The Making of International Agreements: a Reappraisal of Congressional Involvement

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The Making of International Agreements: a Reappraisal of Congressional Involvement

Abstract
Although the constitution implies that the primary responsibility in the making of foreign policy resides in the Executive Branch, the Congress shares several important powers in this area. Among these is the prerogative to join in the making of international commitments, as expressed in the treaty-making provisions of the Constitution. Lately, however, critics have argued that the foreign policy powers of Congress have eroded drastically through unilateral action taken by the Executive Branch. The criticism contends, first, that the form of international commitments has changed in recent years. Increasingly, the President has used executive agreements, proclamations, or other unilateral instruments to circumvent the involvement of the Congress. A second and related criticism centers on the content of the various international agreements. Even when the Congress has been involved in the agreement-making process, the issues with which it has dealt have been substantively less important than those handled unilaterally by the Executive. According to this view, for example, the making of military agreements has tended to take the form of executive agreements—thus excluding congressional participation—while the making of taxation agreements or radio regulations is presented to the Congress in the forms of treaties.

Disciplines
American Politics | Other Political Science | Other Public Affairs, Public Policy and Public Administration

Comments
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† On the constitutional relationship between congressional and executive power in foreign affairs, see Louis Henkin, Foreign Affairs and the Constitution (Mineola: Foundation Press, 1972).
the Constitution. Lately, however, critics have argued that the foreign policy powers of Congress have eroded drastically through unilateral action taken by the Executive Branch. The criticism contends, first, that the form of international commitments has changed in recent years. Increasingly, the President has used executive agreements, proclamations, or other unilateral instruments to circumvent the involvement of the Congress. A second and related criticism centers on the content of the various international agreements. Even when the Congress has been involved in the agreement-making process, the issues with which it has dealt have been substantively less important than those handled unilaterally by the Executive. According to this view, for example, the making of military agreements has tended to take the form of executive agreements—thus excluding congressional participation—while the making of taxation agreements or radio regulations is presented to the Congress in the forms of treaties.

2 Article II, sec. 2 of the Constitution states, "The President shall be Commander in Chief of the Army and Navy of the United States. . . . 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. . . ."


4 The reference is a paraphrase of Senator William Fulbright's comments in The Crippled Giant in which he contrasted the content of treaties and executive agreements for 1954 and 1968 (224). Others who have presented similar views are quoted in Schlesinger, The Imperial Presidency, 313. For example,
eign Relations Committee concluded in 1969, "We have come close to reversing the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one." This research note examines the validity of this criticism by surveying systematically all non-classified U.S. foreign policy commitments from 1946 to 1972. Specifically, we seek to determine the extent to which Congress and the Executive Branch have participated in the making of international agreements over the 27 year period. We explore, also, the question of whether the involvement of Congress or the Executive in agreement-making depends upon the content of the subject matter being negotiated. Are trivial matters left to the legislature while serious issues, like military policy, remain the special preserve of the Executive? Finally, we evaluate the extent to which the form and content of international agreements have differed among the five post-World War II Presidents.

THE DATA

Data for this study were compiled from various source materials

Senator Clifford Case is cited as having said, "We are not put in the Senate to deal only with treaties on copyrights, extradition, stamp collections and minor questions of protocol. If that is the meaning of the Constitution, then I think the Founding Fathers wasted their time." Fulbright is also quoted. "The Senate is asked to convene solemnly to approve by a two-thirds vote a treaty to preserve cultural artifacts in a friendly neighboring country. At the same time, the Chief Executive is moving American military men and material around the globe like so many pawns in a chess game."


Classified agreements are not included in this analysis. Although the exact number of these agreements is not known for the period of our data, we do know that some 63 agreements have been sent to the Congress under an injunction of secrecy between the time that the Case Act was passed (August 1972) and March 1977. A senior staff member of the House International Relations Committee estimates that from five to ten percent of all agreements are secret and mainly deal with military policy (Interview June 1974, Washington, D. C.). In any case, the classified nature of the agreements prevents their inclusion in the analysis. Also, since no record exists of the various verbal agreements between the United States and other nations, this analysis must perforce exclude these informal understandings as well.
on international agreements.\(^7\) Over 6,000 agreements were signed by the United States between January 1, 1946 and December 31, 1972\(^8\). These agreements were collected and coded according to form and content using the following guidelines. First, the form of each international commitment was determined on the basis of the legal authority claimed by the Department of State for signing each agreement. Collapsing the categories established by the State Department Office of Legal Advisor, three basic forms were identified: (1) agreements based in whole or in part upon the authority and power of the President under the Constitution (executive agreements); (2) agreements approved by the treaty process, or made within the framework of treaty provisions without prior or subsequent legislation (treaties); and (3) agreements made pursuant to congressional legislation (statutory agreements).\(^9\) Second,
the content of the agreements was determined by examining their subject matter. While in each year international agreements cover a wide range of issues, the content areas are sufficiently the same that some general categories can be established. Eleven categories were identified and collapsed into five broad policy areas:

of the Department of State classification decisions. They are amply documented and await an assessment by legal scholars. In the meanwhile, the State Department opinions remain a particularly authoritative source regarding the degree to which various administrations have claimed constitutionally-grounded executive authority for agreement-making.

We should emphasize again that our classifying agreements as executive applies only to those in which the President invokes his constitutionally-derived power. Those agreements that are made by the Executive pursuant to congressional legislation are classified into the statutory category. While this distinction is generally recognized by scholars in the area, the tendency has been to place executive and statutory agreements under the same “executive agreement” (non-treaty) grouping.

The eleven content categories follow. Examples of agreements coded in each category are presented after each entry.

(1) Military: agreements on weapons systems; bases; military assistance; military alliances; training of military personnel; military supplies (such as naval vessels); arms control.

(2) Trade and Economics: agreements on commerce; agricultural commodities; trademarks; taxes on income and property; finance and debt rescheduling; economic assistance; fishing and whaling.

(3) Transportation: agreements on airlines and shipping; prevention of incidents on and over the high seas; tolls for international waterways.

(4) Communications: postal agreements; television and radio facilities; satellite telemetry and telecommand stations.

(5) Health: sanitation agreements; disease prevention; cooperation in medical science and public health.

(6) Passports: agreements on passports and visas; immigration quotas; free-entry for diplomatic personnel.

(7) Education: agreements on educational exchanges and special educational programs.

(8) Cultural-Technical: agreements on cultural exchanges; Peace Corps; scientific and technical co-operation; copyrights; tracking stations; environmental protection; energy (including atomic); protection of migratory animals; disaster assistance; weather stations; space co-operation; remote sensing for earth surveys.

(9) Diplomatic Recognition and Relations: agreements recognizing the existence of other nations; matters relating to foreign service personnel; international boundary disputes; exchange of official government publications; transfer of territory.

(10) Claims: agreements on repayment for expropriated property during time of peace.
(1) Military
(2) Economic
(3) Cultural-Technical
(4) Transportation and Communication
(5) Diplomatic

The over 6,000 agreements analyzed here are, of course, not of equal rank; some deal with the reduction of passport visa fees, others with major defense alliances. Comparisons based strictly on numbers have their limitations. While ultimately we hope to extend the research into qualitative comparisons, at this stage we shall focus only on the frequency of the form and content of American commitments since 1946.

FINDINGS

The results of this analysis disclose that the overwhelming percentage—almost 87 percent—of all United States agreements between 1946 and 1972 have been statutory. By contrast, executive agreements and treaties account for only 7 percent and 6 percent, respectively, of all agreements in this same period. These aggregate figures strongly suggest that Congress has not been left out of the agreement process; indeed it has participated in the vast majority of them. At the same time, though, the data confirm the notion that the treaty has been replaced as the official instrument of foreign policy commitment. But again, in contrast to the conventional wisdom, treaties have been replaced not by executive

11 War Claims: restitution of property seized during war; matters relating to military occupation.

These eleven categories were then collapsed in the following way:

(1) Military
(2) Economic (Trade and Economics)
(3) Cultural-Technical (including Education and Health)
(4) Transportation and Communication
(5) Diplomatic (including Passports, Claims, and War Claims)

Finally, it is important to note that each agreement was placed in only one category for the analysis.

11 In the early years of the nation, the treaty was the predominant instrument of foreign policy. By the late 1800s and the early 1900s, the treaty gave way to other forms of commitments. For some historical data on the use of treaties and executive agreements (although the latter is based on a different definition from the one used here), see Fisher, The President and Congress: Power and Policy, 45.
agreements; but rather, by statutory agreements—instruments involving both Houses of Congress as well as the Executive Branch.

The Form of International Agreements

Some fluctuations in form have occurred during the post-war period. For example, statutory agreements varied from 67.1 percent of all agreements in 1949 to 95.1 percent in 1962; treaties from 1.5 percent in 1962 to 15.8 percent in 1949; and executive agreements from 2.3 percent in 1961 to 19.9 percent in 1948. On balance, though, no shift in the rank-order of the major instruments has taken place: statutory agreements have always been used most often as a method of committing the United States in foreign affairs, executive agreements rarely, and the treaty process the least of all.

A similar conclusion results when we analyze the use of these different forms by administration. We fail to detect any dramatic differences among the five Presidents (Table 1). Each (except President Truman) used the statutory agreement over 86 percent of the time for the formal conduct of American foreign policy. Even President Truman, who relied least upon this instrument, still used it 80 percent of the time. The major differences were that President Truman was most inclined to use executive agreements and President Kennedy was least inclined. From the Truman Administration through the Nixon Administration, the use of treaties has declined.
**Table 2**

**FORM OF U.S. FOREIGN AGREEMENTS BY CONTENT AREA, 1946-1972**

<table>
<thead>
<tr>
<th>Form</th>
<th>Military</th>
<th>Economic</th>
<th>Transportation</th>
<th>Cultural</th>
<th>Technical</th>
<th>Diplomatic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agreements</td>
<td>12.0%*</td>
<td>4.3%</td>
<td>5.6%</td>
<td>3.5%</td>
<td>28.9%</td>
<td></td>
</tr>
<tr>
<td>Statutory</td>
<td>84.5</td>
<td>88.9</td>
<td>85.1</td>
<td>93.2</td>
<td>58.0</td>
<td></td>
</tr>
<tr>
<td>Treaties</td>
<td>3.5</td>
<td>6.8</td>
<td>9.3</td>
<td>3.3</td>
<td>13.1</td>
<td></td>
</tr>
<tr>
<td>(N)</td>
<td>(1158)</td>
<td>(2235)</td>
<td>(623)</td>
<td>(1572)</td>
<td>(381)</td>
<td></td>
</tr>
</tbody>
</table>

* Entries are percentages based on column N’s shown at bottom. Thirty-nine agreements, representing .6% of the total, were classified as “other” for content and are not shown in the table.

In sum, the argument that the form of international agreements has shifted to one which excludes the Congress is not supported by the evidence in this study. Moreover, when we examined the data over time and by administration, this conclusion was not altered.

**The Content of International Agreements**

The use of the three major forms of agreements within each of the five content or issue-areas is presented in Table 2. Statutory agreements are once again the dominant form, regardless of the content of the international agreement. Only in the case of diplomatic content does the percentage of statutory agreements drop below 80 percent. The argument that the Congress has been systematically excluded from particular policy areas is not supported by these data. Differences across content areas do exist, however, for executive agreements and treaties. As Table 2 illustrates, executive agreements have been used most frequently for military and diplomatic policy, and considerably less often for economic, transportation/communication, and cultural/technical policies. In contrast, treaties have been used most frequently for diplomatic and transportation/communication policy, less often for economic policy, and least often for military and cultural/technical policy.

In comparing policy differences within each form, then, these
results lend some credence to the proposition that vital issues like military commitments have often been handled through a form removed from congressional participation.\textsuperscript{12} Seemingly less critical matters, however, such as cultural/technical, economic, and transportation/communication policy have been dealt with in a way which allowed congressional action. While the proposition thus has some accuracy, it should not be exaggerated in light of the large number of statutory agreements across all issue-areas.\textsuperscript{13}

\textit{Presidents and International Agreements}

Have the five Presidents differed significantly in the form and content of agreements signed during their respective terms? And, especially, to what extent have Presidents differed in their use of executive agreements for all content areas? When we examine the form and content of agreements for each of the five post-World War II administrations, we find little difference from the aggregate conclusions presented earlier. For each administration, the statutory pact dominates the agreement-making process. With the exception of diplomatic policies, rarely does the percentage of statutory agreements fall below 80 percent in any policy area. For the other two forms, no clearly notable increase or decrease in their usage occurs across the five administrations. Instead, the fluctuations in the use of treaties and executive agreements have remained within relatively narrow ranges.

From this consistency across administrations emerges only one particularly significant pattern that is germane to this discussion: the persistent use of the executive agreement for military and diplomatic issues. With the exception of President Kennedy, all the Chief Executives have used executive agreements to a much greater

\textsuperscript{12} The War Powers Resolution of 1973 allows the Congress to monitor more closely the use of executive discretion in this area. Similarly, recent legislation (the Nelson-Bingham Amendment to the 1974 Foreign Assistance Act) has obtained congressional review on foreign arms sales. To date, however, no legislation has been enacted which allows congressional approval of all executive agreements.

\textsuperscript{13} If we were to assume that all secret executive agreements (estimated at an additional 10 percent of the total) were military, the total percentage of military executive agreements would still not be much higher than 30 percent. Such a result would only reinforce our argument about military policy being more subject to executive discretion, but it would not alter the basic finding regarding the dominance of the statutory agreement, even in this issue-area.
extent for military and diplomatic affairs than for the other major policy areas. Presidents Truman and Johnson had the highest percentages of executive agreements for military pacts (15.5 percent and 25.4 percent, respectively), with Presidents Eisenhower and Nixon (9.1 percent and 10.1 percent, respectively) close behind. In the diplomatic area, the percentage of executive agreements used by each of the administrations was even higher; three of the Presidents (Truman, Eisenhower, and Johnson) used executive agreements for 30 percent or more of their diplomatic transactions.

On balance, then, these results suggest that the Presidents have differed in the extent to which they have participated unilaterally in the making of formal foreign policy commitments—though the differences have not been extreme. Moreover, it is also apparent that the content area of an agreement affects the degree of presidential activism, with military and diplomatic issues the most prominent areas of Executive discretion. Furthermore, our data suggest the absence of any trend toward an increase in Executive power in international agreement-making; in this sense, we find little support for the contention that presidential power has continued to aggrandize in this area of foreign policy-making.14

CONCLUSION

Although the central empirical finding in this research note indicates a greater procedural role for Congress in agreement-making than conventional wisdom suggests, it would be premature to conclude that Congress plays a large substantive role. Instead, our findings demonstrate only that members of Congress have been asked to give, and have given, an official green light to the vast majority of overseas commitments—most initiated by the Executive Branch. Whether or not the Congress always knew precisely what it approved, though, is quite a different question. In fact, the extant literature, as well as our own interviews and impressions,15

14 Such a conclusion should not imply that presidential discretion is already too large or too small, but only that the charge of its continued growth is not consistent with the data presented here.

15 In June 1974, the authors conducted a series of interviews with members and staff of the House International Relations Committee and the Senate Foreign Relations Committee as well as with State Department personnel in the Office of Treaty Affairs.
suggests that the legislative branch is deficient in the substantive area, despite its considerable procedural involvement in the approval of international commitments. A separate data collection and analysis, however, would be required to explore fully this substantive concern.¹⁶

¹⁶ For an attempt to assess the substantive and procedural involvement of the Congress in one important policy area, see Loch Johnson and James M. McCormick "Foreign Policy by Executive Fiat," *Foreign Policy*, no. 28 (Fall 1977), 117-138.