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The Obama Administration's Artful Evasions over the War Power

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[Christopher A. Preble](#) ^[2]

Anyone under the illusion that Congress has any substantive role in foreign policy, especially when it comes to war, should read [today's NYT story](#) ^[3] documenting how the Obama administration intends to "comply with" (read "circumvent"), the War Powers Resolution. The law's 60-day time limit for military operations that have not been formally endorsed by Congress ends on May 20th.

James Steinberg, the deputy secretary of state,... said the administration was examining the military's "role and activities as we move through the next period of time" and would consult Congress about evaluating "what we think we can and can't do."

[...]

The administration apparently has no intention of pulling out of the Libya campaign, and Mr. Steinberg said that Mr. Obama was committed "to act consistently with the War Powers Resolution." So the Obama legal team is now trying to come up with a plausible theory for why continued participation by the United States does not violate the law.

[...]

One concept being discussed is for the United States to halt the use of its Predator drones in attacking targets in Libya, and restrict them solely to a role gathering surveillance over targets.

[...]

By ending all strike missions for American forces, the argument then could be made that the United States was no longer directly engaged in hostilities in Libya, but only providing support to NATO allies.

Another idea is for the United States to order a complete — but temporary — halt to all of its efforts in the Libya mission. Some lawyers make the case that, after a complete pause, the United States could rejoin the mission with a new 60-day clock.

You might think that members of Congress would object to these sorts of shenanigans. To the untrained eye, it looks as though the White House is trying to pull one over on them. But there is reason to believe that members like it that way. It allows them to evade responsibility for the war, and leaves them free to praise or criticize it after the fact, depending upon how it all plays out.

The scope of the president's authority to send U.S. forces into harm's way without so much as a "by your leave" from the legislature is the subject of some scholarly debate. It shouldn't be. The Founders' intent that the legislature, not the executive branch, had the sole authority to declare war is clearly stated in the Constitution, in the supporting ratification debates, and in the comments of Madison and others after the fact.

Indeed, Madison later asserted that "[i]n no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department."

While a young member of Congress from Illinois, Abraham Lincoln understood this point quite well. In a letter to his law partner Lincoln explained:

[The Constitutional] Convention understood [war] 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.

Lincoln was complaining of President James K. Polk's decision to invade Mexico, one of the earliest examples of executive overreach. In Polk's defense, at least he professed that the war was intended to advance U.S. security interests. Polk's claims were risible, but no one in the Obama administration has even attempted a plausible lie to justify the Libyan intervention on the grounds of U.S. national security.

But Obama, like Lincoln, appears to have undergone an Oval Office conversion with respect to the president's power to wage war. [As I wrote here a few weeks ago](#) ^[4], Candidate Obama believed that the president could launch military operations only when the country was in danger of an actual or imminent attack. President Obama, it seems, believes something very different: that he can wage war pretty much whenever he chooses, wherever he chooses, though it would be handy to have a formal UN Security Council endorsement beforehand. To call the U.S. Congress an afterthought in this context would afford that body more influence than it actually has.

But I blame the Congress as much as I blame the president; many legislators, it seems, prefer to snipe at the president's conduct of the war, or to complain of the costs, and have left room to criticize the decision to go to war itself, after the fact, if it goes poorly. Of course, if it succeeds, I predict that most can and will claim credit. That's the beauty of not having to vote on something. You can be for it before you are against it without anyone making fun of you.

As it happens, I had planned to focus on Congress's abdication of its constitutional obligations when Ben Friedman and I speak later today at a [Cato Capitol Hill briefing](#) ^[5]. Now I have new material to work into my talk. Our charge is to answer the question "Why Are We at War in Libya?" I'm quite sure that no one knows for certain, but my best guess is the simplest answer available: We are at war in Libya because Barack Obama chose to go to war there.

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