

## Rand Paul and Jim Webb on Congress's Abdication of Foreign Policy Power

By: Benjamin Freidman – March 11, 2013

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John Brennan's confirmation as CIA director displayed Congress's disinterest in checking the president's runaway security powers. Two months ago, when I wrote an article with the unwieldy title, "Will Obama's Brennan Pick Shed Some Much Needed Light on Drones?" I wouldn't have guessed that the answer would be yes; it will bestir Congress to finally force the administration to say clearly that it does not reserve the right to kill Americans at home with drone strikes, insofar as they are not engaged in combat. That statement came only thanks to whomever leaked the Justice Department's summary memo on the topic, Brennan and Attorney General Eric Holder's impolitic reluctance to articulate limits on the president's power to kill Americans by calling them terrorists, and, of course, Sen. Rand Paul's (R-Ky.) resulting filibuster. The Senate predictably left Brennan's other sins against civil liberties mostly unexamined.

Paul's hard-won "toehold of constitutionality" isn't much to cheer about, even if we add to the spoils the administration's vague agreement to be more open about its legal rationale for placing people on kill lists. This minimal defense of civil liberties and congressional privilege is what got Republican senators like Marco Rubio of Florida and Ted Cruz, Jr. of Texas, who seem to support unfettered executive discretion to kill in the name of counterterrorism outside the United States, to support the filibuster.

Even that was too much restraint for the neoconservative right. Sen. John McCain (R-Ariz.) read on the Senate floor a Wall Street Journal editorial calling Paul's effort a stunt meant to "fire up impressionable libertarian kids" and assuring us that those targeted by drones here or abroad will be "enemy combatants." McCain and the Journal spectacularly miss Paul's point: the issue is whether the president should make that designation, chucking due process rights, without being checked by another branch of government.

As McCain amigo Sen. Lindsay Graham (R-S.C.) noted, the Republican caucus' flirtation with civil libertarianism seems a situational consequence of partisanship. The same goes for Democrats. Were it President McCain doing what Obama is, far more than two Democratic senators (Jeff Merkley of Oregon and Pat Leahy of Vermont) would have voted against Brennan. During his filibuster, Paul asked what happened to the Senator Obama of 2007, who opposed torture and war by executive fiat. Paul suggests that those views were products of Obama's then circumstance: not being president. Even that may be too generous. As I wrote in a recent book review concerning Obama's counterterrorism record, "even when he took office, there was ample evidence that his dovish positions would not outlast their political convenience."

We can hope, I suppose, that Paul's stance will increase Congress's willingness to assert its constitutional war powers. Although he did not, as far as I know, propose specific restrictions on the use of military force outside of the United States, Paul did complain that the 2001 Authorization of Military Force against the perpetrators of the September 11 attacks and those that harbored them has become a permanent warrant for almost limitless executive war powers, a kind of escape hatch from the Constitution opened by presidential utterance of the word "terrorist."

The passage in Paul's filibuster remarks that Julian Sanchez quoted yesterday is worth relaying more fully:

These are questions that should be discussed in Congress... In fact, we shouldn't be asking [the president] for drone memos, we should be giving him drone memos. We shouldn't be asking him how he's going to run the drone program. We should be telling him how he's to run the drone program. That is our authority. We've abdicated our authority. We don't do what we are supposed to do. We are supposed to be the checks and balances.

That abdication is the subject of the cover essay ("Congressional Abdication") in the current *National Interest* by former Virginia senator Jim Webb. Webb argues that Congress has so thoroughly surrendered its constitutional prerogatives in foreign policy that their existence is unknown to many members. He's especially upset by Congress' indifference to the bombing of Libya:

It is not hyperbole to say that the president himself can now bomb a country with which we maintain diplomatic relations, in support of loosely aligned opposition groups that do not represent any coalition that we actually recognize as an alternative. We know he can do it because he already has done it. Few leaders in the legislative branch even asked for a formal debate over this exercise of unilateral presidential power, and in the Senate any legislation pertaining to the issue was prevented from reaching the floor. One can only wonder at what point these leaders or their successors might believe it is their constitutional duty to counter unchecked executive power exercised on behalf of overseas military action. At bottom, what we have witnessed in these instances, as with many others, is a breakdown of our constitutional process.

For reasons I explain elsewhere, I doubt Paul and Webb's exhortations will move their colleagues to again struggle for the privilege of directing American foreign policy. I hope I'm wrong—that Congress will rewrite the 2001 Authorization of Military Force in a more restrictive way and generally revise the legal framework for lethal counterterrorism operations to create more transparency and restraint (on this, read Robert Chesney, Steve Vladeck, and Jack Goldsmith, who all write for the *Lawfare* blog). The chief virtue of doing so is not formal adherence to constitutional structure, but the wisdom inherent in that structure: contested authority creates better policies than the unilateral sort.