

The Treaty Power and the Constitution

Curtis Bradley



Outline of talk

1. What are treaties?
2. Constitutional process for making treaties.
3. Supreme law of the land.
4. The “non-self-execution” doctrine.
5. Federalism constraints?
6. Executive agreements.
7. Terminating treaties and executive agreements.
8. Further reading.

What are treaties?

Vienna Convention on the Law of Treaties, Article 1:

A treaty is “an international agreement concluded between States in written form and governed by international law.”

Bilateral and Multilateral Treaties

Bilateral (between the U.S. and one other nation): e.g., an extradition treaty.

Multilateral (with multiple nations): e.g., the NATO Treaty has 32 parties.

Constitutional process for making treaties

U.S. Constitution, Article II, Section 2:

[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.”

Supreme law of the land

U.S. Constitution, Article VI:

“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.”

Supremacy . . .

Asakura v. City of Seattle, 265 U.S. 332 (1924):

“The treaty is binding within the State of Washington. . . . It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.”

The non-self-execution doctrine

Medellin v. Texas, 552 U.S. 491 (2008):

“This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.”

Federalism constraints?

Missouri v. Holland, 252 U.S. 416 (1920):

“It is obvious that there may be matters of the sharpest exigency for the national wellbeing that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”

Executive agreements

U.S. INTERNATIONAL AGREEMENTS BY TYPE, 1789–2012

Period	Treaties	Executive Agreements
1789–1839	60	27
1839–1889	215	238
1889–1939	524	917
1939–1989	702	11,698
1990–2012	366	5491

Three types of executive agreements

1. Treaty-based executive agreements.
2. Congressional-executive agreements.
 - a. Ex ante.
 - b. Ex post.
3. Sole executive agreements.

Preemption

American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003):

“[O]ur 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. . . . Generally, . . . valid executive agreements are fit to preempt state law, just as treaties are”

Case-Zablocki Act

1 U.S.C. § 112b (amended in late 2022):

(a)(1) Not less frequently than once each month, the Secretary shall provide in writing to the Majority Leader of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, and the appropriate congressional committees the following:

(A)

(i) A list of all international agreements and qualifying non-binding instruments signed, concluded, or otherwise finalized during the prior month.

(ii)

The text of all international agreements and qualifying non-binding instruments described in clause (i).

Terminating Treaties

Restatement (Fourth) of the Foreign Relations Law of the United States § 313(1) (2018):

“According to established practice, the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments”

Further reading

