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BOOK REVIEW

OLD WARS/NEW WARS

PRESIDENTIAL WAR POWER, by Louis Fisher. University Press of Kansas, 1995. Pp. 245. \$29.95

NATIONAL SECURITY LAW AND THE POWER OF THE PURSE, by William C. Banks and Peter Raven-Hansen. Oxford University Press, 1994. Pp. 260. \$39.95

PETER J. SPIRO*

Legal scholars have long clamored for a return to what they consider the appropriate balance of war powers between the political branches of government. It is Congress, they have insisted, not the executive, that should control the primary levers in the decision to initiate armed hostilities. With little dissent, the academy has bemoaned marginal congressional participation in a string of conflicts dating to the Vietnam War, condemning presidential assertiveness in almost apocalyptic terms while imploring Congress (and the courts) to fulfill their supposed constitutional mandate. Although these calls were well-received in the media and amplified by individual legislators, they had little effect on the actual war powers process of the post-Vietnam era. Presidents led, Congress followed, and the courts stood idly by.

That all appears to have changed. With the end of the Cold War, Congress has become increasingly assertive on the foreign policy stage. The legislative branch may never have reflexively done the President's bidding on national security matters, but

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today the White House can no longer even indisputably claim to set the general course of the nation's foreign dealings. On defense and security policy, Congress may now call the shots. Whether this will make for good policy remains open to debate. After years of trumpeting the virtues of legislative vigilance, the conventional wisdom will now be put to the test. Some, perhaps, may not have been careful enough about what they wished for, and they may now get it.

This brief review first examines the changed context of national security decisionmaking, finding that late developments are likely to mark an epochal shift in the division of war powers. It then attempts to situate two recent contributions, by eminent scholars in the field, in this transformed context. Louis Fisher's historical survey of the interbranch struggle over war powers falls squarely on one side of the old debate, defending congressional power even against a consistent practice of unilateral executive branch action. The merits aside, that debate is perhaps of diminishing concern as Congress itself takes up the reins. By contrast, Professors Banks and Raven-Hansen have dispassionately focused on the power of the purse in the national security context, a constitutional intersection that can only grow in significance as Congress moves to assert itself. The review concludes by suggesting a modified research agenda to conform with the new domestic and international realities, one that maintains an historical approach but that focuses on long-neglected periods of legislative supremacy.

I.

The end of the Cold War has no doubt opened a new chapter in the relationship between Congress and the presidency in the national security arena. As with sustained military engagements—real wars—the Cold War posed a perceptible, concrete threat to the nation's very survival. Our boys may not have been under direct fire, but the proverbial trenches were clearly dug; the prospect of destruction at the push of a button and the periodic outbreak of brushfire conflicts required a state of constant military preparedness above that found during periods of true peace. As in real wars, there was an identified adversary, vili-

fied, at times, in precisely the fashion of a battlefield enemy. Indeed, the Cold War had something in common with the major conflicts of the twentieth century—the total wars—insofar as the antagonism between the United States and the Soviet Union grew deep popular roots, becoming not merely a clash of sovereigns but of peoples. As in total war, most foreign policy issues, and many domestic ones as well, were perceived in some measure as relating to Cold War imperatives.¹

The Cold War backdrop tempered process as well as substance, and it had particularly telling consequences in the making of national security policy. In the conduct of real war, centralized decisionmaking enjoys more than the usual comparative efficiencies. The ingredients of a successful foreign policy—precision, flexibility, dispatch, secrecy, leadership—are all made virtuous requirements in the wartime setting; all are enhanced by the concentration of decisionmaking authority in a single, pyramidal institution and, ultimately, in a single individual.² As Professor Woodrow Wilson observed of the Spanish-American War:

When foreign affairs play a prominent part in the politics and policy of a nation, its Executive must of necessity be its guide: must utter every initial judgment, take every first step of action, supply the information upon which it is to act, suggest and in large measure control its conduct.³

The American experience has proved no exception; war has al-

1. Including, for instance, so peculiarly American a practice as racial segregation, which was condemned because, among other reasons, it provided a continuing propaganda theme for the Soviets to exploit in international forums. See Mary L. Dudziak, *Desegregation As a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

2. Only up to a point, of course. The more power that is concentrated in a single individual, the greater the vulnerability to that individual's weaknesses. Hitler had more command power than either Roosevelt or Churchill, and that fact alone may explain Germany's defeat. (Witness the blunderous invasion of Russia.) At the same time, Roosevelt and Churchill were a good deal less fettered in wartime than in peace.

3. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS xi-xii (15th ed. 1913). Or as Gore Vidal said of President John F. Kennedy, "Jack wanted to be a great President, and he'd figured out that the great Presidents were war Presidents." Andrew Solomon, *Gore Vidal Receives a Visitor*, N.Y. TIMES, Oct. 15, 1995, § 6 (Magazine), at 40, 42 (quoting Gore Vidal).

ways worked to the institutional gain of the presidency. And the Cold War here has lived up to its name.

Of course, the corollary to magnified presidential powers was diminished congressional authorities. Enjoying control of the instruments of foreign affairs, the President would routinely invoke the Cold War context in overcoming legislative opposition to his foreign policy agenda. Against that claim, congressional dissenters risked the appearance of back-seat driving at best, disloyalty at worst, when they attacked particular international undertakings, and so Congress as an institution showed a strong inclination to acquiesce in presidential control of Cold War policies. The pattern was clearest with respect to the use of force, where the connection to perceived strategic interests tended to be more evident and the risks of opposition more pronounced. (Hence, for instance, the near unanimous congressional support of so fateful an act as the Tonkin Gulf Resolution.) But almost any presidential preference in the sphere of foreign policy could be squared, however tenuously, with the accepted grand design of resisting the Soviet threat.

The pattern was not without exceptions. Congress has always felt free to condemn failure after the fact, in part because such criticism could be consistent with the anti-Soviet imperative. On occasion, it attempted to constrain presidential discretion *ex ante*, most notably in the context of President Reagan's efforts to assist the Nicaraguan Contras in the mid-1980s.⁴ These efforts were, at least until recent years, nonetheless quite limited.⁵

4. See Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1904, 1935-37 (1984) (prohibiting the expenditure of funds to support military groups or operations in Nicaragua); Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (prohibiting CIA use of appropriated funds for the purpose of overthrowing the government of Nicaragua). It was, of course, the skirting of the so-called Boland Amendments by National Security Council staff member Lt. Col. Oliver North that erupted in the so-called Iran-Contra affair. Congress had more success (albeit temporary) in limiting Reagan Administration covert assistance to Angolan insurgent forces led by Jonas Savimbi. See International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 118, 94 Stat. 3131, 3141 (prohibiting assistance in military or paramilitary operations in Angola without express authorization from Congress), *repealed* by International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 811, 99 Stat. 190, 264.

5. See generally BARBARA HINCKLEY, *LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS* (1994) (concluding that the

Attempts to regulate national security decisionmaking on a more global basis, most notably through the 1973 War Powers Resolution, have met with failure.⁶ Presidents may not have had as easy a go of it in the years that followed Vietnam—post-Vietnam Congresses have plainly been more vigilant on national security matters—but the White House remained in near-complete control so long as the Cold War threat persisted. In historical retrospect, Vietnam may not long be considered the watershed it has been made out to be for war powers purposes.⁷

The end of the Cold War, by contrast, appears to have supplied that turning point. On the one hand, the President can no longer trumpet a role as “leader of the free world,” a badge that has lost almost all meaning amidst the shards of the old East Bloc.⁸ On the other, Congress need no longer fear blame for undermining the “war” effort. The President has lost an almost un rebuttable justification for his every international move, and Congress can now demand a more precise accounting of the national interest with respect to particular undertakings, especially military ones—before the fact as well as after. Outright espionage excepted, the notion of disloyalty has simply disappeared from the public stage. Short of pressing some course of

presidency has maintained effective control of foreign policy throughout the post-WWII period). Where appropriations are at the core, as with foreign assistance issues, legislative supervision has long been strict. See 22 U.S.C. §§ 2151-2443 (1988) (setting forth highly specific mandates for foreign aid programs). Congress has, in various foreign relations contexts, also taken to requiring the president to keep it informed of particular international undertakings. See, e.g., 50 U.S.C. §§ 413-413b (1988 & Supp. V 1993) (requiring the President to inform Congress of covert intelligence operations).

6. On the disrespect shown the War Powers Resolution, see for example, Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1360 (1993) (reviewing JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)).

7. See, e.g., JAMES M. LINDSAY, *CONGRESS AND THE POLITICS OF U.S. FOREIGN POLICY* 24-25 (1994) (crediting Vietnam for the resurgence of congressional foreign policy activism); JAMES A. NATHAN & JAMES K. OLIVER, *FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM* 78-81 (3d ed. 1994) (discussing the “Vietnam Revolution” in congressional war powers).

8. In this respect, as well as others, the Gulf War marked the last gasp of the old order. As an episode in which the Atlantic Alliance (plus some) launched a substantial diplomatic and military effort under unchallenged American leadership, the Gulf War is unlikely to find more than a faint echo in the near future.

action that might lead to American casualties, legislators have little reason to put the gloves on with respect to foreign policy when they have them off for the domestic.⁹

Other systemic factors are also at work in facilitating a more assertive Congress. One springs from the confluence of the global communications revolution and the decline of high diplomacy. During the Cold War era and, indeed, in times before, the President could typically claim the expert's edge over Congress because he enjoyed superior sources of information. The President had his thousands of ears and eyes spread around the world at embassies and intelligence stations, a sort of private reporting service that far surpassed the private media in the number of its bureaus; he also had exclusive control of information conveyed to the United States on a government-to-government basis with the understanding that it would remain undisclosed. With respect to any given national security matter, then, the President was able to fend off a skeptical Congress with assertions that his judgment was based on better analysis (the result of the extra eyes and ears, and the experts behind them) and sources not available to the public or to Congress (confidential foreign government communications to executive branch officials). Such claims were not without foundation; the President has in fact commanded a foreign policy apparatus vastly more sophisticated than that at Congress's disposal.¹⁰

He still does. But the value of that apparatus, and of the information it supplies, has substantially diminished in an era of accelerated international interconnectedness. The State De-

9. During a transitional period, there may be a lingering hesitation in Congress to take action that might plausibly result in a foreign policy disaster. As one analyst has documented, Congress has continued to defer to the White House on matters relating to Russia whereas it has not with respect to such new issues as international peacekeeping. See JEREMY D. ROSNER, *THE NEW TUG OF WAR: CONGRESS, THE EXECUTIVE BRANCH, AND NATIONAL SECURITY* 96-98 (1995) ("Members had to worry about the political price they might pay over 'Who lost Russia?,' but few had to fear a debate over 'Who lost Rwanda?'").

10. It was in part on this functional advantage that Justice Sutherland justified his quintessentially pro-executive opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting that the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war").

partment and the Central Intelligence Agency are no longer the only institutions with impressive global reporting capabilities. Congress may not have its own foreign service or undercover agents, but it can easily tap into information provided by an array of media outlets (CNN, most notably) and nongovernmental organizations (from such generalists as Amnesty International, the World Resources Institute, and the Council on Foreign Relations but also from groups specializing in just about every geographic area or cross-cutting issue worthy of international attention). These news and expert groups now enjoy the sort of physical access to problem areas that often was impossible in the face of tightly controlled Cold War borders, and their material, often of a quality surpassing that from official sources, is gladly supplied to (and more often pressed on) congressional policymakers.¹¹

At the same time as the President has lost his advantage with respect to the gathering and digestion of information, he also finds his monopoly on foreign government communications slipping away. Foreign leaders visiting Washington now understand how important it is to massage officials at both ends of Pennsylvania Avenue.¹² To the extent that such leaders find more

11. Of course, it is not only those on the Hill (members and staff) who have access to these improved information flows. Constituents do as well; so equipped, they may be more likely to push for legislative action on international issues. The electorate appears better-informed on global issues today than in the past, at least with respect to issues that affect them directly (as with trade matters) or groups with whom they share affinities (as with, for example, women's rights and environmental issues). A more knowledgeable public will, one would suppose, on balance result in a more relatively activist Congress, at least to the extent that legislators are easier targets than presidents. Indeed, presidents must balance international costs against domestic political benefits in a way that individual legislators typically will not.

12. See Elaine Sciolino, *New Protocol: Heads of State Now Court Congress*, N.Y. TIMES, Apr. 8, 1995, at A3; see also Clyde H. Farnsworth, *Congress Move on Cuba Irs Canada and Mexico*, N.Y. TIMES, May 23, 1995, at A3 (describing direct lobbying of the U.S. Congress by the governments of Canada and Mexico to defeat tightened embargo measures against Cuba). As with other elements of the post-Cold War allocation of powers that I here describe, this one is not without some precedent. Most notably, in the mid-1980s, House Speaker Jim Wright undertook an elaborate, and ultimately unsuccessful, effort to broker a peace between the warring parties in Nicaragua. See Steven V. Roberts, *The Foreign Policy Tussle*, N.Y. TIMES, Jan. 24, 1988, § 6 (Magazine), at 26. As evidence of what has changed, however, Wright's activities were criticized, see, e.g., *Wright Is Wrong*, NEW REPUBLIC, Dec. 7, 1987, at

friends on the Hill, it is there that you will find them; the foreign minister of Bosnia, for example, at one time may have clocked more face time with supportive legislators than with White House functionaries.¹³ As a general matter, phones, faxes, the Internet, and enhanced travel opportunities have all facilitated the establishment of congressional contacts that replicate those made by the White House and Foggy Bottom. Whereas in the past the President could defend his policies by invoking crucial but confidential foreign government information—thus creating something of an invisible target for those who would otherwise oppose him—he can take no such refuge today.

Even without this leveling of the policymaking playing field, the demise of our principal adversary has inevitably brought fiscal concerns to the fore. During the Cold War, foreign policy and defense items were essentially off budget, in the way that health care is for the upper-middle class. When one's survival is at stake, you get the very best, with only a distant eye on the accounts. Now that the physical threat has dissipated, arguments focusing on value have much greater force, particularly as the budget cutters come ascendant. It is not always proving a simple matter to articulate interests warranting the expenditure of funds, not to mention the loss of lives, in the absence of a new central organizing principle for our international undertakings.¹⁴

7 (deploring his "bizarre intervention" in the Nicaraguan peace process), whereas more recent congressional interaction with foreign government officials appears not to have been.

13. See Elaine Sciolino, *Bosnian Asks G.O.P. Lawmakers To Help End Arms Embargo*, N.Y. TIMES, Jan. 31, 1995, at A3. As Congress becomes a significant independent player on the international stage, it can also become the object of focused foreign government criticism. See Lee Hockstader, *Moscow Accuses Congress Members of Fomenting Return to Cold War*, WASH. POST, Feb. 1, 1995, at A15 (reporting Russian government reaction to congressional positions on Chechnya and other issues); cf. Barbara Crossette, *U.N. Aides See Congress As Impeding Reforms*, N.Y. TIMES, Oct. 8, 1995, at A10 (explaining that some U.N. officials hold Congress responsible for problems at the United Nations). One could now readily imagine a situation in which the White House and a foreign government join forces in a policy alliance against common foes on the Hill.

14. For a recent example, see 141 CONG. REC. S14,636 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) ("[H]ow much will [the Bosnian expedition] cost? That is the first thing the American People want to know."); Dov S. Zakheim, *Adding Up the Taxpayers' Tab for Bosnia*, N.Y. TIMES, Oct. 2, 1995, at A19 (highlighting the

This injection of pocketbook considerations into the national security arena also works to Congress's inevitable advantage. If it has the will, it has the means; with primary control of the purse, Congress can effectively obstruct any activist internationalist inclinations on the president's part, at least to the extent that such an agenda almost by definition requires substantial line items. But employing the power of the purse is no longer only a means, it has also become an end in itself. Congress now feels more free to interpose that essentially domestic objective against those projected from the international stage.

These three factors—the end of war-like footing with the end of the superpower competition, the diminishing institutional advantage of the presidency in the wake of improved information flows, and the heightened emphasis on budgetary priorities—have helped embolden Congress on virtually every recent issue of international concern. It has battled the President on matters relating to Mexico (the bailout plan), Cuba (the appropriate level of sanctions against the Castro regime), China (the granting of a visa to the president of Taiwan and the possible recognition of Tibet as a sovereign state), Russia (economic assistance matters and Chechnya, among others), and perhaps most notably Bosnia, with respect to which Congress has hammered away at the Clinton Administration to adopt a policy more favorable to Muslim government forces at the same time that it has cast a shadow on the deployment of U.S. troops to keep the peace there.¹⁵ Significant legislation regarding U.S. participation in United Nations peacekeeping operations is on

"mind-boggling" possible costs of U.S. participation in a proposed Bosnian peace plan).

15. For recent accounts of the breadth of congressional activity on international matters, see for example, Michael Dobbs, *Domestic Politics Intrudes on Foreign Policy*, WASH. POST, June 26, 1995, at A4 (citing congressional pressure on the President regarding U.S. policy in China, Bosnia, Cuba, North Korea, and Russia); Mark Matthews, *Turf Battle over Foreign Policy Renewed*, BALT. SUN, June 2, 1995, at 9A (quoting Helmut Sonnenfeldt that "[t]his is a more far-reaching effort by Congress to impose on a president certain policies than we've seen in the last five or six decades"). Although they may seem more consistent with the old model than the new, late developments surrounding the deployment of U.S. troops in Bosnia may be consistent with the expansion (albeit incremental) of congressional power. See *infra* note 48.

the block; Congress speaks on which countries should be admitted to NATO; it leaves multilateral treaties unratified at a time when international conventions are becoming an increasingly real force in international affairs; the confirmation process is held hostage to a reorganization plan for the foreign affairs agencies; the budget for foreign operations is cut so as to require the closure of dozens of posts overseas. Even where Congress has not gone to the brink, as with the deployment of troops in Haiti, it has shown an increasingly pronounced tendency to challenge contemplated presidential initiatives. It may be only a matter of time before more direct confrontation transpires, and a congressional triumph in such a circumstance is not so implausible as it once may have been.

Concededly, the shift remains difficult to document in its early stages, for other developments coincide with those I have highlighted. Some commentators see nonsystemic political factors (most notably, the asserted international disinterest/incompetence of the current Chief Executive) by way of explanation. Michael Lind, for instance, contends that the "weakness of the Clinton administration . . . is the result not of long-term trends but of a peculiar conjunction of politics and personality" and that the next president, especially if a Republican, "will be handed the Nixonian imperial presidency, with most of its powers intact and with a few new prerogatives added."¹⁶ I rather doubt it. While the political context may have hastened and dramatized the change, there is no "but for" relationship; George Bush would likely have faced much the same sapping of his freedom to act on national security matters, his strengths in the area notwithstanding. Barring an unforeseen and dramatic turn in world affairs that revives an identifiable and formidable antagonist (a resurgent Russia, an aggressive China), the new congressional fortitude will stick.¹⁷ Foreign policymaking will

16. Michael Lind, *The Out-of-Control Presidency*, NEW REPUBLIC, Aug. 14, 1995, at 18-19.

17. We may even witness more judicial activity in the area. Courts have long shied away from controversies of even remote international sensitivity, fearing the serious consequences of any missteps. Such consequences are no longer so grave in an interdependent world, and perhaps this judicial insecurity will diminish. The Supreme Court, however, has shown no sign of abandoning its restraint in the area.

become a duel of closer equals, one in which the White House may find itself increasingly on the defensive.

II.

History, of course, reminds us that executive branch dominance is not a necessary condition in the navigation of our external affairs. In *Presidential War Power*,¹⁸ Louis Fisher gives us a usefully concise narrative of the course of interbranch relations respecting the use of force from the Barbary pirates to Bosnia. It is an appropriate focus. Fisher builds on his earlier pioneering work that itself established the centrality of practice to the development of constitutional allocations of institutional powers.¹⁹ Constructive debate on contested issues cannot be pursued without an adequate account of historical precedent, to be applied in much the same way as are judicial ones in more quotidian contexts.

Fisher takes such precedent and develops a brief for congressional power. In Fisher's view, Congress must approve the use of any military force, save for when the President faces a genuine emergency in the nature of an attack. There is by now a dog-eared file of foundational evidence to that effect in the constitutional debates and contemporaneous writings of the Founders, and Fisher dutifully recites this data. It does tend to support substantial legislative participation on the road to war.²⁰ The

See, e.g., *Barclays Bank PLC v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2284-85 (1994) ("This Court has no constitutional authority to make the policy judgments essential to regulating foreign commerce and conducting foreign affairs.").

18. LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995).

19. See, in particular, LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* (1975), which sets forth a nuanced historical account of the executive role in the budgeting process. Among other things, Fisher has also developed a model of "coordinate construction" of the Constitution among the three branches of the federal government, eschewing the conventional "last-word dogma" under which the Supreme Court is assumed definitively and exclusively to define constitutional meanings. LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 242-44 (1988).

20. Hence, one oddity of the academic debate surrounding war powers: where progressives usually eschew text and old world meanings, here they vaunt original constitutional intent. See, e.g., Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672 (1972). For a significant reappraisal of the Framers' conception of war powers, see John C. Yoo, *War Powers: The*

Framers were plainly concerned about excessive concentrations of power, and the constitutional text demonstrates a clear intent to separate at least the sword and the purse. Whether this text, even as illuminated in the secondary material, categorically dictates legislative supremacy is another matter;²¹ as is true in this area as with others, many issues are left unresolved if only by force of changed circumstance.

The early practice likewise favors those who would have a strong Congress. As Secretary of State, Jefferson was almost supine in ceding to Congress the power to determine a course of action with respect to the Barbary powers.²² The so-called Quasi-War with France was authorized by Congress, as, of course, was the War of 1812. Polk forced the country's hand by provoking conflict with Mexico, an act first ratified by congressional declaration but subsequently condemned in a House resolution declaring his actions to have been unconstitutional. Although Lincoln challenged the Constitution on any number of fronts, Fisher rightly distinguishes the Civil War context as *sui generis*, in effect amounting to an invasion (which even Fisher agrees allows for unilateral executive action). The Spanish-American War was not only authorized but, in effect, pressed on President McKinley by a jingoist legislature.

But there were a number of lesser nineteenth-century engagements that were undertaken without congressional authorization. Though these engagements are largely ignored in Fisher's survey (with the exception of the bombardment of Greytown in 1854)²³ and are individually of no great historical or constitu-

Continuation of Politics by Other Means, 84 CAL. L. REV. (forthcoming Mar. 1996) (articulating an originalist position for expansive executive war powers).

21. As Justice Jackson said of the debate over original intent in the national security context: "[The] partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. . . . A Hamilton may be matched against a Madison." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 & n.1 (1952) (Jackson, J., concurring).

22. See FISHER, *supra* note 18, at 24 (quoting Jefferson's conclusion that "[u]pon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce").

23. *Id.* at 35-36. For a list of 215 instances in which the U.S. has deployed forces abroad into conflict or potential conflict, see CONGRESSIONAL RESEARCH SERVICE REPORT, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-1989

tional consequence, they did mark the beginning of a practice that has continued until the present day, to the point that, as custom, it has now come to reflect the law. The twentieth century is of course rife with such examples of presidential exercises—ones which, if only because they echo in the experience of our own lifetimes, cannot go similarly neglected in any treatment of constitutional war powers.

From the turn of the century, military engagements abroad increased in frequency, intensity, and duration. The big ones—the real wars, namely World Wars I and II, Korea, Vietnam, and the Persian Gulf—were all authorized by Congress before or soon after they began.²⁴ A great many of the littler ones were not, most of them undertaken in the name of American lives, property, and honor, or by way of protecting our regional interests under cover of the Monroe Doctrine. There were a litany of expeditions, interventions, and occupations of Central American and Caribbean countries, including more and less recent military engagements in Haiti (from 1915 to 1934, and again in 1994-1995), Mexico (General Pershing's 1916 year-long pursuit of Pancho Villa), Nicaragua (almost continuously from 1909 to 1933, and again during the Reagan Administration), and the Dominican Republic (1916 to 1924, and again in 1965). In the years since World War II, there have also been military operations involving U.S. forces deployed to Lebanon (1958, and again in 1982-1983), Cuba (the Bay of Pigs), South Vietnam (the evacuation of U.S. nationals in 1975), Cambodia (the *Mayaguez* incident), Libya (the Gulf of Sidra raid), Iran (the failed hostage rescue operation), the Persian Gulf (during the so-called 1987-1988 Tanker War), Grenada, Panama, Somalia, and Haiti. None

(Ellen C. Collier ed., 1989), reprinted in THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 650-67 (2d ed. 1993).

24. Korea did lack prior authorization, enjoying subsequent ratification in the form of appropriations measures only. See Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 621-33 (1993). Korea can perhaps be distinguished on the grounds that the president there acted in response to an attack, thus implicating his generally accepted powers to repel invasions. See *Authority of the President To Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173 (1950) (contemporary justification of Truman's action "to repel the aggressive attack on the Republic of Korea").

of these efforts enjoyed express congressional authorization before the fact, and none was subject to so much as formal condemnation by way of congressional response.

Fisher does not ignore this string of presidentially inspired and executed operations, but he does not accept them either. As far as he is concerned, only one of these post-war episodes was justified—the evacuation of American nationals from Saigon, a case in which Congress failed to act even in the face of the city's imminent fall and an explicit request from President Ford for authorizing legislation.²⁵ He rejects the rest as an affront to the intended constitutional design.

Indeed, in Fisher's view, the consistency of practice contrary to that design cannot alter its contours. "Illegal and unconstitutional actions," he concludes, "no matter how often repeated, do not build a lawful foundation."²⁶ But it is very hard to argue with the full weight of history. The Republic seems, after all, to have survived these supposed transgressions, undertaken by a virtually unbroken string of presidents from both parties and, almost without exception, acquiesced to by Congress itself. Fisher is reduced to arguing the policy merits of presidential forays on the military horizon, and by appearances here they were all folly. In fact, some were, some were not. The same can be said, however, of those engagements that did enjoy congressional authorization. Indeed, our biggest military folly of all—Vietnam—is generally recognized to have enjoyed a constitutionally valid congressional imprimatur.²⁷ Fisher offers no systematic evidence that missions launched solely on executive initiative have fared any worse than those approved or encouraged by Congress or that they are, in his characterization, any less "attractive" precedents for the use of force.²⁸

Moreover, if one accepts a division of war powers less absolute than in Fisher's conception, it is remarkable how consistently

25. FISHER, *supra* note 18, at 186. Fisher attempts to excuse Congress's inept handling of the matter by finding it to have been "politically unreasonable and unrealistic to expect Congress to complete legislation on such an explosive issue in [the] nine days [following Ford's request]." *Id.* at 135.

26. *Id.* at 191.

27. See, e.g., ELY, *supra* note 6, at 12.

28. FISHER, *supra* note 18, at 188.

the constitutional design has been respected. He correctly indicts the nonchalant use of the long list of unilateral presidential engagements, calling for the examination of specific episodes. The fact is, however, that recent interventions involving relatively insubstantial commitments (Grenada, Panama, and Haiti, for example, not to mention President Clinton's launching of a few cruise missiles into Baghdad in response to Iraq's assassination attempt on former President Bush) were all consistent with earlier practice and are now themselves a part of it. Presidents can and, in some cases, should initiate engagements of a limited nature. When it comes to real wars—ones that have involved a commitment of sustained and substantial nature—presidents have sought and secured legislative approval. When Congress has mandated phased withdrawals, as was the case with the 1982-1983 Lebanon deployment and, more recently, in Somalia, presidents have complied. That is all the Constitution requires, and history proves it.²⁹

Fisher closes his discussion of recent events by asking whether Congress will "accept [a] subordinate, second-class role" on the warmaking front, and whether the American people will be satisfied with procedures that bypass legislative deliberation.³⁰ The answer today would seem a resounding "no." In this sense, Fisher himself may be guilty (as are the generals) of fighting the last war, or the old wars. Indeed, this book may be the final salvo in a debate that has raged for almost three decades.³¹ Little will be gained from scholars asserting a greater role for Congress now that Congress is successfully asserting that role for itself.

29. For an elaboration of my views of the role of history in the making of the law of war powers, see Spiro, *supra* note 6, at 155-64.

30. FISHER, *supra* note 18, at 161.

31. Even if the Vietnam War did not mark a turning point in the actual power of Congress in national security decisionmaking, it certainly did with respect to academic debate. Before the war, there was little in the way of scholarly commentary on the issue; beginning with a symposium edition of the *Yale Law Journal* in 1966, see Symposium, *Legality of United States Participation in the Viet Nam Conflict*, 75 *YALE L.J.* 1085 (1966) (articles by Richard Falk, Neill Alford, and the Department of State's Office of the Legal Adviser), war powers has been the focus of much academic work. For citations to recent legal writings in the area, see Spiro, *supra* note 6, at 1340 n.7.

The primary lever for the new congressional boldness is the appropriations power, and that is the subject of William Banks and Peter Raven-Hansen's *National Security Law and the Power of the Purse*.³² The strength of this book is its clarity in dissecting what can be a quintessentially dry subject—the budgeting process—made only somewhat more sexy by the national security context. This Banks and Raven-Hansen undertake without any apparent institutional partiality, in a highly effective treatment of a subject that will likely grow only more important.³³

They, too, start with an historical overview of the issue, tracing the division of purse and sword from its English antecedents through the colonial and early national practice during which legislatures and the Continental Congress in fact exercised “close legislative control of national security decisions by appropriation.”³⁴ If there is one matter on which the constitutional text seems relatively clear, it is with respect to congressional primacy over military spending.³⁵

But for some of the same reasons that Congress has failed consistently to exercise its putatively exclusive powers under the War Clause, it has also found it consistently difficult to manage military operations through its spending powers. Even early in the Republic, when our foreign engagements were limited by our relative international weakness, it was not always possible to move the appropriations process with flexibility sufficient to meet international exigencies. Presidents soon found mechanisms by which to bypass specific appropriations for specific operations, in the form of lump-sum national security appropriations, discretionary executive transfers between national security programs and accounts, and after-the-fact appropriations for national security concerns requiring immediate attention. These practices established a “template,” in the authors’ characterization, for budgetary maneuvers that are still used by presidents

32. WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994).

33. Banks and Raven-Hansen themselves acknowledge a deep debt to Fisher, whose *Presidential Spending Power* is a classic in the area. See BANKS & RAVEN-HANSEN, *supra* note 32, at vii.

34. *Id.* at 26.

35. See U.S. CONST. art. I, § 8, cls. 12-13.

today.³⁶ In a budget measuring in the hundreds of billions of dollars, the executive is able to find the funds it needs, unless it needs billions at one time. When unilateral presidential efforts in the way of what might be called "strike operations" (Grenada, Panama, the Gulf of Sidra, Desert One) are under contemplation, funding has proved no obstacle.

That is, unless Congress specifically restricts the expenditure of appropriated funds on any particular undertaking. Here one faces the question of appropriations restrictions and, perhaps more seriously, that of appropriations riders, added by amendment to general appropriations measures. The latter have posed a longstanding difficulty, to the extent that riders can attach with relative ease and in great numbers (appropriations being notoriously vulnerable to legislative logrolling). Pet projects, but also pet peeves, find their way into the budget bill without anything approaching majority consideration, much less support. Once included in the budget bill, they have been virtually assured passage insofar as the annual measure is, as a practical matter, veto-proof.³⁷ And of course appropriations do not only implicate spending decisions; they often have everything to do with policy. The danger is that the ordinary legislative process will be swallowed by the budget's alone.

Congress has itself attempted to address this prospect through its own rules. From the beginning, appropriations have had to work from authorizations, the latter connecting the expenditure of funds to some underlying nonfiscal enabling purpose. In practice, this has resulted in the division of power between the appropriations committee on the one hand, and the committees with substantive responsibilities in the area in which the funds are to be expended on the other. In the foreign affairs context, for instance, this means that spending authorization measures will first come out of the Senate Foreign Relations and House

36. BANKS & RAVEN-HANSEN, *supra* note 32, at 33.

37. President Clinton's recent veto of a continuing resolution, motivated at least in part by objectionable riders, may in this respect prove a watershed development. See *Battle over the Budget*, N.Y. TIMES, Nov. 14, 1995, at A1. In the wake of the veto, Congress was quick to delete unrelated provisions (relating, for instance, to abortion and nonprofit tax exemptions), in effect conceding the legitimacy of the President's position.

International Relations committees, measures enacted into law before the appropriations process is itself undertaken. As for riders, the House has tried to combat them by proscribing their introduction during floor debate, the Senate by prohibiting amendments proposing general legislation not germane to omnibus appropriations bills.

These efforts have not met with great success. Most notably in the national security area, one finds the various Boland amendments of the mid-1980s restricting assistance to the Nicaraguan contras. The Boland measures emerged as riders to continuing resolutions rather than as general legislation. Banks and Raven-Hansen are of two minds on the process by which these restrictions were enacted. On the one hand, the limitations themselves bypassed careful committee consideration, were shaped "undemocratically" by a handful of members, and then were packaged in perhaps the most veto-proof—at least until President Clinton's recent display of institutional fortitude—of all spending measures, insofar as continuing resolutions avert imminent federal government shut-down. On the other, they may have represented some general consensus on an issue that had been considered in one form or another in several committees, in the wake of which the rider may have emerged "a relatively efficient mechanism" for accomplishing the objective.³⁸

In any event, Boland-type restrictions on the use of appropriated funds may emerge as the central battleground of national security law, a development that would highlight the shift in the interbranch balance of powers in the area. In the future, issues in the field are more likely to examine whether Congress, rather than the President, is overstepping constitutional bounds. With the precedent of Boland and other similar spending restrictions, Congress now understands that its most effective (and accepted) means to effect its national security preferences is through use of the purse. As Congress becomes bolder on the international front as a general matter, it can be expected freely to deploy restrictive appropriations by way of a policy tool.³⁹

38. BANKS & RAVEN-HANSEN, *supra* note 32, at 61.

39. Other possible levers by which Congress could, in effect, hijack the foreign policymaking process include the strategic use of its appointments power. In a recent

At least theoretically, that tool can be used to any object in constraining executive branch conduct. It has obvious practical application with respect to programs or operations that require substantial segregable costs, as with a military operation ("No funds available shall be expended with respect to military operations in or related to country X."). But the power may potentially apply to executive branch action involving negligible, undifferentiated costs as well, say, the making of a phone call or the salary associated with any at-office attention of an executive branch official. In this conception, Congress could dictate any foreign policy position by use of the "salary and expenses" logic, as in: "No funds available shall be expended by the United States to advocate policy X in bilateral communications or contacts or in the context of international organizations."

Of course, the fact that it can be done does not make it constitutional. On the one hand, there are those who think the appropriations power is merely "procedural" in nature, one that adds nothing to Congress's substantive allocations.⁴⁰ In this view, the "no funds available" language would do nothing to save a measure otherwise beyond legislative capacities. On the other hand, one might argue that assertion of spending power, even in its salaries and expenses mode, should trump any executive branch rejoinder of lesser pedigree.⁴¹ Banks and Raven-Hansen take a sensible middle ground, proposing a test under which one "must ordinarily weigh the extent to which the restriction prevents the president from accomplishing constitutionally assigned functions against the need for the same restriction to promote objectives within the authority of Congress."⁴²

By way of a demonstrative application, the authors find the

notable example, Senate Foreign Relations Committee Chairman Jesse Helms refused to consider the confirmation of dozens of senior foreign policy nominations while he pressed his position on the essentially unrelated issue of State Department organization. See Elaine Sciolino, *Awaiting Call, Helms Puts Foreign Policy on Hold*, N.Y. TIMES, Sept. 24, 1995, at A1.

40. See Panel Discussion, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 623, 629-31 (1990) (remarks of then-Assistant Attorney General William Barr).

41. See, e.g., Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1362 (1988) ("[T]here is no de minimis exception to appropriation limitations.").

42. BANKS & RAVEN-HANSEN, *supra* note 32, at 146.

Boland amendments to have been constitutional, except to the extent that they may have infringed on the president's prerogatives to gather intelligence and to use force in protecting Americans abroad, both being powers of longstanding acceptance, if not enjoying textual support.⁴³ Otherwise, they argue, these restrictive measures were well grounded in Congress's power to grant letters of marque and reprisal, its power to define and punish offenses against the law of nations (especially as undertaken in the Neutrality Act of 1794⁴⁴), and its power to raise and support armies. This seems to me a reasonable assessment of the congressional effort to constrain activities with respect to the Contras. The Reagan Administration's subsequent flouting of these constraints cost it at least some institutional and political legitimacy, itself evidence that the constraints were mostly consistent with Congress's constitutional capacities.

Other cases, however, will not be so easy. All balancing tests suffer a measure of inexactitude, but this will be particularly true in an area that lacks refined constitutional or judicial direction. To pose one not too implausible hypothetical: if Congress prohibits the expenditure of funds with respect to military operations in a Grenada-type scenario, could the President nonetheless proceed with an intervention to protect U.S. citizens in that country? What of a "salaries and expenses" restriction that directed the President to pursue a particular policy in his dealings with foreign officials, up against his "power of diplomatic communication"?⁴⁵ A funding prohibition barring the assignment of U.S. troops to foreign command, in possible conflict with the President's role as Commander in Chief?

These and other possibilities will have to be muddled through as they come along. Important to constitutional outcomes will be the stance of each branch and to what extent they stand up to fight for their institutional rights, especially in the early rounds of this transformed contest. In this respect, the recent controversy over the Bosnian arms embargo is instructive. Congress managed to pass a bill of unprecedented pretensions, directing the

43. *See id.* at 148-54.

44. 18 U.S.C. §§ 960-962 (1994).

45. *See* BANKS & RAVEN-HANSEN, *supra* note 32, at 164-65.

President not only to lift the embargo with respect to the Bosnian Muslim forces as a matter of U.S. law but also to work within the U.N. Security Council to promote the removal of the embargo on an international basis.⁴⁶ In response, President Clinton exercised the first veto of his administration on the ground, among others, that it unconstitutionally infringed on his foreign affairs power.⁴⁷ Congress did not override the veto. The upshot: the President established a limit to congressional assertiveness, to which Congress has acquiesced, at least for now. If he or any other President accepts such a measure out of institutional or political weakness, it will no doubt provide an opening that Congress will subsequently exploit. A single precedent can quickly give rise to regular practice.⁴⁸

Banks and Raven-Hansen's offering will serve as a useful primer to a key element of the transformed national security decisionmaking context. It cannot provide all the answers because it is not yet clear what the questions are. There can be little doubt, however, that, in coming years, Congress is likely to flaunt the power of the purse much more visibly than in the recent past. Here we will find the new wars.

46. See S. 21, 104th Cong., 1st Sess. (1995). The so-called Bosnia and Herzegovina Self-Defense Act was not grounded in Congress's spending power, perhaps because it enjoyed sufficient prominence and bipartisan support to be passed as freestanding legislation. Lacking any tie to appropriations, it represented a full frontal attack on core presidential prerogatives to direct the nation's foreign relations. By contrast, more recent efforts to require congressional approval of any peacekeeping operation in Bosnia have been grounded in the spending power. See H.R. 2606, 104th Cong., 1st Sess. (1995) (prohibiting the expenditure of funds on Bosnia deployment except as expressly appropriated by Congress for such purpose).

47. See 141 CONG. REC. S12,326 (daily ed. Aug. 11, 1995) (reprinting Clinton's veto message).

48. In this respect, even though President Clinton received the congressional "expression of support" that he sought respecting the Bosnia peacekeeping deployment, he may have set a precedent to the effect that such support is constitutionally required. See Todd S. Purdum, *Clinton Moves To Gain Room on Bosnia*, N.Y. TIMES, Oct. 22, 1995, § 1, at 15. This development represents a significant change in the law, to Congress's advantage. Presidents have not in the past acknowledged a constitutional requirement to secure such advance approval before committing troops in similar situations. See Spiro, *supra* note 6, at 1353-55 (noting the constitutional significance of the Somalia, Lebanon, and Haiti episodes).

III.

But the new wars—of course I speak of proverbial conflicts between the branches of our own government—are not without their own precedents. There have been long stretches of our history in which Congress has been the dominant force in federal governance, in foreign as well as domestic affairs. These periods, including most notably the late decades of the nineteenth century and the interwar years of the twentieth, found Congress successfully constraining presidential management of the nation's foreign relations. They were times in which America's international presence and commitments were kept at a relative minimum.

They are also times that have been almost completely ignored in recent war powers and foreign relations law scholarship.⁴⁹ This lack of interest is easily explained: in the Cold War years, the years of clear presidential primacy, historical examples of congressional dominance were of little immediate relevance. When the commentators were in the midst of fending off various presidential abominations, most notably unilateral uses of force, it was of no use to them to cast around in decades in which presidents sat back and did nothing at all. The aim, well-demonstrated by Mr. Fisher's book, has been to show how Congress resisted those who have tried to act on their own.⁵⁰ To no real surprise, *Presidential War Power* has only two pages on the congressional posture of the interwar years and not even a paragraph on events between the Civil and Spanish-American Wars.

In light of the changed context, it may now be time to turn at least a tentative eye to these and other periods long neglected, for their lessons may now be more apposite. No doubt they include examples of congressional overreaching on the foreign relations and national security fronts. Perhaps in analogue to

49. With few exceptions. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 68-99 (1973) (recounting the congressional supremacy of the late nineteenth century).

50. This observation applies equally to the few who have advocated an expansive role for the executive branch. Periods of congressional dominance have been of no use to them either, as they attempt to demonstrate how Congress did *not* resist unilateral presidential undertakings.

the emerging use of the purse in the area, for example, the Senate refused to ratify any major treaty for a generational stretch of thirty-one years, from 1867 to 1898, as elegantly documented in W.S. Holt's 1933 study, *Treaties Defeated by the Senate*.⁵¹ This remarkable performance was in part the result of political partisanship, in part the result of the weak presidencies of the period. But treaty making was here also the victim of institutional aggression on the Senate's part. As Secretary of State Richard Olney wrote in explaining the defeat of an important arbitration treaty with Great Britain, notwithstanding its public popularity: "[I]t must be borne in mind that the Senate is now engaged in asserting itself as the power in the national government. It is steadily encroaching, on the one hand on the executive branch of the government, and on the other on the House of Representatives."⁵² Wilson later spoke of the Senate's "treaty-marring power" during this stretch: "It showed the executive in the right, but feeble and irresolute; the Senate masterful, though in the wrong."⁵³

A glimpse at interbranch relations during the late nineteenth century thus suggests the possible dangers of congressional domination in the sphere of foreign relations. The period warrants renewed attention. For political scientists, it would be useful to review the foreign policy consequences of the Senate's noncooperation in the treaty sphere. For constitutional lawyers, it would be important to determine how presidents during those years responded to what was apparently a practice of congressional obstructionism. Insofar as the late nineteenth century may have produced the innovation of the executive agreement—subject to approval of both houses but only by majority—one suspects that the Senate treaty veto was not accepted as unbounded.⁵⁴ The interwar years of this century might yield

51. See W. STULL HOLT, *TREATIES DEFEATED BY THE SENATE: A STUDY OF THE STRUGGLE OVER THE CONDUCT OF FOREIGN RELATIONS* 102-64 (1933).

52. *Id.* at 159 (quoting a May 14, 1897, letter from Olney to Henry White).

53. WILSON, *supra* note 3, at 50.

54. I say "may" insofar as the matter is not free of controversy. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 832-36 (1995) (challenging the conventional view that the annexations of Texas and Hawaii marked the first significant use of the executive agreement mechanism).

similar patterns. Perhaps in this history there lie parallels for episodes just over our own horizon, episodes in which constitutional lawyers will want to orient their defensive artillery not toward the White House, but rather toward the Hill.

I am not sanguine that such investigation will be undertaken in the near future, for two reasons. First, it will take at least several years (at least one presidential election, and probably more than one, if Bill Clinton is reelected) for the contours of the new arrangement to crystallize. Scholars may hold off from substantial research efforts that could be scuttled by subsequent developments. It is not, after all, impossible that this or a future president will regain Cold-War-type primacy. Second, the most prominent voices in the intense debate of recent decades have all locked into positions that strongly advocate integral legislative participation in national security decisionmaking. It will be difficult, though not unprecedented, for these commentators to turn back on their earlier writings.⁵⁵ In the face of the political realignment of the branches, these voices may now simply go silent. Commentators who have long backed the powers of a Democrat Congress, or of a Republican White House, are unlikely to pursue their paradigms with the same vigor, if at all; their sentiments were not merely institutional, but also political. The academic debates over war powers could be at an end, or at least an interlude.

Even from a blank slate, it would not be easy to take on the study of times of congressional dominance. They were times in which the United States did not shine on the international stage, times in which the U.S. did not assume substantial international responsibilities, times in which the U.S. retreated into home affairs that were not themselves of any public distinction. They were not glory days, and therein may be the broader les-

55. A prominent example of such an academic about-face was Arthur Schlesinger, Jr.'s recantation of his initial support of President Truman's unilateral engagement in Korea. See FISHER, *supra* note 18, at 89-90. Politicians appear a good deal more flexible on the issue; Republicans who used to vaunt executive power now preach the virtues of the legislative check, and President Clinton's positions on war powers issues could have been straight out of Reagan and Bush Administration constitutional playbooks. See, e.g., Helen Dewar, *Now It's the GOP Asserting Role for Congress on Foreign Policy*, WASH. POST, Oct. 26, 1993, at A20.

son. Can we have a strong nation without a strong Chief? Or is it, rather, that when strength is not demanded we will not permit it.