

1985

## The Making of International Agreements: Congress Confronts the Executive

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [International Law Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

Michigan Law Review, *The Making of International Agreements: Congress Confronts the Executive*, 83 MICH. L. REV. 969 (1985).  
Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/29>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE. By *Loch K. Johnson*. New York: New York University Press. 1984. Pp. xx, 206. \$30.

Since the first days of our Republic, Americans have faced the intractable question of the proper balance of congressional and executive roles in the conduct of foreign affairs. The question is inherent in our constitutional system of checks and balances and raises difficult problems of how we as a nation can act effectively and coherently while still preserving democratic control over our foreign policy. It is an issue over which Congress and the President have differed many times in our history and has been the source of unending debate and discussion among political commentators and observers. It is to this important question that Professor Johnson<sup>1</sup> addresses himself in *The Making of International Agreements: Congress Confronts the Executive*.

Johnson does not make a major substantive contribution to the discussion of congressional and executive roles in foreign affairs. Rather, in simple, succinct style, he provides students of international affairs with a helpful description of the making of international agreements by the United States. His work is intended to go beyond the superficial treatment given by many textbooks on U.S. foreign affairs in order to clarify the wide variety of techniques and objectives of formal diplomacy, and to explore the sharp disagreements among policymakers and scholars concerning the proper executive-legislative balance in the making of international agreements. [P. xvi.]

Johnson's further purpose in this book is to advocate a larger role for Congress in the conduct of our foreign affairs. Our current foreign policy, he argues, suffers from an "institutional disequilibrium" and is characterized by a "freewheeling" executive and nonparticipative legislature (pp. xvii-xviii). After briefly touching upon the complex problems associated with the democratic control of agreement making, Johnson ends with some modest but practical suggestions to increase congressional involvement in the making of foreign commitments.

The most interesting and distinctive aspect of *The Making of International Agreements* is the method Johnson has chosen to examine his topic. Unsatisfied with the arm-chair analyst's approach, Johnson gathered concrete data on which to base his analysis and discussion. He collected and analyzed almost 6000 bilateral, nonclassified international agreements<sup>2</sup> entered into by the United States from 1946 to

---

1. Loch Johnson is professor of political science at the University of Georgia. He is a former staff member of the Senate Foreign Relations Committee.

2. According to Johnson, 89% of America's agreements since 1946 have been bilateral agreements. P. 49. Johnson gathered 5,991 such agreements from *United States Statutes at Large*, which lists international agreements prior to 1950, *United States Treaties and Other International*

1972.<sup>3</sup> The result is welcome empirical groundwork for the consideration of American agreement making. The firmer factual foundation, regrettably absent in many commentaries, sheds valuable new light on the question of balancing congressional and presidential involvement in foreign affairs.

Johnson examines his data from several perspectives. One of these is the question of what sorts of countries have entered into agreements with the United States during the years 1946 to 1972. This inquiry provides some general conclusions about the character of our international partnerships, but unfortunately Johnson's examination is short on specific, detailed analysis. For instance, he conceived only three abstract types of political regimes, democratic, authoritarian, and totalitarian, and tries to fit all countries into these analytical boxes. Moreover, he fails to list what countries fall into which category, or to provide any adequate definition or description of these amorphous categories. He says only:

Democratic regimes are conceptualized as states where parties or groups compete for office in relatively free elections; authoritarian, or anticommunist "right-wing" regimes, as states where political power is in the hands of a single ruler, the military, or a civilian oligarchy without the benefit of free elections; and totalitarian, or communist "left-wing" regimes, as states where the Communist party or a Marxist group holds the preponderance of political power within the society.<sup>4</sup>

The reader is left wondering how accurate or objective Johnson's unstated classifications may be. Nevertheless, the broad picture conveyed by Johnson's data is interesting, even though imprecise and of little use for specific analysis or conclusions. The general picture is of a relative predominance of agreements with "democratic" regimes over agreements with either "authoritarian" or "totalitarian" regimes. It also seems a greater number of agreements were made with "authoritarian" than with "totalitarian" regimes. This observation may mean little more than that the United States has had more ties with "right-wing" than with "left-wing" countries — perhaps a foregone conclusion considering that Johnson's sample of agreements is taken from the Cold War period.

In a more useful avenue of analysis, Johnson examines his collection of agreements according to type of agreement and according to subject matter. He first conceives of three different types of agree-

---

*Agreements*, which lists all agreements entered into force after 1949, *Treaties and Other International Acts Series*, a set of numbered, pamphlet copies of international agreements, and the *Digest of United States Practice In International Law*. These compilations are all published by the U.S. Government Printing Office. P. 8 n.12.

3. In a footnote Johnson writes that the years 1946 through 1972 were analyzed because they mark the limits of the Cold War period. P. 8 n.13. However, nowhere in the book does Johnson limit his conclusions to Cold War international politics or to those conditions which characterize a Cold War foreign policy.

4. P. 32 (footnote omitted).

ments and categorizes all the agreements into these general classes. There are (1) agreements based in whole or in part upon the constitutional authority and power of the President, termed "executive agreements," (2) agreements made strictly pursuant to congressional legislation, termed "statutory agreements," and (3) agreements made according to the treaty process under article II, section 2, of the Constitution, termed simply "treaties."<sup>5</sup> He then classifies each agreement according to its general subject matter: (1) military; (2) economic; (3) cultural-technical (including health and education); (4) transportation-communications; or (5) diplomatic (including passports, claims, and war claims).

In analyzing the agreements according to their subject matter, Johnson discovered a consistently greater number of economic agreements than any other. Economic agreements accounted for thirty-seven percent of all the agreements from 1946 through 1972 (p. 15). They were the most prevalent international agreement in every presidential administration except Truman's, in which cultural-technical agreements surpassed economic ones. Cultural-technical agreements were the second most common sort of agreement during this period, followed by military agreements (p. 17). Transportation, communication, and diplomatic agreements were the least frequent during this period (p. 18).

The clearest and most compelling conclusion from all of Johnson's research and analysis is revealed in his classifications of agreements according to their type. Johnson found that his second category of agreements, the statutory agreements, were the overwhelmingly predominant form of international agreement utilized by the United States during this period. Almost eighty-seven percent of all the agreements between 1946 to 1972 were statutory agreements. The statutory agreement was the most common form of agreement in every subject matter area (p. 19). The predominance of this form of agreement held true in each year of every presidential administration during this period. At its lowest, the proportion of statutory agreements among total international agreements in any one year was still sixty-seven percent. The proportion went as high as ninety-five percent in 1962 (p. 13).

If only because of the sheer number of statutory agreements, one might have expected Johnson to concentrate his analysis on this form of agreement. He does not. Instead Johnson focuses on executive agreements, even though they accounted for only 7.4% of all the agreements made between 1946 through 1972 (p. 13). One suspects

---

5. In making these classifications, Johnson relied heavily upon a Department of State publication, *INTERNATIONAL AGREEMENTS OTHER THAN TREATIES, 1946-1968: A LIST WITH CITATION OF THEIR LEGAL BASIS* (1969), and its updating supplements. For some agreements he also relied upon telephone interviews with the Office of the Legal Adviser for Treaty Affairs. P. 8 n.14.

this emphasis is a reflection of Professor Johnson's personal view on the proper roles of Congress and the President in international affairs, a view unaffected by the force of his own empirical findings. Johnson seems entrenched in his perception of "freewheeling executive discretion in the making of international agreements" (p. xviii), notwithstanding the predominant number of agreements made strictly pursuant to congressional authorization. It is his thesis, he says, that although the Congress has participated in the making of many international agreements, major commitments — especially in the military and intelligence areas — have been decided by the President alone or, worse still, by non-elected officials in the executive branch. [P. 158.]

Attempting to explain the inconsistency between his position and the empirical findings, Johnson argues that those many statutory agreements indicate only a *procedural* involvement of Congress.<sup>6</sup> He writes that

earlier studies, as well as the author's own interviews and observations, suggest that the legislative branch is often deficient in the substantive area — the meaningful details of policy — despite its considerable procedural involvement in the approval of international commitments.<sup>7</sup>

However, the one and only "earlier study" Johnson cites, Theodore J. Lowi, *The End of Liberalism*,<sup>8</sup> does not establish that those statutory agreements were merely procedural rubber stamps or that Congress was just giving the "official green light" to the executive (p. 26). Nor do the author's private interviews with unknown persons or his personal, unelaborated observations support the assertion that Congress has had no substantive role in the making of international agreements. Despite his attempts, Johnson simply fails to show the irrelevance of his own clearest empirical finding.<sup>9</sup>

It is the "normative theme" of this book, Johnson says, "that foreign policy should be conducted on the basis of a partnership between the executive and legislative branches" (p. xviii). That is a fine plati-

---

6. Johnson's attempt to distinguish procedure and substance, and to characterize a procedural role as somehow insignificant, is highly problematic. A procedural requirement can be the source of considerable power and influence, and may significantly affect so-called substantive matters. The most obvious example is the procedural requirement of Senate approval in treaty making. This constitutional procedural requirement gives the Senate significant influence to shape a treaty, as well as the power to reject a treaty.

7. P. 26 (footnote omitted).

8. T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979).

9. The reader also should be aware that (intentionally or not) Johnson's classification of types of agreements maximizes the number of executive agreements while minimizing the number of statutory agreements. He counted any agreement based in whole *or in part* upon the constitutional authority of the President only as an executive agreement. Thus, even if an agreement was made pursuant to congressional enactment, the invocation of the constitutional authority of the executive brought it out of the statutory agreement class and into the executive agreement class. P. 8. Of course this creates a statistical bias in favor of executive agreements and against statutory agreements. Therefore, the high number of statutory agreements reported by Johnson is probably even higher in reality, while the number of executive agreements may be overstated.

tude, but the real issue is the balance of power between Congress and the President within that partnership. Johnson obviously believes that Congress has not had enough power in the past and that the balance should shift in Congress' favor. He even proposes some interesting, specific ideas on how to further that end.<sup>10</sup> In his zeal to make the case for a greater congressional role, however, Johnson has overlooked a promising, largely unexplored possibility for achieving a properly balanced foreign policy partnership: the statutory agreement. The statutory agreement is a flexible form of international agreement, capable of incorporating and accommodating both Congress and the President in the conduct of foreign affairs.<sup>11</sup> The already wide use of the statutory agreement evidenced by Johnson's data means that it would likely face fewer obstacles as the vehicle for a balanced foreign policy partnership. Moreover, Congress' control of the purse strings would guarantee it the opportunity for a significant role in the making of international agreements, notwithstanding Johnson's assertions to the contrary. Thus, the statutory agreement holds interesting and promising potential for the management and maintenance of the foreign policy partnership between Congress and the President. It is disappointing, then, that *The Making of International Agreements* devotes so little attention to this instrument of foreign affairs, especially after pointing out its impressive empirical significance.

---

10. Johnson recommends: (1) a computerized storage and access system for this information so Congress can monitor more effectively the making of international agreements; (2) notification to Congress of all international agreements and their substance before they are supposed to become effective; (3) sample audits of the type and extent of United States' agreements with different countries to insure complete and accurate reporting by the executive; (4) upgraded record-keeping and reporting standards within the executive; and (5) a comprehensive legislative review of the procedure for making agreements. Pp. 164-73.

11. One of Johnson's own case studies shows the great capacity of the statutory agreement to accommodate both branches of government in their competing interests. In September 1975, the United States, Israel, and Egypt entered into the Sinai Agreements. These agreements, among other things, provided for the participation of American technicians in an early warning defense system to be established between the forces of Israel and Egypt. Congress objected to this agreement, arguing that an agreement placing Americans in a potential war zone required a treaty and not merely the President's executive agreement. Ultimately, the dispute was settled between the two branches by the compromise of using a statutory agreement. Johnson writes: "What some wanted to be a treaty and others an executive agreement finally became a statutory agreement in order for the Congress to give its approval to the commitment." P. 162. In this way, both branches were involved in the agreement in a genuine, balanced partnership.