In the aftermath of Syrian leader Bashar al—Assad’s use of chemical weapons against his own people on August 21, 2013, United States President Barak Obama declared on August 31, 2013, that he had “decided that the United States should take military action against Syrian regime targets.” Obama’s decision to take military action had been widely expected in view of his earlier statements that Assad’s use of chemical weapons would cross a red line. What was not expected, however, was Obama’s announcement that he would “seek authorization for the use of force from the American people’s representatives in Congress.” Obama’s decision brought back into the forefront an issue that Americans have discussed and debated for 226 years – what are the powers of the President and Congress under the Constitution to use the nation’s armed forces? Obama himself has been on both sides of this issue. In 2007, presidential candidate Barak Obama asserted that “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.” But as President and Commander in Chief in 2011, in a situation that fell far short of “an actual or imminent threat” to the U.S., Obama ignored Congress and ordered American forces to bomb Libya as part of a NATO intervention authorized by the United Nations Security Council.
So what exactly are the constitutional powers of the President and Congress when it comes to the use of American armed forces?

When the leaders of the United States convened in Philadelphia in the summer of 1787, the nation they led was on the verge of collapse. The Articles of Confederation had been adopted as the nation’s basic governing document, but the Articles had created a weak central government, one that lacked the power to raise an army, impose taxes, and regulate commerce and implement treaties with other nations. These weaknesses left the new nation in a perilous state, subject to foreign intrigues and internal disarray, exemplified by Shay’s Rebellion in western Massachusetts in the mid-1780s.

While there was an emerging consensus that the nation needed a stronger central government, one that could protect the people and the nation against both foreign and internal threats, the problem was how to create a stronger government, but, at the same time, ensure that such a government could not become tyrannical or despotic, as the former colonists believed had happened with the British government. How could they create a stronger central government but ensure that it did not threaten the people’s rights and liberties?

The men gathered at the Constitutional Convention in Philadelphia in 1787 solved this dilemma by creating a government based on a system of checks and balances, where powers were divided and separated among the Legislative, Executive, and Judicial branches of the new federal government. Thus, while the new government was empowered to raise armies, levy taxes, declare war, and enter into and enforce treaties, these powers were divided among the 3 branches of the federal government. And Congress, which was expected to be the most powerful branch of the new
government, was further divided by establishing a Senate and a House of Representatives, elected by different methods for different terms of service, and requiring that both chambers agree for the legislature to act.

In writing the Constitution, the nation’s founder’s paid special attention to the question of how the new nation would go to war. Under British rule, the American colonies had been involved in numerous wars against the Native Americans and in the various imperial wars among the European powers, but the new nation’s leaders hoped to establish a system in which American involvement in war would be the exception rather than the rule.

The delegates at the Constitutional Convention in 1787 believed that the Executive was the branch of the government most likely to involve the nation in war. They knew that in Europe, monarchs decided unilaterally whether and when their nations went to war. Even in England, the King enjoyed “the sole prerogative of making war and peace.” But Americans were determined that in the U.S., no one person would have the authority to take the nation into war.

At the Constitutional Convention, when Pierce Butler of South Carolina advocated giving the President the power to decide when the nation would go to war, Elbridge Gerry of Massachusetts exclaimed that he “never expected to hear in a Republic a motion to empower the Executive alone to declare war.” The first drafts of the Constitution reflected Gerry’s views, stipulating that “the legislature of the United States shall have the power . . . to make war.”
But Elbridge Gerry and James Madison recognized the potential problem in vesting in Congress the power to make war. What would happen if the nation were attacked while Congress was not in session? To deal with that possibility, Gerry and Madison moved to substitute “declare” for “make.” This would leave Congress with the power to initiate or decide on war, but it would give the President “the power to repel sudden attacks.” Rufus King of Massachusetts also preferred “declare” to “make” because he feared that giving Congress the power to make war might be construed as giving the legislature the authority to conduct a war once it had begun. Most of the delegates approved the new wording, which was adopted by a vote of 8 states to 1.

The Constitution also vests in Congress other powers closely related to the power to declare war. Article 1, Section 8, of the Constitution gives the legislature the power to:

- declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
- raise and support armies;
- provide and maintain a navy;
- make rules for the government and regulation of the land and naval forces;
- provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.

Moreover, Congress’ power of the purse – the requirement in Article 1, Section 9, that “no Money shall be drawn from the Treasury, but in consequence of appropriations made by law” – strengthens the legislature’s control over whether the nation goes to war, since a war cannot be fought if Congress refuses to appropriate funds for it.
Although the Constitution vests these war powers in Congress, it also provides in Article 2, Section 2, that “The President shall be Commander-in-Chief of the Army and Navy of the United States.” What this means is never defined in the Constitution, but it is clear that the nation’s founders never intended it to mean that the President could initiate war on his own authority. They wanted the President to have the authority to repel sudden attacks against the U.S. and to conduct a war once it was declared by Congress. Alexander Hamilton, a strong proponent of executive power, argued in *Federalist 69* that the President’s authority as Commander in Chief of the Army and Navy of the United States would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It 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.

The nation’s founders were confident that they had lodged in Congress, not the President, the power to take the U.S. into war. As Thomas Jefferson emphasized in a letter to Madison in 1789, “We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the legislative body.”

Congress and the President began sparring almost immediately after the adoption of the Constitution over the power to use the armed forces in hospitalities short of war. George Washington and most of his successors took an expansive view of
their authority to employ the armed forces, and Congress often acquiesced rather than challenging the President’s actions. However, in those few disputes that reached the courts in the early years of the Republic, the judiciary consistently upheld Congress’ power not only to declare war, but to authorize hostilities short of war.

In the late 1790s, relations between the U.S. and France deteriorated to the point where the two nations waged an undeclared naval war – the so-called Quasi War. This conflict raised the question of whether the Executive or the legislature could authorize or order military action against other nations in the absence of a declaration of war.

President John Adams believed Congress’ approval was required even for measures short of war, so he sought permission in 1797 to arm American merchant ships. Congress originally rejected the President’s request, but after the XYZ affair, when French officials demanded bribes before they would even negotiate with American diplomats, Congress acceded to the President’s wishes and authorized hostilities, but not a declaration of war, against France. Congress established the Department of the Navy and authorized the President to use the navy against French privateers and raiders, to retake captured American ships, and to seize armed French vessels. Congress also agreed to raise an army of 10,000 men.

This undeclared naval war with France resulted in a series of court cases in which the Supreme Court ruled that the war power was clearly vested in Congress, and that the legislature was the branch of government to decide when and how the U.S. would wage war or enter into lesser hostilities. In a decision in 1800 (Bas v. Tingy, 4 Dallas 37), the Supreme Court ruled that Congress could authorize hostilities or “imperfect war”
without a formal declaration of war. The following year (Talbot v. Seeman, 1 Cranch 1), the Court ruled that various naval actions were legal because they had been authorized by Congress. In his decision for the Court, Chief Justice John Marshall emphasized that “the whole powers of war being, by the Constitution of the U.S., vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry . . . . . Congress may authorize general hostilities . . . or partial war.” In 1804 (Little v. Barreme, 2 Cranch 170), the Supreme Court ruled that once Congress had established its policy in a statute, the President and the Navy were bound to carry out that policy, and any orders or actions that exceeded what Congress had authorized were illegal. Thus, in all 3 cases, the Supreme Court ruled that it was Congress, not the President, that had the authority to decide whether and to what extent the U.S. would wage war or engage in hostilities short of war.

In 1845-1846, President James K. Polk demonstrated how a President could use his authority as Commander in Chief of the armed forces to create a situation in which Congress had little choice but to declare war. In early 1845, Congress approved a joint resolution annexing Texas, with the understanding that the boundary dispute between Mexico and Texas would be settled by negotiations. Polk sent an envoy to Mexico to try to use the boundary dispute and American financial claims against Mexico as leverage to force Mexico to sell California to the U.S., but the Mexican government was in chaos, with coups occurring frequently, so it was impossible to negotiate either the boundary or the purchase of California.

In early 1846, Polk ordered American armed forces to move south from the Nueces to the Rio Grande, thereby occupying all of the land in dispute, claiming that
such action was necessary to prevent a Mexican invasion of United States territory. American and Mexican forces soon clashed on the banks of the Rio Grande, and Polk immediately asserted that “Mexico has passed the boundary of the U.S., has invaded our territory and shed American blood upon American soil.” He asked Congress to recognize that war now existed between the U.S. and Mexico and to place the means of fighting the war – the troops and the money for the necessary supplies -- at his disposal.

Some in Congress were skeptical about Polk’s account of events, wanting to see the evidence supporting Polk’s contention that the battle had occurred on American soil. They charged that it was Polk’s unilateral decision to send American forces to the Rio Grande that had led to hostilities, noting that Mexican claims to the disputed territory were just as strong as those of the U.S. From the Mexican point of view, Mexican forces were defending their nation against an American invasion, and blood had been shed on Mexican soil. Polk’s fellow Democrats controlled Congress, however, and they embedded the declaration of war in the preamble of a bill to provide supplies for the American troops in the field. They limited debate on the measure, demanding its immediate passage, and refused to allow sufficient time to examine the various documents Polk had sent to Congress. Legislators were reluctant to vote against supplies for American troops who were under attack, and thus the bill declaring war on Mexico was passed overwhelmingly in both the House of Representatives and in the Senate.

One of Polk’s chief critics was a young Congressman from Illinois named Abraham Lincoln. Time and time again, Lincoln demanded to know the spot on American soil where American blood had been shed. Lincoln explained his position in a
letter to a friend in 1848, responding to the friend’s defense of Polk’s decision to send
U.S. troops into the disputed area:

Allow the President to invade a neighboring nation whenever he shall deem it
necessary to repel an invasion (wrote Lincoln), and you allow him to do so
whenever he may choose to say he deems it necessary for such purpose – and
you allow him to make war at his pleasure. . . .

The provision of the Constitution giving the war-making power to Congress was
dictated, as I understand it, by the following reasons. Kings had always been
involving and impoverishing their people in wars, pretending generally, if not
always, that the good of the people was the object. This our Convention
understood to be the most oppressive of all Kingly oppressions; and they resolved
to so frame the Constitution that no one man should hold the
power of bringing this oppression upon us. But your view destroys the whole matter and places our
President where kings have always stood.

When Lincoln was President and faced the crisis of the Civil War, however, he
repeatedly acted unilaterally, exercising authority that was clearly vested by the
Constitution in Congress, not the President. Congress was not in session when
Confederate forces fired on Fort Sumter in April 1861, and although Lincoln called for a
special session of Congress, he set July 4 as the date for the legislature to convene. That
left the President with almost 3 months to deal with the crisis on his own, without
seeking Congress’ advice or approval. Lincoln immediately called out the militia, which
he was authorized to do by various statutes, proclaimed a state of insurrection, and
declared a blockade against the seceding states. The President also suspended the writ
of habeas corpus; expended funds for ships and military supplies, even though no such
funds had been appropriated by Congress; and increased the size of the regular army, a
clear usurpation of Congress’ authority to raise and support armies. When Congress
finally met in July 1861, Lincoln sought legislative approval for the steps he had taken.
He conceded that many of them fell within the jurisdiction of Congress, not the
President, so he asked the legislature to ratify the actions he had taken to meet the emergency. A majority in Congress accepted Lincoln’s contention that the crisis created by the Civil War had required him to take immediate and extraordinary measures to preserve the Union, and Congress passed a resolution validating all of the President’s actions with respect to the army, navy, and the militia, giving them “the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the U.S.”

By the early 20th Century, the generally accepted rule seemed to be that Presidents could use the armed forces on their own initiative in minor instances, especially in Latin America and the Far East. Congressional approval was required, however, for using the military against any of the European powers. Theodore Roosevelt, William Howard Taft, and Woodrow Wilson sent American forces into Panama, Cuba, Haiti, the Dominican Republic, and Nicaragua to preserve order, protect American lives or property, put down rebellions, prevent European intervention, and build the Panama Canal. As Teddy Roosevelt explained in his famous Corollary to the Monroe Doctrine, the U.S. was exercising “an international police power” in the Western Hemisphere. The Constitution does not specifically authorize the President to use the armed forces for these purposes, but Presidents did so anyway in dealing with the nations of Latin America. The power of the U.S. was so much greater than that of the Latin American states that there seemed little risk that war might result from American military action in these instances.

The most serious incident involving the U.S. and Latin America in this era occurred in Mexico, which, because of its size, population, and location, could not be
treated in such a cavalier manner as the Central American and Caribbean states. In 1913, General Victoriano Huerta seized power in Mexico, but President Woodrow Wilson, exercising his power under the Constriction to receive (or not receive) foreign ambassadors, refused to recognize Huerta’s government. In April of 1914, American sailors were arrested in Tampico, Mexico, for going ashore without permission from the Mexican authorities. The local Mexican commander immediately ordered their release and apologized profusely, but the American captain demanded a 21-gun salute to the American flag. When the Mexicans refused, Wilson decided to use the incident as an excuse for military action against Huerta, and he asked Congress to approve his use of the armed forces to teach the Mexicans to respect the rights and dignity of the U.S. Like President Obama 99 years later, Wilson asserted that he already possessed the necessary authority under the Constitution to deal with the situation, but he preferred to work with Congress on such an important matter.

The House of Representatives approved the President’s request the next day, but some senators objected to Wilson’s assertion that he could employ the armed forces without the consent of Congress. Senators also preferred to justify American intervention as necessary to protect American lives and property rather than as a response to the insult to the American flag. Consequently, the measure was still pending in the Senate when Wilson learned that a German ship laden with munitions was about to land at the Mexican port city of Veracruz. Even though Congress had not approved the resolution authorizing the President to use the armed forces, Wilson immediately ordered American marines to prevent the arms from reaching Huerta’s men. American forces took control of Veracruz, but in the process, 19 Americans and
hundreds of Mexicans were killed. All factions in Mexico condemned American intervention, and Wilson quickly accepted when Argentina, Brazil, and Chile offered to mediate the dispute. American forces withdrew from Veracruz a few months later.

Two years later, in 1916, Wilson ordered General John J. Pershing and 6000 American troops back into Mexico in pursuit of Pancho Villa and his men, who had murdered Americans on both sides of the border. The President took this action without consulting Congress. The American forces did not find Villa, but they moved more than 300 miles into Mexico, remained there for 11 months, and clashed with the Mexican army. Only when war in Europe demanded Wilson’s full attention in early 1917 did he withdraw American forces from Mexico.

Events leading to American involvement in World Wars I and II showed once again that even though Congress has the power to declare war, Presidents could set policies and position the armed forces to involve the nation in hostilities without congressional approval. Most of the important decision’s preceding American entry into WW I and WW II were made unilaterally by Woodrow Wilson and Franklin Roosevelt, but both Presidents did eventually go to Congress for formal declarations of war.

Because of time constraints, I am going to skip over Wilson and the World War I era, and jump right to FDR and WW II. Once World War II broke out in Europe in September 1939, Franklin Roosevelt tried to aid Britain and the Allies. In the process, he exceeded his authority as President, but like Lincoln, he believed that the nature of the crisis he was dealing with justified his actions. FDR believed that it was necessary to do whatever he could to prevent a German victory, and Roosevelt and his advisors also
believed that their actions were authorized under the Supreme Court’s decision in 1936 in United States v. Curtiss–Wright Export Corporation (299 U.S. 304). In this case, the Supreme Court had described the President as “the sole organ of the federal government in the field of international relations.” As such, according to the Court, the President’s authority in foreign affairs did not have to be based on acts of Congress; the President could make decisions and implement foreign policies unilaterally as long as he did not violate any specific provisions of the Constitution.

It should be noted that most of this decision was *obiter dictum*, excess verbiage not necessary to the ruling in the case. Moreover, a distinction must be made between Congress’ power to declare war, a power vested explicitly and exclusively in the legislature, and authority in foreign affairs in general, which is divided between Congress and the President. When John Marshall, then a member of the House of Representatives, originally described the President in 1800 as “the sole organ of the federal government in international relations,” he meant that it was the president alone who communicated with other nations on behalf of the U.S. As Chief Justice of the Supreme Court a year later, Marshall had clearly proclaimed that the Constitution vested in Congress “the whole powers of war.” Moreover, even under the rationale of the Curtiss-Wright case, presidential exercise of the war powers would be unconstitutional because that power is expressly given to Congress.

Prior to America’s formal entry into WW II, Roosevelt used an executive agreement to transfer 50 American destroyers to Great Britain in exchange for the right to build bases on British territories in the Western Hemisphere, sent American troops to protect Iceland against a possible German occupation, and used the German attack
against the American destroyer *Greer* to justify ordering American ships to shoot at German warships and submarines, “the rattlesnakes of the Atlantic,” as Roosevelt called them, as soon as they were sighted. Roosevelt took all these actions unilaterally, citing both his authority as Commander in Chief and the Curtiss-Wright decision as the legal basis for his actions. By mid-October 1941, the U.S. and Germany were engaged in an undeclared naval war on the Atlantic. But this time, in contrast to the 1790s when the undeclared naval war against France had been authorized by Congress, American lives were now being lost without the consent of Congress. Roosevelt had stretched his authority beyond previously recognized limits. Two months later, on December 8, Roosevelt asked Congress to “declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, 1941, a state of war has existed between the United States and the Japanese Empire.” A few days later, Germany’s and Italy’s declarations of war against the U.S. led FDR to request that Congress “recognize [that] a state of war” also existed between the United States and those countries.

In the years after World War II, American Presidents further expanded their authority as chief executive and Commander in Chief, deciding unilaterally where and when to send American forces into hostilities. In the nuclear age, when the United States might have to respond instantaneously to a Soviet challenge, Congress’ power to declare war seemed more and more like an anachronism, a relic from an earlier age.

When North Korean forces invaded South Korea in June 1950, President Harry Truman committed American forces to a full-fledged war without congressional approval or authorization. Truman relied on his authority as Commander in Chief and on United Nations resolutions as his basis for sending American troops to fight in
Korea. Most legislators supported Truman’s firm response to what they saw as communist aggression in Korea, but Republican Senator Robert Taft from Ohio and a few others condemned Truman’s failure to seek congressional approval for sending U.S. troops to Korea, charging that the President had usurped Congress’ power to declare war. They suggested that Truman at least follow Lincoln’s example of seeking congressional approval for his actions after the fact. Truman refused to do so, however, believing that congressional approval was unnecessary. He relied in part on a State Department memorandum that listed 85 previous instances when Presidents had supposedly used the armed forces without congressional authorization or approval. (I say supposedly because many of the Presidents’ actions cited, such as those of John Adams during the Quasi-War with France in the 1790s, actually had been authorized by Congress.) The State Department asserted in its memorandum that “the President, as Commander in Chief of the armed forces of the United States, has full control over the use thereof.”

Actually, Truman denied that the U.S. was involved in a war in Korea, accepting a reporter’s characterization of the American role in Korea as a “police action” under the auspices of the United Nations. But as the war in Korea bogged down, and American casualties rose, more and more people complained that Truman had violated the Constitution by unilaterally involving the nation in an undeclared war in Korea.

Truman’s successor, President Dwight Eisenhower, made sure not to repeat Truman’s mistake. When Eisenhower considered using American forces to assist the French in Vietnam in 1954, defend Formosa (Taiwan) in 1955, and stop the spread of Communism or pan-Arab nationalism in the Middle East 1957, he sought prior
congressional authorization each time. Congressional leaders rejected any use of the armed forces in Vietnam in 1954 unless certain conditions were met, but Congress approved the Formosa Resolution in 1955 and the Middle East Resolution in 1957, authorizing the President to use the armed forces in those areas as he deemed necessary. In passing the Formosa Resolution, Congress ignored the warning of Senator Herbert Lehman – for whom our college is named – that the measure constituted “a pre-dated blank check of authority . . . which can be used, or which might be used, to involve us in a war.” Most legislators saw these resolutions as a major improvement over Truman’s unilateral actions in Korea, and Eisenhower used the Middle East Resolution to send American troops to bolster a pro-Western government in Lebanon in 1958.

Presidential use of congressional resolutions to wage war culminated, of course, in the Gulf of Tonkin Resolution in 1964, which approved and supported “the determination of the President, as Commander in Chief, to take all necessary steps, including the use of armed force, to repel any attacks against American forces . . . and to prevent further aggression” in Southeast Asia. Believing that American ships in the Tonkin Gulf had been the victims of an unprovoked attack, and trusting that President Lyndon Johnson would exercise restraint in using the authority he was being granted, the House of Representatives approved the resolution 416-0, and the Senate quickly followed suit, 88-2. Johnson quickly cashed this blank check, citing the Gulf of Tonkin Resolution as his authority for bombing North Vietnam and sending 500,000 American combat troops to Vietnam in the next four years. When questioned about his authority to wage war in Vietnam without a declaration of war from Congress, Johnson frequently
pulled a copy of the Tonkin Gulf Resolution out of his pocket and reminded legislators that they had approved it by a combined vote of 504-2. Under Secretary of State Nicholas Katzenbach expressed the administration’s view when he told the Senate Foreign Relations Committee in 1967 that the Gulf of Tonkin Resolution, combined with the Southeast Asia Treaty (SEATO) and congressional appropriations for military operations in Vietnam, were the “functional equivalent” of a declaration of war.

When Richard Nixon became President in 1969, he asserted that, as Commander in Chief of the armed forces, he could do whatever was necessary to protect American troops in Vietnam. In April 1970, Nixon ordered American forces into Cambodia to destroy Vietcong bases there. The Senate immediately passed an amendment cutting off funds for American troops in Cambodia after July 1, but the measure became moot when Nixon withdrew American forces from Cambodia while the bill was still pending in the House of Representatives. Over the next 3 years, Congress repealed the Gulf of Tonkin Resolution and used its power of the purse to prevent Nixon from continuing the war in Southeast Asia. After the Paris Peace Accords finally ended America’s combat role in Vietnam in 1973, American planes continued to bomb Communist positions in Cambodia until Congress cut off the funding for American military activity in Southeast Asia in August 1973.

Nixon’s ordering American troops into Cambodia in 1970 led New York Republican Senator Jacob Javits to introduce the first version of what would eventually become the War Powers Resolution of 1973. For Javits and others, the Cambodian incursion clearly demonstrated the need for Congress to restore the balance originally intended by the nation’s founders by reasserting the legislature’s authority to decide
where and when the U.S. would engage in war or lesser hospitalities. As the Watergate scandal and revelations of Nixon’s misconduct weakened his presidency, Congress adopted the War Powers Resolution over Nixon’s veto in November 1973.

The War Powers Resolution requires the President to *consult* with Congress “in every possible instance . . . before introducing United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated.” The President must also *report* to Congress within 48 hours whenever he introduces American forces into hostilities or situations where hostilities are likely, sends troops “equipped for combat” to a foreign nation, or substantially increases the number of American forces so equipped in a foreign country. In subsequent years, there would be considerable disagreement over what constituted consultations, when consultations were possible, what constituted hostilities and whether they were imminent, and whether American troops were equipped for combat.

The War Powers Resolution also requires the President to withdraw American forces from hostilities within 60 days unless Congress specifically authorizes him to continue military operations. The President can extend this deadline for an additional 30 days by certifying that more time is necessary to preserve the safety of U.S. forces while they are being withdrawn. The resolution also allows Congress to order the return of American military forces to the U.S. at any time by concurrent resolution, a measure not subject to the President’s veto, and it sets forth special procedures to ensure that bills approving or rejecting a President’s use of the armed forces are not buried in committee or blocked by a filibuster. Missouri Democratic Senator Thomas Eagleton, an early proponent of the War Powers Resolution, voted against the final bill
because he believed these provisions gave the President the authority to wage war on his own for 90 days without congressional approval.

Most Presidents since 1973 have questioned the constitutionality of the War Powers Resolution, asserting that Congress cannot by statute limit the President’s authority under the Constitution as Commander in Chief. But the Courts have never ruled directly on the War Powers Resolution, holding that disputes between Congress and the President over the use of American troops are political questions to be settled between the legislature and the executive.

During his presidency, Gerald Ford complied with the War Powers Resolution grudgingly, transmitting the required reports to Congress when he used the armed forces to evacuate American and South Vietnamese nationals in 1975 and to rescue the crew of the American merchant ship the *Mayaguez* when it was seized by Cambodia. Ford merely informed congressional leaders of his decisions to use the armed forces instead of engaging in meaningful consultation. In each of these instances, Ford reported that he acted under his authority as President and Commander in Chief.

In 1982, President Ronald Reagan asserted that the War Powers Resolution did not apply when he sent American forces into Lebanon because U.S. forces were part of a multinational peacekeeping force that would not be involved in hostilities. However, when American forces in Lebanon came under fire in 1983, Reagan ordered air strikes against the attackers and authorized the use of American air and artillery power to assist the Lebanese armed forces. When members of Congress complained that American forces in Lebanon were now engaged in hostilities that had not been authorized by
Congress, as required by the War Powers Resolution, the Reagan administration reluctantly entered into negotiations with House Speaker Tip O’Neill, which resulted in congressional approval of the Multinational Force in Lebanon Resolution, which explicitly stated that the War Powers Resolution did apply to Lebanon and authorized the use of American armed forces there for 18 months. Reagan signed the bill into law, but he still challenged the legality of the War Powers Resolution, emphasizing that his signing of the measure should not “be viewed as any acknowledgement that the President can be impermissibly infringed by statute.”

On October 25, 1983, 2 days after a terror attack killed 241 American Marines in Lebanon, President Reagan sent American forces into Grenada, a small island nation in the Caribbean, explaining that he done so to protect and evacuate American students and assist in restoring order and constitutional government on the island. Reagan’s real objective, however, was to prevent the Marxist government of Grenada from establishing a military base for Cuba or the Soviet Union. Like most of his predecessors, Reagan did not really consult with Congress, merely informing the congressional leaders of the operation in Grenada after he had already issued the orders for it. The Reagan administration asserted that no congressional approval was required because the U.S. troops would be removed from Grenada before the 60-day limit set by the War Powers Resolution expired.

The invasion of Grenada showed that the best way for presidents to avoid problems with the War Powers resolution was to win quick military victories and withdraw American forces before the time limits specified in the War Powers Resolution become an issue. In December 1989, President George Herbert Walker Bush ordered
American forces into Panama to protect American citizens there, protect the Panama Canal, and capture General Manuel Noriega. Bush briefed congressional leaders just hours before the invasion began, and he reported to Congress the next day. The operation proceeded successfully; Noriega was captured, and U.S. forces were withdrawn before the 60-day limit was reached.

When Iraq invaded Kuwait in August 1990, President Bush ignored the War Powers Resolution when he sent 200,000 American troops to Saudi Arabia immediately and then again when he sent an additional 200,000 troops to the region in November. While hostilities may not have been imminent, the troops were certainly equipped for combat, but President Bush deployed the troops without consulting with or seeking the approval of Congress. He met with members of Congress on numerous occasions, but these sessions were merely to brief them on decisions already made, not to seek their advice or consent. During the fall of 1990, as war seemed more and more likely, the Bush administration insisted that the President had the authority under the Constitution to use American military forces as he deemed necessary, without congressional approval or authorization.

The United Nations set a deadline of January 15, 1991, for Iraq to withdraw from Kuwait, and as that day approached, Congress considered whether to authorize the President to use the armed forces against Iraq. Many legislators believed that such authorization was necessary under the Constitution and the War Powers Resolution, and they introduced a measure authorizing the President to use the armed forces to enforce United Nations resolution ordering Iraqi forces to leave Kuwait. President Bush now declared that he would welcome such a congressional resolution because it would
send a clear message of American resolve to Saddam Hussein. A momentous debate ensued as the House and Senate considered the resolution to authorize the President to use all necessary means, including armed force, to expel Iraqi forces from Kuwait. The House and the Senate both adopted the resolution on January 12 – the Senate by a narrow vote of 52-47 – and 4 days later, President Bush ordered the bombing of Baghdad to begin, followed by the invasion of Iraq.

After the war against Iraq, President Bush and President Bill Clinton used American forces in numerous instances in the rest of the 1990s without asking for approval or authorization from Congress. Bush and Clinton claimed in Somalia, Haiti, and the former Yugoslavia that they were acting under the President’s authority to conduct United States foreign relations, carry out United Nations or NATO resolutions, or that U.S. forces were engaged in humanitarian or peacekeeping activities, not hostilities. Usually there was some discussion with congressional leaders, mostly informing them what the President intended to do, and the President did report his actions to Congress, “consistent with the War Powers Resolution,” but for the most part, Bush and Clinton continued to decide unilaterally when and where to use American armed forces. Some members of Congress grumbled and protested at times, usually Democrats complaining about President Bush and Republicans objecting to President Clinton’s actions, but Congress as a whole did not challenge the President directly on his use of American armed forces. Congress rejected various proposals to invoke, amend, or repeal the War Powers Resolution, and the legislators continued to fund American military activities in Bosnia, Kosovo, and elsewhere.
In September 2001, in the aftermath of the terrorist attacks on 9/11, President George W. Bush sought from Congress broad authority “to deter and prevent any related future acts of terrorism and aggression against the United States.” Congress narrowed the scope of Bush’s proposal, declaring instead that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the U.S.” and authorizing him “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the U.S. by such nations, organizations, or persons.” This authorization was explicitly stated to be the specific statutory authority to use the armed forces required by the War Powers Resolution, and it was passed by Congress with only one dissenting vote (Rep. Barbara Lee –D-CA). Bush quickly used this authority to order American forces into Afghanistan to oust the Taliban regime that had harbored Osama Bin-Laden.

In October 2002, Congress passed a resolution condemning Iraq’s alleged continued possession of weapons of mass destruction and authorizing the President to use U.S. armed forces to “defend the national security of the U.S. against the continuing threat posed by Iraq,” and to “enforce all relevant United Nations Security Council resolutions regarding Iraq.” As we know, President George W. Bush used this authority to send U.S. forces to Iraq to topple Saddam Hussein and find those alleged weapons of mass destruction, which, it turned out, no longer existed.

In the spring of 2011, when U.S. forces participated in NATO air strikes against Muammar Gadhafi’s regime in Libya, Obama reported the action to Congress, and, like
his predecessors, he based his actions on UN resolutions and his constitutional authority to conduct U.S. foreign relations and as Commander in Chief. Obama noted that he was keeping Congress fully informed, “consistent with the War Powers Resolution.” But when the air strikes against Gadhafi continued longer than originally anticipated, Obama ignored the 60-day deadline set by the War Powers Resolution, refusing even to report to Congress on the matter. Liberal Democratic Congressman Dennis Kucinich of Ohio introduced a resolution mandating an end to U.S. military action in Libya, which drew support from an unusual coalition of liberal Democrats and conservative Republicans. To ward off Republican support for the Kucinich resolution, House Speaker John Boehner introduced a resolution of his own, which criticized the President for continuing the U.S. military role in Libya without express congressional approval, but did not require an end to American military operations in Libya. The House passed Boehner’s resolution rebuking the President, but it rejected Kucinich’s proposal to halt American military actions in Libya.

Boehner’s resolution also posed various questions to the President, about his authority to use the armed forces against Libya in the absence of congressional authorization to do so. In his reply to the Speaker, Obama asserted that “given the important U.S. interests served by U.S. military operations in Libya, and the limited nature, scope, and duration of the anticipated actions, the President had constitutional authority as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers to direct such limited military operations abroad.” The administration claimed “that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization.
because U.S. military operations are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60-day termination provision.” As Eugene Robinson, a Washington Post columnist who usually supports Obama’s policies, put it, Obama’s claim that U.S. military action in Libya did not constitute hostilities was “nonsense.”

Given his actions in Libya, why did President Obama decide to seek congressional approval for a military strike against Syria, especially since the limited military response being contemplated against Syria seemed a lot smaller than what he had done in Libya, which he had defined as not constituting hostilities and therefore not requiring congressional approval or authorization or triggering the 60-day time limit. Why did Obama go to Congress for approval or authorization to use the military in Syria?

I have to confess, I don’t know why Obama went to Congress in this instance, reversing many years of Presidents, including Obama, making such decisions unilaterally. Historians are a lot better at explaining the past than we are at understanding the present or predicting the future. We are a lot like football coaches who need to see the game film – in our case, the documents – before we can comment intelligently on what has just happened. I will say, however, that Obama going to Congress in this instance is how the framers intended the system to work when they wrote the Constitution in 1787. Since the United States is not under direct or imminent attack, the President is supposed to work with Congress in deciding whether the U.S. will use military force, and that is what Obama has done in this case. It will, of course, be fascinating to see how events in Syria play out, whether Russian cooperation continues and whether Assad complies with the agreement to give up his chemical weapons. If not, will Obama go back to a reluctant Congress, hoping that the failure of
diplomacy leaves Congress little choice but to approve U.S. military action, or will he act without authorization from Congress? Hopefully, the situation will not require him to make that decision.