

“Legalizing” War With Secret Memos....

By [David Swanson](#)

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In the good old days of Bybee and Yoo, before we let them get away with it, thereby guaranteeing worse things to come, [Justice Department memos](#) “legalizing” the crime of aggressive war were secret. Now they’re published quickly, and there’s a new one out on Libya ([PDF](#)). It begins:

“The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest. Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration. April 1, 2011.”

April Fools! Ha Ha! They had me going.

Actually they mean it. But the memo doesn’t offer anything to substantiate the claims. It merely states that the United Nations passed a resolution — a fact that does not legally erase the U.S. Constitution’s placement of war powers in the legislature. It also pulls out that old standby so beloved by Yoo and Bybee: “Clinton did it!”

“Earlier opinions of this Office and other historical precedents establish the framework for our analysis. As we explained in 1992, Attorneys General and this Office “have concluded that the President has the power to commit United States troops abroad,” as well as to “take military action,” “for the purpose of protecting important national interests,” even without specific prior authorization from Congress. Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992) (“Military Forces in Somalia”). This independent authority of the President, which exists at least insofar as Congress has not specifically restricted it, see Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 n.4, 178 (1994) (“Haiti Deployment”), derives from the President’s “unique responsibility,” as Commander in Chief and Chief Executive, for “foreign and military affairs,” as well as national security. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); U.S. Const. art. II, § 1, cl. 1, § 2, cl. 2.”

And not just Clinton. Other presidents have done it! And judges have OK’d it — sort of.

“The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to “declare War,” “raise and support Armies,” and “provide and maintain a Navy,” as well as general authority over the appropriations on which any military operation necessarily depends. U.S. Const. art. I, § 8, cl. 1, 11-14. Yet, under “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution,” the President bears the “vast share of responsibility for the conduct of our foreign relations,” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)), and

accordingly holds “independent authority ‘in the areas of foreign policy and national security.’” Id. at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); see also, e.g., *Youngstown Sheet & Tube Co.*, 343 U.S.6.”

That is to say, in violation of the Constitution, past presidents have moved in this direction. The memo goes on to explain that, regardless of what any laws say, presidents have used the military without Congressional approval lots and lots of times. And the presidents have belonged to “both parties”!

The memo then goes on to promote a common lie about the War Powers Act, namely that it allows this practice, whereas its whole purpose was to put an end to this practice except in instances where the United States was actually under attack by another nation. That little problem, this memo explains, is solved by declaring part of the War Powers Act, the part forbidding a president to use the military except when the United States is attacked, is merely a “policy statement” and “is not to be viewed as limiting presidential action in any substantive manner.”

Plus, these servants of the President assure us, the President believes bombing Libya is in our “national interest,” a point the nation clearly need not be asked for an opinion on, and — moreover — this surgical little operation isn’t big enough to count as a real war. Why? Because previous Justice Department memos have said all sorts things to the same effect and nobody has ever put an end to this unconstitutional madness.

The “national interest” turns out to involve regional stability, despite Libya not being in our region of the world, and the credibility of the United Nations. However, the memo stresses, a President does not require any resolution from the United Nations in order to launch unconstitutional wars. Having one just helps provide an excuse in this instance.

The new Yoo or Bybee who signs this rip-off of their work is Caroline D. Krass, Principal Deputy Assistant Attorney General. I bet her mamma just couldn’t be prouder!

David Swanson is the author of “War Is A Lie”

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