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# The war with Libya and the Constitution

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By STEPHEN KERSHNAR, The OBSERVER

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There are many reasons to oppose the current U.S. war on Libya.

First, this war is expensive. Reuters reports that we've already spent \$550 million on it and we just got into it. The federal government is currently borrowing roughly 43 percent of what it spends (roughly, we will likely borrow \$1.6 trillion on a \$3.7 trillion budget) and hence a country mired in debt is putting the war on the credit card. We've already spent \$800 billion on the Afghanistan and Iraqi wars. The total costs of these other wars may go as high as \$3 trillion if the estimate by Nobel-Prize-winning economist Joseph Stiglitz is correct.

Second, because our goals are not clearly defined, mission creep has occurred and likely will continue to do so. The war was initially sold to us as imposing a no-fly zone to keep Moammar Gadhafi's air force from killing the rebels. This could be accomplished by taking out his air force and air defenses. The mission then changed to protecting civilians. The new goal might explain why we've killed Gadhafi's soldiers, destroyed his armor and command-and-control centers, and even bombed his residence. The recent discussion of arming the rebels suggests a new mission is on the way: regime change. If this mission succeeds, we'll likely have yet another mission: nation building. In Afghanistan and Iraq this has been expensive and gone poorly, but President Obama rushed in anyway.

Third, the war makes U.S. policy unpredictable to both U.S. citizens and foreign countries. The U.S. attacked forces in Serbia, Bosnia, Iraq, and Libya, in part for humanitarian purposes, but did nothing in Sudan, Congo, and Rwanda. Given the lack of U.S. interests in Serbia, Bosnia, and, arguably, Libya, the pattern is arbitrary. This arbitrariness can also be seen in the U.S.'s muted response to protesters being killed in Bahrain and Yemen. Because both Republicans and Democrats jump into humanitarian wars, U.S. voters have no way to end this type of foreign adventurism. Other countries are also left to guess at what we'll do next.

The main reason to oppose this war is that it is unconstitutional. Obama didn't bother to get Congressional approval for his war. He did, however, get U.N. permission. Apparently, that's what's important.

Article I Section 8 states that Congress shall have the power to declare war. The best interpretation of this clause is that except in the cases where the country or its vital interests are attacked, the President cannot initiate war until Congress has declared it. Not only does the language of the Constitution suggest this, but the country's fathers, James Madison, Alexander Hamilton, and George Washington, likely intended this. As writer Walter Isaacson notes, Washington said, "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 on the subject, and authorized such a measure." Alexander Hamilton in Federalist no. 69 stated that the President



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is just the "first general and admiral" and just as generals and admirals may not initiate war, Presidents may not either.

The structure of the Constitution also supports this interpretation. Elsewhere in Article I Section 8, Cato Institute scholar Gene Healy points out, Congress has the power to initiate military action, specifically by allowing private American ships to attack other countries' ships and to use militias to suppress domestic rebellion and repel invasions. In contrast, the Constitution grants to the President merely supervisory war-related powers. He may lead the army and navy only after Congress has created them and authorized their use.

University of California at Berkeley professor and former Bush administration lawyer John Yoo provides the strongest argument for the claim that the President alone has the power to make war. Yoo argues that this claim can be seen in the nation's history. The U.S., he notes, has used force abroad more than 100 times and only declared war five times. Even major wars like the Korean and Vietnam wars were fought without a declaration of war and Congress didn't even authorize the former.

Yoo also argues that the drafting history of the Constitution supports his claim because the Constitutional delegates substituted in "declare war" for "make war," suggesting that they didn't view Congress as having the power to initiate war. He further argues that when the Constitution sets out a power that Congress and President share, such as enacting laws and entering treaties, it lays out a specific procedure. However, it does not lay out a specific procedure for war. He claims that a proper historical understanding also supports this interpretation. Constitutional delegates, Yoo claims, were following our English ancestry. In England, he notes, the King alone could initiate war and Parliament could undermine a war by refusing to fund it. Congress, Yoo notes, can stop a war via the purse.

The courts and the Clinton and Obama administrations have in effect adopted Yoo's position. In *Doe v. Bush* (1st Circuit 2003), *Campbell v. Clinton* (D.C. Cir 2000), and *Massachusetts v. Laird* (1st Circuit 1971), which considered Constitutional challenges to the second Iraqi, Serbian, and Vietnam wars, the courts threw out challenges based on the fact that Congress had not authorized these wars. The courts reasoned that because Congress had not ordering an end to the wars or cut off funding, it was not at odds with the President. This reasoning makes sense only if Presidents can make war without Congressional approval.

If Yoo and the recent administrations were correct, then the Constitution permits Presidents to unilaterally start bloody and expensive wars with major powers like China and Russia without Congressional oversight. If Congress tried to stop the war by passing a law and the President vetoed it, Congress could then stop it only by forming a super-majority to override the President's veto. In effect, Congress would have to act through hard-to-obtain super-majorities. This is likely not what the war-weary founders intended. It would also do little to slow down our repeated entry into unnecessary wars, especially with the pathetic specimens who populate Congress.

In addition to the Constitution, the War Powers Resolution, passed over the veto of President Nixon, prohibits the President from using the armed forces in a war for more than 60 days (with an addition 30-day withdrawal period) without Congress declaring war or otherwise authorizing the use of force. This resolution appears to be inconsistent with the Constitution on either of the above views because it transfers a power (war-making) from Congress to the President or vice versa. In any case, it's still on the books and Obama has yet to satisfy it.

The best approach here is for Congress to follow Stanford Law Professor John Hart Ely's suggestion to impeach and convict Obama for illegal war-making. Ely argues that violating the separation of powers to engage in an illegal war is a "high crime or misdemeanor" and far worse than, for example, Richard Nixon's wiretapping and Bill Clinton's perjury and witness tampering. Were this adopted earlier, this might have prevented Presidents from

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...this adopted earlier, this might have prevented Presidents from recklessly spending American blood and treasure in Korea, Vietnam, Iraq, Somalia, Serbia, Bosnia, and Libya. Whether the military who took an oath to uphold the Constitution should refuse to fight is an issue for another day.

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