



Written by [Thomas R. Eddlem](#) on July 2, 2011

President Obama's Constitutional Exegesis on the Libyan War

There have been a lot of questions about the constitutionality — constitutional interpretations of a few decisions you've made, so I'll just simply ask: Do you believe the War Powers Act is constitutional?

— NBC News White House reporter Chuck Todd, question to President Obama in June 29 press conference.

[President Obama replied](#) by not answering Chuck Todd's question, and entering into a defense of his Libyan war:



Now, when you look at the history of the War Powers resolution, it came up after the Vietnam War in which we had half-a-million soldiers there, tens of thousands of lives lost, hundreds of billions of dollars spent — and Congress said, you know what, we don't want something like that happening again. So if you're going to start getting us into those kinds of commitments you've got to consult with Congress beforehand.

And I think that such consultation is entirely appropriate. But do I think that our actions in any way violate the War Powers resolution? The answer is no. So I don't even have to get to the constitutional question. There may be a time in which there was a serious question as to whether or not the War Powers resolution — act was constitutional. I don't have to get to the question.

We have engaged in a limited operation to help a lot of people against one of the worst tyrants in the world — somebody who nobody should want to defend — and we should be sending a unified message to this guy that he should step down and give his people a fair chance to live their lives without fear. And this suddenly becomes the cause célèbre for some folks in Congress? Come on.

But is President Obama's explanation a fair description of his powers under both the Constitution and the 1973 War Powers Resolution? No, in both cases.

The [War Powers Resolution](#) has been criticized by neo-conservatives and interventionists generally as



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unconstitutionally infringing upon the powers of the President to take the nation to war, to interfere with the unitary presidency. Honest critics of the war power in the traditionalist right have claimed the exact opposite, that the War Powers Resolution was an unconstitutional authorization for 90 days of presidential wars. Both sides are wrong.

The traditionalist right is closer to the truth when it comes to war powers under the U.S. Constitution, but wrong with regard to the War Powers Resolution. The Resolution explicitly says it does not authorize presidential wars. Section two of the resolution [states](#):

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

In other words, the War Powers Resolution says the President's power to command U.S. troops into war is based solely upon either explicit affirmative approval by Congress or a sudden attack on the United States in circumstances when Congress cannot be called into session. And the War Powers Resolution requires the President to remove troops from harm's way within 90 days of one of those sudden attacks on the United States. In the case of Libya, President Obama made no case that Gadhafi had made a sudden attack against the United States.

Section 8 of the War Powers Resolution even goes on to state that the resolution itself — as well as any treaties that the United States has signed — is not a license to wage war for 90 days:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred ...[or] construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

The War Powers Resolution is in line with what the Founding Fathers wanted. During the Constitutional Convention of 1787, Elbridge Gerry, Oliver Ellsworth and George Mason debated changing the Congress' power over war from "make" to "declare." According to James Madison's notes at the Convention, the Convention agreed that no republic would place the power to declare war in the hands of the executive branch, as a president could not be trusted with it:

Mr. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. ELSWORTH. there is a material difference between the cases of making war and making peace. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negotiations.

Mr. MASON was agst. 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."

The Constitution stipulates:

"Congress shall have the power...

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the



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Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water...

To make Rules for the Government and Regulation of the land and naval Forces;"

In other words, absent an imminent invasion, the Constitution says Congress has sole authority to place American troops in harm's way. And the President has none of these powers. It's Congress' job to punish "crimes against the laws of nations" as Qaddafi is accused of.

As Alexander Hamilton wrote in [Federalist #69](#), the President's power "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies — all which, by the Constitution under consideration, would appertain to the legislature." Just as a general who has the command of CENTCOM in Europe cannot start a war, neither can the U.S. President do so.

President Obama says his constitutional obligation is giving Congress information on wars he starts. But the Constitution is clear. He doesn't need to give information. He needs to get permission from Congress. And he doesn't have it.

President Obama [told](#) the press June 29: "I'm not a Supreme Court justice so I'm not going to ... [be] putting my constitutional law professor hat on here."

But perhaps he ought to, and begin to follow the U.S. Constitution and the War Powers Resolution.

Photo: President Barack Obama speaks in the State Dining Room of the White House, May 31, 2011: AP Images



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