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Libya & the War Powers Act

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The NATO intervention in Libya has brought on a new episode of an old series: Debate about the War Powers Act and the constitutional authority to make war. The debate is interesting in several regards because it tends to cut across the usual lines of partisan, and even ideological, divides.

The most valuable aspect of the debate is that it demonstrates clearly the limits of constitutional originalism of the kind advocated by Justice Antonin Scalia and others. For most of American history, there was no question about where the authority to make war lay in our polity: Article I, Section 8 of the Constitution states that Congress has the power to declare war and no one else. The founders were very concerned that lodging such an enormous power in a solitary executive officer would grant that individual too much power. And, because the chief magistrate is also the Commander-in-Chief of the Armed Forces, such a concentration of power in his hand might invite tyranny of a kind that has long been a scourge upon humanity, a ruling junta.

The founders may have been perceptive and even prescient about the way power aggregates to those with the power to make war, but they were not prescient about the advent of airplanes or rocket missiles and other technological innovations that changed the nature of warfare. Congress is ? or at least it was so conceived ? a deliberative body. But, with the advent of modern means of delivering war to our shores, there may not be time to deliberate in the face of a foreign threat. The immediacy of the threat demands immediacy of action and it is inconceivable that any party will challenge the basic right and duty of the president to engage in military action to defend the nation in the face of an immediate threat.

But, during the post-World War II era, Article I, Section 8 took another hit. At the same time as threats to the nation?s security became more immediate, the nature of war became more murky. The Korean War was fought under the auspices of the United Nations and was called a ?police action? not a war. Covert operations by our intelligence forces slid into war in Vietnam. The U.S., as a member of NATO, became involved in the Balkans. There was no clear dividing line between war and peace anymore.

The War Powers Act of 1973 sought to address these two changes in the nature of modern warfare and put the decision to engage U.S. military forces on a more sound constitutional footing. It allowed a president to send troops into harm?s way for a limited time, after which congressional authorization must be sought. Today, the administration is looking for ways around that act.

Only the two Gulf Wars bore the characteristics of a traditional war and, in both instances, Congress gave its assent without formally declaring war, a precedent to which neither the White House nor Congress objected. That is a shame. It would have been better to have had formal declarations of war in both those instances, if only to help reclaim the idea that the decision to go to war should be made by the people?s representatives as well as by their president.

The conflict in Libya most closely resembles the conflict in the Balkans and not only because both operations are being conducted by NATO. It is not enough to say, as Congressman Barney Frank said last night on one of the cable shows, that we want Qaddafi gone but we want the Brits and the French and the Germans to do it. As

we learned during the siege of Sarajevo, there are times when only U.S. leadership and U.S. involvement will be effective.

What is troubling today, however, is that a justifiable concern about the power to make war has become a cover for those, on both the left and the right, who wish to return America to its isolationist past. Isolationism was no answer in 1940 and it is no answer today. Indeed, I can think of no way to invite more war and more violence in the world than for the United States to step back from its engagement with the world. We are, rightly, troubled by the actions of the Pakistani government and military, some of whom seem hell bent on encouraging terrorists. There is an understandable desire to wash our hands of the mess, cut off funds to Pakistan and break relations. But, what would that achieve? A Pakistan freed from any relationship with the U.S. is a Pakistan inclined to a more reckless and more violent future.

As Catholics, we are not only called upon to exercise a preferential option for the poor, but also a preferential option for peace. But, the achievement of peace is a complicated thing in a troubled world. Isolationism, the roots of which are deep in the American psyche, is not the answer. Constitutional scruples should be addressed ? and President Obama has not done a good job addressing them ? but those scruples should not be opening for a return to a more isolationist foreign policy. We cannot right injustice everywhere, but if America is not in the business of righting injustice, it ceases to be America.

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