

4-1-2010

Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers, by G.S. Kurtz and J.S. Peake

Michael A. Genovese

Loyola Marymount University, mgenovese@lmu.edu

Repository Citation

Genovese, Michael A., "Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers, by G.S. Kurtz and J.S. Peake" (2010). *Political Science Faculty Works*. 5.
http://digitalcommons.lmu.edu/poli_fac/5

Recommended Citation

Genovese, Michael A. 2010. "Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers, by G.S. Kurtz and J.S. Peake." *Journal of Politics* 72(2):600-601.

regions' authority. The separation of executive, legislative, and judicial powers can help ensure that one interest does not dominate others, as can the incorporation of regional actors at the federal level through, for example, regional representation in the legislature or power sharing in the executive.

By popular safeguards, Bednar refers to the power of the people to "patrol the boundaries of federal and state authorities" (110) through elections, punishing politicians that break the rules. Political safeguards, in contrast, place the responsibility for federal robustness on politicians. Building on Filippov et al. (2004), Bednar suggests that the political party system can bind politicians at different levels of government together, creating both a sense of sympathy and incentives for these politicians to cooperate and respect the internal boundaries of the federation. Finally, judicial safeguards refer to how courts monitor the distribution of powers within the federation and create common understanding by interpreting constitutional rules.

No safeguard is by itself sufficient for ensuring federal robustness, but combined they complement and reinforce one another. For example, while structural safeguards may prevent the federal government from encroaching on regional governments' jurisdictions, they do not prevent regional governments from disrespecting the distribution of authority. The political safeguards can step in and fill that gap: in a party system where politicians at different levels depend on one another for staying in power, *both* federal and regional-level politicians have incentives to respect the boundaries. Indeed because each institutional safeguard has a different threshold and is unable to enforce perfect compliance, they manage to create a balance of compliance and adaptation, as "governments can experiment around the edges of the distribution of authority at little cost, and the system as a whole may learn from what they find" (184).

Bednar emphasizes that the book "will not offer an ideal design—there is no 'perfect' constitution in an appendix—but it does offer design principles" (4). The premise of the book is that the robustness of a federation depends on institutional context—not just one institution, but several. In the conclusion, it becomes clear that societal context matters as well: "Language differences, differences in legal code, and even population settlement history may cause particular safeguards to be more or less capable" (215). This is an important point, especially as federalism is often proposed as a means to manage heterogeneous societies (think of recent debates about federalism in Iraq). It is worth asking

how such community traits influence the institutional safeguards. Bednar's aim is not to test how the safeguards' effects may be conditional on noninstitutional variables, but she carefully discusses the promises and perils of each safeguard. For instance, she notes the possible adverse (and unintended) consequence of political safeguards in a heterogeneous society. Indeed, mutual dependence between federal and regional-level political parties can contribute to minority group exploitation by allowing nondemocratic pockets to exist: "Political safeguards fail completely to guard against these opportunistic enclaves; in fact, it is the mutual dependence, the key mechanism of the political safeguard, that makes these enclaves possible" (118, fn. 27). While Bednar convincingly underscores the importance of auxiliary institutions, our understanding of federalism can further benefit from theorizing and testing the ways in which the robustness of federations may also depend on societal context.

Kristin M. Bakke, *Leiden University*

Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers. By Glen S. Kurtz and Jeffrey S. Peake. (Ann Arbor: The University of Michigan Press, 2009.)

doi:10.1017/S0022381609991010

This provocative and persuasive book is a direct challenge to the growing body of literature in the field of presidency studies that argues for a more unilateralist or direct action approach to the understanding of presidential power. The authors examine the presidency from a more Neustadtian perspective and argue that a more nuanced and political understanding of presidential power is in order.

The authors begin with the accepted wisdom regarding why presidents have resorted to the use of executive agreements over treaties in reaching international agreements, arguing that "a strong conventional wisdom had emerged: modern presidents routinely evaded Congress (and the requirements set forth in the Constitution) by using executive agreements instead of treaties" (ix). Presidents use executive agreements "strategically" in an effort to bypass Congress and govern alone, legislating unilaterally. This "evasion hypothesis" predominates the literature, but is it true?

The evasion hypothesis is one of the legs upon which the unilateralist approach stands. If untrue, the foundation of the unilateralist approach is severely weakened. To the extent that presidents can and do act as independent

policy makers, the direct action argument is strengthened. As the authors note, the unilateral approach posits that “With the rise of executive agreements, modern presidents appear to have grabbed the treaty power, intended by the framers to be shared with the Senate, and made it their own, thus diminishing an important check on executive power and thwarting the constitutional principle of shared power” (9).

Kurtz and Peake review the literature on executive agreements and treaties, a literature that on the surface seems to support the unilateral theory of presidential power. But they look more closely at how presidents behave, how Senators and their staffers view the relationship, and how bureaucrats in the State Department deal with the issue. By delving deeper into the problem, the authors see a much more complex and interdependent set of forces at work. What may appear true on the surface yields to a more nuanced understanding when studied more closely.

The authors offer their own theoretical framework for understanding this problem. As they write, “our framework proceeds from the notion that while treaties and executive agreements are . . . legally interchangeable, they are not politically interchangeable . . . their use has important political ramifications that presidents are likely to consider.” They see “the two institutions as interdependent parts of an adaptive system that must together forge and implement internationally binding agreements with a vast array of nations and international organizations, all the while maintaining the constitutional and political prerogatives of shared power” (10). In the end, they see the president and Congress striking “an institutional bargain grounded in requirements for efficiency that are demanded in modern realities” (10).

This work then goes about demonstrating that the theoretical framework is indeed plausible. And the authors make a persuasive case, especially when they introduce us to congressional staffers and state department bureaucrats who engage day-to-day in the give and take process of politics on the international stage.

The realities the authors speak of are the demands for swift action on the international front (treaty approval is often a long, grueling process) and the inherently slow nature of how Congress does its business. In a way, Congress, unable to keep up with the presidency (recall Samuel Huntington’s “adaptation crisis” of Congress), delegates a great deal to the executive. It reserves the “right” to block treaties or object to executive agreements, yet it is not institutionally disposed to the long and hard work on a day-to-day basis. Presidents recognize this and push only so far as not to wake the sleeping dog.

Does this recognition by Congress support the authors’ Neustadtian view or is it a more nuanced version of unilateralism? Here, a dialogue between the two competing schools would be most valuable. Is Congress adapting to modern realities and institutional weaknesses, or is it serving as an enabler of its own decline? To what extent are presidents limited by Congress in their strategic calculations? Is Congress a mere annoyance, like a fly to be squatted then ignored, or does Congress, as the authors suggest, stand as a mighty giant waiting for a president to go too far, when it will rise up and crush him?

Kurtz and Peake see a significant if not a robust role for Congress in this, writing that “Rather than painting the Congress as weak and ineffectual, our theory suggests that both the Senate and the House clearly benefit from the use of executive agreements” and that “so long as presidents do not abuse the process on consequential agreements, the Senate is a willing partner” (193). And yet, one is left with the gnawing suspicion that Congress is merely making the best of victim status here.

The authors conclude by suggesting that “theories of presidential power, which have leaned toward unilateral persuasion in recent years, need to swing back somewhat to incorporate the principle of shared power” (197) and that “Based on the results of this study and a careful reading of the unilateral perspective, we believe that the principle of shared power needs to be more explicitly brought back into the fold. While unilateral action can indeed be prevalent, it often stems from and is bounded by shared power” (198).

One can only hope that this fine and challenging book starts an argument, or at least a dialogue, about presidential power in a post-Bush era. It merits the attention of presidency and congressional scholars, and those interested in the interaction of America’s political institutions.

Michael A. Genovese, *Loyola Marymount University*

Out of Reach: Place, Poverty, and the New American Welfare State. By Scott W. Allard. (Yale University Press, 2009.)

doi:10.1017/S0022381609991022

Today’s American safety net looks vastly different than it did 30—or even 15—years ago. Most notably, the provision of cash assistance to individuals in need has shrunk to a tiny portion of the aid dispensed in this country. The safety net of today is one of services: job training, mental health services, vocational