

The Presidency in International Affairs

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This chapter considers the President as the United States' Chief Diplomat and Commander in Chief, the degree to which presidents are supreme or constrained by Congress in those roles, and their unique but possibly declining position as "Leader of the Free World."

Learning Objectives: After reading this chapter, you should know the following:

- The president's constitutional authority as Chief Diplomat and how they exercise it;
- Congress's role in international affairs;
- How the President's role as Chief Diplomat incorporates their roles both as Head of State and Head of Government;
- What it takes to ratify a treaty;
- What is an executive agreement, and why they have become more common than treaties;
- The significance of the power to appoint and receive ambassadors;
- The President's constitutional authority as Commander-in-Chief;
- How the warmaking power has shifted from Congress to President;
- How the roles of Chief Diplomat and Commander-in-Chief interact.

CHIEF DIPLOMAT

He 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...

[H]e shall receive ambassadors... (Article II, §2 & 3, U.S. Constitution).

The constitutionally granted powers cited in this snippet from Article II of the U.S. Constitution—the power to make treaties with other countries, and the powers to appoint ambassadors to other countries and receive ambassadors from them—together make the President the U.S.’s Chief Diplomat, its representative to the rest of the world. While Congress—particularly the Senate—does have some power to check the President in foreign affairs, in general “his position is paramount, if not indeed dominant.”¹ Congress tends to be deferential to the President in foreign affairs (although not invariably so).

Head of State and Head of Government

The President’s role as Chief Diplomat incorporates both the Head of State and the Head of Government roles. Presidents speaking to other countries stand within their Head of State role because represent the whole of the United States, not just the party to which they belong or those citizens who represent them—they are the personification and embodiment of American sovereignty. No other person in or out of government can lay claim to this status; if the President chooses not to speak to the world, the U.S. is silent.

But as Chief Diplomat presidents also must play the role of Head of Government, because as the chief executive—the official head of the executive branch agencies (the bureaucracy)—they must oversee and manage the Department of State, the U.S.’s diplomatic agency, and they also must engage in extensive policymaking about how the U.S. will act with or toward other countries. While many of these policies will require congressional action to make effective (by approving and providing funds for them), the President’s pre-eminence in foreign affairs, and the idea that politics stops at the water’s edge (although there is no constitutional reason it must), normally lead Congress to concur with the President’s policy choices.

Treaty Making

The Constitution gives the President, and only the President, the power to negotiate treaties, but to take effect treaties must be approved by a $\frac{2}{3}$ vote of the Senate, a super-majority requirement which can be tough to meet. Presidents rarely do the negotiating themselves, delegating this task to subordinates (whether the Secretary of State or lower-level officials), but the President remains the principle and the delegate is merely the agent. Congress cannot require a President to negotiate a treaty, nor can they prevent a President from negotiating one, although the Senate can refuse to approve them, either by a vote rejecting them (as happened to Woodrow Wilson’s treaty to create the League of Nations after World War I) or by simply never bringing them to a vote (as happened to the 1996 Comprehensive Nuclear-Test-Ban²). But presidents take notice when Senate (and public) opposition to a treaty is strong, and more often than suffer an outright rejection they will not bother even sending it to the Senate³ (as Bill Clinton did with the Kyoto Protocol treaty on climate

change). And yet the percentage of treaties negotiated by the President but never approved by the Senate is only around 6%.⁴

However, the Constitution speaks not only of Senate consent but of *advice* and consent, and while Presidents have no constitutional duty to take the Senate's advice, as a pragmatic matter they may not be able to ignore it, because the $\frac{2}{3}$ supermajority requirement for Senate approval is such a high bar. Senators also want to have influence, and there are several ways in which they try to pressure a President to listen to their advice: 1) by serving as part of the negotiating team; 2) by providing input during the negotiation process; 3) through approval with amendment. In the case of Woodrow Wilson's League of Nations Treaty—which he saw as the crowning achievement of his life—the Senate wanted some of their members to be part of the negotiating team, and were offended when Wilson refused to invite them.⁵

Fully aware of this, President Truman included Senators on the U.S. team when negotiating the creation of the United Nations after World War II.

Senators—at least those on the relevant committees—also like to be kept informed of the state of the negotiations, which allows them to register concerns so that they can be addressed prior to the conclusion of negotiations, when changes may be harder to make; getting their information from the press, after it's been made public, rather than directly from the President's office prior to becoming public, can anger them. Finally, rather than reject a treaty, the Senate can approve it conditionally, subject to amendments that satisfy Senators concerns, forcing the President to either return to the negotiating table or give up on the treaty.

Executive Agreements

In lieu of negotiating formal treaties presidents often take the easier path of executive agreements, an agreement between the U.S. President and the head of another country. Under international law these have the same binding power of treaties, but under U.S. law they are considerably weaker than treaties. The Supremacy Clause of the U.S. Constitution (Article VI) makes Treaties part of the supreme law of the land, whereas executive agreements are more akin to executive orders or agency rule-making, and more easily overridden by Congressional action.

Although an old practice, the use of executive agreements expanded dramatically after World War II, as the U.S. moved out of its traditionally isolationist foreign policy and into a leadership role in world affairs. This required the U.S. to enter into ever more international

Ratification of Treaties

Technically, the Senate does not ratify treaties, although that phrasing is commonly used. The Senate "consents" (approves of) treaties, and the ratification occurs when the instruments of ratification—documents signed by the Head of State or other appropriate government official—are exchanged between the ratifying countries. Treaties can be, and occasionally have been, approved by the Senate but never ratified

agreements, and created pressure for a more efficient process than the constitutional process of treaty approval. While presidents sometimes use executive agreements so they can avoid the challenges of achieving a $\frac{2}{3}$ majority in Congress (where a President's political party rarely has such an advantage), this unilateral approach accounts for only about 5% of all international agreements. Over 80% of all international agreements are "congressional-executive agreements" negotiated under a statutory grant of authority by Congress (the remainder are formal treaties). Under these grants of authority Congress generally retains the authority of approval, although with a simple majority (50%+1) rather than requiring the $\frac{2}{3}$ supermajority needed for treaties.⁶ The evidence suggests that the Senate as an institution prefers a more efficient approval process for international agreements than the high bar for Senate approval set by the Framers of the Constitution.

Appointing and Receiving Ambassadors

Another important aspect of the President's Chief Diplomat role is the power to appoint and receive ambassadors. In some respects this is just a procedural task—the U.S. has diplomatic negotiations with almost every country in the world, and each President gets to replace the preceding President's ambassadors with his own (although each appointee must be approved by the Senate), and other countries also occasionally replace their ambassadors to the U.S. But this power can have very important policy implications because it enables the President to determine whether the U.S. will recognize another country or not. Because the U.S. is so powerful, this recognition can play an important role in determining whether that other country is recognized by yet other major countries—that is, whether it will be treated as a country in world affairs or not. For example the U.S. encouraged the region of Panama to break away from Colombia in 1903, and immediately recognized its independence, giving it legitimacy, as a means of gaining approval to build the Panama Canal.

Similarly, in 1948 Jews in Palestine declared a new independent country of Israel, carved out of a portion of territory Great Britain controlled following World War I. Britain had made various conflicting promises to Jews and Arabs in the region, leading to frustration on both sides. U.S. President Truman granted diplomatic recognition to Israel within a half hour, instantly giving the Israeli claims a legitimacy they would not have had if the U.S. had ignored them. In contrast, the U.S. refuses to recognize claims of independence for the Palestinian areas around Israel, so while Palestine is recognized by other Arabic states it is not generally treated as its own country in international affairs.

An even more significant example is the U.S. choice of which of the competing governments of China to recognize. After World War II, a civil war in China resulted in Mao Zedong's communists winning control of the mainland, while Chiang Kai-shek's nationalists retreated to the Chinese island of Formosa, which they renamed Taiwan. Even today, both governments claim to be the rightful government of China, and although in practice there are two Chinas—the People's Republic of China (PRC) on the mainland and the Republic of China (ROC) on Taiwan—officially the whole world recognizes the mainland and Taiwan as part of a single

China (the one China policy). So U.S. Presidents have to choose which government to recognize. Initially the U.S. and its allies recognized the nationalists as the real government of China, which meant they held China's permanent seat on the United Nations Security Council—one of only 5 countries to have a permanent seat and the veto over all Security Council actions that goes with it. In 1972 Richard Nixon began the normalization of relations with the communists by visiting mainland China and beginning discussions with the communist government, and in 1979 Jimmy Carter withdrew the U.S. ambassador from Taiwan and sent an ambassador to Beijing, the mainland capital, simultaneously withdrawing recognition of Taiwan's ambassador to the U.S. and receiving an ambassador from Beijing. This led to the communist government taking over the UN Security Council seat, and also put pressure on the Soviet Union to engage in arms reduction talks as they saw their two greatest enemies establishing warmer relations.

Presidents also use a lack of diplomatic relations to signal extreme displeasure with another country, even if it does not affect that country's recognition by the rest of the world. For example the U.S. canceled diplomatic relations with Cuba in 1961, when the new communist government of Fidel Castro expelled American diplomats. This freeze in relations continued even after the dissolution of the Soviet Union, Cuba's patron state, in 1991, and diplomatic relations were only successfully restored in 2015 by President Barack Obama. The United States also broke off diplomatic relations with Iran after protestors seized the U.S. embassy and took Americans hostage, and despite the recent executive agreement on nuclear weapons, the two countries remain without formal diplomatic relations. The U.S. also has no diplomatic relations with North Korea, and in 2014 closed its embassy in Syria and expelled Syrian diplomats from the U.S. in response to the Syrian civil war.

The President can also use the prestige of the U.S. to shape relations between other states to the advantage of the U.S. As an example, after Israel and Egypt had fought several wars within a quarter century, in 1978 Jimmy Carter invited the leaders of both countries to Camp David, the presidential retreat, to try to work out a peace agreement. Because of their hostilities neither country was willing to initiate peace talks, but each was willing to accept the invitation of the U.S. Although the talks nearly broke down multiple times, requiring Carter to go back and forth between the cabins of the Israel and Egyptian leaders to persuade them to not give up, ultimately they were successful, and the peace agreement reached has now lasted for over 35 years, and remains effective even through the recent revolution in Egypt.

COMMANDER-IN-CHIEF

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States (Article II, §2, U.S. Constitution).

The Congress shall have power...To declare war...To make rules for the government and regulation of the land and naval forces (Article 1, §8, U.S. Constitution).

In a role related to being the country's Chief Diplomat, the President is also Commander-in-Chief of the country's armed forces. The military is a quintessential executive power. Max Weber defined the state as having a monopoly on the legitimate use of physical force, and no other mechanism of the state has greater capacity for force than the military.

The Constitution's appointment of the President—an elected civilian—as the Commander-in-Chief is an important political choice. As has been observed in many developing countries over the past century, lack of civilian control over the armed forces often leads to coups that overthrow democratic governments and install military dictatorships. The U.S. President appoints the Secretary of Defense (and other top officials in the Department of Defense, who must also be civilians, although they can be former members of the military) as well as the Joint Chiefs of Staff (the top officers the military), and can remove them at will.

Congressional Authority

The President's authority as Commander-in-Chief is constrained by Congressional authority. As provided for in Article 1 of the Constitution, Congress writes the laws governing the military (which are compiled in the U.S. Code, Title 10), with which the President and the Department of Defense must comply. Congress also determines, in negotiations with the President, the budget for the military and how the money may be spent. For example, Congress can decide whether money will be spent on development of a new weapons system or not, and if so, how much will be spent on it.

Congress also has the authority to declare war, which theoretically constrains presidents from using the military until Congress has decided to authorize action. In practice, successive presidents have managed to wrest the warmaking power away from Congress, and although the U.S. has engaged in numerous wars in the past 70 years, Congress has not formally declared war since WWII, and in every case where they have passed a resolution authorizing military action—a step that falls just short of actually declaring war—they have done so in reaction to a President taking the initiative to send troops into action. By taking the initiative, Presidents set the policy agenda and put the pressure on Congress to rubber-stamp their choices. In the rare cases where Congress has refused to authorize the action, presidents have ignored the lack of legislative approval, even going as far as to declare that as Commander-in-Chief they do not need legislative authorization to order the military into action because to do so is part of their inherent executive powers, rather than a legislative power.

Congressional Responses to Presidential Initiative in Warmaking

Presidents taking initiative in warmaking is not new—President James Polk initiated the Mexican-American War by sending troops to patrol territory claimed by both the U.S. and Texas, knowing it would provoke a response that would lead to war—but it remains controversial. But as the U.S. took on a world leadership role after World War II, first in response to the threat of communism, and then in response to terrorism, presidents have claimed the authority, as Commander-in-Chief, to determine solely on their own when and where to insert troops into conflict. An incomplete list of these actions includes the following:

- In Korea, which was divided between the Soviet Union and the U.S. at the end of World War II, U.S. troops responded to an attack in 1950 by Soviet supported communist North Korean troops—the troops being already there, and having been attacked first, Harry Truman did not see congressional authorization as necessary to have the troops respond not just by defending themselves but by shifting to offensive warfare;
- In 1964, with military advisers already in-country trying to help the Vietnamese government stop a communist insurgency, Lyndon Johnson secured U.S. authorization for an increased troop presence in Vietnam by presenting Congress with a false claim of an unprovoked attack by Vietnamese gunboats on a U.S. ship sailing peacefully in international waters (in fact the ship was in Vietnamese waters, engaged in support of troops on land, and was not attacked);
- In the 1980s Ronald Reagan invaded the Caribbean Island of Grenada to remove a socialist government that had come to power through a coup, informing Congress only after the fact;
- In the 1990s, as Yugoslavia plunged into civil war following the collapse of its communist government, Bill Clinton sent troops to enforce a UN ceasefire despite Congress's rejection of a resolution to authorize the use of force;
- In the 2000s George W. Bush's advisers initially argued that his authority as Commander-in-Chief meant he did not need congressional authorization to launch a full-scale invasion of Iraq,⁷ although ultimately he did seek and receive that authorization as Congressional opposition wilted in the face of what turned out to be false claims that Iraq was close to developing a nuclear weapon.

Congress's attempts to reign in the President's usurpation of the warmaking power have been ineffective. In response to Johnson's misleading of Congress in the Vietnam War, it passed the 1973 War Powers Resolution, requiring presidents to notify Congress within 48 hours of committing troops to military action, and putting a 60 day limit (plus another 30 days for troop withdrawal) on such action unless Congress declared war or otherwise authorized the use of force. Despite hopes that this would help Congress regain control of the warmaking power, presidents have since then continued to strengthen their near-total control over the decision of when and where to use military force. Congress could, theoretically, constrain

presidential warmaking by revoking funding for military actions, but in practice doing so might have the appearance of not supporting the troops, and few legislators would dare to run for re-election with that as their opponent's campaign slogan. A further difficulty is that while Congressmembers in general might like to rein in presidents, most legislators are reluctant to do so by weakening presidents of their own party.

The Framers of the Constitution thought they were setting the institution of Congress against the institution of the presidency. But in fact each Congressman is generally more concerned about their own district and their own party more than they are concerned about the interests of Congress as an institution, because defying the interests of their constituents can cost them re-election and defying the interests of their own party can cost them influence, but defying the interests of Congress as an institution has no political costs for them.

War and Diplomacy

Although distinct on paper, the roles of Chief Diplomat and Commander-in-Chief are inter-related. The military historian Carl von Clausewitz famously said that "war is not merely a political act, but also a real policy instrument, a continuation of political commerce...by other means."⁸ Those means, and their purpose, he described as "an act of violence intended to compel our opponent to fulfil our will."⁹ Diplomacy is also an act of political commerce intended to persuade others to act in ways that fulfil our will, so war can be seen as a particular form of diplomacy.

Although most diplomacy occurs in the absence of any threat of war because it occurs between countries pursuing a mutually agreed upon goal (and mostly haggling over the details), when countries have conflicting goals, the threat of military action is at least in the background, and sometimes very much in the forefront, of the discussion as a possible policy action if a satisfactory agreement is not reached. For example the recent agreement between the U.S. and Iran limiting Iran's development of nuclear weapons took place with a backdrop of the recent U.S. invasions of two of Iran's neighbors and American foreign policy hardliners talking seriously about the possible necessity of also invading Iran.

At the same time the prospect of war can put limits on diplomatic opportunities. In 2014 Russia occupied and annexed the Crimean peninsula, internationally recognized as territory of Ukraine. Although U.S. President Barack Obama protested the action, the prospects for any diplomatic solution were dim because of the risk of war. Although the U.S. and its NATO allies had the military capacity to drive Russia out of Crimea, the costs of war with another major power, and the potential for it to spread into a broad regional or even world war, made the costs too high. And absent a credible threat, the U.S. had little to offer Russia diplomatically to entice them to leave.

Ultimately, as Chief Diplomat and Commander-in-Chief the President is fulfilling two aspects of the same role as the U.S.'s representative to the world, and the two cannot be fully separated.

Summary

The Framers of the Constitution certainly intended the President to take the leading role in representing the United States to other countries, giving him the authority to negotiate treaties, to appoint ambassadors (or not) to other countries, and to receive (or not) other countries' ambassadors, as well as to be Commander-in-Chief of the country's means of enforcing its will on other countries through violence. But they also provided Congress with an important role in international affairs, giving the Senate authority to approve or reject treaties, and to approve or reject the President's appointments for ambassadors, as well as the power to declare war. But over time the President's pre-eminence in foreign affairs has grown at the expense of Congress. Treaties have largely, although not completely, been replaced—with Congress's complicity—with executive agreements that are much harder for Congress to reject, and the President has effectively co-opted the warmaking power entirely, with Congress unable to find a way to effectively check the President's war powers.

¹ Rossiter, Clinton. 1956/1960. *The American President*, 2nd ed. New York: Mentor Books. p.28.

² United States Senat. "Pending." <http://www.state.gov/s/l/treaty/pending/>.

³ United States Senate. "Treaties." <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>

⁴ *ibid.*

⁵ United States Senate. "Senate History 1878-1920. November 19, 1919: A Bitter Rejection"
http://www.senate.gov/artandhistory/history/minute/A_Bitter_Rejection.htm.

⁶ Krutz, Glen S. and Jeffrey S. Peake. 2009. *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers*. Ann Arbor: University of Michigan Press. p.30.

⁷ Fisher, Louis. 2003. "Deciding on War Against Iraq: Institutional Failures." *Political Science Quarterly* 118(3): 389-410.

⁸ von Clausewitz, Carl. 1966. *On War*, v.1. Translated by Col. J. J. Graham. London: Routledge and Kegan Paul. p.23.

⁹ *Ibid.* p.2.