

# Forbes

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### The Politics of Plunder

It's Time For Congress To Speak On Libya

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These days it is hard to imagine a U.S. president not going to war. Americans are constantly reminded that the world is a dangerous place.

But that doesn't mean the U.S. has to be constantly at war. Why did President Barack Obama send America into its third war in a decade in the Middle East? [Libya posed no threat to the U.S.](#) and, contrary to the president's sensational claims, Moammar Qaddafi, though a thug, evidenced no genocidal tendencies. [Now Washington is enmeshed in a potentially lengthy civil war.](#)

Equally worrisome is how President Obama took America into war. Or "kinetic military action," as his officials prefer to call it. That's a bit like President Harry S. Truman's "police action" in Korea. Never mind the bombing and killing. "War" is such an ugly word!

But war it is. And the president involved America without the consent of Congress. The former constitutional law professor made nary a nod to the Constitution.

Indeed, his decision looked almost frivolous. The president went publicly to-and-fro on possible involvement. He only called congressional leaders the day before he started bombing to "consult" them. Then he took days to explain to the American people why U.S. military personnel were risking their lives to kill people in another country.

Under the Constitution it is not enough for the president to decide on war. He must win a vote of Congress.

Obviously, more than a few officials don't care what the Constitution says. Presidents want to wield power, while many legislators seek to avoid responsibility. Let the president decide: Then they can applaud if the conflict goes well or carp if it turns out badly.

But this president and his top officials know better. When asked whether he could unilaterally bomb Iran, presidential candidate Obama responded: "The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."

Candidate Hillary Clinton responded in the same unequivocal fashion: "the Constitution requires Congress to authorize war. I do not believe that the president can take military action—including any kind of strategic bombing—against Iran without congressional authorization."

[Then-Senator Joseph Biden addressed the issue](#) more than a decade ago: "The Framers' views were dominated by their experience with the British King, who had unfettered power to start wars. Such powers the Framers were determined to deny the president." He contended that the "Framers intended to grant to Congress the power to initiate all hostilities, even limited wars," and went on to urge impeachment for President George W. Bush if the latter bombed Iran without congressional authority.

The Constitution is clear. Article 1, Sec. 8 (11) states that "Congress shall have the power ... to declare war."

Advocates of executive war-making claim that declaring just means, well, declaring. You know, like having the minister officially declare that a couple is man and wife after they have exchanged marriage vows.

Bush legal adviser John Yoo, infamous for his memos justifying torture, argued that this enumerated power is simply rhetorical fluff, allowing "Congress to establish the nation's legal status under international law." Conservative attorneys David Rivkin and Lee Casey made a similar claim, contending that "the president has the authority to determine when and how U.S. forces are used" and that he has "wide latitude to use military force."

America's Founders could have written the Constitution with this intention. But they didn't.

Early Americans, both in drafting and ratifying the document, routinely criticized the British monarch because he could unilaterally drag his nation into war. This was a time when war was the sport of kings, costing Europe much blood and treasure. [Wrote John Jay](#): a variety of dubious motives, "which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his

people.” Americans rejected both the formality of monarchy and *reality of monarchical powers*.

Indeed, at the constitutional convention South Carolina’s Pierce Butler explicitly advocated giving the president kingly power. His proposal flopped. Elbridge Gerry of Massachusetts opined that he “never expected to hear in a republic a motion to empower the executive to declare war.”

Some Americans still opposed the proposed Constitution because they feared that it gave the chief executive authority similar to that of the British king. Don’t worry, [explained Butler to South Carolina legislators](#): “Some gentlemen [namely himself!] were inclined to give this power to the president, but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.”

Also offering assurance was the great friend of executive power Alexander Hamilton. Being commander-in-chief merely made the president the “first general and admiral” of American forces, Hamilton explained. The president’s authority was “in substance much inferior to [that of the king]. It would amount to nothing more than the supreme command and direction of the land and naval forces ... while that of the British king extends to the declaring of war.”

The commander-in-chief position is the fount of the presidential war power. Wrote John Yoo: “The Constitution centralized the management of war in the president precisely to avoid the delays and mistakes of decision-making by committee.” True, and no one expects legislators to conduct operations in the field.

However, that authority remains strictly limited by Congress’ authority to raise armies, write the rules of war, ratify treaties, issue letters of marque and reprisal, regulate international commerce, approve ambassadors, and, most importantly, declare war. It is up to Congress to answer the basic policy question: war or peace? Once legislators have decided that the nation has a war to fight, the president exercises his powers as commander-in-chief.

The Founders divided powers this way because otherwise they feared that presidents would act as they do now. Explained James Madison in 1793, it is necessary to adhere to the “fundamental doctrine of the Constitution that the power to declare war is fully and exclusively vested in the legislature.”

Convention delegates did change Congress’ power from “make” to “declare” war so the president could confront a sudden attack. In this sense Yoo is right that “The Constitution creates a presidency that is uniquely structured to act forcefully and independently to repel serious threats to the nation.”

For instance, the president could “repel” war, explained Roger Sherman. Early American presidents often deployed the nation’s fledgling military, but commonly distinguished

between limited defensive and more expansive offensive actions. Even after the Japanese attack on Pearl Harbor Franklin Delano Roosevelt called on Congress to declare war. He didn't plan a four-year global military campaign on his own authority.

The nation's Founders mandated congressional assent for starting wars because *they wanted to make war less likely*. The president "is not safely to be entrusted with" the power to decide on war, said George Mason of Virginia. Mason spoke of "clogging rather than facilitating war."

James Wilson was pleased that the proposed constitution "will not hurry us into war." Instead, he explained, "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 in the legislature at large." Thomas Jefferson wrote of creating an "effectual check to the dog of war by transferring the power of letting him loose."

No less a conservative paladin than [Antonin Scalia affirmed the limits on presidential war-making](#) in his dissent in *Hamdi v. Rumsfeld* regarding the treatment of "enemy combatants." Scalia wrote: "Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the president under Article II. As Hamilton explained, the president's military authority would be 'much inferior' to that of the British King."

Similarly, [observed Columbia law professor John Bassett Moore](#): "There can hardly be room for doubt that the framers of the Constitution when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace."

Politics, not the Constitution, is the basis for an expansive presidential war power. Advocates simply have an ideological preference in favor of war. For instance, John Yoo complained that newly elected Republicans who believe in limited government "resist Washington's indispensable role abroad." But even if more war was better, that wouldn't change the Constitution.

In fact, the Founders were prescient. Presidents have shamelessly manipulated both dubious intelligence and credulous public opinion to take the U.S. into many unnecessary wars. These executive adventures have almost always turned out to be the sort of "dumb wars" which candidate Obama said he opposed, such as Iraq.

Truly odd are presidents determined to win a vote of the United Nations Security Council and/or NATO ambassadors but not the U.S. Congress. Only the latter satisfies the Constitution. Ironically, [the British parliament voted to authorize Great Britain's attack](#)

[on Libya](#). Two centuries later, American revolutionaries and British monarchists seemingly have switched positions.

Perhaps the worst argument for executive war-making is that previous presidents have gotten away with violating the Constitution. In fact, some of these operations were carried out with colorable congressional authority; most were limited deployments, very different from overthrowing an existing government, installing a client ruler, and maintaining him in power. Irrespective of past misbehavior, the Constitution still applies.

Past lawbreaking actually offers a strong argument for Congress to take its constitutional responsibilities more seriously. Lawmakers, regardless of party, should insist that presidents, regardless of party, fulfill their oath of office.

There always will be gray areas, of course, but most cases today are easy. Such as intervening in Libya's civil war.

The last president who accepted the limits of the presidential war power may have been Dwight Eisenhower, one of the few chief executives with command military experience: "When it comes to the matter of war, there is only one place that I would go, and that is to the Congress of the United States." A few months later he explained that "I am not going to order any troops into anything that can be interpreted as war, until Congress directs it."

Eisenhower was channeling George Washington, who wrote South Carolina Gov. William Moultrie: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."

Presidents Eisenhower and Washington are much better role models than Presidents Richard Nixon, Bill Clinton, and George W. Bush.

Democrats as well as Republicans in Congress should insist that President Obama abide by the nation's fundamental law. American presidents cannot lawfully risk the lives of young Americans in foreign military adventures without congressional consent. The decision on war and peace is far too important to leave to one man, however honest, smart, charming, or popular.