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THE JUDICIAL POWER OF THE PURSE:
HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS

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The Executive holds the sword . . . the Legislature commands the purse. The Judiciary, on the contrary, has no influence over the sword or the purse.

—Alexander Hamilton, Federalist No. 78
## TABLE OF CONTENTS

*List of Tables*
*List of Figures*
*Acknowledgements*

**INTRODUCTION**

**CHAPTER 1:** **Federal Judges’ Budgetary Powers**

**CHAPTER 2:** **Pulling the Purse Strings: An Information Theory of Crisis Jurisprudence**

**CHAPTER 3:** **Mobilizing Judicial Resources: The Information Theory in Action**

**CHAPTER 4:** **The Judicial Understanding of Costly Foreign Policy Events**

**CHAPTER 5:** **The Next Stop: The Information Theory in the Domestic Context**

**CONCLUSION**

*References*
INTRODUCTION

Two months before Germany surrendered, six months before the U.S. dropped atomic bombs on Hiroshima and Nagasaki, and well before Congress repealed the World War II revenue laws, the U.S. Supreme Court heard oral arguments in the case Commissioner v. Court Holding Co. This 1945 controversy involved a three-way property transaction in which the Court Holding Company distributed real estate to its shareholders as a dividend, who then immediately sold the property to a pre-determined third party. The evidence unambiguously indicated that the shareholders were involved in the deal for one reason: to enable Court Holding to avoid the status of seller, thereby steering clear of the high federal taxes imposed on the sale of corporate assets. Justice Black, writing for a unanimous Court, held in favor of the government noting that “[t]o permit the true nature of a transaction to be disguised by mere formalisms which exist solely to alter tax liabilities would seriously impair the effective administration of the tax policies of Congress.”

Four years later, in 1949, and six months before North Korea’s surprise attack on the Republic of South Korea, the Court heard oral arguments in U.S. v. Cumberland, a case that involved remarkably similar facts to those in Court Holding. A corporation, its shareholders, and a third party engaged in a three-way property transaction undertaken to enable the Cumberland Public Service Company to sell its property while avoiding the negative tax consequences associated with the sale of corporate-owned assets. Justice Black, again writing for a unanimous Court, noted the transaction looked “shadowy and artificial” but this time rendered a decision in favor of the taxpayer, thereby allowing Cumberland to avoid paying taxes. The Court acknowledged the “oddities in [the] tax consequences,” but justified the decision on
the grounds that Congress had not enacted legislation specifically barring the use of shareholders as conduits to evade corporate taxes, and, moreover, the lower court tribunals had, themselves, reached a pro-government result in *Court Holding* and one that favored the taxpayer in *Cumberland*.

Scholars, courts, and commentators have attempted to reconcile the two cases but conventional wisdom holds that the Supreme Court did nothing more than foster confusion and incoherence in an important area of the law. After all, the two cases involved identical legal provisions and virtually identical facts and circumstances, yet the justices unanimously agreed to issue divergent outcomes. Moreover, changes on the bench in the interim period were minimal: the Court had eight Democratic-appointees in 1945 and nine Democratic-appointees in 1949. In short, while the justices decided *Cumberland* in order to “clear up doubts arising out of the *Court Holding Company* case,” they seemed to do just the opposite.

This book argues that while *Court Holding* and *Cumberland* appear confusing and irreconcilable on their face, the cases are in fact wholly predicable if important factors are taken into account, namely the existence of wartime conditions. The justices considered *Court Holding* at a time when the U.S. was fighting major wars against enemy states on several fronts, but *Cumberland* emerged after World War II had dissolved into peacetime. Why would wartime emergencies cause Supreme Court justices to transform their decision-making calculus in a manner that appears to favor the government in the taxation cases that end up on the Court’s dockets? Because in the words of President Roosevelt, and quoted by the Court, itself: “[w]ar cost money.” In light of the massive and unavoidable financial costs that emerge in times of foreign policy crises, the justices have suggested in various ways and in various cases that “[i]n total war, it is necessary that a civilian make sacrifices of his property and profits with at least
the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself.”⁶ Indeed, the Court has gone so far as to suggest that it has a role to play in raising the revenue necessary to meet the nation’s wartime needs. In a dispute involving World War II taxes, the justices noted, the country was “faced with revenue needs and a tax program of a magnitude unthought of in modern times, and we all realize it is necessary to raise every dollar of additional revenue that can be raised without seriously disturbing or shattering our national economy.”⁷

The justices, of course, are not in a position to adopt revenue-raising laws or directly seize property for the nation’s wartime efforts, but they are able to render decisions in a manner that systematically favors the government in cases and controversies that implicate the fiscal pie in times of war, thereby indirectly providing economic assistance to the nation in times of need. This book aims to convince readers that the justices use cases such as Court Holding and Cumberland to advance not only their own, but the nation’s goals—providing access to economic resources, when necessary, to increase the probability of success on the battlefield. In short, the thesis of the book is that Supreme Court justices (as well as lower federal court judges) hold an implicit power of the purse, a power that can be used to realize extra-legal and budget-related objectives.

Not surprisingly, quite a few scholars have documented the manner in which Congress and the president have dealt with fiscal issues in wartime emergencies,⁸ but the extant literature is virtually silent on the financial role of the federal courts in times of crises. Students of the judiciary, to be sure, have investigated legal challenges to emergency funding measures, such as property seizures, banking regulations, and excess profits taxes, and have noted courtroom disputes enable judges both to support and derail economic policy,⁹ but the literature has failed
to explore the possibility that judges are in a position to engage in revenue raising and spending polices in their own right. More to the point, scholars have not identified federal judges as fiscal actors positioned to influence the size and use of the federal budget.

A handful of scholars in both law and political science have explored federal judges’ ability to affect state and local funding decisions and more than thirty years ago, the legal scholar Gerold Frug aptly characterized a series of federal judicial mandates as an exercise of the “judicial power of the purse” given that courts were able to force state and local governments to spend public funds on certain activities, irrespective of their own preferences or those of their constituents. The title of this book, of course, derives from Frug’s early and important insight vis-à-vis judicial powers. The substance of this study, however, moves far beyond Frug’s descriptive point and demonstrates that judges are able both to raise and spend federal monies irrespective of the preferences of the other two branches of government. Federal judges, in short may not have the formal power of the purse (it lies with Congress), but, as evidenced in the chapters that follow, they nevertheless can--and do--systematically exercise control over a surprising portion of the federal budget.

Uncovering and describing federal judges’ roles in the national budgetary process charts new territory, but it also raises two important questions: Do judges have any penchant to employ their fiscal authority in times of crisis, thereby increasing the nation’s ability to adequately respond to perceived threats? If so, do judges in fact use their budgetary powers differently in times of crisis than in periods of relative calm? This study seeks to answer to these inquiries through the lens of emergencies brought about by military threats or attacks from abroad. Stated most directly, the book sets aside the interesting questions that emerge in the context of domestic emergencies and focuses on the exercise of judicial purse powers in times of foreign policy
crises. For the sake of clarity, foreign policy crises, as defined here, are emergencies that raise national defense issues associated with military safety and security, but not issues that implicate nonmilitary foreign aid, diplomatic and trade relationships, and so forth.\textsuperscript{11}

The Plan of the Book and Its Place in the Extant Literature

To investigate if, how, and when judges use their fiscal powers, this book sets forth an information theory of crisis jurisprudence, a theory that posits rational judges, like individuals and policymakers generally, prefer periods of safety and security to those plagued by danger and chaos. Given this preference, judges are likely to render decisions in the cases and controversies that show up on their dockets in a manner calculated to keep the nation safe. Preparing and readying the nation for possible engagement in military hostilities is an extremely costly endeavor and, thus, the information theory argues that instrumentally rational judges will seek to enable the nation to fend off foreign threats through the strategic use of their purse strings.

Judges, of course, are experts in legal and constitutional matters, and not foreign policy matters, and thus will have difficulty identifying foreign policy crises, yet they will want to deploy their decision-making powers to help fund national defense in dangerous times. Consequently, the information theory posits that judges will take judicial notice, perhaps \textit{sub silencio}, of credible cues emerging from the elected branches of government vis-à-vis the perceived existence of foreign policy crises. These cues can take a range of different forms, such as a congressional declaration of war, a major troop deployment by the executive branch, or the conscription of men into the army in preparation for military engagement. The important theoretical point made below is not the specific cue relied upon, but the idea that judges will look
to experts for purposes of determining the existence of a foreign policy crisis, and not their own perceived expertise or that of the parties litigating before them.

The cues received by the courts will generally contain consistent messages (that is, both Congress and the president will take action indicating a crisis either exists or it does not exist), and in these circumstances judges will have no difficulty discerning the presence or absence of a foreign policy crisis. It is possible, however, that the elected branches will convey contradictory messages: Congress may refuse to support the president’s decision to deploy troops by withholding funds or through some other formal and public mechanism, suggesting the two bodies of government have diverging views on whether a foreign policy crisis is at hand. In this context, judges must assess the credibility of the messages and, in effect, side with one branch, or the other, on the question. For a number of reasons outlined below including the long-standing judicial deference to legislative actions in times of foreign policy crises--but not necessarily to those undertaken by the executive branch--the information theory of crisis jurisprudence posits that judges will often trust cues emanating from Congress over those sent by the president when they are at odds and when the nation’s finances are implicated.

The president, as the nation’s commander-in-chief, certainly has valuable information and expertise in the foreign policy context. The political scientist Aaron Wildavsky proposed the “two presidencies thesis” more than forty years ago arguing that policymakers systematically support the executive branch in the foreign policy arena given the president’s foreign policy information, knowledge and experience, but not in the domestic context where the two branches are assumed to be on equal footing. More recently, the legal scholars Eric Posner and Adrian Vermeule have focused specifically on federal courts and have made a strong case for federal judicial deference to the president’s foreign policy choices on grounds similar to Wildavsky’s
two presidencies thesis.\textsuperscript{13} The information theory presented and empirically investigated below, however, is not in conflict with the idea that judges and policymakers should or do privilege presidential cues on \textit{specific wartime policies} because it is a theory that addresses judges’ use of their budgetary powers in periods of crises more generally--not their decisions on individual and specific policy choices. Indeed, the cases and controversies that allow judges to operate as fiscal agents often do not involve military matters at all, but routine disputes in taxation and other financial areas of the law. The information theory posits that court-induced financial assistance is apt to emerge when Congress and the president send consistent cues indicating that the nation’s safety and security are threatened. If the president is supportive of increased levels of defense but Congress is silent or even opposed to military action, courts are unlikely to offer a funding boost on the grounds that military success does not depend on it.

The information theory of crisis jurisprudence does not imply that when federal judges choose to act, they will always attempt to loosen budgetary constraints in an effort to enable the nation to consume greater levels of defense. Rather this new understanding of the courts posits that judges will deploy the judicial power of the purse both negatively and positively. More specifically, judges will support the government in times of crisis by rendering decisions that expand the fisc when they believe extant safety and security are inadequate and thus greater levels of defense are necessary to protect the nation’s interests. But if judges receive trustworthy cues indicating that current policy has gone astray in the sense that military activities have become excessive--courts will seek to tighten the fisc by siding with private parties in litigation and against the government, thereby forcing the latter to make unwanted payouts and limiting the amount of public funds available for continued military endeavors. In these circumstances, judges will seek to shrink the size of the fiscal pie in order to promote their desire for the optimal
level of defense spending. To see why judges are likely to adopt this strategy, consider a situation in which Congress formally repeals its prior support for a president’s wartime activities and reduces funds available for defense generally. In this scenario, judges are likely to employ their powers in a manner also intended to squeeze the budget and, in the process, implement judicial incentives for the president and his advisors to reconsider their course of action and possibly reduce the level of military activity perceived to be excessive.

The information theory, in short, focuses on the trade-off that judges routinely face between “all other goods” (such as law, policy, institutional stability, personal legacy, and so forth) and “safety and security.” Judges seek the ideal level of defense but must rely on the cues and signals emanating from the elected branches of government to determine whether extant levels are too high or too low. When they receive credible information that defense levels are insufficient to keep the nation safe, they will trade off all other goods for more defense; if they receive cues indicating defense levels have become disproportionate to the amount needed for safety and security, they will decide cases in a manner that enables greater consumption of the other desired goods, such as law and ideology. Absent such cues, judges will issue opinions that reflect their belief that current defense levels are optimal and thus they need not increase nor shrink the size of the budget: the ideal bundle of goods is already being consumed.

This study builds on the extant literature in that it conceptualizes judges as instrumentally rational actors seeking to implement individual preferences over a range of goods, but it also presents a new understanding of the courts. Judicial scholars have long theorized and investigated the role of microlevel factors, such as the facts of a case, specific laws, and judicial political preferences (identified as “all other goods” above). Far less attention has been paid to
macrolevel factors in judicial decision-making and no study has provided an explicit model of judges’ willingness to utilize their budgetary authority in times of national danger.

To be sure, legal and political science researchers have not entirely ignored macrolevel factors and their effects on the judicial decision-making process. In two recent and important contributions to the literature, the legal scholar Barry Friedman and the team of political scientists, James Gibson and Gregory Caldeira, have noted that judges account for the political and social environments when rendering decisions on important issues in order to maintain a certain level of popularity and public acceptance. As well, Robert Erickson, Michael MacKuen, and James Stimson have investigated the effects of political and economic trends on courts by devising a measure that simultaneously incorporates features of both in their important and path-breaking book, *The Macro Polity*. This study, unlike the existing literature, however, posits that judges account for the broader environment not to maintain legitimacy and popular support--but rather to shape national policy in ways that accord with their own preferences.

More on point are the studies that investigate the effects of macrolevel events, such as foreign policy crises, on federal courts. Numerous legal and political science researchers have explored these effects, including Lee Epstein, Daniel Ho, Gary King, and Jeffrey Segal, Richard Posner, Eric Posner and Adrian Vermeule, Bruce Ackerman, Mark Tushnet, and Justice William Rehnquist, and all have made important and noteworthy contributions to the literature. Because each of these studies, as well as many others, advances our understanding of judging in times of foreign policy crisis, it is worthwhile to investigate briefly just how this book builds upon and extends this literature.

Beginning with the chief similarities. The contributions to the literature just listed, like this one, explore the reality that foreign policy crises exert an influence on the judicial decision-
making process. Moreover, the existing studies, taken together, like this one, present a range of both qualitative and quantitative evidence, documenting how, why, and when judges are likely to privilege the views of the federal government vis-à-vis private parties during on-going military crises. These commonalities exist, but important differences also distinguish this book from existing studies on a number of fronts.

First and foremost, scholars investigating judging in times of foreign policy crisis, including those listed above, have explored whether judges do or should decide civil rights and liberties cases differently in times of peace than in periods when the nation is in peril. Put differently, scholars have devoted their time and energy to understanding what might be labeled the judicial *policing hand*—they investigate whether judges should or do make trade-offs between individual rights and liberties, on the one hand, and law and order, on the other, in times of crisis. As must be obvious by now, this study investigates the judicial *fiscal hand* in order to identify and understand judges’ financial role in fending off military threats from abroad. Scholars have entirely ignored the idea that judges operate as federal fiscal actors seeking to assure the country consumes the optimal level of defense, thereby assuring necessary trade-offs between safety and security and “all other goods.”

Second, this book develops a theoretical basis for why we should expect judges to respond to foreign policy crises, and perhaps more importantly, why judges will rationally employ their decision-making power as a double-edged sword when pursuing their preferences. To be sure, hints of the information theory of crisis jurisprudence presented here have emerged in the literature, but scholars have all focused on one side or the other of the judicial sword, or on normative rather than positive considerations. No scholar to date has attempted to flesh out a complete theory of the federal courts in times of a foreign policy crises, nor have scholars
attempted to clarify just how such a theory is able to accommodate and build upon the long-
standing court scholarship focusing on microlevel factors, such as facts, law and judicial
ideology. From a theoretical perspective, then, this book seeks both to organize and advance our
understanding of judging in periods of crises and in times of peace.

Third, this book investigates the empirical implications of the information theory with
data that is quite a bit different than that used in the extant literature. With few exceptions,\textsuperscript{16} the
literature has focused almost exclusively on judicial decision-making at the apex of the judicial
hierarchy: the U.S. Supreme Court. This study, by contrast, investigates the Supreme Court as
well as the lower federal courts in times of crisis. While the Supreme Court is arguably the most
important body in the judicial system given that the justices nearly always resolve issues of
national significance and at the same time render opinions with great precedential value, lower
federal courts also undeniably play a key role in judicial decision-making given the large number
of decisions they render every year and their ability to flout Supreme Court doctrine, at least at
the margin. Moreover, existing studies tend to focus on narrow time frames or unique periods in
court history, whereas this study investigates thousands of judicial decisions rendered by both the
Supreme Court from 1900-2010 and in federal appellate courts from 1925-2002, enabling far
more detailed analyses of military crises than heretofore attempted.\textsuperscript{17}

\textbf{Why Investigate the Information Theory of Crisis Jurisprudence Through the Narrow Lens of
Foreign Policy Crises?}

Turning now to the specific focus of this book: judges as fiscal actors in times of foreign
policy crises. One might ask why it is useful to set forth and investigate an information theory of
crisis jurisprudence through the lens of foreign policy crises, and not crises more generally. In
short, why not conduct a far more expansive and comprehensive study with military crises as just one component of a larger investigation? To answer to these questions, consider the following.

A large extant literature investigates how the federal government—all three branches—responds to foreign policy crises, but no study has sought to identify the judicial power of the purse or to document just how these financial powers are used to facilitate the nation’s military success in times of crisis. This study, then, aims to fill a surprising and unfortunate gap in the literature, and in doing so, seeks to expand not only our current understanding of judicial preferences, but also to illustrate the manner in which judges interact with and possibly influence the other two branches of government. This latter insight is important: scholars have generally sought to identify the means by which Congress and the president seek to influence judicial decision-making, but this study seeks to flip the causal arrow, demonstrating that judges will seek to influence the policymaking that unfolds and transpires in the elected branches of government. Whether judges successfully transform the policymaking choices of Congress and the president is an empirical question that is not addressed here—rather the point is that judges will act as if they are able to exert such influence.

The information theory of crisis jurisprudence can (and should and will) be investigated in a range of different crisis contexts, but it is worthwhile to flesh out and scrutinize this new theory in the milieu in which it is likely to have the greatest purchase: foreign policy crises. These crises are truly national events, posing a threat to the country’s interests and, perhaps, its very survival, while at the same time inflicting considerable costs on the public fisc. For these reasons, military crises involving high-risk situations are likely to take priority in policymaking circles, perhaps, in part, because the incidents tend to have homogenous effects throughout the nation in the sense that we have never observed one part of the country at war while another is at
peace. Due to this experiential homogeneity, it is reasonable to expect that these crises will also have largely homogenous effects on judges all around the nation and up-and-down the judicial hierarchy, if they are affected at all. Of course, the local nature of military casualties and defense industry profits may lead to larger (or smaller) effects on courts located in different regions of the country, but these factors do not change the underlying idea that a major military event will affect court outcomes throughout the country given the high stakes in every jurisdiction.

Issues involving domestic crises, such as natural disasters, crime waves, major economic downturns, and other types of macrolevel events, by contrast, can have national effects but are more likely to be contained to relatively narrow regions. In fact, data suggest that regional differences in many of these circumstances persist over time, and that different localities (even within the same state) often experience events quite a bit differently from the national average. To give just one example, hurricanes are far more likely strike in the Eastern and Middle parts of the Southern U.S., but are unlikely to affect the Pacific Northwest. Given the local nature of natural disasters such as hurricanes, it is doubtful that they will exert a strong influence on the average federal judge who is likely to have very little--or no--information about the event or its costs to the federal budget. Whether the information theory, or a macrotheory of the court more generally, could accommodate such issues is intriguing and certainly worthy of future consideration, but these issues will be investigated in a follow-up project rather than here.

The notion that foreign policy crises pose distinct and all-encompassing threats to the nation as whole does not, of course, originate with this study. Judges, themselves, have suggested as much. In Yakus v. U.S., for example, the Supreme Court considered a dispute involving wartime price controls implemented in the 1940s. The justices issued a series of opinions in Yakus implying that the on-going wartime crisis was reason enough to sanction the
new laws—even if a different view would likely prevail in peacetime. In the words of Justice Rutledge, who questioned the law’s procedural aspects but not the government’s substantive decision on price controls:

Judged by normal peacetime standards, over-all nationwide price control hardly has an accepted place in our institutions . . . Whether control so extensive might be upheld in some emergency not created by war need not now be decided. That it can be supported in the present circumstances and for the declared purposes there can be no doubt.\textsuperscript{18}

The justices are not alone in their view that foreign policy crises, such as wars, create unique circumstances warranting extraordinary federal actions often at great expense to the budget. As the legal and political science scholar Edward Corwin noted in his well-known work \textit{Total War and the Constitution}, “war, public war, total war, is still no doubt the emergency par excellence”\textsuperscript{19} and this, in turn, justifies government intervention of a sort and level unseen, and perhaps, undesirable in times of peace.\textsuperscript{20}

Consider other the views also emanating from the political science literature. A prevailing view in the realist school of international relations posits that because the international system is plagued by a great level of competition and danger, a nation’s top priority is (and must be) its security and survival.\textsuperscript{21} This preference leads many realists to make strong claims about foreign versus domestic policymaking: while the latter is rife with conflicting viewpoints, partisan politics, and regional disagreements, the former is characterized by unanimity and accord given the high-stakes involved.\textsuperscript{22} Scholars subscribing to this view of realism have investigated these contrasting dynamics in the context of Congress and have noted that in times
of foreign policy crises, legislators rationally offer bipartisan support for the president to assure a successful resolution of the issues, thereby facilitating national safety and security. While a number of recent scholars, including William Howell, Jon Pevehouse, David Rohde, and John Tierney convincingly challenge to the realists’ assertion that partisan politics dissolve in times of crisis, no scholar or team of scholars has questioned the underlying claim that resolving foreign policy crises is a top priority in policymaking circles given the risks involved. Similarly, this study of the federal courts posits that foreign and military crises weigh heavily on the judicial mind given the severe national consequences of failure; to disregard crises is to jeopardize not only the well-being of the judges and the judiciary, but the whole nation.

Similarly, the idea underlying the “rally-around-the-flag effect” is linked to the unique nature of international and foreign policy events. Rally events, as defined by the political scientist John Mueller are specific, dramatic, and sharply focused international events involving the United States and the president in particular, and lead to sudden and substantial increases in presidential approval ratings. Rally events that have sparked notable and increased popularity rating include the on-set of the Korean War, the Iranian hostage crisis, and the concerted attacks on the nation that occurred on 9/11. The precise cause of the rally-around-the-flag effect is disputed; some argue they are associated with patriotic feelings that Americans experience in times of danger while others argue they are linked to political leaders’ willingness refrain from publicly criticizing the commander-in-chief during an on-going foreign crisis. Irrespective of the underlying cause, again there is no dispute that international and foreign policy crises are unique incidents in American history involving high-stake issues that generate popular views unobserved in times of domestic crises or other macrolevel events. Similarly, this study expects federal judges to respond to foreign policy crises in a way that differs from the decision-making
that transpires in periods of domestic disorder and peacetime generally—they will decide cases in a manner that enables the nation to purchase the preferred levels of defense.

There is one final reason why foreign policy crises are well-suited for an initial investigation of the effects of macrolevel events on courts—they impose massive costs on the nation and thus it is reasonable to expect that judges will deploy their fiscal authority in a manner intended to aid the nation’s financial needs in these periods. While many of the costs are incommensurable and difficult to estimate, such as the suppression of individual rights and liberties, human suffering, and death; other costs, such as direct expenditures on military equipment, training, and deployment, can be calculated with some precision. Since the turn of the twentieth century, for example, U.S. policymakers have spent nearly $12,700,000 billion defending the nation from military threats abroad, an average of $115,000 billion every year (all numbers here and below are in 2009 dollars unless indicated otherwise). As the legal academics Steven Bank, Kirk Stark, and Joseph Thorndike have noted in their excellent history of fiscal policymaking in times of emergency: wartime activities engender sheer necessity. “There is simply no other government activity that requires as much revenue,” the authors argue, “as fighting a war. Success on the battlefield requires economic resources [and the nation must find a way] to marshal those resources.”

These military costs, of course, have not been constant throughout all time periods, an empirical fact that will play an important role in both the theory and empirical findings presented below. In the first half of the twentieth century, defense outlays spiked in both world wars and then returned to near-peacetime levels at the end of each foreign policy crisis. Between 1900 and 1916, for example, the government spent an average of $266 million on military activities, but mean spending in 1917 and 1918 was $3,383 million, the years when the nation was involved
in World War I. Similarly, the government invested $1,029 million on average between 1920 and 1940, but incurred roughly $52,180 million in expenses on average every year during World War II on defense operations.

This defense expenditure cycle--from high levels in times of foreign crises to low levels during peacetime and then back again--was the norm up through World War II, but after that time the cycle began to fade as military costs remained high and relatively constant in all years. This is not because the nation avoided serious foreign policy crises after World War II--the Korean War, the Vietnam War, the Gulf War, the Afghanistan War, and the Iraq War--all prove otherwise. Rather the high and constant military costs are attributable to policymakers’ choice to devote substantial funds to military activities in all periods, at least in part, to assure the nation’s ability and readiness to respond to any and all military hostilities as the cold war unfolded.

Table 1 below depicts the costs incurred by the nation in the years it was involved in “major wars” throughout the twentieth and early twenty-first centuries, totaling more than $6 trillion above what the nation would have incurred in military expenses absent a foreign policy crisis. World War II cost the nation more than $4 trillion and is, by far, the most expensive foreign policy crisis to date; the Iraq and Afghanistan Wars have led the government to spend close to $1 trillion in public funds; while the other wars involved expenditures of far less monies: $686 billion (Vietnam War), $253 billion (World War I), $320 billion (Korean War), and $96 billion (Gulf War).
Table 1 informs on the cost of major wars, but it is misleading in two important respects. First, when the nation employs the military draft, as it did during the two world wars and the Korean and Vietnam Wars, recruits are paid below-market wages and thus the costs depicted in table 1 indicate actual outlays but substantially understate social costs. Second, the table ignores defense costs incurred by the nation in the absence of major military deployments. Accordingly, figure 1 below presents military spending in real dollars and as a proportion of the GDP, which addresses the second problem but the not the first. The dotted line in the figure depicts outlays in billions of 2009 dollars and is linked to the $y$-axis on the right-hand side of the figure; the solid line presents defense outlays as a proportion of the GDP and is linked to the $y$-axis on the left-hand side of the figure.
Figure 1
Defense outlays, 1910-2010

Note: Solid line represents total defense outlays in billion of 2009 dollars and dashed line depicts defense spending as percent of GDP.

Figure 1 suggests that major wars are often, but not always, correlated with high levels of defense expenditures. World War I, World II, the Korean War, the Vietnam War, and the Iraq/Afghanistan Wars all led to a spike in defense spending as represented in constant dollars and as a portion of the GDP. The spike in spending correlated with the Vietnam War, however, did not take place until the late 1960s notwithstanding the fact that the war is widely believed to have begun as early as 1963 when Congress passed the Tonkin Gulf Resolution supporting President Johnson’s military activities in Indochina; perhaps even more notable, real defense spending *decreased* several times during this wartime period as did defense spending as a proportion of GDP—suggesting that neither Congress nor the president were prioritizing the Vietnam War in their appropriations and spending decisions. Moreover, spending increased notably in the 1980s during a period of heightened tension and perceived international conflict,
and yet there were no major troop deployments on the scale of those observed during the wartime periods. Finally, real defense spending increased sharply in the early twentieth century and has continued to increase throughout the Iraq/Afghanistan Wars, but has increased only a small amount vis-à-vis the GDP during this time period.

While figure 1 and table 1 both indicate that defense activities are costly, the nation also spends substantial monies responding to various other macrolevel events, such as natural disasters, economic downturns, crime, immigration, and so forth. Unlike defense activities, however, these expenditures are not widely and routinely publicized in the media, extensively discussed in academic scholarship, or analyzed as unique budgetary items in policymaking circles. Indeed, identifying the costs of major military crises, and defense spending generally, is an easy task given that they are listed separately in the annual federal budget, which is made widely available by the government in print publications and on internet sites. The federal costs associated with domestic crises and other macrolevel events, by contrast, are not aggregated nor estimated in any single location and, with few exceptions, are virtually impossible to identify with any precision given that agency protocols do not require these costs to be singled out in the budget reporting process. These differences in budgeting practices, again, increase the likelihood that federal judges will strategically employ their budgetary powers to help the nation fund emergency costs brought about by foreign policy crises but not other types of crises or large-scale events that plague the nation.

The Organization of the Book

This book is organized as follows. Chapter 1 uncovers and describes the judicial power of the purse from the perspective of each branch of government. With the help of published data
and interviews with various current and former government officials, the chapter establishes the possible upper and lower bound of judicial fiscal power, thereby setting the groundwork for an investigation of how this budgetary authority is exercised in times of foreign policy crises.

Chapter 2 sets forth the information theory of crisis jurisprudence positing that judges wield their fiscal power as a double-edged sword with the goal of assuring the nation consumes the preferred level of defense. When military spending is perceived to be insufficient (perhaps due to unforeseen military threats from abroad) judges will employ their purse powers with the intent of expanding the size of the fisc and enabling consumption of greater levels of defense; when judges perceive defense spending to be excessive, they will seek to pinch the fisc in an effort to reduce the military activities undertaken by Congress and the president. Having neither information nor expertise with respect to foreign policy issues, judges will have difficulty determining whether they (and the nation) should trade-off consumption of “all other goods” for greater levels of defense and for this reason they will rely on cues and signals emanating from the elected branches. When these cues are consistent, judges will have no difficulty discerning whether the nation needs more or less defense to maintain the optimal level of safety and security, but when Congress and the president send conflicting messages judges must side with one branch over the other on the issue at hand. The information theory hypothesizes that judges will often side with Congress over the president when it comes to decision-making in times of crisis for a number reasons suggested above and explored in detail below.

Chapter 3 conducts a large-N quantitative study of judicial decision-making and finds substantial support for the information theory of crisis jurisprudence in the context of the Supreme Court but not the lower federal appellate courts. More specifically, the findings show that during World Wars I and II, the justices systematically sought to augment the size of the
fisc, but after that period, judicial strategies became substantially more complex. Major troop deployments led the justices to markedly disfavor the government throughout the cold war period yet during this same time, the justices favored the government if defense spending increased. These twin findings in the cold war era suggest that the justices were willing to aid the nation financially when the elected branches of government devoted more of the nation’s financial resources to its military activities, but when Congress and the president failed to identify defense as a priority in their own spending choices--the Court was apt to refuse to help fund the military efforts--indeed, they were apt to tighten the fisc as a means to encourage the government to reconsider its foreign policy tactics. Chapter 4 turns to qualitative evidence found in judicial opinions, courtroom filings, and law clerks’ memoranda and uncovers data that substantially mirror the quantitative findings presented in chapter 3. The qualitative evidence indicates that judges are not only aware of the high financial costs of war, but will eagerly utilize their decision-making powers to enable the nation to purchase increasing levels of defense but only when it appears necessary for success on the battlefield.

The information theory of crisis jurisprudence presented here, along with its empirical implications, establish the groundwork for additional research exploring the effects of crises on federal courts in contexts well beyond foreign policy emergencies. These crises might include economic, health, or crime issues, or may concern natural disasters, but all would involve events beyond control of either the litigants or the judges. The book, in short, invites further investigation of how national issues--macrolevel issues--outside the foreign policy context affect courts. To explore this possibility, chapter 5 conducts an out-of-sample study of decision-making in one domestic context--economic policymaking. This preliminary study finds the information theory, with minor adjustments, substantially aids in forecasting how and why
judges respond to macroeconomic trends. The theory suggests, and the data confirm, that Supreme Court justices perceive the state of the economy as a credible cue of federal policymakers’ ability to manage the nation’s resources: when the economy is doing well, the justices tend to support the government in the decision-making process but as the economy turns sour this support evaporates and the justices begin issuing increased levels of anti-government decisions in financial cases that show up on the docket. This “judicial business cycle” corresponds to the typical macroeconomic upturns and downturns, but with the onset of a serious economic contraction--such as the Great Depression in the 1930s--the justices are more likely to collaborate with federal policymakers rather than punish them for extant economic conditions.

The book owes a debt to the literatures in both international relations and judicial decision-making. Accordingly, the concluding chapter offers a brief summary of the extant scholarship and explores how the information theory and the empirical findings presented here build upon and extend the current literatures in these areas. Finally, the chapter closes with a short discussion of the normative implications of the judicial inclination to employ the implicit judicial power of the purse in times of crisis to advance judges’ and the nation’s goals.
ENDNOTES

1 324 U.S. 331 (1945).
2 324 U.S. 331, 334 (1945).
4 It appears that Justice Douglas was conflicted out because he took no part in either the consideration of the issues or the decision of the case.
5 Lichter v. United States, 334 U.S. 742, n.5 (1948) (quoting extensively from President Roosevelt’s Message to Congress, 88 Cong. Rec. 32, 33-34 (1942)).
6 334 U.S. 742, 754 (1948).
7 Putnam v. Commissioner, 352 US 82 n. 16(1956) (citing Hearing before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong. 2d Sess. 1).
14 (Gibson and Caldeira (2010); Friedman, (2009)).
15 Lee Epstein, Daniel Ho, Gary King, & Jeffrey Segal, The Effect of the War on the Supreme Court, 80 NYU Law Rev 1 (2005); Richard Posner, Not a Suicide Attack (2006); Eric Posner & Adrian Vermeule, Terror in the Balance (2006); Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in the Age of Terrorism (2006); Mark Tushnet (editor), The Constitution in Wartime (2005); William R. Rehnquist, All the Law but One: Civil Liberties in Wartime (1998)
17 The empirical component of this study uses three databases. One was created by the author and is available at xx; the other two are publicly available databases including the Spaeth dataset located at http://supremecourtdatabase.org and the Songer database available at http://www.cas.sc.edu/poli/juri/appctdata.htm.
18 321 U.S. 414 (1944)
19 Edward S. Corwin, Total War and the Constitution 178 (1947). Foreign crises, of course, encompass shooting wars but also situations that have not officially been declared as such, including the conflicts in Korea, Vietnam, and the Gulf region. Congress has not declared war
since World War II and thus this study includes military events that have not involved congressional declarations of war—although the events have prompted Congress to issue resolutions supporting the president’s military endeavors on many occasions.

20 321 U.S. 414 (1944)