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Franck & Weisband: Foreign Policy by Congress

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BOOK REVIEW

Congress and Foreign Policy

Foreign Policy by Congress. By Thomas M. Franck and Edward Weisband, New York and Oxford: Oxford University Press, 1979. Pp. ix, 357. \$15.95.

Reviewed by Robert H. Hammel*

If the complex litigation in *Goldwater v. Carter* provides no other clear lesson, it is a convincing demonstration that much of the constitutional law governing executive-legislative relations remains confused and ill-defined. With the Supreme Court's refusal to adjudicate the issue on the merits, the power to terminate treaties is consigned to a constitutional *terra incognita* where the boundaries of power must be achieved by *de facto* institutional practice rather than by legal theorizing. Whether this is a wise exercise of "the passive virtues" is open to dispute. It is, however, the way that the American political system has chosen to handle a number of salient problems in executive-legislative relations--problems such as the power of the President under the guise of "executive privilege" to withhold information from Congress, the limits of presidential war-making power, and a host of others.¹ Insofar as such disputes between Congress and the Executive Branch reach the courts, they characteristically are analyzed in terms of jurisdictional concepts (such as standing, ripeness, justiciability, and the political question doctrine) that avoid, or at least camouflage, the underlying substantive issues. Yet it is not inappropriate that these cases so often raise these jurisdictional issues, for the core problem in such disputes is evaluating the *institutional capacities* of the various organs of the national government.² Indeed, reluctance

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1. For a provocative discussion of these and other problems in executive-legislative relations, see Eckhardt & Black, *The Tides of Power* (1976).

2. Jurisdictional concepts such as standing, ripeness, justiciability, and political questions doctrine can be interpreted as modes of analyzing the institutional competence both of the courts and of the parties before it. See, e.g., Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517 (1966).

to evaluate or confusion about how to evaluate the institutional capacities of Congress and the presidency accounts for much of the incoherence of the constitutional law of executive-legislative relations. It is in this context that Franck and Weisband's *Foreign Policy by Congress* is to be recommended to any serious student of *Goldwater v. Carter*, for whatever legal principles finally come to govern the power to terminate treaties must, if they are to be viable, be founded on the underlying realities of presidential and congressional power. Thus such disputes must ultimately be evaluated in light of how good Congress actually is at making foreign policy, and it is to this subject that Franck and Weisband address themselves.

Foreign Policy by Congress is a difficult book for a reviewer to summarize -- though an easy and enjoyable one to read -- because the text interweaves detailed presentation of factual material with related exercises of political analysis. The difficulty is compounded by the fact that the political analysis is sometimes simply an evaluation of American political institutions as they are, while at other times it is an argument for how they should be. In broad terms, Franck and Weisband are concerned with the institutional capacity of Congress to participate in foreign policy-making in the aftermath of the reforms that resulted from the perceived presidential abuses associated with Vietnam and Watergate. That these reforms have been profound and not merely cosmetic in their effect is a point that the book makes incontestably clear.

The principal value of *Foreign Policy by Congress* lies in its rigorous presentation of a wealth of factual material and, of course, in the lessons that can be drawn from this material. The bulk of the book is devoted to detailed case studies of congressional efforts to influence foreign policy, including congressional actions to end the war in Vietnam, legislative reversal of presidential policies towards Turkey and Angola, the passage of the War Powers Act, the assumption of an oversight role over the intelligence agencies, and the assertion of congressional control over policies regarding human rights, military aid, and the export of nuclear technology and material. It is unnecessary to summarize these case studies here, but it should be noted that the authors present them in a manner that is not only thorough and rigorous but also literate and interesting, even exciting, to the reader. The authors'

command of the factual material they present is genuinely awesome, and they often flesh out their account by providing "behind the scenes" information that is helpful and frequently entertaining.³ It is from these case studies and from the detailed descriptions of congressional institutions and practices provided in the final chapters of the book that a picture of the institutional capacities of Congress emerges.

The traditional view among political scientists has been that Congress lacks the policy-making resources to play a responsible role in the formulation of foreign policy and that this lack of resources, along with diffuseness of the legislative decision-making process, relegates Congress to the role of ratifying or incrementally modifying executive policies. The material that Franck and Weisband provide demonstrates that this view is probably anachronistic. The most dramatic change has been in the area of expertise. Congress has expanded its informational support services, has enlarged committee staffs and improved their quality, and, through trips abroad by legislators and staff members and contacts with lobbyists for foreign governments, has established a sort of shadow State Department that can collect its own foreign affairs information. The result of this growth of expertise is that "(c)hairmen, and even individual members, are now more often in a position to challenge Administration officials with independently obtained facts and statistics as well as with their own informed analyses of the facts' significance for the national interest."⁴ Furthermore, as Congress enhances its own informational resources, it becomes all the more capable of prying information out of the executive branch -- a development that is reinforced by the fact that foreign policy professionals now envision in their career patterns the possibility of switching between the State Department and the staffs of congressional foreign policy committees.

3. To cite one amusing if somewhat trivial example, Franck and Weisband in describing the lobbying efforts of the executive branch to gain ratification of the Panama Canal Treaty note that Ambassador Sol Linowitz played tennis with Senator Zorinsky and purposely allowed the Senator to win. Franck & Weisband, *Foreign Policy by Congress 277* (1979) [hereinafter cited by page number only].

4. P. 233.

Similarly, changes in the legislative process within Congress have also reduced some of the organizational inefficiencies that used to undermine legislative participation in the making of foreign policy. Congressional reforms in the last decade have reduced the power of committee chairmen and generally "democratized" the committee system. While the reforms themselves produce certain dysfunctions, the result has been some increase in the influence of committees due to their newly enhanced legitimacy. This influence is, of course, further strengthened by the growth of committee expertise. The result, as Franck and Weisband suggest, is that committees are seen as both more representative and more expert, and their recommendations are in this respect all the more likely to be adopted by the legislature as a whole. In a variety of ways Congress has also tried to constrain the fragmenting influence of lobbyists. One method, inspired by scandals such as "Koreagate," has been to enact measures designed to limit lobbying abuses; another, described in an intriguing case study of the formulation of anti-boycott legislation, has been to force conflicting lobbyists to meet together and hammer out mutually acceptable measures. The result of all these developments is that Congress is more likely to produce coherent and consistent policies and that the Executive Branch no longer needs to be looked to as the sole institution capable of ensuring rational continuity in American foreign policy.

Thus the picture that emerges from the material that Franck and Weisband present is of a Congress far better equipped to play a responsible role in the formulation of foreign policy than traditionally expected. Nonetheless, as the authors make clear, it is an institution that still suffers from structural weaknesses that can inject irrationalities into the policy-making process. One example that is mentioned briefly in passing is especially germane to the issue in *Goldwater v. Carter*: namely, the differing institutional incentives between the Senate and the House over the treaty-making power. Since the House has no constitutional role to play in the ratification of treaties, it is inclined to encourage the President to expand the area of foreign relations dealt with through executive agreements authorized by statute and not to require that international agreements be formalized into treaties.⁵ Conversely, the Senate,

5. In a clever turn of phrase, the authors describe an executive agreement as "an undeclared treaty which, like an undeclared war, seeks to avoid paying its Constitutional dues by changing its name." P. 141.

in pursuit of its own institutional self-interest, has tended to insist on the use of treaties even for matters that arguably are better left to the more flexible instrument of the executive agreement.

More serious than differing interests between the Senate and the House are irrationalities that stem from conflicting committee jurisdictions. The authors are especially critical of usurpation by congressional appropriations and budgetary committees of matters that ought to be left to the substantive foreign affairs committees.⁶ Similarly, the authors deplore the inconsistencies that can result from legislative compromise and from the impact of the procedural technicalities involved in getting a bill through Congress. In this vein the authors criticize the arms cutoff to Greece and Turkey, which was the product of intense conflicts and compromises both within Congress and between Congress and the President:

What Congress and the President wrought was, in fact, a go-stop-go policy towards arms exports that succeeded only in alienating both Greeks and Turks while producing a policy ranking low in both the scales of principle and pragmatism.⁷

Franck and Weisband are likewise critical of the Senate's failure, due to wrangling and procedural technicalities, to authorize the extension of SALT I until SALT II negotiations were concluded.⁸ At times the book assumes an almost virulent tone in its criticisms of the effects of congressional interference in foreign policy, as, for example, when it notes that congressional actions with respect to the war in Vietnam led to a situation where ultimately "General Giap needed only to read the U.S. statutes to know what to expect: mandatory inaction."⁹

While Franck and Weisband deplore the international implications of some aspects of congressional activism, they also recognize the positive side of recent developments. Indeed, for students of world public order, one of the most interesting aspects of *Foreign Policy by Congress*

6. Pp. 249-53.

7. P. 43.

8. Pp. 152-54.

9. p. 23.

is its suggestion that Congress' new role in foreign policy in many ways benefits American participation in the international system. Franck and Weisband observe that

[W]hat was once resisted as a dangerous Congressional trespass on Executive prerogatives has now been recognized as a healthy reform of U.S. policy as well as of Executive-Congressional relations.

Congressional codetermination has... proven a better tactic than had been expected by the practitioners of quiet diplomacy. It is Congress which now draws the ire of foreign dictators, allowing the State Department to appear more understanding in a global game of "good cop-bad-cop."¹⁰

Similarly, the fact that foreign policy must now be endorsed by both Congress and the President allows other nations to have greater confidence in the seriousness of America's commitment to its policy decisions. Indeed, these perceived benefits have been a factor in reducing executive branch resistance to congressional assertions of power.

Thus the picture that Franck and Weisband present is a balanced one, and the authors are careful not to bludgeon the reader into either celebrating or deploring Congress' new role in the making of foreign policy. Overall, where *Foreign Policy by Congress* is strongest is in providing anecdotally rich and analytically rigorous data about the nature and effects of the reforms that have been instituted in the last decade. The analysis is especially valuable in its recognition of the interdependence of the various changes that have taken place, cogently describing, as more legalistic studies generally fail to do, the interplay among the growth of expertise in congressional committees concerned with foreign policy, the rise of lobbying by foreign governments, and the decline of the traditional leadership in Congress.

The book's major weakness is a direct counterpart of its strengths: because it is factually dense and because its focus is on the gamut of specific reforms,

10. P. 97.

it does not provide an adequate general theoretical basis to explain the broad changes in the distribution of power between the legislative and executive branches. Apart from a short introduction and brief remarks scattered throughout the text, the authors' explanations are typically on a "micro" level, usually in the form, "This presidential action stimulated this response by Congress." Little material is provided to explain why legislators voted the way they did on specific measures, and the authors resort instead to blithe allusions to "this atmosphere of disaffection"¹¹ or "the rebellious mood of that era."¹² In the few places that a broader and more rigorous theoretical view is taken, the result, as shall be suggested below, is not altogether satisfactory. It is, of course, somewhat unfair to criticize authors for not doing what they did not (presumably) intend to do; yet from the standpoint of a lawyer whose task to some degree is to try to evaluate rules *sub specie aeternitatis*, the failure of the authors to provide a long-term theoretical framework in which to analyze the developments they describe represents the only major flaw to an otherwise wholly admirable book.

In a short introduction, Franck and Weisband begin their analysis by noting that throughout American history there have been alternating periods of presidential and congressional control over foreign policy and that these periods have tended to fit three generalizations:

- (1) War tends to end the swing to Congress, and the ending of a war tends to trigger the swing back.
- (2) Each swing contains within itself the excesses that generate the counterforce for the next swing.
- (3) The durations of the swing, historically, may be getting short. ¹³

No explanation is given for why these generalizations have tended to hold true: in fact, the authors proceed to argue that the most recent resurgence of the congressional power is not to be seen as such a temporary "swing" but rather as a "revolution," the effects of which may be permanent. Instead of offering any theoretical

11. P. 88.

12. p. 99.

13. P. 6.

perspective to analyze the shift in power between the branches and to identify the institutional virtues of each branch, the authors rely recurrently on this analogy to "revolution." While the analogy succeeds in highlighting some significant developments and while it enjoys a good deal of poetic force, its failure to provide solid categories of analysis is suggested by the following characteristic passage:

Revolutions occur when people lose patience and, acting in anger, seize the controls. It is not the preferred method of operating a ship, although it may be the only way to deal with madness or incompetence on the bridge. It is in such a context that these events in Congress must be understood. Had there been a modicum of mutual respect and good faith, the Congress would probably not have acted as it did. It undoubtedly assumed functions that it cannot, and therefore should not even try to, perform.¹⁴

Yet the crucial question is what functions Congress or the Executive Branch should or should not perform, and here the answers that the authors suggest, though sensible, are cursory and superficial.¹⁵ The analogy to revolution is not useful in this context, as what is needed to identify the institutional capacities (and incapacities) of Congress is a deeper theory of how the institution operates.

In this respect, *Foreign Policy by Congress* is a frustrating book. Although it supplies indispensable factual data and case studies, all very competently analyzed, from which a full theoretical explanation of congressional competence could be generated, the authors' occasional efforts in this direction remain tentative and unconvincing. "What is appropriate to each branch," they suggest, "is usually discernible by looking at the instruments available to it. Congress acts by making law. Law is a vehicle of predictive certainty, the antithesis of flexibility and creative uncertainty."¹⁶

14. P. 32.

15. The passage just quoted is followed by the simple but not very useful suggestion that Congress should determine broad foreign policy goals and methods to achieve them but should not supervise or interfere with day-to-day decisionmaking. P. 32. The problem, of course, is *how* the legislature can mandate methods to achieve goals without excessively interfering in executive decisionmaking.

16. P. 32.

Accordingly, the authors conclude that Congress has a positive role to play in foreign-policymaking when certainty is needed, while the executive should be looked to when flexibility is required.

This wisdom is as old as *The Federalist Papers* and as venerable, but it is not clear that when applied to today's government it does not conceal as much as it reveals. There is a good deal of evidence to suggest that the executive branch is not nearly so flexible as it is often presumed to be; bureaucratic entrenchment and inertia often lead to the perpetuation of policies long after they become instrumentally dysfunctional.¹⁷ Similarly, the use of its law-making power may no longer be the prime modality through which Congress exercises its power.¹⁸ As the unfolding of the Watergate crisis illustrates (where the exercise of Congress' law-making power did not play a significant role), Congress has available to it a number of devices such as the confirmation power and the power to investigate that can be used to control executive branch policy-making. Theory must go beyond the lessons of *The Federalist Papers* or analogies to "revolution" to provide a convincing evaluation of the merits of congressional participation in the making of foreign policy. While one can draw conclusions about the institutional capacities of Congress from the case studies that Franck and Weisband provide, such conclusions must remain tentative--as being possibly nothing more than the haphazard result of particular problems and personalities--unless a deeper theoretical framework of analysis is supplied.

It is, of course, no easy task to discover a satisfactory theory to explain the intricacies of congressional behavior. Such a theory would have to encompass a consideration of the institutional and organizational constraints on Congress, of the legislative role in formulating domestic as well as foreign policy, of Congress' various formal and informal powers, and of the pressures and concerns that motivate the actual members of Congress. Furthermore, with respect to foreign policy, such a theory would have to explain why Congress seemed so intent on abdicating its power to the President during most of the post-World War Two period, only to assert

17. See, for example, Allison, *Essence of Decision* (1971) and Neustadt, *Alliance Politics* (1970).

18. See Huntington, *Congressional Responses to the Twentieth Century in The Congress and America's Future* (2nd ed. D. Truman 1973).

itself with almost reckless abandon during the post-Vietnam era. The literature in political science suggests that there are underlying consistencies in legislative behavior that can help resolve such seeming anomalies. Especially suggestive in the context is David Mayhew's analysis of Congress from the perspective of its "electoral connection."¹⁹ Mayhew demonstrates how both the structure and output of Congress can be explained by focusing on the efforts of members to ensure their reelection. Though this is not the place to elaborate such a theory, it is clear that much of Mayhew's analysis (such as his concept of "credit-claiming" or his suggestion that legislative behavior can be seen as a conspiracy among incumbents to help each other keep their seats) can profitably be applied to explaining congressional participation in the foreign-policy-making process. Franck and Weisband's failure to provide such analysis deprives their conclusions of weight they might otherwise have.

The theoretical failings on the part of *Foreign Policy by Congress* are all the more regrettable in light of the penetrating insights that the book offers into how the policy-making process actually works. The authors are remarkably sensitive to the effects of organizational variables on policy outputs, and the comprehensiveness of their institutional analysis is exemplary. On the level of analysis at which they choose to operate, the authors are careful to touch all bases--their thoroughness is evident, for example, in the range of reasons they offer to support their assertion that the recent changes in the congressional role in making foreign policy are likely to be permanent. These reasons include 1) that Congress has mandated procedural changes in policy-making rather than simply insisting on particular substantive outcomes, 2) that Congress has restructured itself to provide its own autonomous policy-making capability, 3) that Congress has changed its own legislative procedures to reduce its dependence on particular congressional leaders and to disperse power to the rank-and-file of its members, 4) that legislators have become less insulated from pressures by constituents and lobbyists on foreign policy matters as a result of the growing politicization of these issues, 5) that the Executive Branch has restructured itself to accommodate congressional participation in foreign-policymaking, and 6) that the perceived bene-

19. Mayhew, *Congress: The Electoral Connection* (1974).

fits of congressional participation in policy formulation have increased while the feared costs have been lower than expected.²⁰ Even if one remains skeptical about the permanence of these changes, the authors cannot be faulted for failing to support their argument.

It is worth reiterating that a general theme behind the author's analysis is that congressional insistence on inflexible normative principles enshrined in law may unduly restrict executive discretion and pragmatism. The authors advocate that a sensible balance between these two elements be achieved, and much of the material they present suggests that both Congress and the Executive Branch have indeed made progress in creating such a system. It is clear, of course, to even the most casual observer of American politics that both branches have their flaws and that what is needed is a mode of executive-legislative interaction that minimizes these flaws without impeding the exercise of each institution's virtues. The material provided in *Foreign Policy by Congress* offers grounds to believe that the last ten years have seen marked progress in this direction. If such is the case, history may someday rule that the Supreme Court was wise in *Goldwater v. Carter* not permanently to "constitutionalize" a process that must respond to the unpredictable and ever changing demands of international politics and that the Court was correct in consigning the question of who may terminate treaties to the constantly evolving interaction between Congress and the President.

20. Pp. 6-8.

