



Written by [Bruce Walker](#) on June 16, 2011

Speaker Cautions President on Libyan Combat

The Constitution was intended to impose checks and balances, separation of powers, and other limits on the power of government, particularly the federal government. Any reading of that foundational document that ignores that purpose ignores the Constitution entirely. Among the three branches of the federal government, the “least dangerous branch” was the federal judiciary. The Supreme Court is the only federal court provided for in the Constitution, although lesser federal courts could be created (and destroyed) by Congress, and the jurisdiction of all those federal courts, with only very limited explicit jurisdiction by the Supreme Court, was determined by Congress.



As tightly as the Founding Fathers felt that they have bound the federal judiciary, the states thought differently. The 11th Amendment, the first amendment after our Bill of Rights, was to further limit the power of federal courts.

What of the Executive Branch? The principal duty of the Presidency is to see that the laws of the nation are faithfully executed (and not much else.) Although the president made appointments, with the advice and consent of the Senate, and could enter into treaties, provided two-thirds of the Senate concurred, the president had few other real powers.

The Constitution did not even envision a standing army. Among the provisions in Article I is the prohibition against Congress appropriating funds for more than two years for the army. Why? Because the men who created our nation thought that the idea of a permanent, large army was troubling. Why did we need it? When we went to war with Mexico, for example, the Mexican Army was larger than the United States Army. Most states had militias which could be used for self-defense, and the language of the 2nd Amendment specifically cites the need for a well-regulated militia as part of the reason why Congress could pass no law limiting the right to bear arms. These militia, often, were all needed to maintain peace with Indian tribes or protect communities from violence. Article I Section 8 provides also that Congress, not the President, shall provide for the calling forth of the militia and for the organization of the militia.

The attitude of the Constitution towards naval power was different. The men of 1789 understood that building frigates took time and money, and that sailors needed to be trained. Moreover, while the borders of our nation were safe, the same could not be said for the oceans. The early wars of our nation, including the Revolutionary War, involved the use of sea power against us. But more than just a navy was contemplated. Congress, not the President, has the power also to issue letters of “Marque and Reprisals” which allowed, in essence, American privateers to engage in maritime war, taking prize ships as their compensation, against those nations that were injuring our merchant marine or threatening our



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nation.

Interestingly, the role of the President in all this is modest. If our sailing ships ran into problems with the Spanish Navy, for example, the President had no power to issue letters of Marque and Reprisal. Only Congress could do that and the implication is that Congress could issue those letters as a non-lawmaking function (that is to say, that the President could not veto that action.) The President can make no treaty without the Senate. He cannot command the state militia, absent federal law. The President, also, cannot make war.

House Speaker John Boehner (R-Ohio) in a letter to President Obama noted that our military involvement in Libya has gone past the 90-day period provided for in the War Powers Resolution. On June 14 Boehner also sent the President a letter which said, among other things:

"Five days from now, our country will reach the 90-day mark from the notification to Congress regarding the commencement of the military operation in Libya, which began on March 18, 2011. On June 3, 2011, the House passed a resolution which, among other provisions, made clear that the Administration has not asked for, nor received, Congressional authorization of the mission in Libya. Therefore, it would appear that in five days, the Administration will be in violation of the War Powers Resolution unless it asks for and receives authorization from Congress or withdraws all U.S. troops and resources from the mission.

"Since the mission began, the Administration has provided tactical operational briefings to the House of Representatives, but the White House has systematically avoided requesting a formal authorization for its action. It has simultaneously sought, however, to portray that its actions are consistent with the War Powers Resolution. The combination of these actions has left many Members of Congress, as well as the American people, frustrated by the lack of clarity over the Administration's strategic policies, by a refusal to acknowledge and respect the role of the Congress, and by a refusal to comply with the basic tenets of the War Powers Resolution."

Although the Speaker's attempt to reassert congressional power into the form it was clearly intended to have in the Constitution, the fundamental problem is this: extended military operations - actions which involve more than just immediate self-defense - are acts of war. Although, historically, presidents have asked Congress to declare war on nations, which assumes that presidential authority is needed for that request. It is not. Congress, and Congress alone, has the power to make war. Even if President Obama went before Congress and said that our nation had no interest in Libya and that our military should not be involved there, Congress, over his objection, could declare war on Libya.

Once we accept the mistaken notion that the President can engage military forces of our country, especially overseas, without a formal declaration of war by Congress, then the vast gray shadows of ambiguity take over the process. Are we at war with Libya? Are we at war, instead, with the Gadhafi clique? Who decides these sorts of issues? If we are at war with Libya, then what is the precise cause for this war?

One benefit of broad legislative debate is that members of Congress can ask those questions publicly and the resolution of war can define the reasons for war (which would also help define the goals of peace).

What Speaker Boehner might do, instead of writing the President, is introduce a declaration of war against Libya into the House of Representatives. He could explain that this would be for the purpose of Congress determining whether we were, or were not, at war. Because a declaration of war would



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involve both Houses of Congress voting into favor of the declaration, then after a spirited debate if the House of Representatives voted against the declaration that that would mean, ipso facto, that we were not at war with Libya. And if we are not at war, then what are our troops doing there? It is more than a fair question to ask, it is a question imperative for the government of any free republic to answer.



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