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# Critical Dialogue: "The Politics of War Powers: The Theory and History of Presidential Unilateralism." By Sarah Burns

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# Critical Dialogue

**The Politics of War Powers: The Theory and History of Presidential Unilateralism**. By Sarah Burns. Lawrence: University Press of Kansas, 2019. 328p. $27.95 cloth.
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In the first half of 2020, impeachment, COVID-19, Black Lives Matter, and the upcoming presidential election knocked forever wars even farther off our radar. According to Gallup's "Most Important Problem" polling, over the past six months, national security, terrorism, and international affairs in general registered less than 0.5% of mentions in the national sample. And yet Sarah Burns's new book is as relevant as it would have been if public opinion still cared about war as much as it did in the first decade of this century. Although this book, published in 2019, obviously could not include these timely 2020 subjects, it is indirectly relevant to them. When is the reckoning going to come for the dysfunctions of the modern presidency that simultaneously abuses and squanders power across various issues? When will Congress ever again embrace the fullness of its constitutional authority to stop executive branch actions that majorities decry and see to completion a different agenda that members ran on and won?

A recap of just a few facts about the longest-running military actions in US history shows that these questions are not mere handwringing exercises. Political science needs more books on war, from a variety of research approaches, to bring attention to the chasm between separation of powers theory and reality that has little to do with which party is in power.

The United States passed two Authorizations for the Use of Military Force (AUMFs) in 2001 and 2002. Although aimed at Afghanistan and Iraq, respectively, three presidents used these open-ended war authorizations in at least 14 countries. According to the Costs of War project at the Watson Institute for International and Public Affairs at Brown University, 7,000 US service members have died related to these wars, thousands more private contractors were killed, and the United States and its allies have caused at least 335,000 civilian deaths across Afghanistan, Iraq, Syria, Yemen, and Pakistan. Unrelenting war in the region has also created a refugee crisis counted at around 8.4 million, as well as an untold number of wounded civilians and combatants across all these countries, as well as the United States. Costs of War project director Professor Neta Crawford and her research team estimate that the United States has spent or obligated almost $6.5 trillion for the direct costs of these military operations—largely through issuing public debt. Yes, these facts matter for a variety of raging political and policy fires today that require federal dollars and competence.

Burns's book does not squarely focus on these aspects of "politics" as much as on the crisis in our constitutional polity that has repeatedly undermined successful war policies. The book is grounded in constitutional theories of separation of powers, with an emphasis on John Locke and Baron Montesquieu. Burns aims to explain how executive branch institutional development on war and national security repeatedly "warps" founding theories by skewing to Locke, first intermittently and then eventually in a permanent way, which now permanently distorts constitutional values of deliberation and accountability on war. In effect, the "politics"-related insights of the book concern the bizarre lack of politics surrounding war. Burns shows that, no matter the partisan or electoral landscape of the past seven decades, unilateral decision-making to embark on new military actions is always in fashion at 1600 Pennsylvania Avenue; this is despite whatever positions or promises the presidential candidates may have made while running. Simultaneously, congressional majorities of all stripes are content with sometimes waving flags and other times wagging fingers. No serious effort to repeal or replace the two AUMFs have come to the floors of the US House and Senate.

Burns explains on the book's first page that delving into constitutional theories of separation of powers is important because the founders wanted a stable constitutional order— not a country that hewed solely to one individual leader's personality, background, interests, and the like. Executive branch domination on any policy front therefore undermines constitutional ideas of systemic "ballast" through shared power and constitutionally derived differences in the outlook of the branches. Burns dislikes the fact that executive unilateralism depends on individual

character traits, but the electoral college was supposed to be an elaborate filtration system that would bring us far more George Washingtons than Donald Trumps. Even a casual reading of the *Federalist Papers* reveals the authors' commitment to a virtuous office that sees the nation's interest in a holistically superior way to the House and Senate. Congress was somehow supposed to maintain robust institutional ambition despite being cleaved into two chambers of independently elected or appointed members. The House and Senate were designed explicitly not to function as a cohesive body on a regular basis, but Congress held its own for a variety of complex reasons until the mid-twentieth century.

Chapters 2–4 elaborate on the philosophical foundation and early debates that led to the creation of this second US Constitution. Chapter 2 delves into the arguments and influence of Montesquieu's *Spirit of the Laws,* which advocates structural elements of "moderation" in modern states. Burns explores and eventually contrasts this main idea with that of Lockean executive "prerogative," which can backfire on state stability when used mindlessly and continually. Chapter 3 explains how, in the wake of the American Revolution, leaders' "limited knowledge of the separation of powers," among other blind spots, "led to the creation of a structurally flawed confederacy" under the decentralized Articles of Confederation (p. 49). As Burns sees it, Madison understood Montesquieu and jousted with the more Lockean Hamilton even as both advocated together for more robust national government authority. Chapter 4 brings these points into a more molecular focus on the debates between the Federalists and Antifederalists that often centered on the latter group's collective fear of unrestrained executive power, especially on war (which seems remarkably prescient when read now). This chapter delves into several *Federalist Papers*, but for some reason does not dwell on No. 69, in which Hamilton clashed with prominent Antifederalists, including the governor of New York, whom he chides for having more power to direct his state militia than the proposed presidential office, which would have to wait for legislative war authorization.

Chapters 5 and 6 then march through presidential war history from George Washington through William McKinley, with reference to a combination of secondary accounts and original primary sources, to label various presidents as hewing closer to the Locke or Montesquieu side of the power spectrum. This approach matters because "the Lockean system relies more heavily than the Montesquieuan or American system on the virtues of those in power and of the citizens" (p. 94). Chapter 5 also reminds all of us who research and teach on war powers to reread the "Neutrality Proclamation" debates and history to ponder the fact that the same men who participated in writing the Constitution disagreed on the actual nature of presidential powers. Throughout these chapters, when presidents see Congress as an optional partner or hindering nuisance, they are on Team Locke (surprisingly including Jefferson, but less surprisingly including Polk). If presidents welcome and engage constitutional principles through the House and Senate, Burns places them on Team Montesquieu (Madison and McKinley). Of course, Burns also explains why some presidents, such as Washington, Lincoln, and both Roosevelts, deserve much more nuanced treatment—and those parts of the book are worth reading especially closely, because ambivalent (read Montesquieuan) war presidents seem to have weaker legacies.

Chapters 7 and 8 cover the birth of the modern presidency in the two world wars and the Cold War, and then chapters 9–11 explain why the implosion of the USSR did not change either party's constitutional orientation to national security. Building on the work of other prominent institutional scholars on the separation of powers, Burns critiques the permanent Lockean model embraced by Harry Truman onward. She is especially insightful and original in her searing critique of the current war on terrorism, which lacked cultural literacy, military strategy, and deep, consistent congressional deliberation and oversight. These chapters are also tied together by the extraordinary (and little-known) power of the Office of Legal Counsel (OLC) in the Department of Justice. Presidents from FDR on have relied on this office of naked institutional partisanship that is "a tool for presidents when they hoped for a legal justification to circumvent congressional restraints" (p. 147). The final chapters on the current strategic military abyss forged by George W. Bush, Barack Obama, and Donald Trump bring home the dire and unintended consequences of military blunders forged under this narrow perspective.

Notwithstanding these numerous strengths, throughout the book—even when returning repeatedly to the real-world policy implications of separation-of-powers distortions—Burns neglects one-third of the constitutional ballast: federal courts. Louis Fisher explains in *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (2017) that from the erroneous dicta of the infamous *Curtiss-Wright* decision through today, all three branches often have misunderstood their own and other branches' powers. And as my most recent book argues, federal courts are a crucial piece of the constitutional war puzzle, both when they take up cases and when they demur through a variety of justiciability tools. If Congress pepped up, federal courts could do a bit more to bolster the constitutional distribution of war powers and find a way to support the misguided War Powers Resolution of 1973. Until then, *Federalist 51* remains a modern-day fairy tale. Thus, one might ask what role Burns thinks the judicial branch has played—and ought to play—in redressing the problem of



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executive overreach with respect to the United States' seemingly endless wars.

### Response to Jasmine Farrier's Review of *The Politics of War Powers: The Theory and History of Presidential Unilateralism*

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— Sarah Burns

Studying the separation of powers is disheartening at best. Understanding how members of Congress became so ambivalent, the executive became so unilateral, and the courts acquiesced to this imbalance requires the acceptance of an unhealthy constitutional order that shows no sign of improvement. Jasmine Farrier and I took different approaches to these issues. We diagnose the same problems, but we diverge on which parts of the dysfunction to address and how to address them. In her book, she carefully examines the three branches over the course of several decades to demonstrate how different branches have contributed to the current state of affairs. As Farrier points out in her review of *The Politics of War Powers*, I do not discuss judicial decisions or the reasoning of judges who have decided to avoid weighing in on many political questions. I think this is a valid critique, and I hope I can address why I did not discuss it.

My reason for this exclusion relates to the very situation she demonstrates in her work. Despite major changes to the balance of power between the executive and legislative branches in the realm of foreign affairs, with a few exceptions federal judges refuse to hear cases brought by members of Congress who ask the judiciary to constrain presidential unilateralism. For better or worse, they leave the political branches to sort out the dispute themselves, occasionally telling the plaintiffs that Congress possesses the formal powers needed to address executive overreach.

Because of this state of affairs, the judiciary does not figure into the central concern of my book: the failure of Congress to impose serious constraints on the executive, which has caused significant problems at home and abroad. At home, it has warped the constitutional system to the point where the idea of serious deliberation about what kind of operation and what would constitute a successful conclusion of military operations has fallen by the wayside. Abroad, it has allowed poorly developed and poorly executed policy to have a detrimental impact on various countries, and it has failed to improve national security. The imbalance and the problems it causes have been the state of affairs for more than 70 years, and there are no signs of improvement. Understanding why that happened and why it persists is a central focus of my work. Seeing how the imbalance grew over the course of the twentieth century (especially during the Cold War) provides further evidence that the problem is not, strictly speaking, a constitutional one. Before the United States entered World War II, members of Congress had the capacity to hold presidents accountable, and more importantly, they did. On paper, it is therefore constitutionally possible for Congress to display the bipartisanship and branch unity needed to pass a bill that would constrain the executive and survive the inevitable presidential veto. Although it is not likely, it is possible. At present, the United States is merely experiencing the kind of imbalance that regularly imperils developed liberal democracies. There is, however, a point of no return.

### Constitutional Dysfunction on Trial: Congressional Lawsuits and the Separation of Powers. By Jasmine Farrier. Ithaca: Cornell University Press, 2019. 198p. $115.00 cloth, $29.95 paper.

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Jasmine Farrier's work demonstrates the incredible restraint among judges in the federal system when it comes to addressing separation-of-powers questions, especially when members of Congress bring suits against the president. After providing historical context by referencing *The Federalist Papers* and early court decisions, the work focuses on cases from the 1970s onward. Before Nixon's unprecedented actions, members of Congress had never asked the courts to help them restrain presidents. Although this change may seem reasonable, Farrier effectively demonstrates that congressional members' efforts in the 1970s and future efforts to seek help from the courts reveals a dysfunctional system that the judiciary cannot fix. She argues that Congress has shirked its duties and delegated its prerogatives to the president. Judges agree but demonstrate a strong reluctance to solve the legislature's problem for them.

In several instances, justices state plainly that Congress has a means of restraining the president—namely through legislation—but they do not use that tool effectively. The actions of Congress have caused an imbalance between the political branches, and Congress no longer has the capacity to repair it. For example, when explaining why she dismissed the case in *Conyers v. Reagan* (1984) District Judge Green wrote, "If plaintiffs are successful in persuading their colleagues about the wrongfulness of the President's actions, they will be provided the remedy they presently seek from this Court. If plaintiffs are unsuccessful in their efforts, it would be unwise for this Court to scrutinize that determination and interfere with the operations of the Congress" (quoted on p. 43).

Despite consistently receiving decisions like Green's, members of Congress continue to ask the judiciary to restrain presidential overreach rather than using their legislative tools. Farrier addresses this puzzle through interviews with some individuals who participated in the lawsuits. In an interview with some of the plaintiffs in *Campbell v. Clinton* (1999), Farrier discovers that "the lawsuit was designed to bring public attention to Congress's 'lack of will' to confront President Clinton on war" (p. 48). The plaintiffs felt compelled to use this route to gain attention because they knew they could not use their branch's prerogatives. As the plaintiffs note, despite the broad consensus among both parties that presidents overreach, especially in military affairs, "war brings…institutional disinterest" (as quoted on p. 48).

In the specific area of war powers, modern courts avoid definitive answers—with a few exceptions—despite the incredibly broad interpretation of executive powers adopted by presidents of both parties. The reserve of federal judges is even more perplexing after examining the historical evidence. As Farrier notes, *Federalist 51* implies that a "healthy separation of powers system requires peaceful but consistent interinstitutional combat," and the Constitution does not state or imply that questions of war powers are off-limits to the courts (p. 5). Furthermore, courts adjudicated war powers cases until at least the Mexican American war by tracing presidential power back to congressional authorization. Modern courts have therefore abandoned earlier practice and switched from requiring presidents to prove they have permission to go to war to requiring Congress to proactively restrain presidents from doing so, which requires achieving a supermajority that will overcome a veto from the White House. Farrier demonstrates how these changes occurred over the course of three major wars culminating in Truman's constitutionally suspect decision to initiate the Korean War.

That move was the first time a president unilaterally initiated a large-scale military operation—and Congress let him. It may have been helpful in this section if Farrier had briefly addressed why the Cold War caused such a dramatic shift among all of the branches, with special attention to the motivation of the federal courts during a lengthy period of heightened insecurity. This would be especially enlightening in the case of the Korean War. Why did Congress agree to fund the war after failing to authorize it? Why did they not appeal to the courts, in this instance, as they did during Nixon's presidency?

As Stephen Griffin notes in *Long Wars and the Constitution* (2013), the shift in the balance of power during the Cold War is akin to a constitutional amendment. For that reason, the "peaceful but consistent interinstitutional combat" gave way to an imperial president, a supine Congress, and a Court burdened by a more clearly "defined… political question doctrine" after *Baker v. Carr* (1962) (p. 5). Including a section addressing how Cold War federal judges saw their role in the shifting balance between the other branches would have greatly increased the reader's understanding of why this occurred and what role the courts played.

Farrier's discussion of the important cases of the era hints at an assessment of judicial acquiescence to the new balance of power, as she demonstrates how such cases helped presidents continue to overreach as Congress failed to check them. This was compounded after the passage of the War Powers Resolution (1973) when we see the turn toward requiring Congress to restrain presidents, rather than requiring presidents to have prior congressional authorization.

Another meaningful contribution of the work is her examination of these cases at the lower levels. However, it may have been valuable for Farrier to have a brief discussion of why she included certain lower-level cases and which judges she quoted from them. This would provide insight into why the lower-level judges appeared more friendly toward Congress. Does Farrier think those judges had a more accurate interpretation of their judicial powers and of what burden should fall on whom? This approach might have shed more light on why these were included rather than other possible cases. At the highest level, with remarkable consistency, judges dismiss cases brought by members of Congress against presidents. What accounts for this change once a case reaches the Supreme Court?

Interestingly, the partisanship of judges does not seem to affect their decisions, especially on foreign policy questions. As Farrier notes, "Whatever the motivations of federal judges who have formed these multilayered barriers around war powers, the consistency of the judicial position defies ideological polarization" (p. 51). Just as the interviews with plaintiffs meaningfully contribute to the book, having interviews with judges would also have provided interesting insights. Why do they adjudicate so consistently on these questions? For instance, *Sanchez-Espinoza v. Regan* (1984) looks like a case in which members of Congress should have prevailed. It would have been engaging to have a better sense of why the judges in this case seemed overly cautious and what motivated them.

Despite demonstrating that modern courts put a heavy burden on a dysfunctional Congress, Farrier proves that courts cannot solve the problem. Instead, the very fact that Congress asks courts for assistance allows (1) presidents to implicitly win when the court dismisses the case and (2) risks the possibility of a very pro-presidency decision. The problem goes even deeper. In addition to losing their ability to counter the "ambition" of the executive, Congress shows "two sides" that "are often in tension: a drive to protect constituents and counterintuitively, a drive to shed institutional power" (p. 89). Her discussion of the decision-making process used to determine what military bases to close in the 1990s is particularly illuminating.



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In addition to delegating powers, Congresses also imposes "a variety of legislative process obstacles." These, according to Farrier, are "self-inflicted wounds" (p. 93). When combined with the fact that "presidential unilateralism is often supported by all branches through overt approval or tepid opposition" (p. 98), Farrier has ample evidence that "it seems all three branches are working against Congress" (p. 93).

Unfortunately, this dysfunctional system is here to stay, barring a major catalytic event like the Great Depression or the Cold War (that does not reinforce the current imbalance). Farrier has diagnosed the problem effectively and explored it thoroughly. After examining the systemic problems, one must ask, Does she think the dysfunction is so deep that there are no solutions worth offering? It would have been interesting to explore what a judicial shift would do to the balance of power among the political branches. As Sanford Levinson and Jack Balkin note in *Democracy and Dysfunction* (2019), judges alter the way they interpret the Constitution in different eras. Is it possible that judges could shift toward providing Congress with more support? This would not eliminate the problem, but perhaps this change and some other reforms could slowly start a rebalancing between the political branches, especially in the realm of foreign policy.

Except for these few minor questions, I think this book makes an excellent and unique contribution to a very well-researched field. A number of audiences will benefit from reading Farrier's careful analysis of American constitutionalism and the separation of powers.

### Response to Sarah Burns's Review of *Constitutional Dysfunction on Trial: Congressional Lawsuits and the Separation of Powers*

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— Jasmine Farrier

I am grateful for Daniel O'Neill's invitation to engage in this critical dialogue and also for Sarah Burns's insightful review of my book.

One important area of questioning that Sarah Burns raises concerns the broadest of all topics: "Why"? Why has Congress allowed presidential/executive branch power to grow regarding extant and potential national security threats? Why is the delegation of power relatively stable across different partisan and policy eras? She is correct that my book could take up that question more centrally. Looking at the literature in a broad way (spanning Ackerman to Zeisberg), we know that there are a variety of explanations for these stubborn trends. The most convincing of those explanations include electoral indifference to legislative abdication, lack of institutional maintenance from House/Senate leadership, and the fright of twentieth- and twenty-first-century technologies of war that may require rapid response.

Another area of the book that Burns would have liked to see expanded is the nature of the lower courts' decisions in member lawsuits. Again, I heartily agree that this is fertile ground for additional research and more dedicated focus. Are lower federal court judges more courageous—sometimes taking up robust defenses of members' claims? Or are they penned in by hewing to precedent and (consciously or not) their own ambitions of promotion to a higher level, which could be damaged by anti-presidential opinions? Burns is on to something here. Several years ago when I began the project, I had dreams of extended appendices that would include the president's name/party and US Senate majority at the time of the federal judge's appointment, as well as the president's party, congressional majority, and type of holding for every member case that came to each judge. A pilot of that database on war powers cases compiled by an undergraduate researcher that I supervised showed that there was no predictive quality to these data points. I remain intrigued by the idea that there is an elegant way to display these variables for future researchers who remain skeptical that war is a corner of jurisprudence not tainted by partisan and ideological polarization.

This point leads to Burns's final suggestion for additional work. What if federal judges took a greater interest (and heavier hand) in congressional lawsuits? Would these judges help heal or further inflame the United States' dysfunctional separation-of-powers system? As *Constitutional Dysfunction on Trial* explains, judicial restraint is akin to executive branch victories, because it sends members back to their legislative chambers to pass disapprovals of delegations of power that may not have been authorized in the first place—and then try to muster supermajorities to overcome certain presidential vetoes. Federal judges take these precedents and build a wall under the not-very-compelling judicial default of, in effect, "we do not take these types of cases because…we do not take these types of cases." As we face another semester of teaching the outdated separation-of-powers fantasy called *Federalist 51,* we can be forgiven if we wonder why only one of three branches appears to relish flexing institutional muscle.