

Why the Libyan war is unconstitutional

By [John Samples](#) 6:40 PM 03/22/2011

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War is commonly defined as “a state of usually open and declared armed hostile conflict between states or nations.” By that definition, the United States and its allies have been at war with Libya since late last week. “At my direction,” President [Obama](#) told Congress, “U.S. military forces commenced operations” in Libya.

Article I, section 8 of the United States Constitution states that “Congress shall have the power . . . to declare war. . .” Since Congress has not declared war on Libya, is American involvement in the Libyan war unconstitutional?

Some members of Congress think so. Rep. Scott Ringell, a freshman from Virginia, said that the Libya hostilities “should trigger a debate within Congress and [among] the American people about proper interpretation and application of [the] Constitution. I’m surprised more conservatives aren’t speaking out about this issue.” Some Democrats have spoken out questioning the validity of the action. In the past, [Senators Obama](#) and Biden both said the president lacks the authority to do what President Obama has done.

The question of the constitutionality of the Libyan effort depends on the original public meaning of Article I, section 8 of the Constitution. Vice President (then Senator) Joseph Biden recalled that meaning in a speech on the Senate floor on July 30, 1998. He noted that the original draft of the Constitution would have empowered Congress to “make war.” James Madison and Elbridge Gerry moved that the language be changed to “declare war” so that the president would have the power “to repel sudden attacks.” Biden pointed out that only one framer, Pierce Butler of South Carolina, thought the president should have the power to initiate war.

Biden concluded that under the Constitution, the president could not use force without prior authorization unless it was necessary to “repel a sudden attack.” Presidential candidate Barack Obama agreed in 2007: “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.”

Senator Biden also expounded on the framers’ reasons for limiting presidential discretion:

The rationale for vesting the power to launch war in Congress was simple. 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.

Of course, in 1998 and today, some claim the president has broad powers to initiate and carry on war under the “executive power” and the commander-in-chief clauses of Article II. But the framers rejected this “monarchist view” of the presidency.

The framers of the Constitution knew that the English king possessed certain prerogatives or discretionary powers to act for the public interest. Among these prerogatives was the power to declare war. He could also carry on undeclared wars. Yet the framers explicitly gave Congress the power to declare war. Apart from repelling sudden attacks, the Constitution is silent on the president’s power to conduct undeclared wars. Read against the English background, the text of the Constitution creates a constrained executive for the new nation.

What does this history imply for the present? President Obama told Congress that the use of [force](#) in Libya was intended “to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.” But the framers did not empower the president to initiate war to prevent humanitarian catastrophes, deal with threats to international peace and security, or protect the lives of foreign nationals. The framers stated that the Constitution was instituted to provide for the common defense of We, the People, not the defense of people everywhere.

They did recognize a limited power to repel sudden attacks. The Libyan regime did not suddenly attack the United States or its citizens. There is nothing to repel. America’s war in Libya thus cannot be constitutional.

What now? The [Supreme Court](#) is unlikely to invalidate presidential actions in Libya. The task of vindicating the Constitution falls to Congress. It needs to hear from its conservatives, those who believe in the original meaning of the Constitution. Congress also needs to hear from its liberals, those who believe what Senators Biden and Obama once said about presidential power. Together members of Congress could finally live up to their constitutional obligations and impose restraints on a president who has become too much of a king.

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