

War, Politics, and the U.S. Constitution Today

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At this moment, as fighting in Iraq continues along with the war on terrorism, many people around the world have questioned the wisdom of U.S. foreign policy. A sizeable number of Americans opposed the Iraq war from the start; many who initially supported the war have grown increasingly anxious about its prospects.¹⁾ I would like to consider the current state of affairs from a constitutional perspective, by examining with you a question of American constitutional law. Adopted 218 years ago, the U.S. Constitution is based on the idea that the government derives its power from the people and that all powers exercised by the government must be authorized by the written charter. The issue I propose to investigate with you, then, is what guidance the U.S. Constitution provides today concerning the power to make war.

This may strike you as a subject more suited for Americans to consider in the United States itself. To my way of thinking, it is appropriate to engage in such a discussion here. The war in Iraq has generated concern around the world, not least of all in Japan. Prime Minister Junichiro Koizumi's government has sent troops to Iraq; some say in violation of Article 9 of the Japanese Constitution. Besides that, this year marks the sixtieth anniversary of the end of World War II. I think it is safe to say that no other country has moved so far from militarism to pacifism in that period. I am mindful as well that my own position this year — as a visiting Fulbright lecturer in Japan — carries with it an obligation to build upon Senator J. William Fulbright's commitment to international peace. The least I can do, it seems to me, is to engage in a public exchange of ideas here about my own country's use of force.

When I was first asked to give this lecture, I considered focusing on the question of civil liberties in wartime. This is a topic that has been much discussed in the United States after September 11th. The quest for homeland security has raised numerous constitutional issues concerning airport searches, domestic surveillance, privacy, and racial profiling of persons from the Middle East. The use of military power abroad has raised additional questions. Last summer the U.S. Supreme Court issued preliminary rulings concerning the detentions of enemy combatants. In *Hamdi v. Rumsfeld* (2004), the Court held that an American citizen who had been captured in

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1) Adam Nagourney and Janet Elder, "Public Voicing Doubts on Iraq and the Economy, Poll Finds," *New York Times*, 20 Jan. 2005.

Afghanistan and imprisoned for two years had the right to challenge the government's decision to hold him as an enemy combatant. When I heard of this case, I thought that it revealed something of value in the American system of government. How extraordinary, when you pause to think about it, that this prisoner could sue the man in charge of the world's most powerful military.

In the end, though, these cases may expose the limitations of the American judiciary when confronting the power of the president and the military during wartime. Undoubtedly important questions have been brought before the courts, and will continue to arise, involving wartime civil liberties.²⁾ A substantial number of the provisions of the Bill of Rights are implicated, including due process, the search and seizure clause, the right to counsel, the privilege against self-incrimination, and the right to a speedy and public trial by jury. Having committed my professional career to the practice and study of law, I am not one to minimize the significance of these constitutional guarantees. Nor would I underestimate the role that courts have played in the development of the liberties Americans enjoy today.

Yet history reveals the difficulties of relying on the courts in wartime. The lesson that can be drawn from the Civil War to the Persian Gulf War in 1991 is that the judiciary is not the best institution, or even a good last resort, to contend against military power. True, in *Ex parte Milligan* (1866), the Supreme Court declared unconstitutional the use of military tribunals, but only after the war was over. The Court itself sidestepped *Milligan* during World War II when it permitted a military commission to try captured Nazi saboteurs. Throughout the Vietnam War, the justices resisted requests asking them to rule on its constitutionality. While courts have hesitated to intervene when presented with "political questions" seemingly ill-suited to the judicial process, their reluctance to second-guess military and executive officials has led them to affirm substantial deprivations of liberty. Perhaps there is no more shameful example of this than the case of *Korematsu v. United States* (1944). Accepting at face value the government's false claims about security, the Court approved the internment of Japanese-Americans during World War II. 112,000 were evacuated from their homes and taken to desolate camps in the western United States. The "power to protect must be commensurate with the threatened danger," wrote the opinion's author, Justice Hugo L. Black, who aside from this case was one of the greatest champions of civil liberties ever to serve on the Supreme Court.³⁾

The "power to protect must be commensurate with the threatened danger"; I selected this language from the *Korematsu* opinion for a specific purpose. As a statement of principle it seems sensible enough, appealing in its simplicity. Yet this idea raises more questions than it answers. Who determines where danger lurks? How is the threat to be evaluated? Who decides what power must be brought to bear on the threat and how it should be used?

These questions apply with special force today. The war on terrorism that began on 9/11 has a distinctive character. It will last indefinitely, probably without end. Who can say when the last terrorist has been vanquished? There will always be, to use Justice Black's words, a "threatened

2) In *Rasul v. United States* (2004), the justices decided that the federal courts have jurisdiction to hear cases brought by noncitizens held at Guantanamo Bay, Cuba.

3) *Ex parte Milligan*, 71 U.S. 2 (1866); *Ex parte Quirin*, 317 U.S. 1 (1942); *Korematsu v. United States*, 323 U.S. 214, 220 (1944).

danger.”

In that context, I have growing concerns about the government’s power not only as it affects the rights of individuals, but also as it relates to the decision to make war. Events in Iraq laid the question bare for me. This was the first application of the Bush doctrine of pre-emptive war, which holds that the United States has the right to attack terrorists and the countries that harbor them. President George W. Bush justified the use of military force in Iraq based upon his assessment of the threat posed by Saddam Hussein’s ties to terrorists and Iraq’s capacity to use weapons of mass destruction. On both counts, the administration overstated its case. That has not, by all appearances, lessened the president’s commitment to the idea of pre-emptive war. We have learned recently that American commandos are in Iran identifying potential targets for air strikes. Also, the Department of Defense has been considering military actions solely for the purpose of gathering intelligence.

Whether these plans reflect foresight or excessive zeal, they illustrate the effect that September 11 has on American foreign policy-makers. If I were charged with official responsibilities in the global war on terror, no doubt I would be thinking hard about the creative uses of power rather than its limits. That is exactly why members of the public should examine for themselves the constitutional question of who decides when to take the United States to war and how to do so.

The Constitution establishes a framework for analysis. Article I empowers Congress to declare war. Article II provides that the president is commander in chief of the armed forces. These constitutional provisions have been given various interpretations over the years, but two basic positions can be identified. One is that Congress has the sole power to decide whether the nation goes to war, unless there is no time for the legislature to act. The other is that the president, as commander in chief, has the authority to use military force without securing Congress’s prior approval.⁴⁾

In fact, Congress has issued a formal declaration of war only five times: in the War of 1812, the war with Mexico, the Spanish-American War, and the two world wars. The Korean War, which President Harry Truman called a police action, launched a half-century of executive-legislative struggle. This reached a critical point during the Vietnam War. In 1973 Congress adopted the War Powers Resolution, which required the president to consult with Congress before putting U.S. forces into hostile situations. The resolution also directed the president to submit reports at specified intervals after troop deployments, which were limited in duration. Since its adoption, presidents have generally viewed the resolution as an unconstitutional invasion of executive power, and it has not stopped them from using military force without legislative authorization. You may recall several instances of this: the invasions of Panama (1989) and Grenada (1983), the air strikes against Libya (1986), the use of military advisers in Central America (1980s), the initial deployment of Marines to Lebanon (1982), Operation Desert Shield in the Persian Gulf (1990), and

4) U.S. Constitution, art. 1, sec. 8, cl. 11; art. 2, sec. 2, cl. 1. Compare David Gray Adler, “The Constitution and Presidential Warmaking,” in David Gray Adler and Larry N. George, *The Constitution and the Conduct of American Foreign Policy* (Lawrence, Kans.: University Press of Kansas, 1996), 183-226, with John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers,” *California Law Review* 84 (1996): 170-305.

the missile attack on Baghdad (1993).⁵⁾

The modern constitutional debate over war powers dates from the Korean War. It provides a revealing study in American constitutional interpretation. Both sides have relied on conventional forms of constitutional argument which, in my view, fail to provide a satisfactory explanation of how the war power should be allocated between the president and Congress. Moreover, the expression of constitutional concerns has had little practical effect. A pattern is by now established: military conflict and criticism, followed by another armed conflict and another round of criticism.

With that in mind, I wish to focus on the Declare War Clause to make three main points in the remainder of this lecture. First, I will identify several conventional methods of constitutional reasoning that have played a prominent role in this debate, and I will explain some of the difficulties with each. Second, I will offer an interpretive approach which I believe provides a more compelling account of what the Constitution requires of Congress and the president. Third, I will suggest why it is impossible to fulfill the Constitution's mandate today.

Perhaps the most obvious mode of constitutional interpretation is textual: look at the language of the Constitution to determine its meaning. There is a natural inclination to start with the text of the Constitution, which is after all a written charter. Besides, the language of the Declare War Clause seems straightforward: wars must be declared by Congress.⁶⁾ The issue, then, is what is a "war," an inquiry that calls for the kind of logical characterization appealing to common lawyers trained in the Anglo-American legal tradition. You can see this vividly illustrated in a case from the Vietnam era where Supreme Court justices Potter Stewart and William O. Douglas framed the issue in this way: "Is the present United States military activity in Vietnam a 'war' within the meaning of Article I, Section 8, Clause 11 of the Constitution?" We will never know how the Supreme Court would have answered that question, as their colleagues refused to reach the merits of that case.⁷⁾

Even if they had done so, the Court would have quickly reached the limits of what could be derived from the constitutional text. The wording of the Declare War Clause leaves several questions unanswered. It does not tell us explicitly when, if ever, the president can commit troops to combat without a congressional declaration of war. The text does not say whether every military action is a "war." Nor does the Declare War Clause explain what factors determine when a military action qualifies as a "war." Does the answer depend upon the number of troops involved, the duration of their deployment, or the circumstances in which they are engaged? A few examples illustrate the interpretive difficulty: one-time air strikes (say, against Iran's nuclear sites); troops deployed for humanitarian purposes but in potentially hostile situations (recall Somalia); military advisers under rules of engagement that forbid them from entering into combat themselves; and troops stationed for defensive purposes (the Korean Peninsula).

What we have is open-ended language that illustrates a classic problem of American

5) War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973); Louis Fisher, *Presidential War Power* (Lawrence, Kans.: University Press of Kansas, 1995), 134-61.

6) John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton, N.J.: Princeton University Press, 1993), 3.

7) Quoted in *Edward S. Corwin's The Constitution and What It Means Today*, rev. Harold W. Chase and Craig R. Ducat (Princeton, N.J.: Princeton University Press, 1978), 108.

constitutional interpretation. Think of other fundamental guarantees of the Constitution, like “due process of law.” What do these words mean? Or “freedom of speech” and the power to “regulate commerce?” U.S. constitutional history has been devoted to interpreting such provisions, but the text itself has furnished only the starting point.

With the Declare War Clause, the problem with textual argument is compounded when the words receive so much attention that interpretations put form over substance. The question becomes when is a war (in the common understanding of the term) not a war (as contemplated in the Declare War Clause)? You can see where this kind of thinking leads, beginning with the Korean War when the Truman administration argued that the U.S. was not engaged in a war but rather participating in a police action. Similarly, the State Department’s Office of the Legal Advisor later claimed that the Vietnam War did not require a congressional declaration because it was a military action for collective self-defense and therefore not technically a “war.” These arguments strike me as a parody of legalism: the focus on the words does not reflect what was actually taking place in Vietnam and Korea.

Besides the constitutional text, consideration is often given to what the framers of the Constitution intended with the Declare War Clause. In the recent past, there has been a vigorous debate in the United States over the place of original intent in constitutional interpretation. Originalists contend that the framers’ intent must be binding. Others consider the Constitution a living document that every generation is entitled to interpret for its own time. In my own view, it is often difficult to decipher exactly what the framers intended. That does not mean that we should ignore what they said, but rather that interpreting the Constitution is more involved than simply restating their positions. The Declare War Clause is a case in point.

Critics of recent military actions often find support in the records of the framers’ debates, especially statements made at the Constitutional Convention in Philadelphia on August 17, 1787, the day the “Declare War” language was adopted. The delegates had before them a proposal that gave Congress the power “to make war.” After a question was raised that the legislature was “too slow” and would only meet “once a year,” James Madison and Elbridge Gerry offered “declare war” as a substitute, while stating that the president could “repel sudden attacks.” Their motion was adopted without much debate. The consensus, judging from the few who spoke, was in favor of “clogging rather than facilitating war.” Some delegates expressed concern over the president’s power to start wars.⁸⁾

Notable framers reiterated these concerns after the convention was over. During the ratification debates, for example, James Wilson said: “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.” Madison explained his views to Thomas Jefferson in 1798. The Constitution “supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care vested the question of war in the Legisl.”⁹⁾

8) *Records of the Federal Convention of 1787*, ed. Max Farrand, 2 (New Haven, Conn.: Yale University Press, 1937): 318-19.

9) *The Debates in the Several State Conventions . . .*, ed. Jonathan Elliot, 2 (1836): 528; Madison to Jefferson, 2 Apr. 1798, *Writings of James Madison*, ed. Gaillard Hunt, 6 (New York, 1900-1910): 312-13.

To this point, the original understanding may appear clear. Yet the historical evidence presents a more complicated picture. At the key moment when Madison and Gerry introduced the “Declare War” language, it is not certain what they had in mind. Historian Charles A. Lofgren identified several plausible interpretations. Rather than subordinating the executive to legislative power, they may have sought only to ensure that the president had authority to repel sudden attacks. Or their aim might have been to clarify that Congress had no say over the conduct of a war once one was declared.¹⁰⁾

Not long after the Constitution was adopted, moreover, it became evident that some of the most important framers held different views of war-making powers. In 1793 President George Washington issued a proclamation of neutrality in the war between Britain and France. Alexander Hamilton defended the proclamation, which arguably trenched upon Congress’s power to decide whether to go to war. He pointed out that the executive was naturally in charge of foreign policy and that any exceptions to the president’s authority in this area must be strictly construed. Hamilton was not bothered if the president’s actions affected Congress’s authority to declare war; in his view, each branch had “*concurrent* authority” in this area. Madison contested each step of Hamilton’s analysis. Their letters, published in contemporary newspapers, set out the opposing positions as well as any later discussion.¹¹⁾

There is more to the framers’ views, of course. A thorough inquiry would take account of their understanding of influential legal treatises on international law (for example, by Hugo Grotius and Samuel Pufendorf), eighteenth-century customs surrounding declarations of war, and related powers given Congress to grant “Letters of Marque and Reprisal.”¹²⁾ Yet it is not clear that the framers’ positions on such seemingly esoteric points should determine the exercise of war powers in the twenty-first century.

At least one other standard constitutional argument deserves to be mentioned. It, too, is based on the historical record, but from the past two centuries rather than the founding period. Based upon the actual practice of the president and Congress over the years, it has been argued that presidents regularly resort to military force without receiving legislative sanction beforehand. The State Department defended the Vietnam War by citing “at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization.” By 2002, the count was 234, according to Bush’s White House counsel. These range from largely forgotten missions in the nineteenth century, such as fighting pirates in the Fiji islands, to major combat operations like Korea and Vietnam.¹³⁾

This type of argument, appealing to precedent, is a familiar one in the Anglo-American legal tradition. Ordinarily, lawyers think of precedent established by judicial decisions, but similar reasoning can be applied to executive and legislative actions. The idea is that an interpretation of the Constitution is implied by whatever elected officials do.

10) Charles A. Lofgren, “War-Making Under the Constitution: The Original Understanding,” *Yale Law Journal* 81 (1972): 677.

11) *The Works of Alexander Hamilton*, ed. H. Lodge, 4 (1904): 437-44; *Writings of James Madison* 6:152.

12) U.S. Constitution, art. 1, sec. 8, cl. 11.

13) Department of State Bulletin, 474, 484 (1966); Elisabeth Bumiller, “The Office Where Law Meets War,” *New York Times*, 23 Sept. 2002.

That said, the history of American military activities presents difficulties for both sides. Sometimes the number of undeclared military actions is cited as if that clinches the point. This loses sight of what arguing from precedent is all about. Although the number of precedents may be important on some issues, lawyers do not often rest their arguments on that. They evaluate the weight of the precedent and reason by analogy to determine whether previous cases apply.

Critics dismiss the use of these precedents as either trivial operations or military actions that had congressional approval in some form. They conclude that the historical record does not justify the series of unilateral executive actions that began with the Korean War.¹⁴⁾ Yet not all of the earlier cases are so easily set aside. What are we to make, for example, of President William J. McKinley's deployment of 5,000 troops to quell the Boxer Rebellion in China? Or successive interventions in Central America?¹⁵⁾ More troubling, perhaps, is that it gets more difficult as time goes by to say that actions since World War II do not qualify as precedents. If they contradict earlier actions, then we have two competing lines of precedent, and once again, the interpretation of the Constitution calls for something more.

Instead of looking primarily at the Constitution's text, the original understanding, or historical precedent, it seems to me that this constitutional problem lends itself to a structural interpretation. This method of reasoning is based upon political structures, institutional relationships, and values implicit in the constitutional framework. The advantage of structural argument on this issue is not that it yields an indisputable conclusion, but rather that it focuses the discussion over what is really at stake.

The importance of structural analysis in constitutional interpretation was brought to light thirty-five years ago by Charles L. Black Jr., a Yale law professor. He described this as a non-textual "method of inference from the structures and relationships created by the constitution in all its parts or in some principal part." In the course of reviewing various judicial opinions that purportedly relied on the Constitution's text, Black showed how basic structural relationships, like that between the federal government and the states, provided the most convincing rationale for several of the Supreme Court's past decisions. Since then, judges and lawyers have accepted the place of structural argument in constitutional interpretation.¹⁶⁾

It has been said that structural interpretation often consists of "deceptively simple logical moves."¹⁷⁾ The following argument, which I will briefly outline along with some possible objections, is no exception to that. Start with the premise that war, as Madison said, ranks among "the greatest of national calamities." The decision to go to war is accordingly one of the most consequential acts of public policy. The question arises then as to who should make that decision. If there is one central idea underlying the Constitution (which you can find discussed by the framers), it is a suspicion of power, especially when concentrated in the hands of one person. Another question concerns how that decision should be made. Apply another basic precept of American

14) See Adler, "Constitution and Presidential Warmaking," 218; Ely, *War and Responsibility*, 9-10.

15) For historical accounts, see Arthur M. Schlesinger Jr., *The Imperial Presidency* (Boston: Houghton Mifflin Co., 1973), 35-99; Fisher, *Presidential War Power*, 13-161.

16) Charles L. Black Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge, La.: Louisiana State University Press, 1969), 8.

17) Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 74.

constitutionalism: reason should guide the people in their public affairs in a deliberative process subject to public scrutiny, so far as that is feasible.

The result, at least as I have set up the premises, is that Congress should be the primary decision maker on whether to go to war. Power in the legislature is dispersed among 435 elected officials. Capitol Hill provides a natural forum for deliberation in which opposing sides lay their arguments before the public.

Against this, it may be argued that war presents a special case, that the Constitution's structural relationships point in the other direction because the conduct of foreign affairs calls for a unity of action that only the chief executive can provide. As the U.S. Supreme Court once said, the president serves as the "sole organ of the federal government" in international relations with "plenary and exclusive power."¹⁸⁾ Of all issues of public policy, national defense is most likely to call for swift and sometimes secret action. This argues for locating authority in the executive. The office of the president permits clear and decisive leadership; Congress presents the prospect of delay and division. Besides, lawmakers bound to serve their local constituencies may lack a broad perspective to perceive what lies in the national interest. Members of Congress are arguably more responsive to the influence of special interests.

While it is true that individual legislators may have more parochial concerns than the president, there is a distinction between lawmakers working as individuals and Congress acting as a whole. A collective decision reached by the legislature may reflect a wider view of what lies in the public interest. Nor are presidents immune from the influence of special interests, as recent history of those who have held the office from both parties suggests. Furthermore, the goal of presenting a unified front to the world suggests that Congress should take a substantial role from the start. A congressional declaration of war demonstrates a commitment by the entire nation. And if events warrant swift action, the president retains significant powers as commander in chief. It will not always be possible for Congress to deliberate, with the possibility of terrorists using weapons of mass destruction. This is nothing new for Americans, who lived with the risk of nuclear attack during the Cold War and accepted the president's authority to respond as necessary without a declaration from Congress.

As for the idea of public deliberation, it may be argued that the president can engage the public as well as Congress can, perhaps even better. When President Bush made his case for invading Iraq, for example, he provoked a debate not just in the United States, but around the world.

While there was an extraordinary debate, that was not the same as a deliberative process in public view leading to a decision. President Bush used his office as a bully pulpit (to use Theodore Roosevelt's words) to gain support for a decision he had already made. That decision, set in motion by a top secret document Bush signed within a week after September 11, was not the product of a public exchange.¹⁹⁾

By virtue of institutional make-up, the executive decision-making process is qualitatively

18) *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

19) Glenn Kessler, "U.S. Decision On Iraq Has Puzzling Past; Opponents of War Wonder When, How Policy Was Set," *Washington Post*, 12 Jan. 2003.

different than the legislative. To be sure, members of Congress bargain in private. Congressional debates consist of emotional appeals as well as logical presentations. Whatever its limitations, though, Capitol Hill provides a place for elected representatives from around the country to express different perspectives and promote alternative policies. Before a recorded vote, lawmakers conduct a formal debate in public view.

Presidents, by contrast, make decisions with hand-picked advisers behind closed doors. The tendency is not to have such a wide-ranging debate as Congress would since members of the administration generally share the president's positions. Even if they differ with the president, there is a limit to how far White House staffers or even Cabinet secretaries can contest him in close quarters in the Oval Office.²⁰⁾ Internal decision making may get skewed because those serving the president present what they think he wants to hear, as was the case with President Lyndon B. Johnson and the escalation of America's military commitment in Vietnam. Also, there is no formal procedure for public scrutiny of the way in which the chief executive makes decisions. Indeed, presidents claim executive privilege to shield confidential communications with their advisers from the public.

More can be said for both sides about the Constitution's structure, but to my mind the argument suggests that Congress should take a more decisive role. Yet as the war on terror follows the Cold War, I think it is not realistic to expect the legislature to reassert its authority to declare war. The threat of terrorists using weapons of mass destruction has created a climate of fear and insecurity in the United States. This has in turn diminished the prospects of having a genuine deliberative process in Congress before the United States resorts to force.

Events preceding the war in Iraq are illustrative, and perhaps a sign of things to come. It may be suggested that Congress in fact deliberated, passing a joint resolution which authorized the president to defend the national security against the "continuing threat" posed by Iraq. Following the War Powers Resolution, Congress directed the president to consult congressional leaders and report to Congress regularly.²¹⁾

Despite reiterating its commitment to the War Powers Resolution, Congress in effect handed its decision-making authority to the president. The key passage authorized the president to use armed force against Iraq "as he determines to be necessary and appropriate." Senator Joseph Biden, the ranking Democrat on the Foreign Relations Committee, characterized the resolution as the "constitutional equivalent of a declaration of war."²²⁾ This is questionable reading of the Constitution. Instead of issuing a clear directive for the president to employ the armed forces, as was done in both world wars, the Iraq resolution was an open-ended authorization, leaving the decision of going to war to the president's discretion. It does not go too far to interpret Congress as saying that the conditions for war had actually *not* yet been met at the time of the vote.

If Congress bears some responsibility for shifting power to the executive branch, presidents have done their part to put lawmakers in an untenable position. The result has been to distort the

20) In July 2002 the State Department's director of policy planning asked the national security adviser about weighing the alternatives on Iraq. He was told that President Bush had already made his decision. *Ibid.*

21) Authorization for Use of Military Force against Iraq Resolution, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

22) Quoted in Robert F. Turner, "The War on Terrorism and the Modern Relevance of the Congressional Power to 'Declare War,'" *Harvard Journal of Law and Public Policy* 25 (2002): 521.

deliberative process. To be sure, deciding whether to go to war has always been part of the political process. Gamesmanship and even manipulation are part of American politics. President Johnson persuaded Congress to adopt the Gulf of Tonkin Resolution based on dubious reports of attacks on American naval vessels near North Vietnam.²³⁾ The first President Bush put Congress in an awkward position by sending 580,000 troops to the Persian Gulf before the legislature sanctioned the use of force there. Even opponents of military action had difficulty objecting without appearing to abandon the troops. Lawmakers confronted additional considerations of international diplomacy, as the withdrawal of forces could be construed as a sign of weakness.

The ongoing war on terror has created new obstacles to the deliberative process. The run-up to the vote before the Iraq War is a case in point. The Bush administration skillfully exploited the election cycle by timing the vote shortly before the congressional midterm elections. The political strategy set by the White House was to have Republicans make the war on terror a major campaign issue, criticizing Democrats who were soft on Iraq. The president campaigned for his party's congressional candidates by declaring "We're a battleground."²⁴⁾ Anyone familiar with the political climate in America these days will have no trouble guessing the effect of such a remark.²⁵⁾

Where does all of this leave us? There is a wonderful expression from the American founding about the "sober second thought" of the people. The public are the ultimate check on the powers of the government and the president. Yet it has been more difficult since September 11 for that sober second thought to emerge. Policy failure also has a way of limiting power, but at what cost? And for how long? Judging from recent American experience, at great cost and only until the next crisis.

23) 78 Stat. 384 (1964).

24) David Firestone and David E. Sanger, "Congress Now Promises to Hold Weeks of Hearings About Iraq," *New York Times*, 6 Sept. 2002.

25) Dana Milbank, "Democrats Question Iraq Timing; Talk of War Distracts from Election Issues," *Washington Post*, 16 Sept. 2002; Jim VandeHei, "GOP Nominees Make Iraq a Political Weapon," *Washington Post*, 18 Sept. 2002.