non-self-executing treaties. A self-executing treaty, in the Court’s view, is a treaty that the president and Senate intend to be independently enforceable without implementing legislation from Congress. Non-self-executing treaties, in contrast, are treaties the president and Senate do not intend to be privately enforced absent implementing legislation from Congress. This distinction is especially significant in the context of treaties purporting to confer rights on individuals, most of which have been held to be non-self-executing. Thus, in cases such as Medellin v. Texas, 552 U.S. 491 (2008), the Supreme Court refused to allow state prisoners to contest their criminal convictions on the ground that the conviction was obtained in violation of their rights under treaties such as the Vienna Convention on Consular Relations, as interpreted by the International Court of Justice. Indeed, Medellin went one step farther, suggesting that non-self-executing treaties are not just unenforceable; they may not even be binding, and thus not the “supreme law of the land.”

IMPLEMENTING AND TERMINATING TREATIES

Because of the distinction between self-executing and non-self-executing treaties, significant questions have arisen about the scope of Congress’s power to implement treaties, a regulatory power that is not expressly conferred by Article I, Section 8. In its decision in Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court held that Congress does not violate the Tenth Amendment when it enacts legislation to implement treaties. So long as the treaty is procedurally valid, Justice Oliver Wendell Holmes Jr. wrote, “[T]here can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government” (252 U.S. at 432). But Holland has been widely criticized for its breadth, especially as the Supreme Court has scaled back Congress’s enumerated powers under the spending clause and the commerce clause since the 1990s. Thus, although the Supreme Court sidestepped Holland’s continuing force in its decision in Bond v. United States, 572 U.S. ___ (2014), three justices—Samuel Alito, Antonin Scalia, and Clarence Thomas—would have overruled Holland and limited Congress’s power to implement a treaty to those circumstances in which the regulation can be tied to one of its other, freestanding enumerated authorities. Whether a majority of the Roberts Court justices would so hold remained, in 2015, an open question.

Whereas the making and implementing of treaties requires the involvement of both Congress and the president, a separate issue is whether the president may unilaterally terminate a treaty. (Congress, of course, may override a treaty by statute, including statutes enacted by overriding the president’s veto.) In Goldwater v. Carter, 444 U.S. 996 (1979), a four-justice plurality of the Supreme Court held that whether the president may unilaterally rescind a treaty is a nonjusticiable political question to be decided by the political branches. As Erwin Chemerinsky has explained: “Although the Court did not uphold the constitutionality of the president’s rescinding treaties without Senate consent, in practical terms
that was the effect of the Court’s decision. The president can rescind treaties without worrying about judicial invalidation because the Court held that challenges are not justiciable” (2011). Thus, although the president’s power to unilaterally terminate a treaty also remains an open question legally, as a matter of practice the answer may well be yes.

NON-TREATY EXECUTIVE AGREEMENTS
Finally, an increasing number of agreements between the United States and foreign nations have been conducted outside the formal treaty ratification process, becoming effective when signed by the president and the head of the foreign nation. Although such executive agreements do not have the constitutional status (or force) of treaties and cannot be privately enforced, they have been broadly endorsed by the Supreme Court. Moreover, in cases such as American Insurance Association v. Garamendi, 539 U.S. 396 (2003), such agreements have also provided the contested basis for the formation of rules of federal common law that will displace state laws with which the agreement conflicts. Given the proliferation of such

From left, British prime minister David Lloyd George, French prime minister Georges Clemenceau, and American president Woodrow Wilson walking together during the Paris Peace Conference, 1919. © HULTON ARCHIVE/GETTY IMAGES

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agreements and the relative decline of the more formal treaty process, such decisions could become more common—and controversial—going forward.

SEE ALSO Executive Agreements; Extraterritoriality; Federal Powers: General; Foreign Policy; Political Question; Separation of Powers.

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TRIAL BALLOON
A trial balloon in the political world is the intentional release of information by candidates or public officials to the media to gauge the public’s reaction to that information. For example, politicians frequently use “leaks” to disseminate information to the public about proposed legislation or policy changes. The public reaction to these leaks then informs the politician as to how well the actual legislation or policy change will be received. This reaction is often captured through informal surveys and polls, and through close tracking of newspaper, television, and Internet coverage. Even the media’s placement of the story regarding the leak (on the front page or far down page sixteen, at the beginning of the news program or at the end) can be instructive. From this response the politician may proceed with the proposed action, revise it, or abandon it. Leaking information also allows politicians to deny knowledge of it. In the 1950s and 1960s, this practice was commonly invoked as “let’s run it up the flagpole and see if anyone salutes it.” Sometimes an informant in a politician’s office will leak the important information on Friday afternoon. Over the weekend the office is closed and unavailable for comment, talk shows air the information, and politicians get free feedback, which they can address when they return to work on Monday.

SEE ALSO Media and Politics; News Cycle; News Media in the Policy Process.

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TRUST
SEE Political Legitimacy; Public Trust.

TWELFTH AMENDMENT
The Twelfth Amendment to the US Constitution (ratified on July 27, 1804) reformed the Electoral College as originally designed by Article II, Section 1. Under the original system, all electors cast two ballots for president. The candidate receiving the most votes (if a majority) became president, and the candidate receiving the second most votes became vice president. If there was a tie or no candidate received a majority of electoral votes, the election was decided by majority vote in the House of Representatives.

The Framers of the original system did not foresee the emergence of organized political parties. As the Federalist and Democratic-Republican parties developed in the 1790s, presidential voting began to reflect partisan divisions. In 1800 the electors from every state cast an equal number of votes for the two Democratic-Republican candidates (Thomas Jefferson and Aaron Burr) and every state except Rhode Island cast an equal number of votes for the two Federalist candidates (John Adams and Charles Cotesworth Pinckney). This was part of a deliberate effort by each party to elect members of their own party as both president and vice president, thus avoiding another divided administration like the Adams-Jefferson administration of 1797 to 1801. However, the rules of the extant Electoral College system created difficult coordination problems for parties strongly preferring a specific candidate to be president and a different specific candidate to be vice president. In 1800, Jefferson was the clear Republican Party preference for president, but if electors cast all their ballots for him, a Federalist candidate would become vice president or president. Thus, Republican electors needed to cast enough ballots for Burr, their clear preference for vice president, so that he could get the second most overall electoral votes but, at the same time, not cast so many that he tied or surpassed Jefferson’s vote total. Failing to fully overcome this coordination problem, the Republican electors created a tie between Jefferson and Burr for the most votes, and thus sent the election to the House of Representatives to decide. Amid much chaos, including thinly veiled threats by some southern governors to resist militarily if Jefferson lost, Jefferson ultimately prevailed.

An aim of the Twelfth Amendment was to avoid this sort of crisis while accommodating the bipartisan desire to vote for a party favorite for president and a copartisan as vice president. With Jefferson as president and strong Democratic-Republican control of Congress and the legislatures of three-fourths of the states, an amendment