
WAR POWERS AND THE CONSTITUTION: 15 YEARS AFTER 9/11

SYMPOSIUM DISCUSSION: GRIFFIN

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DRAKE UNIVERSITY LAW SCHOOL

Stephen Vladeck: How do you reconcile the President Obama who said he wanted to work with Congress to repeal and replace the AUMF with the President Obama who wanted to pursue the same commitments? It seems to me there is a decisive break in the story in the summer of 2014 when President Obama, who up until that point had been meaningfully moving toward repealing the 9/11 AUMF and replacing it with something narrower, then dropped the subject entirely concomitantly with the rise of ISIS. Is that because Obama didn't mean it all along, or is that because the emergence of ISIS suggested to him, contrary to what he had previously thought, that the war wasn't really ending?

Stephen Griffin: It's somewhat similar to what happened at Guantánamo, where President Obama did want to close Guantánamo and then found out it was going to be complicated. Supposedly, he recently said that he realizes he should have just closed Guantánamo unilaterally, but he can't do stuff with Congress unilaterally. I think he realized he had to reset the situation and reassess the nature of the threat posed by ISIS until he figured out what he wanted to do. There's a common theme in Cold War presidential administrations: They don't like to submit anything to Congress until they know what they want to do. Until President Obama knew how he wanted to approach the ISIS problem, he wasn't going to submit anything of a final nature to Congress. So, he started the ISIS conflict in August of 2014. People told me the 60-day clock was then running under the War Powers Resolution, but whether it ran or not, he did submit a new resolution to Congress in January of 2015. The ball was then in Congress's court, and they haven't been able to do anything with it.

I don't really charge him with a failure at that point. You have to keep in mind how his decisions are made. In Lawyer Land, we think these decisions are always made in a legal context, but in my experience studying history, presidents make decisions in a policy and political context first and think about the law second. If he had to put things on hold for Congress longer than 60 days, that's a secondary consideration, given that he did

intend to bring it to them eventually, and he did.

Stephen Vladeck: But before ISIS came along, how do you reconcile the Obama who said he wanted to work with Congress to repeal and replace the AUMF? It seems to me that's a departure from the Cold War presidency insofar as you have a president who until ISIS came along was publicly saying, "I want to scale back my work hours. I want to work with Congress to take away this authority that I otherwise have exploited."

Stephen Griffin: I'm not sure if you're talking about his first term or his second term. If you're talking about his first term, I see the big emphasis on him adopting a stance of repudiating his Article 2 authority and that he's basing everything on the AUMF. I think that's where his focus is early in his administration. Early in his administration, his focus is not replacing. As time goes on, people start complaining more: "This is a long war, surely things have changed." And that is heard a lot more after we go after Osama bin Laden. So, after 2011, after the presidential campaign, we hear a lot more from the Administration about how we would like to reset the clock. Things are different now. They make some important speeches about that. I fully expect that he had that intention, but then he runs into the ISIS problem.

Audience Question: Can you say a little bit more about the intra-branch checks and intra-executive jobs that you mentioned?

Stephen Griffin: As a traditional law professor, I'd love just to think about checks between the Executive and Legislative, but in a world in which it seems that the Legislative Branch has had multiple chances to step up and hasn't, and in a world in which we've learned more about how the process works or doesn't work inside the Executive Branch, there is a strong argument to be made that President Obama set up a more effective intra-branch process to handle legal issues. I'm only talking about legal issues, not policy issues. Charlie Savage also makes this argument in his book. President Obama set up a more effective process on legal issues to make sure, in other words, that people from all the different agencies had their voices heard and that there was a process of deliberation back and forth. It's pretty clear this didn't always happen in the Bush Administration.

You can question, as Savage questions, whether all of this legal structuring actually made any practical difference, but I think it's undeniable that it is an important question. We live in a world in which the Judiciary is intervening only rarely, and perhaps we'll hear from Professor Vladeck on this. And if we're living in a world where Congress for various reasons doesn't really want to engage, we're going to have to pay more attention to how the Executive Branch itself might be able to—this is the part I don't like

as a traditional law professor—reproduce some of the values achieved and some of the deliberation among the branches inside the Executive Branch itself. That’s something I’m afraid we have to think about going forward.

And so what would I recommend for the future? I would recommend that whoever is elected president next should pay close attention to how he or she structures the intra-branch process because that would give us an important clue about the adequacy of his or her legal decision making. It’s a topic scholars weren’t always paying attention to, and we should.

Audience Question: In the Cold War, we had recognized countries, and with ISIS we don’t have a recognized country. Taking what we have to do with the United Nations out of the equation, is there something that’s unique in this relationship that the President has to consider with Congress that he would not have to consider with a recognized state versus an unrecognized state?

Stephen Griffin: I tend to see more continuities here than contrasts. I know people have said, “This is a different kind of war, so maybe it isn’t a war and it’s not occurring against a country.” What I want people focused on is that, from a presidential perspective, I wouldn’t say it’s not different, but there’s an important element of continuity. The continuity is this: “I’m supposed to defend the United States from all enemies, foreign enemies.” Given that orientation, how President Obama implements a strategy against terrorist groups may be quite different from the kind of support for third party nations we did in the Cold War. The strategy may be quite different, the tactics may be different, but I stress the continuities because that structures and determines so much of executive behavior.

Is there a time to talk about how the strategies might be different? Well, sure. And our strategy might look quite a bit different. The debate over drone strikes might be quite different if countries like Yemen, for example, had total control over its territory in the way that France and Germany and maybe Belgium do. Our strategy would be different. We wouldn’t be conducting drone strikes in Yemen. This seemingly increased meltdown of countries that don’t control their whole territories is an important background element. But I see more continuities than differences.

Audience Question: You have said that the constitutional order has been evolving since the Cold War and since World War II. It sounds like the constitutional order has evolved into being more policy regulated and using the combination of hard power and soft power. Would you agree with that?

Stephen Griffin: I would, and there’s an early point in the Eisenhower

Administration itself when the Administration realizes the direct use of U.S. military force is not only not always possible, but also not always the best way to do things. I don't know if money counts as a soft power, but the Eisenhower Administration realizes it's going to have to use more indirect means to influence countries that used to be on the U.S. side or follow the U.S. path. And it realized there are new battlefields, as it were, that are mainly in the third world. So this kind of realization is not new. It started back in the Eisenhower Administration, so that is something we've been pursuing all along.

To me, the interesting continuity is not so much about soft power, but rather that we haven't come fully to terms with how to use the intelligence agencies as a substitute for hard power. We can do all sorts of things with the intelligence agencies we can't do with the military, but it inherently makes people nervous. It's not really soft power, but it's something I like to discuss.