
**WAR POWERS, PRIVATE ACTORS, AND
NATIONAL SECURITY STATE CAPACITY**

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“We have gone from a sense of urgency to restrict an imperial President to a sense that the President needs to restrict, if not an imperial Congress, at least a spendthrift one.”

U.S. Senator William Cohen, Line Item Veto Debate, 1995.¹

“Possessing the ability to annihilate other militaries is no guarantee we can achieve our strategic goals”

U.S. Secretary of Defense Robert Gates, Fort Leavenworth, KY, May 7, 2010.²

INTRODUCTION

As a student of the comparative politics of national security institutions, military capabilities, and defense spending, I have been inspired by the authors’ empirical research and nuanced development of the war powers debate to elaborate upon the state-society—or public-private—relationships in U.S. national security policy since 1945. The post-World War II (“WWII”) phenomenon of private contractors involved in national security has been labeled as the “Fourth Branch” of government, a term once used to refer to

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¹ JASMINE FARRIER, *PASSING THE BUCK: CONGRESS, THE BUDGET, AND DEFICITS* 215 (2004).

² Jim Garamone, *Gates Notes Coverage of Conventional, Irregular War*, U.S. DEP’T DEF. (May 7, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=59079>, archived at <http://perma.cc/7UYF-TMCT>.

independent government agencies.³ However, Mariah Zeisberg's analysis of the legislative investigations into the role of the munitions industry in the United States's entry into World War I ("WWI") reveals a history of private actors in war, with allegations of influence that sound familiar to contemporary debates. (Zeisberg p. 188-93). Both Zeisberg's discussion of the munitions committee and Stephen Griffin's discussion of the role of civilian expertise inspired my reflection on the structural and systematic influence of this "Fourth Branch" of private activity within the context of the war powers debate. Instead of looking at the balance of power between branches of government over war, I discuss the balances of power between state and society over war.

What is the impact—if any—of private actors on war powers in the United States? Influence may be twofold, affecting each of the legislative and executive branches of government. First, the increasing outsourcing of national security policymaking and expertise (and delegation to private military companies) enhances presidential autonomy over war, but simultaneously creates constraints on the executive branch through the hollowing out of the bureaucratic capacity of executive agencies and institutions. Second, the diffusion of defense industry manufacturing within the United States has also changed the priorities and preferences of the legislative branch after WWII, leading to a contemporary situation where Congress is the protector of military spending and the longevity of weapons systems. This has led to an ample supply of the standing resources needed to wage war—therefore also increasing the war powers of the executive branch—but it has also constrained both the legislative and executive branches in their ability to craft strategic policy responsive to changing structures and threats in the international system. When you include private as well as public actors in an analysis of U.S. war powers, the conclusion that there is an increasingly imperial presidency is less conclusive; it may be more autonomous and possess impressive standing war resources, but it is also more constrained than ever before due to a diminished capacity to set strategic national security policy.

I. WAR POWERS: AUTHORITY *AND* CAPACITY

While the debate over the intergovernmental allocation of war powers is one of constitutional authority, both authors reference the concept of capacity throughout the texts. Zeisberg notes both the "president's capacity to respond to 'rapidly evolving military and diplomatic circumstances,'" (Zeisberg p. 4), as well as both the executive and legislative "branches' powerful governance and epistemic capacities" and their "special institutional capacities." (p. 18). Griffin directly references "state capacity" as "crucial to the construction of the constitutional order," citing Congress holding key powers over war at a time

³ See, e.g., Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 3, 2007, at A1.

when the U.S. government had low capacity compared to the Cold War. (Griffin p. 24).

While capacity is referenced frequently in both books, it is not defined in either. This omission does not reflect on the authors, but reflects the terminologies of the debate over the intergovernmental and formal U.S. war powers literature within the study of U.S. politics, where the terms authority and capacity may be used interchangeably. Outside of the study of advanced industrial democracies, however, these terms and concepts are often sharply distinguished from each other and can vary over time and across domestic institutions in inverse directions. In many places, authority to conduct policy might not translate into a capacity to conduct that policy, and actors might also possess a capacity to conduct policy *without the concomitant authority* to do so. How is this so? Authority varies independently of capacity because of two conditions: 1) uncertainty over the allocation of authority and rapidly changing interpretations over rules of the game (e.g. treaties, constitutions, and institutional formation), and 2) state-society relations. State-society relations can influence capacity in both directions: dense relations between public and private actors can facilitate policy outcomes because of close coordination and implementation, or dense relations between public and private actors can create suboptimal policy outcomes because of private interests, capture, and increasing constraints on public policy.

After reading Zeisberg's analysis of the shifting and fluid inter-institutional (relational) nature of U.S. national security policy—as well as her elevation of historical cases of alleged commercial capture of U.S. national security policy—I recognize U.S. national security policy as a case study justifying importing concepts from comparative politics, as it is perhaps the most uncertain, contested, and shifting authority relations within U.S. domestic politics. Ironically, the area of war powers, where the United States is thought of to have so much power is perhaps the least institutionalized of all policies, meaning it is most subject to debate and interpretation. It also means that authority over war power is not necessarily linked to an absolute capacity to enforce an effective national security policy.

From a comparative perspective, the authority to declare war is just *one aspect* of a state's coercive powers. In assessing the powers of coercion, equal measures of power include the ability to extract resources and the ability to independently set policy agendas for national security, including a national security strategy and doctrine. Powers of coercion are more than just the decision to go to war, they are also about the effective mobilization of national security resources towards a national security strategy. Beyond the specifics of the U.S. case, what is fascinating about the war powers debate is that while the executive branch of the United States has been acquiring increasing authority over the ability to declare war, the picture is more complex when addressing other aspects of power. While war powers developments have shifted authority away from Congress to the presidency, the executive branch has been simultaneously losing its administrative and agenda-setting capacity to control

1) the financing of war and 2) an autonomous national security strategy. In terms of the former, Congress has increasingly granted the executive branch a blank check for a number of military excursions, but this has often come at the cost of the ability of the executive to determine the details of national security strategy.

II. PRIVATE ACTORS AND NATIONAL SECURITY

Both books reference the constitutionality of the U.S. intervention and military operations in Libya in 2011—Zeisberg in her introduction, (Zeisberg p. 2), Griffin in his conclusion, (Griffin p. 250)—as a contemporary example of presidential claims to authority in the context of the War Powers Resolution (“WPR”).⁴ These recent events serve to illustrate how far the executive branch has drifted in its autonomy vis-à-vis the legislative branch. However, the deployment of the U.S. military apparatus in the Libya case reflects only one of many options in the contemporary presidential toolkit on national security policy. Over the last two decades, a market for private, civilian force (and private, civilian national security expertise) has become a robust tool of military statecraft as a complementary tool to state military force.⁵ Well before the United States initiated hostilities in Libya—and long after both the WPR expired and NATO ceased its operation—private military companies (“PMCs”) were on the ground operating outside of the NATO command structure.⁶ While PMCs do not replace all of the functions of a military deployment, they allow for a flexibility of action with limited accountability on the part of the contracting authority. The executive branch, specifically the Department of Defense (“DOD”), hires and regulates civilian PMCs through its Federal Acquisition Regulations in the service of its foreign and national security policies.⁷ Not new to the Libya operation, the contracting of civilians for military operations has been a phenomenon institutionalized since the Defense Base Act of 1941⁸ required U.S. contractors and subcontractors to report civilian (and foreign) employee casualties to the Department of Labor

⁴ See 50 U.S.C. §§ 1541-48 (2012).

⁵ See DEBORAH AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 251 (2005).

⁶ See Lolita C. Baldor & Slobodan Lekic, *Covert Teams from US, NATO Boost Rebel Forces*, NBC NEWS (Aug. 22, 2011, 7:24:22 PM), http://www.nbcnews.com/id/44234613/ns/world_news-mideast_n_africa/t/covert-teams-us-nato-boost-rebel-forces/#.VRRm97pbulK, archived at <http://perma.cc/4NKM-2TTB>; Lee Ferran, *American Killed in Libya was on Intel Mission to Track Weapons*, ABC NEWS, (Sept. 13, 2012), <http://abcnews.go.com/Blotter/glen-doherty-navy-seal-killed-libya-intel-mission/story?id=17229037>; *Security Firms Hustle in Lawless Libya*, UPI, (Dec. 9, 2011, 12:10 PM), http://www.upi.com/Business_News/Security-Industry/2011/12/09/Security-firms-hustle-in-lawless-Libya/75871323450621/, archived at <http://perma.cc/N2GT-V4HX>.

⁷ Deborah Avant, *Mercenaries*, FOREIGN POLICY, Jul.-Aug. 2004, at 20, 22.

⁸ 42 U.S.C. §§ 1651-54 (2012).

and provide medical and life insurance coverage.⁹ This phenomenon accelerated after 9/11—from a ratio of 50:1 military personnel to contractors in the 1991 Gulf War to 10:1 in Iraq in 2005,¹⁰ with the ratio reversing (i.e., contractors and civilians outnumbering military personnel) in Iraq and Afghanistan in 2010.¹¹ At this point in time, there are more private civilians conducting U.S. foreign policy in combat abroad than military personnel. The general concern over the rise in the private market for force is that it can undermine constitutionalism and democracy by bypassing veto points and formal governmental involvement, centralizing power in the branch of government writing the contracts and delegating its foreign policy to private actors.¹²

Privatization and outsourcing might not simply centralize executive authority, however. As Paul Verkuil has argued, privatization and outsourcing of security expertise might centralize the power of the executive branch over the legislative branch, but this might come at a loss of power, expertise, and *capacity* of the state in favor of private actors and the market.¹³ When the state outsources too much of its core governmental function and core personnel to private actors—for reasons of efficiency, expertise, or to avoid accountability—it can lose the ability to regain control of its capacity for agenda setting and oversight.¹⁴ Verkuil locates this phenomenon not at the deployment of private military companies in the service of U.S. policy abroad, but in the outsourcing of project management and regulatory authority in

⁹ See Rod Nordland, *Risks of Afghan War Shift from Soldiers to Contractors*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/world/asia/afghan-war-risks-are-shifting-to-contractors.html?pagewanted=all&_r=1.

¹⁰ Rebecca Ulam Weiner, *Sheep in Wolves' Clothing*, LEGAL AFF., Jan.-Feb. 2006, at 23.

¹¹ See T. Christian Miller, *This Year, Contractor Deaths Exceed Military Ones in Iraq and Afghanistan*, PROPUBLICA (Sept. 23, 2010, 10:33 AM), <http://www.propublica.org/article/this-year-contractor-deaths-exceed-military-ones-in-iraq-and-afgh-100923>, archived at <http://perma.cc/2UPT-H94Q> (“More private contractors than soldiers were killed in Iraq and Afghanistan in recent months, the first time in history that corporate casualties have outweighed military losses on America’s battlefields.”). For contractor death statistics, see the Pro Publica project website, *Disposable Army*, PROPUBLICA, <http://www.propublica.org/series/disposable-army>, archived at <http://perma.cc/RZT4-7AUE> (last visited Oct. 21, 2014).

¹² Deborah Avant & Lee Sigelman, *Private Security and Democracy: Lessons from the US in Iraq*, 19 SECURITY STUD. 230, 249-55.

¹³ See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 1* (2007).

¹⁴ See *id.* at 36 (“The bigger problem, and the one highlighted throughout this book, is the effect of such comprehensive private contracts on the government’s ability to manage and control the outcomes. . . . inherent government functions are involved in these assignments . . .”).

executive institutions and agencies.¹⁵ When core governmental functions, such as oversight, contracting, and policymaking (government “outsourcing its brain”)¹⁶ become outsourced by the executive branch of government, there is an immediate risk of the hollowing-out of governmental capacity and a long-term risk of agenda capture. Private actors, particularly in national security policy, now act as a “shadow government” as they outnumber public employees at a ratio of six to one.¹⁷ Because the government has privatized and outsourced core political decisions, there is a shrinking core of public sector employees overseeing contracts, resulting in the executive branch hiring contractors to oversee contractors.¹⁸ While the Government Accountability Office (“GAO”) has faulted the DOD for insufficient oversight of their contracts because of declining government personnel, even the GAO has outsourced its review of contractor performance to other contractors.¹⁹ Verkuil argues that while outsourcing and privatization used to occur for reasons of efficiency, it now occurs out of necessity because the executive branch has been downsized to the point where there are not enough government personnel to perform core governmental tasks.²⁰ Even before any privatization trends, the executive branch has not possessed a great deal of expertise over war planning in the first place, as Griffin notes regarding the errors made in Vietnam and Iraq war planning, reflecting an “inherent lack of expertise on the civilian side of the executive branch with respect to making decisions for war.” (Griffin p. 247).

As Zeisberg notes in her introduction, there are tradeoffs to the executive branch becoming more insular to inter-branch oversight and shared authority; the “president’s decision space may be restricted by many forces beyond Congress.” (Zeisberg p. 15). These constraints can come from partisans, cabinets, ideological or emotional groupthink within advisors, or economic or commercial interests that can “leave the president beholden . . . against his own will.” (pp. 15-16). While the Munitions Committee case²¹ provides a fascinating pre-history to the post-WWII increase in the role of private actors in U.S. security policy, the increase in private power over institutions representing U.S. national security interests has not simply flowed through the mechanism of industry capturing the agenda of the executive branch, as was alleged in the investigation. (p. 188). Instead, the executive branch has

¹⁵ See *id.* at 24 (“[A]gencies . . . are delegating significant duties to private hands.”).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 6 n.35.

¹⁸ See *id.* at 6.

¹⁹ *Id.* at 6 & n.37; see U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-274, CONTRACT MANAGEMENT: OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS 2-3 (2005).

²⁰ VERKUIL, *supra* note 13, at 23.

²¹ See SPEC. COMM. ON INVESTIGATION OF THE MUNITIONS INDUS., THE NYE REPORT, S. REP. NO. 74-944, at 3-13 (2d. Sess. 1936).

increased its flexibility for military action through outsourcing multiple government functions to private actors—including logistics in combat operations—which have affected its ability to conduct national security policy. While Senator Gerald Nye’s chief concern in his investigation of the role of the munitions industry prior to WWI was whether the President would be beholden to commercial interests, he was not prescient enough to foresee the same structural constraints impacting the legislative branch in the second half of the twentieth century.

A parallel post-WWII phenomenon to the executive branch outsourcing national security is one that primarily affects and empowers the legislative branch: the diffusion of defense contractors and subcontractors from a few urban locales to all states and legislative districts in the United States, and the consequent shift in congressional preferences over military expenditures. At the moment of the 2011 Libya intervention, it was reported that a fragile but growing congressional consensus to begin reigning in the U.S. military budget was undermined by the initiation of a third foreign war with a one billion dollar projected cost.²² Congress did not then—nor has it for decades—used the power of its purse to control military expenditures. Prior to WWII, the legislature exercised strict budgetary control over military expenditures, but over time began to promote and protect both top-line spending and specific line-items and weapons platforms. One of the main distinctive capacities of the legislative branch, as Zeisberg notes, is harnessing and reflecting a variety of political opinions and “cultivat[ing] diverse responses to dilemmas of public policy . . .” (p. 29). Over the post-WWII period, however, Congress’s response to military spending has become a singular message: spend more money and do not cut weapons programs. Its distinctive governance capacity of budgetary control is not robust when it comes to military expenditures.

Why has Congress become so spendthrift? Explanations based on threat environments, congressional weakness, executive leadership, constitutional interpretations, pro-war ideologies, and partisanship are not satisfactory predictors of legislative preferences protecting spending. Instead, a recent study has found that the postwar geographical spread of major defense industries from large coastal cities to small, rural districts with less diverse economies dependent on defense contracts provides a systematic predictor for the shift in legislative preferences towards sustained increases in defense spending and resistance to line-item and weapons systems cuts.²³ In this context, “legislators do not simply acquiesce to the president’s military agenda out of weakness or deference. . . . [They] gain politically by supplying the defense resources that allow presidents to implement their national security

²² Carrie Budoff Brown, *Libya May Make Defense Cuts a No Fly Zone*, POLITICO (Mar. 28, 2011, 4:40 AM), <http://www.politico.com/news/stories/0311/52021.html>, archived at <http://perma.cc/V3NU-CL53>.

²³ See REBECCA THORPE, *THE AMERICAN WARFARE STATE: THE DOMESTIC POLITICS OF MILITARY SPENDING* 5-6 (2014).

policies independently.”²⁴ This acceleration of legislative military spending has served to provide the executive branch with seemingly endless resources for war, as well as more centralized authority, leading some to conclude that this has permanently tipped the balance of institutional war power.²⁵

However, I argue, a conclusion about centralized executive authority does not reflect the complexities of national security policy. Because of the interests of defense industry constituencies, Congress has not only consistently fought for spending increases and against cuts in overall military spending, but it has also favored specific weapons systems over others, and certain line-items in the budget. Thanks to congressional profligacy, the President has increasing authority and resources to go to war but decreasing capacity to address the national security interests of the country to “preserve, protect, and defend” the state.²⁶ In the study of international relations, there is supposed to be a singular national interest defended by the national executive, and it does not come from domestic constituencies of the state, but instead from the nature of the state’s international threat environment (e.g., whether current military technologies are offensive or defensive) and the structure of the international system (e.g., whether it is bipolar, unipolar, or multipolar). The story of the United States in the post-WWII environment is one where the executive appears to be centralizing and consolidating national security authority and resources for initiating and sustaining the conduct of war, but has been simultaneously losing the capacity to formulate national security policy because of the complexity of the increasing direct and indirect dependence on private actors in war, as well as the locking-in of parochial preferences over the national interest of the state.

III. EXPENDITURES AS CONSTRAINTS ON THE EXECUTIVE?

In the contemporary political environment of the post-Cold War United States, a defense secretary representing the national security preferences of the executive branch does not prevail over Congress in matters of defense expenditures when the executive prefers to cut weapons systems. This did not use to be the case. At some point in the late twentieth century, Congress became an institution that never cuts weapons systems. At one level, this enhances the President’s standing resources to declare war, but it has simultaneously restricted the President’s ability to formulate national security policy and strategy. The executive branch attempts to direct national security policy based on the singular national interest of the United States and its threat environment, but more often than not, cannot do so. Although the United States has massive amounts of national security resources, they are not the ones that the executive branch deems necessary for national security.

²⁴ *Id.* at ix.

²⁵ *Id.* at 7, 22.

²⁶ *See* U.S. CONST. art. II, § 1, cl. 8.

While the executive branch has the responsibility to respond to the international threat environment by mobilizing national security resources, it also has the responsibility to mobilize the most appropriate capabilities to address the threat, as well as to de-mobilize resources and capabilities when threats are reduced so that resources are available to address a changing threat environment. The international threat environment does not explain why Congress refused to cut even a single weapons system after the fall of the Soviet Union, even with testimony arguing on behalf of cuts from across the services and executive branch.²⁷ Then Secretary of Defense Dick Cheney pled with Congress in 1992 to enact weapons systems cuts reflecting changing military priorities instead of protecting their economic constituencies, arguing that they were “forcing me to spend money on weapons that don’t fill a vital need in these times of tight budgets and new requirements,” with priorities unrelated to defense, “but mostly related to politics back home in the district.”²⁸ Congress does not cut weapons systems that the executive branch wants to cut, prolongs the life of weapons systems the executive branch deems unnecessary for national security, and argues for the investment in weapons systems unwanted or unneeded by the military and its Commander-in-Chief. This limits the flexibility of the military and executive to respond to international threats with the most appropriate capabilities in its toolkit. While Congress’s refusal to limit military spending provides the President with mobilized resources to wage war, they might not be the resources required for promoting national security or a Clausewitzian policy outcome.

Not much has changed in twenty years. In 2012, Defense Secretary Leon E. Panetta complained that the House and Senate Armed Services Committees “had diverted about \$74 billion of what we asked for in savings in our proposed budget to the Congress, and they diverted them to other areas that, frankly, we don’t need,” including “aircraft, ships, tanks, bases, even those that have outlived their usefulness, [but] have a natural political constituency.”²⁹ The DOD was under “pressure . . . to retain excess force structure and infrastructure instead of investing in the training and equipment that makes our force agile and flexible and ready.”³⁰ The fiscal 2013 defense bill was packed with funding for programs the Pentagon fought to cut or delay but failed: the Global Hawk Block 30, a high-altitude, long-endurance unmanned aircraft; upgrading the M1 Abrams tank; modifying the M2 Bradley armored vehicle;

²⁷ THORPE, *supra* note 23, at 7. Threats in the international environment during the Cold War and post-9/11 provide justification for why the legislative branch increased spending and ceded military authority, but cannot explain why presidents during periods of reduced threat were also granted broad implicit authority over war in 1990s military interventions such as Somalia, Haiti, Bosnia, and Kosovo. *See id.* at 7-8.

²⁸ *Id.* at 93.

²⁹ Walter Pincus, *It Appears from the Hill that the Military Has Money to Spare*, WASH. POST, Dec. 19, 2012, at A19.

³⁰ *Id.*

buying more F-18s; new plutonium research buildings at Los Alamos; additional spending on missile defense and Special Operations imagery intelligence.³¹ Congress approved a single cut: a \$188 million reduction in the budget for military bands (the marching musical kind).³² For the second year in a row, the Army asked Congress to prevent the acquisition of 280 M1A2 Abrams tanks, with Army Chief of Staff General Raymond Odierno pleading with the House Appropriations Subcommittee on Defense that “[t]he conundrum we have is that we don’t need the tanks”³³ The Army and Marine Corps already have 6,000 Abrams tanks—built in anticipation of war against the Soviet Union—with 2,000 junked in depot storage, where the Army plans to send the additional 280 upon delivery.³⁴ Panetta’s predecessor Robert Gates was not much more successful in reining in Congress: he attempted to anticipate congressional resistance to ending programs such as the F-22 and the DDG-1000 Navy destroyer by signaling the creation of new weapons systems for a more modern and nimble military, based on a “holistic assessment of capabilities, requirements, risks and needs for the purpose of shifting this department in a different strategic direction.”³⁵ Gates framed the struggle as one where “every defense dollar spent to over-insure against a remote or diminishing risk—or, in effect, to “run up the score” in a capability where the United States is already dominant—is a dollar not available to take care of our people, reset the force, win the wars we are in, and improve capabilities in areas where we are underinvested and potentially vulnerable. That is a risk I will not take.”³⁶

This is not how congressional oversight of military expenditures was supposed to turn out. From 1803—when then-President Thomas Jefferson delayed the acquisition of fifteen gunboats approved by Congress in favor of newer models—until 1974, Presidents occasionally exercised their power for impoundment when congressional outlays did not match the strategic needs of national security.³⁷ The 1974 congressional Budget and Impoundment Control

³¹ *Id.*

³² *Id.*

³³ Brendan McGarry, *Biden and Ryan Argue Over Tank Funding Army Doesn’t Want*, BLOOMBERG BUS. (Oct. 16, 2012, 3:13 PM), <http://go.bloomberg.com/political-capital/2012-10-16/biden-and-ryan-argue-over-tank-funding-army-doesnt-want/>, archived at <http://perma.cc/3PXC-BY7X>.

³⁴ Laura Litvan & Julie Bykowicz, *Defense-Cut Hypocrisy Makes GOP Converge with Democrats*, BLOOMBERG BUS. (Feb. 19, 2013, 8:00 PM), <http://www.bloomberg.com/news/articles/2013-02-20/defense-cut-hypocrisy-makes-gop-converge-with-democrats>, archived at <http://perma.cc/EKL9-C86R>.

³⁵ Robert M. Gates, Secretary of Defense, Defense Budget Recommendation Statement (Apr. 6, 2009).

³⁶ Noah Shachtman, *Gates Pushes for Radical Overhaul of Pentagon Arsenal*, WIRED, Apr. 6, 2009 (internal quotation marks omitted).

³⁷ See Thomas Jefferson, President, Third Annual Message to the Senate and House of Representatives of the United States, (Oct. 17, 1803).

Act (CBICA) removed the power of impoundment from the executive branch (in reaction to Nixon's budgetary adventures), requiring the full expenditure of appropriations within a fiscal year.³⁸ Since 1974, the balance of impoundment power shifted back and forth between Congress and the executive branch over military expenditures (with Congress always preferring an appropriation—such as the SR-71 Blackbird spy planes—and with the services and the President always against the weapons system for strategic or budgetary reasons), until a 1998 Supreme Court decision again took impoundment powers away from the executive branch.³⁹ During the era of presidential impoundments, there were multiple episodes of presidential delays over expenditures, refusals to increase funding, or redirection of funding towards other projects.⁴⁰

In my ongoing research with Professor Rosella Cappella Zielinski on defense expenditures, we have found that the 1962 decision on the part of the Kennedy administration and Defense Secretary Robert McNamara to refuse to continue development of the XB-70 (B-70/RS-70) Valkyrie long-range bomber (in favor of deeper investment in strategic missile technology) represents the first instance where the legislative branch fought back to demand the appropriations be spent. In fact, the House Armed Services Committee and its Chairman Carl Vinson of Georgia attempted to declare that “[t]he Secretary of the Air Force [Zuckert], as an official of the executive branch, is directed, ordered, mandated, and required to utilize the full amount of the \$491 million,”⁴¹ nearly provoking a constitutional crisis before the Chairman met privately with President Kennedy, after which the language in the report was downgraded from “directed” to “authorized.”⁴² This first instance where Congress exercised its “reverse” powers of the purse—to attempt to prevent military cuts based on the decision of the executive branch’s national security strategy—occurred the year after Lockheed Martin established a major manufacturing center, which became the largest employer in the entire southeast, in Marietta, Georgia, part of Vinson’s congressional district.⁴³ While

³⁸ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 297 (“[E]stablish[ing] a procedure providing congressional control over the impoundment of funds by the executive branch.”).

³⁹ See *Clinton v. City of New York*, 524 U.S. 417, 447-48 (1998) (holding that the Line Item Veto Act was unconstitutional in that it would allow the President to unconstitutionally modify laws passed by Congress).

⁴⁰ *Id.* at 647-68 (Scalia, J., concurring in part and dissenting in part) (providing historical examples of impoundments by Presidents Grant, Franklin Roosevelt, Truman, and Nixon).

⁴¹ H.R. Rep. No. 87-1406, at 9 (1962).

⁴² LAWRENCE S. KAPLAN, RONALD D. LANDA & EDWARD J. DREA, *HISTORY OF THE OFFICE OF THE SECRETARY OF DEFENSE, VOL. V: THE MCNAMARA ASCENDANCY, 1961-1965*, at 104-05 (Alfred Goldberg ed., 2006).

⁴³ Richard S. Combes, *Aircraft Manufacturing in Georgia: A Case Study of Federal Industrial Investment*, in *THE SECOND WAVE: SOUTHERN INDUSTRIALIZATION FROM THE 1940S TO THE 1970S*, 24, 33-36 (Philip Scranton ed., 2001); JAMES F. COOK, *CARL VINSON: PATRIARCH OF THE ARMED FORCES* 334-35 (2004).

McNamara and Kennedy were able to prevail, after 1998 the executive branch has had no such mechanism for justifying impoundment of appropriations on strategic grounds.⁴⁴

Although the President has increasing resources to wage war, the capacity of the President and military to harness the appropriate resources for war and develop a national security strategy are constrained by their inability to exercise strategic judgment. As Panetta said: readiness has no political constituency.⁴⁵ Because of the increasing structural role of private actors in U.S. national security policy—in both the legislative and executive branches—the authority of the executive to wage war has increased, but this has come at the expense of many capacities to craft national security. The President and the services have seemingly endless defense resources, but they have also been saddled with obsolete weapons systems that are often irrelevant to current or future national security strategy. If the executive of a state wants to change the status quo by enacting and enforcing a policy choice and it cannot do so, then, through a comparative politics lens, we say that state lacks capacity. A state able to enact policy, particularly when it goes against private, parochial, market, or societal resistance, is a high capacity state.

IV. PRIVATE ACTORS AND U.S. NATIONAL SECURITY CAPACITY

A. *State Capacity*

In the political science subfield of comparative politics, there has been a resurgent interest in theorizing and measuring the dimensions of the “state” as an actor since the 1985 publication of Evans, Rueschemeyer, and Skocpol’s influential text *Bringing the State Back In*.⁴⁶ A major element of the state and its institutions is its capacity—not just its authority. State capacity is a difficult and slippery concept, but is distinguishable from concepts of authority and power. A common theme of state capacity is *ability of institutions to effectively and efficiently implement public policy or official goals*.⁴⁷ Scholars in comparative politics have argued that relative capacity is a key feature of executive bureaucracies, including their ability to set quality agendas, craft effective issues and policies, and implement political solutions. Capacity (the ability to harness resources, make efficient decisions, and influence the policy agenda) as a variable has been theorized and measured by proxies, but usually only as a feature of the governance quality of developing states. State capacity and bureaucratic quality are considered a given in advanced industrialized

⁴⁴ See *Clinton*, 524 U.S. at 446-47 (rejecting the “unilateral” impoundment power from being invested in the presidency).

⁴⁵ See Pincus, *supra* note 29, at A19.

⁴⁶ BRINGING THE STATE BACK IN (Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol eds., 1985).

⁴⁷ KATHRYN SIKKINK, IDEAS AND INSTITUTIONS: DEVELOPMENTALISM IN BRAZIL AND ARGENTINA 11 (1991).

states such as the United States, assumed by omission not to vary to any degree of significance.

Until recently, social scientists have neglected the concept of a state's capacity for structuring social relations. Some argue this is an Anglo-American phenomenon, because in these places the state is relatively weak vis-à-vis its society, and therefore has a weak capacity for governing domestic adjustment.⁴⁸ However, the return of the state as an important variable restored the idea of capacity as an important dimension of institutionalization. Differences amongst states have more to do with the degree and type of institutional depth (insulation) and breadth (embeddedness), not the presence or absence of institutions. Institutional depth is the degree to which boundaries of the state and the orientation of the state actors define a public sphere distinguishable from larger society, while institutional breadth is the density of the links between state activities and those of other social entities.⁴⁹ Together, depth and breadth bring a measure of insulation and embeddedness to the complex of organizations constituting all modern states.

The important concept of state capacity is nearly impossible to define in the abstract because states are institutions with many different organizations and bureaucracies within them. Michael Mann defines the modern state as "polymorphous and factionalized in its structure."⁵⁰ Different policy domains such as military or economic affairs "mobilize differing, if overlapping and intersecting, power networks, and their solutions have consequences, some unintended for each other."⁵¹ This creates variations in capacities within states: not just between states, but between competing bureaucracies and institutions. Overall, there is no sense in talking about the capacity of a state or governance organization in general, but only of its constituent parts, organizations, or policy domains.⁵²

⁴⁸ See, e.g., LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* 3-4 (1998) (describing the American and British states as "political institutions with weak capacities for *domestic* adjustment strategies").

⁴⁹ STEPHEN D. KRASNER, *POWER, THE STATE, AND SOVEREIGNTY: ESSAYS ON INTERNATIONAL RELATIONS* 96 (2009).

⁵⁰ MICHAEL MANN, *THE SOURCES OF SOCIAL POWER, VOL. 2: THE RISE OF CLASSES AND NATION-STATES, 1760-1914*, at 796 (2012).

⁵¹ *Id.* at 736.

⁵² See Barbara Hobson, *Feminist Strategies and Gendered Discourses in Welfare States: Married Women's Right to Work in the United States and Sweden*, in *MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES*, 396-429 (Seth Koven & Sonya Michel eds., 1993) (examining the role of women's agency in the "the politics of social policy and the origins of welfare states"); See generally ROBERT W. JACKMAN, *POWER WITHOUT FORCE: THE POLITICAL CAPACITY OF NATION-STATES* (1993) (examining political capacity through a behavioral approach, which examined "informal patterns of observed behavior" rather than "formal descriptions . . . of particular institutions").

The effects of bureaucratic capacity vary within states along the lines of policy sectors.⁵³ The type of policy domain is relevant because different tasks impose qualitatively different demands on government.⁵⁴ Financial deregulation and trade or investment liberalization require governments to stop or reduce activity: to stop providing financial subsidies, for example, or to end restrictions on foreign investment. These policies may be politically difficult to adopt but, once adopted, remain in effect until rescinded by new policy. In contrast, policies such as capital account monitoring need continuous enforcement. These are regulatory or active policies: they demand the involvement of government authorities for as long as they are to remain operative. Still other domains require both: defense politics require the executive bureaucracy to be simultaneously the regulator and the monopsonistic buyer.

B. *Disaggregating State Capacities*

States have multiple—not singular—capacities,⁵⁵ and it is an empirical task to identify and predict these “differences in the way states are organized and then connect those differences to variations in [political] outcomes.”⁵⁶ Any attempt to capture how state capacity varies over time or across domestic institutions “requires differentiating among the features of the state in order to assess their relative importance; [so] the state becomes less than the sum of its parts.”⁵⁷ There is no singular state capacity, but there are “state capacities,” because governments may vary in their ability to achieve their goals across different institutions, functions, and policy areas.⁵⁸ Capacity to make political decisions can vary independently of the ability of a state to implement the same policies.⁵⁹ Following Skocpol, there are three “general underpinnings of state capacities”: plentiful resources, administrative-military control of a

⁵³ See STEPHEN D. KRASNER, *DEFENDING THE NATIONAL INTEREST: RAW MATERIALS, INVESTMENTS AND U.S. FOREIGN POLICY* 329 (1978) (explaining that the state is not a “unified rational actor” but rather a “complex set of bureaucratic institutions and roles”).

⁵⁴ See generally Merilee S. Grindle, *Policy Content and Context in Implementation*, in *POLITICS AND POLICY IMPLEMENTATION IN THE THIRD WORLD* (Merilee S. Grindle ed., 1980).

⁵⁵ WEISS, *supra* note 48, at 4 (“[T]here can be no such thing as state capacity in general, merely capacities in particular areas.”).

⁵⁶ PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* 40-41 (1995).

⁵⁷ Margaret Levi, *The State of the Study of the State*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 33, 34 (Ira Katznelson & Helen V. Milner eds., 2002).

⁵⁸ See Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN*, *supra* note 46, at 9 (examining the capacities of states in various domains in light of differing “powerful social groups” and “recalcitrant socioeconomic circumstances”).

⁵⁹ Hillel Soifer & Matthias vom Hau, *Unpacking the Strength of the State: The Utility of State Infrastructural Power*, 43 *STUD. COMP. INT’L DEV.* 219, 227 (2008) (explaining that the “line between control and provision” is often overlooked).

territory, and loyal and skilled officials.⁶⁰ These features generally correspond with three common dimensions of state capacity: extractive capacity, coercive capacity, and bureaucratic/administrative capacity. There are also variations in a state's infrastructural and despotic power: the degree to which states are capable of implementing policies is analytically separate from how policy priorities are chosen and the extent of citizen control over elites.⁶¹ Both types of capacity involve policy implementation, but differ in where capacity comes from. Despotic power allows leaders to act autonomously from social or market actors: thus they can make unpopular decisions about force or unpopular legislation, particularly over the "high politics" of security policy.⁶² The literature on despotic power is centrally concerned with policy implementation, evident most clearly when states overcome societal resistance. In contrast, infrastructural power concerns how much a state can penetrate its society to implement policy.⁶³ A state with more infrastructural capacity is able to implement policy and enforce laws because of its effective interaction with society, of policy implementation and enforcement of laws. This capacity requires dense linkages with social and market actors.⁶⁴

The despotic capacity for coercion is central to the powers of a modern Weberian state possessing a monopoly on the legitimate use of force within its territory.⁶⁵ This is the element that allows a state to protect against internal and external threats, control borders, and enforce compliance over policies controlling and harnessing violence. Tied to coercive capacity is the despotic capacity to raise and maintain revenue for the security apparatus of the state. States are defined by their ability to tax constituents,⁶⁶ and there is a direct relationship between a state's extractive capacity for extending its power, sovereignty, and security.⁶⁷ States must have enough extractive capacity to reach their entire population for the collection of rent, as well as enough legitimacy to manage compliance and personnel for taxation.⁶⁸ The third major

⁶⁰ Skocpol, *supra* note 58, at 16.

⁶¹ MANN, *supra* note 50, at 59.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See* Skocpol, *supra* note 58, at 27.

⁶⁵ *See* MAX WEBER, VOL. I: ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 54 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968) (explaining that a state must "uphold the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order" to be considered a true state).

⁶⁶ *See* DOUGLASS CECIL NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 17, 21 (1981).

⁶⁷ *See* MARGARET LEVI, OF RULE AND REVENUE 2 (1988) ("The greater the revenue of the state, the more possible it is to extend rule."); CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990, at 90-91 (1990) (using the Dutch as an example of a "capital-intensive state[]" that used "heavy-handed taxation" to extract military resources).

⁶⁸ *See* LEVI, *supra* note 67, at 29-31 (explaining the importance of extracting capacity and managing the collection of and compliance with taxation).

element of state capacity is infrastructural and relates to its relative institutional quality: a bureaucratic or administrative capacity relates to the ability of a state to formulate impartial and effective policy agendas and legislation in the national interest, deliver public goods and services, and regulate commercial activity.⁶⁹ Bureaucratic capacity requires autonomous, meritocratic, and professional bureaucracies and personnel with high expertise, legitimacy, enforced coordination, limited corruption and capture by private actors, and effective reach across state institutions and within a state's society.⁷⁰ The quality and capacity of bureaucracy varies, and is a key feature of effective governance. In the developing world, it is "the scarcity rather than the surfeit of bureaucracy that impedes development" and transformative policymaking, and "[i]f transformation demands an effective bureaucracy, there is no guarantee that supply will match demand."⁷¹ Good bureaucratic institutions do not simply materialize because of legal authority or resources. Bureaucratic capacity is both crafted and dependent on linkages at many stages in the institutional process. The supply of high quality, independent bureaucracies varies across states and political authorities, and it also varies within states themselves. All of these state capacities are interrelated: coercive capacity relies on the generation of revenues and high quality bureaucracies. High quality bureaucracies rely on revenue, as well as the legitimacy of successful control of a population.

The concept of bureaucratic capacity is the most complex of all state capacities, because it varies as a product of the right kind of public interactions with the private sector, rather than simply internal resources or authority. In many historical or ideal forms of bureaucracy, there was little room for direct interactions between bureaucrats and civil society, and public policy research focused solely on the delegation and interaction between the politicians and administrators. However, this ideal type has little to do with the effectiveness of public administrations in many countries, as delegation *is often not the sole product of power relations between branches of government*.⁷² The mode, scope, and character of relations between agencies of the state and organizations in society—in particular major economic actors—are equally important to political outcomes.

⁶⁹ See generally Helena Olofsdotter Stensöta, *Impartiality and the Need for a Public Ethics of Care*, in GOOD GOVERNMENT: THE RELEVANCE OF POLITICAL SCIENCE 87-149 (Sören Holmberg & Bo Rothstein eds., 2012).

⁷⁰ MAX WEBER, VOL. II: ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978).

⁷¹ EVANS, *supra* note 56, at 40.

⁷² See Myung-Jae Moon and Patricia Ingraham, *Shaping Administrative Reform and Governance: An Examination of the Political Nexus Triads in Three Asian Countries*, 11 GOVERNANCE 77, 79 (1998) (explaining that in Korea the bureaucratic apparatus "gradually became more politically empowered in the course of continuing political democratization and bureaucratic institutionalization" despite relatively even political power split among the branches of government).

A state's bureaucratic capacity can vary based on its interaction with the private sector, but the direction of causation is not clear: the private sector can enhance the capacity of a state based on the embeddedness with policy outcomes, capture legislation and regulations when the state is not appropriately insulated from influence, or hollow out the state from the outside-in when too many aspects of public policy are outsourced or based on private power. From a corporatist perspective, transformative state capacity comes exclusively from external industry groups. Measuring state capacity would simply be the measurement of variations in bottom up interests. From a statist perspective, transformative capacity comes from inside the state institutions, and the stronger and more insulated it is, the better it can withstand any private social influence.⁷³ So, government performance is predicted by the internal resources of a bureaucracy: the budget, staff size, centralization of power, and other internal resources. Along these lines, Theda Skocpol defined state capacity as the despotic ability to "implement official goals, especially over the actual or potential opposition of powerful social groups or in the face of recalcitrant socioeconomic circumstances."⁷⁴ The Weberian factors enhancing capacity include stable finances, authority, organizational coherence, and loyal and skilled officials. Peter Hall specified three factors adding up to state capacity: 1) the internal structure of the bureaucracy (the relationship between political and career executives and the internal decision making attributes); 2) the relationship between state and society (the kind of leverage the political authority has over society); and 3) the structure of society, which can facilitate or constrain effective intervention (the kinds of industry organizations enhancing policy implementation).⁷⁵ In an ideal type, the core of political authority is coherent and somewhat insulated, but does not need to be so isolated as to preserve capacity and prevent capture. Capacity is enhanced through connections to external actors, and through joint projects the resources of the private actors are channeled, while their risk is reduced under a rapidly changing environment. Ideally, the autonomy of the bureaucracy allows it to manage this risk while formulating its own goals, avoiding capture of the public agenda by private interests.

CONCLUSION

The question of war powers becomes more complicated when taking into account all of the possible variants of state capacity. From a comparative politics perspective, the relative monopoly on legitimate violence that

⁷³ See JOHN ZYSMAN, *GOVERNMENTS, MARKETS, AND GROWTH: FINANCIAL SYSTEMS AND THE POLITICS OF INDUSTRIAL CHANGE* 269 (1983) (explaining that in the American system, which is weak and not insulated, corporations themselves hold the power and decision making capability).

⁷⁴ Skocpol, *supra* note 58, at 9.

⁷⁵ See PETER A. HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* 17-20 (1986).

accompanies Weberian stateness can vary across different institutions and policy areas within the government, but it can also vary across state and private actors within its society. When private actors have some aspects of control (even indirect or structural) over the capacity for legitimate violence normally within the sphere of state authority, that control has an impact on the despotic and infrastructural capacity of the state in different ways. While the dual postwar phenomenon of the executive branch outsourcing war functions to private actors and the domestic spread of military contracting changing congressional preferences over military spending have both increased the authority of the executive branch to wage war, the impacts of these phenomena on national security capacity is more mixed. Capacities for coercion and extraction have increased, but at the expense of bureaucratic capacities to set national security agendas, such as the formulation of national security goals and implementing effective and flexible agendas for readiness. The structural influence of private actors has made U.S. national security institutions less Weberian over time. The despotic capacity of the state to set national security policies without economic or commercial interference has also been diluted. When you include private actors in the analysis of national security capacity, the picture is even more complicated than just the question of who has the authority to take the country to war.