



Written by [Thomas R. Eddlem](#) on August 30, 2013

Does Obama Have the Constitutional Power to Go to War in Syria?

The *Washington Post's* neoconservative columnist Jennifer Rubin appears to be on the warpath against members of Congress skeptical of Syrian intervention, especially congressmen who assert that it's beyond the power of President Obama to initiate the war. Rubin [wrote](#) in an August 28 column:

As for Congress, Rand Paul again demonstrates his misunderstanding of the Constitution. A declaration of war requires congressional action; a minimal strike of the sort the president contemplates is surely within the Article 1 powers of the commander in chief. Thomas Jefferson thought so.



Actually, [Article 1 of the Constitution](#) outlines the powers of Congress; the [powers of the president are outlined in Article 2](#).

Over her "Thomas Jefferson thought so" remark, Rubin provided a [hyperlink](#) to a Library of Congress webpage that summarizes the American quasi-war against the Barbary pirates. But the Library of Congress webpage contained little information about how hostilities commenced. If it had, Rubin might have noticed that she committed a second error in constitutional and historical analysis. The [link](#) provided didn't prove the sweeping historical assertion that the [Xena-Warrior Princess](#) of the neoconservative Right sought to prove. Quite the opposite was true.

The reality is that Jefferson first asked Congress for permission to engage in offensive military action against the Dey of Tripoli, and he received that permission by an [act of Congress](#) before proceeding with the war.

Jefferson did, however, dispatch a squadron of naval frigates to the Mediterranean to protect American shipping before receiving congressional approval of any offensive operations. But Jefferson had his Secretary of Navy, Robert Smith, give explicit instructions to the commander to preserve peace as much as possible and to wage only defensive actions to protect American shipping from attacks. Smith [wrote on](#) May 30, 1801: "It is thought probably that a small squadron of well appointed frigates appearing before their ports will have a tendency to prevent their breaking the peace which has been made, and which has subsisted for some years, between them and the United States.... But should you find, on your arrival at Gibraltar, that all the Barbary powers have declared war against the U. States, you will then distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce and chastise their insolence — by sinking, burning or destroying their ships and vessels wherever you shall find them."

Jefferson himself [wrote](#) to the Dey of Tripoli of his deployment of ships into the Mediterranean: "We



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hope their appearance will give umbrage to no Power: for, while we mean to rest the safety of our commerce on the resources of our own strength and bravery in every sea, we have yet given to this squadron in strict command to conduct themselves toward all friendly Powers with the most perfect respect and good order.” But ultimately, he went to Congress for permission to conduct offensive warfare against Tripoli.

Massachusetts Congressman William Eustis [explained](#) on the floor of the House of Representatives in December 1801 that “the President, in his communications, has informed us that he has hitherto acted on the defensive. The simple question now is, whether he shall be empowered to take offensive steps.” Congress did give that permission two months later.

On February 6, 1802, Congress passed a law authorizing the President to wage war against the Barbary nation of Tripoli “for a period not exceeding two years.” The [law stipulated](#): “It shall be lawful for the President of the United States to instruct the commanders of the respective public vessels aforesaid, to subdue, seize, and make prize of all vessels, goods, and effects, belonging to the Bey of Tripoli, or to his subjects, and to bring or send the same into port, to be proceeded against, and distributed according to law; and also to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.”

Jefferson’s response to the terrorist attacks against the U.S. shipping interests comported precisely with the views of the Founders of the U.S. Constitution, who, according to James Madison’s notes at the 1787 constitutional convention, sought to have the president defend against sudden attacks only. The decision to engage in offensive war or retaliation was left solely to Congress. In [Madison’s notes](#), the constitutional convention debated whether Congress’ sole power to initiate war should be changed from “make” to “declare” war, the delegates argued:

[Connecticut’s Roger Sherman] thought it stood very well. The Executive should be able to repel and not to commence war. “Make” better than “declare” the latter narrowing the power too much.

[Massachusetts’ Elbridge Gerry] never expected to hear in a republic a motion to empower the Executive alone to declare war....

[Virginia’s George Mason] was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred “declare” to “make.”

Even staunch defenders of executive power among the Founders insisted that the power to initiate force rested solely with Congress. Alexander Hamilton [wrote](#) on June 29, 1793, “In this distribution of powers the wisdom of our constitution is manifested. It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War.”

James Madison — who rarely agreed with Hamilton about anything — agreed on the principle of retaining the war power with Congress, [writing](#) on August 24, 1793, “In the general distribution of powers, we find that of declaring war expressly vested in the Congress, where every other legislative power is declared to be vested, and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature.... Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which



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separates the sword from the purse, or the power of executing from the power of enacting laws.”

Congress is increasingly agitated about Obama’s threatened usurpation of congressional war powers. Some 116 congressmen have also asserted their constitutional responsibilities in an August 28 [letter](#) written by Virginia Republican Scott Rigell to President Obama, claiming that “engaging our military in Syria when no direct threat to the United States exists and without prior congressional authorization would violate the separations of powers that is clearly delineated in the Constitution.”

While mostly Republicans signed on to Rigell’s letters, liberal California Democrat Barbara Lee and 53 other Democrats signed onto a letter authored by Lee arguing essentially the same thing. Lee’s letter similarly stated: “While we understand that as Commander in Chief you have a constitutional obligation to protect our national interests from direct attack, Congress has the constitutional obligation and power to approve military force, even if the United States or its direct interests (such as its embassies) have not been attacked or threatened with an attack.”



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