

Volume 47 | Issue 4

---

1997

# The Spontaneous Order of War Powers

John O. McGinnis

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

## Recommended Citation

John O. McGinnis, *The Spontaneous Order of War Powers*, 47 Case W. Res. L. Rev. 1317 (1997)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol47/iss4/9>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# THE SPONTANEOUS ORDER OF WAR POWERS

*John O. McGinnis*<sup>†</sup>

War Powers jurisprudence raises a fundamental issue for the form of constitutional order: in what circumstances are rulers best restrained by rule centralism and in what circumstances by a spontaneous order generated by the dynamic interplay of institutions.<sup>1</sup> The two papers before us take a very different approach to this question. Louis Fisher is a moderate advocate of rule centralism: the War Powers Clause has a fixed and determinate meaning that should be applied to all the branches.<sup>2</sup> He believes that except in limited and defined circumstances military action can be taken only with express congressional authorization. On the other hand, Peter Shane believes that the meaning of War Powers is largely dictated by custom generated by the complex interaction of the legislative and executive branches and not by any fixed rule.<sup>3</sup> His War Pow-

---

<sup>†</sup> Professor, Benjamin N. Cardozo School of Law. I am very grateful to Dean Gerhardt for inviting me to this conference. His good will and hospitality to those with whom he habitually disagrees in matters of law and politics is exemplary.

1. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 138-40, 230-64 (1991) (discussing generally spontaneous order and legal centralism in law). Professor Ellickson contrasts the order that arises from the enforcement mechanism of a central coordinator with the more spontaneous order that under certain conditions can arise in its absence. He argues that the legal centrist tradition has neglected consideration of decentralized forms of order that explain much social behavior. This article is in keeping with Ellickson's project because it attempts to show that some parts of our constitutional regime were necessarily designed to reflect spontaneous order of evolving norms generated by political institutions.

2. See Louis Fisher, *Sidestepping Congress: Presidents Acting Under UN and NATO*, 47 *CASE W. RES. L. REV.* 1237 (1997). John Hart Ely, who calls for very substantial judicial intervention to enforce fixed and determinant rules provides the paradigm example of this approach. See John Hart Ely, Jr., *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

3. See Peter M. Shane, *Learning McNamara's Lessons: How War Powers Resolution Advances the Rule of Law*, 47 *CASE W. RES. L. REV.* 1281 (1997).

ers Clause jurisprudence is thus necessarily more indeterminate and protean than that of *Louis Fisher*.

My own position on this central matter is that the War Powers law is necessarily a form of spontaneous order—the result of accommodations and implicit bargaining between the branches.<sup>4</sup> Moreover, I believe this method of constitutional restraint is both the natural consequence of the structure that the Framers established and the best possible structure to govern the exercise of military force. In this brief comment I will offer some of the reasons why a constitutional structure of spontaneous order is to be preferred in this area. These reasons seem to me so powerful that it is difficult to imagine a War Powers jurisprudence that relies on rule centralism existing outside the pages of law reviews.<sup>5</sup>

In War Powers jurisprudence, as in other areas of constitutive law, we can understand what is the preferred form of constitutional order only if we first understand the problem of governance it is meant to solve. Therefore let me briefly outline the central problem of governance that the War Powers was meant to address.<sup>6</sup> This problem is but a particular instance of the general dilemma we face in designing any just regime: How can we establish a government that is powerful enough to create public goods but in which that power is sufficiently constrained to prevent its deployment of behalf of purely private interests?<sup>7</sup> In other words, we want to establish a constitution that leads to high ratio of governmental acts that provide public goods compared to acts that are redistributive or otherwise redound to purely private advantage.<sup>8</sup>

---

4. See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 *LAW & CONTEMP. PROBS.* 293 (1993) (describing the way the War Powers provisions actually work as a bargaining game). In the present analysis, I suggest that this structure is normatively justified.

5. One problem for the advocates of a strong form rule centralism is their failure to provide examples of countries in which war-making has been regulated by the judicial application of fixed rules. If, as I argue, the regulation of war-making is shaped by intrinsic facts that militate against rule centralism in this area, the absence of examples would not be surprising.

6. By the War Powers I mean not only the War Powers Clause per se, but the whole complex of clauses that relate to the exercise of American military power, including Congress's authority to raise armies and the President's authority as Commander-in-Chief.

7. See Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development*, 11 *J.L. ECON. & ORG.* 1 (1995) (identifying the provision of public goods under appropriate constraints as the central problem of governance).

8. It is obviously beyond the scope of this essay to give a full defense of this vision

In the case of the War Powers, the public good at issue is perhaps the most fundamental that any government provides: the defense of its existence and its interests against the natural tendency of other nations to act aggressively and more generally expand their influence at the nation's expense. This public good responds to the most elemental of human drives: people's interest in defending their resources and property against other bands of people who, in the absence of such a defense, will naturally threaten their property, security, or way of life.<sup>9</sup> Furthermore, in providing this public good, the government must send citizens to risk their lives—an act that also engages the primal emotions of the public.

The private motive which leads rulers to exploit the need for this public good for their own ends is also elemental—the innate desire for status that we share with other primates.<sup>10</sup> The Framers well understood this risk, although they used concepts familiar to the eighteenth century rather than modern biology. As Professor William Treanor has recently shown, the Framers' principal concern about the conduct of military affairs was the strong tendency for the desire for fame and glory to distort the judgment of rulers and make them undertake wars that were not in the public interest.<sup>11</sup> To be sure, governmental military action can be used as a cloak for other private ends, such as gaining business opportunities for particular groups.<sup>12</sup> Nevertheless, it seems clear that the Framers thought the output of this particular public good was most

---

of constitutionalism or even a completely determinate definition of public goods. But the essential intuition is simple: Formal and informal markets are better at producing goods than governments and therefore government should be limited to the production of public goods. Moreover, a government that is not so limited but engages in redistribution will decrease the incentives for individuals to produce and will thus reduce economic growth.

9. See John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES (1997).

10. See *id.* (describing the biological roots of the problems of governance addressed by the War Powers).

11. See William Michael Treanor, *Fame, Founding, and the Power to Declare War*, 82 CORNELL L. REV. (forthcoming May 1997). The Framers were not wholly disinterested in being concerned about the status-seeking tendencies of future rulers. The greatest fame and glory can be attained through founding a new republic, thus wiping out part of the Framers' own renown. History, including our own, suggests that the best way to found a new republic is through war. The only President to rival the renown of the Framers, Abraham Lincoln, certainly transformed, and some would say overthrew, the Framers' Republic through war.

12. Some military interventions by the United States at the end of the nineteenth century may have been propelled by this kind of private interest.

likely to be impaired by the self-aggrandizement of the rulers themselves.

The elemental, mass emotions engendered by this public good have implications for the constitutional order responsible for controlling its provision. Some set of ruler or rulers will necessarily be given the initiative in the conduct of military action. The pull of glory and status seeking will make such ruler(s) very unlikely to tolerate restraints on their action other than those backed by a large political consensus. Moreover, the fundamental nature of the public good will make any legal institution charged with controlling these ruler(s) loathe to intervene on any basis but the clearest principle lest it be held responsible for a grievous harm to the republic.<sup>13</sup> Both of these factors limit the possible forms of constitutional restraint that can be applied to the provision of this public good. Unless the principle of restraint can be made determinate and clear, it will be extremely difficult for a restraining legal institution to summon the will to enforce it. In the absence of such a determinate principle, the only method of restraint would not be through fixed rules centrally applied by a legal institution, but through the more ad hoc pressures of countervailing centers of political power.

The problem of how to obtain this most necessary of public goods while preventing the use of government to serve this deep-seated self interest is compounded by yet another intrinsic difficulty: the structure by which the good can be best obtained turns out to be also the structure that leads to substantial risks of status-seeking. Placing the initiative for war making in a simple individual is necessary for the coherent assertion of national power, but an individual with such a singular responsibility is also the kind of decision maker most likely to use this power for his own aggrandizement.

The Framers understood that the conduct of war must be entrusted to executive. One important reason is that military decisions are better made by a unitary executive who has the capacity for continuity of purpose, secrecy, and dispatch.<sup>14</sup> As then Professor Woodrow Wilson observed, the executive control over the conduct of the war inevitably leads to executive control over the initiative in war and foreign affairs:

---

13. See McGinnis, *supra* note 4, at 306 (discussing risks to the judiciary of intervention in war making decisions).

14. See THE FEDERALIST NO. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

When foreign affairs play a prominent part in the politics and policy of a nation its Executive must of necessity be its guide: must utter every initial judgment, take every first step of action, supply the information upon which it is to act, suggest and in large measure control its conduct.<sup>15</sup>

Congress on the other hand as a collective body has a diffuse structure with many opportunities for members to vote on both sides of an issue and to undercut one another. It is thus less likely to chart a coherent military course.

Here I briefly address Dean Shane's suggestion that the Robert McNamara's recent memoirs, *In Retrospect: The Tragedy and Lessons of Vietnam*, show that the executive's conduct of the war suffers from certain defects (particularly in the processing of information) and would actually be improved by more input from Congress.<sup>16</sup> Dean Shane acknowledges that his point is an anecdotal one.<sup>17</sup> We should therefore be wary of making generalizations from the perspective of one executive actor in one conflict. This is a particularly important caveat when one considers that Vietnam was but a single battle in a much larger struggle against communism—the Cold War. While a detailed evaluation of the United States' performance in this larger battle is obviously beyond the scope of this comment, I would suggest that successful conclusion of such a long-term struggle by a democracy against a more authoritarian power is remarkable in the history of the world.<sup>18</sup> This struggle was by all accounts directed through the executive branch by a succession of Presidents of both parties.<sup>19</sup>

But, more fundamentally, my response is that even if McNamara does show that the executive branch is not perfect in the conduct of the war, he does not show that the executive is worse than the legislature or some combination of the legislature and executive. Ultimately our Constitution confers power on the

---

15. See WOODROW WILSON, *CONGRESSIONAL GOVERNMENT; A STUDY IN AMERICAN POLITICS* xi-xii (5th ed. 1913).

16. See Shane, *supra* note 3, at 1285.

17. See *id.* (McNamara's *Lessons* demonstrate "the ineffectiveness of uni-branch military policy making, at least under particular conditions").

18. For instance, the Peloponnesian War—a struggle between democracy and authoritarianism of comparable scope and length—did not turn out so well for Athens, the democratic society.

19. See Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 725 (1996) (observing that Presidents exercised strong control of foreign policy and military action during this period).

basis of discounted probabilities of the long term cost and benefits of a particular structure for delivering particular public goods. Even if we were to confine our empirical universe to Vietnam in formulating a challenge to that judgment, we would have to weigh the mistakes of the executive, when acting alone at the beginning of the war, with those toward the end of war when Congress was heavily involved in the decision making process. While a law review is not the place to reargue the merits of the conduct of the Vietnam War, I do not think the balance is at all favorable to decisions made in the latter period.<sup>20</sup>

Respite the advantages of executive initiative in war powers, the Framers also recognized that concentrating such power in a simple individual does exacerbate the danger that rulers will use the war making authority to increase their own status rather than to advance the interest of the republic. Madison writing in the *Helvidius* was quite explicit about this dilemma:

[T]he trust and temptation [of war] would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, a physical force is created; and it is the executive will to direct it. In war the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weakness of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.<sup>21</sup>

Therefore, war making is a public good where the optimal assignment of power for the most effective delivery also leads to a great risk that it will be produced for private ends. This dilemma

---

20. See, e.g., HENRY A. KISSINGER, *THE WHITE HOUSE YEARS* 512-13 (1979) (painting a rather jaundiced view of Congress's information processing and decision making at key points in the conflict in Southeast Asia); GERALD FORD, *A TIME TO HEAL* 255 (1979) (arguing that Congress's performance was consistently "short-sighted").

21. *THE LETTERS OF HELVIDIUS* NO. 4, at 452 (James Madison) (Hallowell ed., 1852).

shows that the task of constitutional restraint in military affairs is fundamentally different and more difficult than the one Framers confronted in providing domestic public goods. There they could assign and divide the responsibility for providing public goods between the states and federal government in a manner that both optimized their provision and minimized the risk of use of power for purely private ends.

The system of federalism recognized that most public goods were generally better delivered by the states than the federal government because states would better represent local preferences.<sup>22</sup> On the other hand, because of local parochialism, a common currency and the eradication of trade barriers among the states were better provided on a national scale, as reflected by the provision for such goods in the Constitution.<sup>23</sup> Moreover, the danger that the power to provide the public goods would be misused by the rulers of the state and federal governments and their supporting coalitions was also policed by that same division of responsibilities. Rent-seeking from state government was limited by putting those governments in competition with one another for capital, including human capital, and the conditions for such competition were maintained by the very limited powers given to the federal government.<sup>24</sup> The misuse of powers by the federal government was minimized by the limited nature of those powers and the election of one house of Congress by the state legislators.<sup>25</sup>

In War Powers, however, it is hard to find a principle of division of power that will simultaneously assure the provision of the public good of military power while minimizing the possibility of

---

22. See DENNIS MUELLER, *CONSTITUTIONAL DEMOCRACY* 77 (1996) (suggesting that federalism raises the efficiency of the provision of public goods by matching politics to communities of public good consumers).

23. See U.S. CONST. art. I, § 8.

24. See Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 147, 149 (1992) (suggesting that federalism restrains state power because individuals can move freely from state to state).

25. The Seventeenth Amendment eliminated this institutional check on the federal government. See U.S. CONST. amend. XVII.

In the New Deal, the Supreme Court essentially abandoned enforcing the limitations on the federal government's powers. While some might argue the dividing line was not sufficiently determinate, I believe the original constitution drew lines that were determinate and practically enforceable. See also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 *VA. L. REV.* 1387 (1987) (describing a coherent jurisprudence for the Commerce Clause). In any event, even if one disagrees with that judgment, the difficulty of discovering a determinate principle in the Commerce Clause area underscores the same problem in War Powers jurisprudence.

its misuse. That task of finding a determinate principle to restrain the President is also complicated by the inherent difficulty of creating a charter of rules to cabin the use of force in national defense. As Alexander Hamilton stated:

The essence of legislative authority is to enact laws, or in other words to prescribe rules for the regulation of society; while the execution of the laws and the employment of the common strength, either for this purpose or the common defense, seem to comprise all the functions of the executive magistrate.<sup>26</sup>

One of the very reasons that the deployment of force was understood to be executive rather than legislative was that the very nature of the subject matter could not be governed by fixed rules, but required discretion to maximize the effective deployment of the strength of the nation.

The inadequacy of a rule-centered War Powers jurisprudence in furnishing the determinate principles necessary for its operation is apparent even from the outline offered by its advocates. The rules proposed generally depend on a distinction among the circumstances of the use of military force. Congressional authorization is generally required for military hostilities, but the President is acknowledged to possess the authority to repel the sudden use of force against the nation or our armed forces. Moreover, he is generally recognized to enjoy the authority to make decisions about troop deployment in the absence of hostilities.<sup>27</sup> But these distinctions do not furnish determinate principles of practical enforceability since there is no very clear line between defense and offense, particularly as military technology changes. Furthermore, once the President has the power to deploy troops and the power to defend them, the President can create a defensive situation by first putting troops in harm's way and then by exercising his authority to defend them.<sup>28</sup>

---

26. THE FEDERALIST No. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

27. To deny these powers to the President would be to seriously jeopardize the production of the public good of military action. A deliberative body cannot make day to day deployment decisions and sudden attacks cannot await a congressional response.

28. The practical enforceability of restraints that depend of the circumstances of the use of force is also complicated by the elemental emotions involved in an attack on our fellow citizens.

A jurisprudence of rule centralism has the additional disadvantage of being insensitive to the shifting balance between the necessity and the risks of war.<sup>29</sup> While the public good—military action—and the private evil—status seeking—are eternal problems created by the human condition, the risk of each may substantially change depending on the circumstances of a particular age. In some eras, the risk of adverse military action toward the United States may be very great. During the Cold War, the President needed to be able to threaten a massive use of force not only in response to an attack on the United States but to an attack on our troops in Europe. At other times, like the present, the need for swift military action may be somewhat muted. Similarly, at other times, the risk of status-seeking through war may be diminished. For example, when the country enjoys its ease and there is little glory to be had from war, the danger of status-seeking from military action is much diminished.

For all these reasons, it is not surprising that the War Powers has never been generated by the centralized application of fixed legal norms. Instead, War Powers are governed by norms that evolve through bargaining among the branches. Each branch has powers that are relatively unambiguous and legally uncontested. They can be deployed insofar as each branch can exercise the political will to do so. The President, as Commander-in-Chief, has the initiative in that he can deploy troops and respond to threats against them. Congress also can exercise core powers that are so generally accepted by popular opinion that they are beyond executive challenge. For instance, through its power to raise armies, Congress can gauge broadly the need for a strong military, can appropriate in proportion to the danger, and can terminate appropriations if it opposes a war. The Court also has authority that bears on the exercise of War Powers, since they have the authority to declare that one of the political powers has overstepped its boundaries. But this authority is rarely used, as the Court prefers to exer-

---

29. In this regard, the War Powers Clause presents a contrast with the speech clause of the First Amendment. At base, the First Amendment is also designed to address a problem intrinsic to the human condition—the natural desire of primate hierarchies to entrench themselves. See McGinnis, *supra* note 9. By protecting the communication that facilitates coalitions capable of displacing hierarchies, the First Amendment prevents entrenchment, thus making it harder for hierarchies to extract wealth for themselves. *Id.* The need for this function is likely to be fairly constant in a democracy. Accordingly, it can be better enforced with fixed rules than the provision of military force.

cise its authority in areas where any error risks less monumental damage to its prestige than an error in the War Powers area.<sup>30</sup>

I have described the details and effects of this bargaining game in detail elsewhere.<sup>31</sup> Here, I will take the opportunity to add three points. First, I believe that the existing spontaneous order is the result intended by the Framers. As I have noted above, it is the natural consequence of the system they established. But it was also their intent in a stronger sense. They understood that "parchment barriers" were unlikely to constrain rulers, even in less elemental areas than war.<sup>32</sup> Further, they understood that in establishing the different branches of government they were setting up entities that would act toward one another like nation states, making bargains and accommodations.<sup>33</sup> On this point, Professor Yoo's excellent article on the original understanding of the War Powers provisions suggests that the Framers believed that Congress' control over appropriations was the principal means by which Congress can police the President's military decisions.<sup>34</sup> The power of the purse is inherently a power exercised as a matter of political judgment, thus leading to flexible accommodations between the political branches.<sup>35</sup>

---

30. See Jonathan L. Entin, *The Dog that Rarely Barks: Why the Courts Won't Resolve the War Powers Debate*, 47 CASE W. RES. L. REV. 1305 (1997) (detailing the way courts avoid intervening in War Powers area through justiciability doctrines); McGinnis, *supra* note 4, at 306-307 (outlining motivations of institutional self-interest for courts' failure to intervene in the War Powers area). Justiciability doctrines are notoriously elastic and there are indications that the Court reserves for itself the power to intervene even in military and foreign affairs during a "constitutional impasse." Cf. *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (refusing to intervene in a dispute between legislators and the President over the scope of the treaty power in the absence of a "constitutional impasse").

31. See McGinnis, *supra* note 4 (discussing at some length why, unlike Dean Shane, I believe that the War Powers is unlikely to affect the basic contours of the accommodation between Congress and the executive. War Powers is ineffective because it does not represent any real expenditure of political capital in a concrete situation involving the use of force and therefore the other branches are unlikely to take substantive account of it). See also Peter Spiro, *War Powers and the Sirens of Formalism*, 69 N.Y.U. L. REV. 1138, 1357 (1993) (congressional statute cannot succeed in rearranging the "evolutionary constitutional construct" of the War Powers).

32. THE FEDERALIST NO. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961).

33. At the convention, Elbridge Gerry, for instance, indicated that branches might seek alliances with one another, implicitly suggesting a comparison between the branches and nation states. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (Max Farrand ed., 1966) (remarks of Elbridge Gerry).

34. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295 (1996).

35. See *id.* at 296.

Second, this spontaneous order of accommodation provides a sensible response to the real problem involved in the government's provision of the public good of military action. As noted above, while providing the initiative to the President in military matters is the most effective means to provide this public good, it is also the structure that leads to greatest risk of misuse of power. Congress's authority over military appropriations allows it to take into account a variety of factors that defy codification in rules, such as the dangerousness of the world and the character of the President. By the amount of money it appropriates and the length of time for which it appropriates, Congress can give the President a short or long leash.

Third, I recognize that despite the evolving, pragmatic nature of the bargaining game, in which the contours will shift with changing circumstances and the vagaries of political power, actors in the executive branch and legislative branch will frequently describe their actions as taken on the basis of the timeless constitutional rights of their respective branches.<sup>36</sup> In a culture as legalistic as ours, where the audience to be persuaded are the public and more particularly, political and media elites, it is hardly surprising that arguments will be put in terms that appeal to concepts familiar from the area of our law more governed by rule centralism. Publicizing principles in legal terms may also serve as precommitments to strengthen positions in the bargaining game.<sup>37</sup>

Like other elements of the War Powers bargaining game, the legalization of the discourse of war making has its virtues; in the provisional norms it creates, it retains for the present the wisdom of past accommodations. For instance, as Professor Spiro has written, there are fairly well-established differences in the degree of congressional authorization required depending on the magnitude of the military force used.<sup>38</sup> Presidents have generally not sought express authorization for short military strikes, but they have sought such authorization for the massive commitment of force, although the difference in the magnitude of force used has no

---

36. At the conference Louis Fisher was kind enough to remind me that, as Deputy Assistant Attorney General for the Office of Legal Counsel, I had participated in creating documents that seemed to apply a fixed set of principles favorable to executive power to war powers situations. My academic task, however, is to evaluate the actual structure of legal practices, whatever the actors involved in the practice say they are doing.

37. See McGinnis, *supra* note 4, at 314.

38. See Spiro, *supra* note 19, at 1347-48.

textual constitutional significance.<sup>39</sup> Such precedents are always provisional in the sense that circumstances may change the balance between the branches. For instance, it was policy of the executive branch to reserve the right to launch at least tactical nuclear strikes against an attack on our troops in Europe—surely a massive deployment of force.<sup>40</sup> Nevertheless, for more quotidian situations, past precedents provide focal points that make it easier for participants in war making to understand the contours of the accommodation.

The creation of provisional norms through the spontaneous order of accommodation helps us understand what is at stake in the debate over whether approval by the United Nations is sufficient to authorize military action by the United States. This is best analyzed as a question of whether the new circumstances in which international authorization of United States military action is possible changes the appropriate balance of the accommodation. If, as discussed above, the War Powers jurisprudence is designed to obtain a high ratio of military action that will be in the public interest compared to that which will serve the President's private goals of status-seeking, approval by the United Nations of the use of United States forces as part of an international force will be a useful factor bearing on the evolution of norms between Congress and the President. Other things being equal, approval by an international body should suggest that an operation is in the public interest.<sup>41</sup> Moreover, participation by the United States as part of an international force should reduce the danger that the President is undertaking the mission for reasons of status-seeking.<sup>42</sup> Consistent with this view, approval by the United Nations has been cited as a factor justifying military intervention.<sup>43</sup>

---

39. *Id.*

40. See KISSINGER, *supra* note 20, at 218-20; see also DAVID N. SCHWARTZ, NATO'S NUCLEAR DILEMMA 2-39 (1983) (discussing the United States policy of swift nuclear response to attacks in Europe regardless of whether those attacks used nuclear weapons or conventional force).

41. Professor Stephan suggests that internationally approved action is more likely to be in the public interest because a wide range of politics are unlikely to be simultaneously captured by special interests. See Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L. L. & POL'Y 745, 749 (1995).

42. As Madison noted in Helvidius, there is more danger of status seeking when a successful operation would redound to the glory of only one individual. See *supra* note 21 and accompanying text. International operations have a more diffuse initiation and therefore, *ceteris paribus*, presents less dangers of self-aggrandizement.

43. See Memorandum to the Attorney General from Timothy E. Flanigan, re: Authority

Understanding United Nations approval as a factor in legitimizing Presidential action steers a middle course between the all or nothing approaches of Louis Fisher, who thinks such approval has no relevance to the legality of operations, and of Thomas Franck, who believes it provides unimpeachable authority for the President to act.<sup>44</sup> The Fisher approach fails to take account of the relevance of the United Nations approval as a filter from which a high ratio of military interventions that are in the public interest are likely to emerge. The Franck approach fails to understand that United Nations approval is no more than a filter and cannot be regarded as dispositive assessment of the public interest of the military action approved. In my view, the spontaneous order of the War Powers that I advocate is more likely to give rise to norms that give appropriate weight to United Nations approval.

A review of War Powers has more general lessons for constitutional jurisprudence. In my view, constitutional analysis generally, like the War Powers analysis in particular, has suffered because scholars often fail to begin by delineating the social problem the constitutional provisions were meant to solve. Only by identifying the public good that the constitutional provisions are designed to produce and exploring through science (such as economics and biology) the peculiar risks involved in its production, can the purpose of these provisions be understood. This type of inquiry is also useful for understanding original meaning of constitutional provisions because the Framers themselves approached the problem of designing society as students of the Enlightenment who believed the government was a response to problems thrown up by human nature in the particular environment in which they found themselves. The approach is also essential for constitutional reform: only by understanding the problem the provisions were meant to solve can we decide whether changing circumstances, such as innovations in technology or decreasing information costs, render these provisions inadequate to address the enduring problems of governance.

---

of the President to Use Military Forces for the Protection of Relief Efforts in Somalia, 16 Op. Off. Legal Counsel 8, 10 (1992).

44. See Fisher, *supra* note 2; Thomas M. Franck & Faiza Pael, *UN Police Action in Lieu of War: The Old Order Changeth*, 85 AM. J. INT'L L. 63, 74 (1991).

