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ABDICATION BY ANOTHER NAME: AN ODE TO LOU FISHER

NEAL DEVINS*

Let me start with a confession. I find it a bit daunting to write a response to Lou Fisher's *War and Spending Prerogatives: Stages of Congressional Abdication*.¹ Nineteen years ago, while working on a law school seminar paper on budget policy, I took a chance and wrote Lou Fisher, one of the leading scholars in the field. Lou took an interest in the paper and in me. Five years later, an evolved version of that seminar paper and a paper I coauthored with Lou on the item veto helped convince the William and Mary law school to take a gamble and hire me. Over the past fifteen years, I have had numerous occasions to critique Lou's works. But these critiques were written for an audience of one.

After this build up (suggesting that I am going into attack dog mode), I am about to let the audience down. I agree with an awful lot of what Lou has to say about the critical role that institutional competition plays in our system of government and, with it, the horrible price our nation pays when members of Congress place self interest ahead of all else. At the same time, Lou goes too far in arguing that Congress has abdicated core powers and, in so doing, placed democracy and self government at risk.²

* * *

No doubt, were the power of the purse and the power to declare war transferred to the President, Congress's ability to protect itself from outside "encroachments" would be jeopardized.³ Indeed, stated at this level of generality, pro-executive scholars would join ranks with Lou Fisher in arguing that Congressional abdication of its war and appropriations powers would undermine the separation of powers.⁴

* Goodrich Professor of Law, College of William and Mary. This observation is an outgrowth of comments made at the "Congress: Does It Abdicate Power?" Symposium, St. Louis University School of Law. Thanks to Joel Goldstein for inviting me to the Conference.

1. Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7 (2000).

2. *Id.* at 7.

3. THE FEDERALIST NO. 51, at 356. (James Madison) (B. Wright ed., 1961). For the framers: "Ambition must be made to counter ambition." *Id.*

4. Consider, for example, John Yoo, a scholar whose arguments resonate with defenders of a strong presidency. Although claiming that Congress's power to declare war has nothing to do with the waging of war (including the decision to start a war), Yoo also argues that "the Framers

But how does one define abdication?⁵ Does it require Congress — through a constitutional amendment proposal — to formally transfer core legislative responsibilities to the President? Alternatively, is it enough for Congress to enact legislation which shifts some legislative power to the President? What then of custom, say Congress's practice of deferring to presidential military initiatives? Finally, what about instances where Congress utilizes budgetary procedures which may result in its following the President's lead? For example, did Congress abdicate power when it centralized budgetary policymaking and, in so doing, embraced supply side economics during the Reagan years?

For Lou Fisher, I think, the answer to all these questions is "yes." All of these categories are referred to in his paper as manifestations of Congress's abdication of its appropriations and war powers. Lou makes several nice points in advancing his argument, especially when it comes to Congressional war powers. But Lou's definition of abdication, ultimately, is too expansive. It discounts the ways that Congress participates in these disputes. Consider, for example, budgetary policymaking. In here, Congress's institutional interests and the individual interests of its members are often aligned. Congress remains a vital force in shaping budgetary policy. In contrast, the individual and institutional interests of Congress are rarely aligned on war powers. Consequently, I think, presidents are able to run roughshod over the constitutional design (although not quite as rough shod as Lou would have us believe).

I. THE PRESIDENTIAL ADVANTAGE

Presidential power is much more than the "power to persuade."⁶ Thanks to the singularity of the office, Presidents are well positioned to advance their interests before Congress, the nation, and the world. Critics of the modern day presidency, including Theodore Lowi and Jeffrey Tulis, put it this way: "[R]egularly 'go[ing] over the heads' of Congress to the people at large," the powers of the American people have been invested in a single office, "making

intended Congress to participate in war-making by controlling appropriations." John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295 (1996).

5. Commenting on "Congressional Abdication: War and Spending Powers," a paper that Lou presented at St. Louis University last year, Doug Williams provided an insightful discussion of how the line separating delegation (something that Lou considers an essential part of modern government) and abdication "remains blurred." Douglas R. Williams, *Demonstrating and Explaining Congressional Abdication: Why Does Congress Abdicate Power?*, 49 ST. LOUIS U. L.J. 1013, 1014 (1999).

6. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENCY*, at X (1960).

[it] the most powerful office in the world.”⁷ Even defenders of presidential power recognize that Presidents are motivated to seek power and have the tools to accomplish the task. “The opportunities for presidential imperialism are too numerous to count” according to Terry Moe and William Howell, “because, when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.”⁸

When presidents act, moreover, it is up to the other branches to respond. In other words, presidents often win by default — either because Congress chooses not to respond or its response is ineffective. Furthermore, by end running the burdensome and oftentimes unsuccessful strategy of seeking legislative authorization, unilateral presidential action expands the institutional powers and prerogatives of the presidency. In other words, the President’s personal interests and the presidency’s institutional interests are often one and the same. Witness, for example, executive orders: between 1973 and 1998, presidents issued roughly 1,000 executive orders. Only thirty-seven of these orders were challenged in Congress. More striking, only three of these challenges resulted in legislation.⁹

Presidents, of course, sometimes need Congress to enact legislation. When Bill Clinton introduced his health care initiative, its fate rested in the hands of Congress. Here, Congress had the upper hand. Rather than having to do battle with the President on his own field (enacting legislation that is subject to a presidential veto), it is up to the President to overcome the burden of inertia — cajoling Congress into action. As such, modern day presidents often advance their agenda through unilateral action, not legislative strategies.¹⁰

Unlike the presidency, the individual and institutional interests of members of Congress are often in conflict with one another. While each of Congress’s 535 members has some stake in Congress as an institution, parochial interests will overwhelm this collective good. In particular, members of Congress need to be reelected to advance their (and their constituents’) interests. For this reason, lawmakers are “trapped in a prisoners’ dilemma: all might benefit if they could cooperate in defending or advancing Congress’s power, but each has a strong incentive to free ride in favor of the local constituency.”¹¹

7. JEFFREY K. TULLIS, *THE RHETORICAL PRESIDENCY* 4 (1987); THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED*, at x-xi (1985).

8. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 138 (1999).

9. *Id.* at 165-66.

10. *See generally* RICHARD NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983). *See also* NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* 97-120 (1996) (commenting on abortion).

11. Moe & Howell, *supra* note 8, at 144.

Nowhere is the gap between presidential and legislative incentives starker than war powers. To start with, as Lou Fisher and others have shown, the constitutional design envisions (at a minimum) a significant congressional role.¹² Notwithstanding this clear constitutional mandate, Congress has very little incentive to play a leadership role. “Rather than opposing the President on a potential military action,” members of Congress “find it more convenient to acquiesce and avoid criticism that they obstructed a necessary mission.”¹³

Presidents, in contrast, often have strong incentives to launch military strikes. Presidents achieve status, fame if you will, by leading the nation into battle.¹⁴ Unwilling to overcome the burden of inertia and rein in the President, Congress typically stands by on the sidelines (or worse yet proclaims that the President is the sole organ of military affairs).¹⁵ In this way, the institutional powers of the President expand through every fame-inducing exercise of self interest.

II. RETHINKING THE PRESIDENTIAL ADVANTAGE

The singularity of the office (combined with the tools to execute, that is, put programs into effect) allows presidents to take unilateral action. But presidents oft times are dependent on other parts of the government and the people. When this happens, the individual interests of the President may conflict with the institutional interests of the presidency. In such battles, presidents invariably place their own interests ahead of the institution.

Take the case of George Bush, a president who launched an “unprecedented effort to implement a serious and systematic legal strategy for

12. *See generally* LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCHES?* (1992). Indeed, legal academics who served as presidential appointee’s in the Justice Department’s Office for Legal Counsel do not disagree with this claim. *See, e.g.*, John O. McGinnis, *The Spontaneous Order of War Powers*, 47 *CASE W. RES. L. REV.* 1317, 1327 n.36 (1997); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *CORNELL L. REV.* 695 (1997); Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 *U. MIAMI L. REV.* 107 (1995). *But see* H. Jefferson Powell, *The Founders and The President’s Authority Over Foreign Affairs*, 40 *WM. & MARY L. REV.* 1471 (1999).

13. FISHER, *supra* note 12, at 1006. *See also* Dante Fascell, *War Powers and Congress*, 50 *U. MIAMI L. REV.* 121, 124 (1995) (commenting on leadership in Congress).

14. For this very reason, the framers intended that Congress play the dominant role in initiating military actions. *See* Treanor, *supra* note 12.

15. Presidents likewise have succeeded in side-stepping the Constitution’s demand that Congress ratifies treaties. Specifically, by negotiating agreements with foreign nations (executive agreements), presidents accomplish through unilateral action what might not be accomplished through the constitutional design. *See also* Moe & Howell, *supra* note 8, at 163-64.

the defense of the presidency.”¹⁶ Notwithstanding this effort, the Bush administration regularly sacrificed institutional interests in order to advance incremental policy objectives. To quiet a controversy in Congress over Reagan administration efforts to kill affirmative action, for example, the Bush administration did not exercise its authority to speak the Federal Communications Commission’s voice before the Supreme Court. Instead, it cut a deal to allow the Commission to represent itself. As a result, while Commission attorneys vigorously defended race preferences, the Solicitor General (representing the United States) filed an amicus brief challenging the constitutionality of Commission policies.¹⁷ Far more significant, through the so-called “Baker accord,” four committees of Congress as well as party leaders were given veto power over the fractious issue of funding the Nicaraguan Contras.¹⁸ Although White House counsel C. Boyden Gray objected to this level of involvement by Congress in foreign policy, especially through what seemed to him an unconstitutional legislative veto, the President cared more about funding the Contras than defending his institutional prerogatives.¹⁹

The Baker Accord is telling for other reasons. It calls attention to Congress’s penchant for reactive “fire alarm” oversight. As public choice theory suggests, lawmakers often devise legislation at the behest of powerful interest groups. When there is a dominant interest group, legislation will often specify the devilish details of administration. Yet, since the details of administration cannot always be anticipated (when there is a dominant group) and since interest groups often compete with each other, legislation is often ambiguous. As such, oversight enables lawmakers to respond to ongoing constituency pressures. In other words, lawmakers, by necessity and design, may well establish “a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), charge executive agencies with violating congressional goals, and seek remedies from agencies, courts, and Congress itself.”²⁰

16. Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 21 (1995).

17. This episode is recounted in Neal Devins, *Unitariness and Independence: Solicitor General Control of Independent Agency Litigation*, 82 CAL. L. REV. 255, 293-97(1994).

18. See generally LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1988); William Safire, *Taking Baker to the Cleaners*, N.Y. TIMES, May 21, 1990, at A21.

19. See David Hoffman & Ann Devroy, *Bush Counsel Contest Contra Aid Plan; Gray Feels Pact with Congress May Infringe on Presidential Power*, WASHINGTON POST, March 26, 1989, at A5; Lund, *supra* note 16, at 64-66.

20. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). See also Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984).

Witness the “Baker Accord.” Rather than reach a firm decision on how much aid could go to the Contras, Congress established procedures which allowed it to play a reactive role.²¹ If constituency pressures supported continuing funding, the committees would not exercise their veto. If continuing funding proved politically problematic, however, the committees could exercise their veto without having to do battle with the White House. In so doing, Congress minimized the cost of decision making.

Another example of reactive congressional oversight is appropriations riders. By forbidding the expenditure of appropriations on activities that Congress disapproves of, appropriation riders allow Congress to derail presidential initiatives (without enacting freestanding legislation setting forth congressional policy).²² Typically, riders limit domestic policy initiatives. But Congress has also limited military initiatives this way, most notably during the Vietnam War.²³

Here, I think, is where Lou may overstate his claim about Congress’s abdication of war making power. *First*, rather than play no role, Congress may prefer to play a reactive role.²⁴ In particular, through appropriations, treaty ratifications, confirmations, and other types of oversight, Congress is very much in the business of shaping military strategy.²⁵ *Second*, when there is a real risk of significant casualties, Presidents may well turn to Congress for authorization. The “contemporary President,” as Lou observes in his paper, is well equipped to wage war without Congressional authorization because “military technology now enables Presidents to wage war with few casualties.”²⁶ Indeed, not a single U.S. casualty resulted from either 1998 air strikes against Iraq or the 1999 attacks against Serbia. Under these circumstances, Presidents can wage little wars without fearing the ire of a reactive Congress.

21. See WALSH, *supra* note 18.

22. See generally Neal Devins, *Regulation of Government Agencies through Limitation Riders*, 1987 DUKE L.J. 456 (1987).

23. See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1312-14 (2d Cir. 1973) (discussing congressional attempts to limit authorization of bombing in Cambodia), *cert. denied*, 416 U.S. 936 (1974).

24. This is not to say, however, that Congress does not pay a heavy price for playing a reactive, not leadership, role. Aside from making a mockery of the Framers’ design, Congress may find it difficult to intercede. For example, the impulse to rally round the troops may translate into ineffectual oversight. Lou’s chronicling of Congress’s ever diminishing role in war powers buttresses this conclusion.

25. A recent example is the Senate’s rejection of a treaty banning the testing of nuclear weapons. See Eric Schmitt, *Senate Kills Test Ban Treaty in Crushing Loss for Clinton*, N.Y. TIMES, Oct. 14, 1999, at A1. Moreover, through its confirmation power, Congress (especially during the Clinton years) has affected military policymaking. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (forthcoming).

26. See Fisher, *supra* note 1, at 50.

In contrast, Presidents may see the need to seek congressional approval when American lives are on the line. For example, notwithstanding all his bravado, George Bush *did* seek Congressional approval before going to war against Iraq. Here, the President may fear being blamed for recklessly endangering American lives and, as such, may seek cover in congressional action.²⁷ Needless to say, the President's dominant role in military affairs, party loyalty, and the President's ability to send a singular message to the people (through press coverage and speeches) will probably allow the President to get his way with Congress.²⁸ Nevertheless, I would draw a line between presidential advantage and congressional abdication.

III. THE CONGRESSIONAL ADVANTAGE

What then about the budget? Here, the institutional interests of Congress and the self interests of its members should coalesce. Specifically, members have a strong interest in rewarding their constituents through appropriations. And when members of Congress control the appropriations process, well, the power of Congress itself is strengthened. Moreover, unlike military strikes (where the President can act without Congressional authorization), Congress cannot be shut out of the appropriations process. It must enact a budget. In other words, the President's agenda control advantage on budgetary matters is, at best, a muted one.

So much for theory. According to Lou, Congress has abdicated its control over the appropriations process. In support of this proposition, Lou cites the following evidence: (1) Members of Congress depict themselves as budget dunces and, more significantly, have enacted legislation (Gramm-Rudman-Hollings; Line Item Veto Act of 1996) which formally transfers some of their appropriations power; (2) Presidents, although submitting budgets at least as large as Congress, have waged a successful rhetorical campaign in which they depict themselves as committed to fiscal restraint; (3) Centralization in budgeting — an outgrowth of the Budget Act of 1974 — has both advantaged the President in his negotiations with Congress and contributed to run away budget deficits.

27. As Lou points out, Bush claimed both that he did not need Congressional authorization and that, if Congress turned him down, he would have ordered troops into combat. See Fisher, *supra* note 1, at 27-28. I place little stock in these post-hoc claims. Had Congress voted him down, I suspect that Bush would have found the cost of waging war on his own authority too great.

28. Indeed, the more Congress defers to presidential initiatives, the harder it is for Congress to resist such presidential entreaties. Why? Well, Congress, the press, the people, and the President come to see war making as an executive function. See FISHER, *supra* note 12, at 980-83 (the press); *id.* at 977-80 (the Congress); Fisher, *supra* note 1, at 49 (the people); *id.* at 51-53 (the President).

Each of these three charges is significant and, I think, that Lou has done a good job in supporting each of these claims. But I do not think that Lou has shown that Congress has abdicated its authority on budgetary matters. To begin with, Congress, its appropriations committees, and its members are very much engaged in budgetary policy making. Although the Budget Act of 1974 embraced centralizing procedures (the creation of both the Congressional Budget Office and Budget Committees to oversee the budget process), power was not formally transferred from existing authorization, appropriations, or tax-writing committees.²⁹ Moreover, powerful members of Congress are well served by centralization. For example, in working out the specific terms of omnibus appropriations bills, the status and authority of party leaders is enhanced. Finally, presidential participation in budget summits, negotiations over the terms of omnibus and other appropriations measures, and the like is very much tied to the President's veto power. In other words, the constitutional design envisions a significant presidential role in budgetary and other lawmaking.

None of this is to suggest that the budget process works well. It may be that centralization in budgeting encourages Congress and the President to build their budget proposals around unrealistic assumptions and, in so doing, contributes to the national debt.³⁰ Also, while Presidents often make concessions to Congress in their budget negotiations, centralization makes it easier for the President to shape the budget. In FY 1988, for example, Ronald Reagan used his veto threat to preserve funds for anti-abortion counseling and for foreign assistance. More significant, Reagan pushed through a provision on Contra aid and the withdrawal of language codifying the fairness doctrine. Reagan, however, did have to swallow \$23 billion in tax increases.³¹

Effective presidential leadership in negotiating the terms of budget agreements seems a far cry from the outright transfer of Congress's power of the purse. What then of the 1985 Gramm-Rudman-Hollings Act and the Line Item Veto Act of 1996? Here, Congress did seem to relinquish some control of its budget making authority.

Under Gramm-Rudman, Congress proved it was no longer willing to trust either its own internal budgetary process or the President's. Through an automatic sequestration procedure, Congress sought to ensure that the budget conformed to statutorily specified deficit reduction targets.³² With deficit targets, automatic sequestration, and a formal OMB role in projecting deficits,

29. See ALLEN SCHICK, *CONGRESS AND MONEY: BUDGETING, SPENDING, AND TAXING* 78 (1980).

30. See Fisher, *supra* note 1, at 39, 60; Neal Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 393 (1990).

31. See Janet Hook, *Budget Deal Enacted at Last, Congress Adjourns*, 45 CONG. Q. WKLY. REP. 3183 (1987).

32. In 1990, deficit targets were abandoned in favor of caps on spending and increased taxes.

Gramm-Rudman certainly constrained Congressional discretion in budgeting. But Gramm-Rudman did not alter the fundamental budgetary balance of power: Congress helped set deficit reduction targets, it specified that the sequestration apply to both domestic and foreign spending, it exempted a number of social programs from the sequestration process, and it delegated much of the Act's implementation to an officer of Congress (the Comptroller General).³³ Moreover, in an effort to protect their spending priorities, appropriations committees and subcommittees worked hard to end run Gramm-Rudman's byzantine structure.³⁴ With that said, Congress's repeated claims that it could not be trusted to keep its fiscal house in order set the stage for item veto legislation.

At first blush, the Line Item Veto Act looks like a wholesale abdication of Congress's power of the purse. By allowing the President to rescind appropriations, Congress seemed to transfer its power both to set expenditure levels (Presidential rescissions effectively reduce appropriations levels) and budget priorities (the President could veto programs he disfavored while leaving untouched programs he favored). In practice, however, the item veto was more bark than bite. *First*, by identifying program priorities in unofficial and informal documents, Congress could communicate its preferences to agencies without subjecting its handiwork to presidential cancellations. Since agencies are unlikely to risk retaliation in subsequent legislative cycles, this informal mechanism would work as well as either statutory or committee report specifications.³⁵ *Second*, the aggressive use of rescission authority is not in the President's self interest (even if it enhances the power of the presidency). Congressional and interest group pressure would make it politically costly for the President to do more than tinker at the margins. In particular, since any rescinded appropriation would go into a lockbox for deficit reduction, presidents could not shift funds (and thereby reward political allies or constituent interests). As such, presidents risk making enemies and little else by invoking their cancellation authority.³⁶ Bill Clinton's cautious use of Item Veto Act authority bears this out.³⁷

33. For this reason, the original statute was struck down because it undermined the President's power to implement the law. *Bowsher v. Synar*, 478 U.S. 714 (1986).

34. See Louis Fisher, *Continuing Resolutions: Can't Live With 'em, Can't Live Without 'em*, 48 PUB. BUDGETING & FIN. 101 (1988).

35. See generally Neal Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605 (1997); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871 (1999).

36. Mike Fitts takes this point one step further and argues that the singular nature of the presidency can, in fact, limit presidential power. See Michael A Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized, Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 895 (1996).

37. Would this caution have continued? I think so. With the Supreme Court's invalidation of the statute we will never know. See *Clinton v. City of New York*, 524 U.S. 417 (1997).

Gramm-Rudman and item veto legislation, at the same time, make clear that Congress is willing to forfeit some of its appropriations power. Apparently, members are willing to trade off some institutional power in order to reap the gains of telling the nation that they are serious about the deficit. At the same time, neither Gramm-Rudman nor item veto legislation formally limits the power of individual members of Congress to reward their constituents. In this way, while these bills suggest a willingness to diminish its power of the purse, Congress very much cares about its power to reward constituents through appropriations. For this reason, I think Lou goes too far in suggesting that these measures are proof positive that Congress has abdicated its appropriations power.

IV. CONCLUSION

It is time to wrap up: Lou Fisher has done a wonderful job in calling attention to ways in which core Congressional powers have diminished in recent decades. But Lou's proof is of diminished power, not power transferred to the President. With that said, for our system of checks and balances to work, Congress must step up to the plate and reassert its institutional priorities. Otherwise, there is a risk — especially in war powers — that the constitutional division of power and, with it, the Constitution itself will eventually become irrelevant.