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

SYMPOSIUM DISCUSSION: PRAKASH

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Mariah Zeisberg: I think your defense of congressional supremacy in war is even more impactful, given your book's argument that there's an imperial presidency ever since the beginning, so I'm really interested about that. My question is about your reading of Libya. Does it make any difference to you that this was an extremely multilateral engagement, that it was supported by the U.N., that the United States was supporting an arguably ineffective policy, or that there were compelling humanitarian reasons? Do any of these substantive and also allied multilateralism-type reasons play any role in your reading of a presidential responsibility to protect or a presidential police power?

Saikrishna Prakash: Thank you so much, Professor Zeisberg, for your question. I should add that if you're going to buy the book, chapter seven discusses all this war stuff. So you can get my fuller explanation, not of Libya or ISIS, but of the original Constitution.

You know, Professor Zeisberg is onto something really interesting. Presidents often want to cite international law as a reason for waging war, and I think the legal answer is there are two legal regimes you have to comply with: international law and domestic law. The fact that you have complied with one doesn't give you a pass on the other. I assume that marijuana is illegal in this state, both federally and state-wise, but if for some reason either the state or the federal government chooses to legalize marijuana, I'm still guilty of a crime if I smoke marijuana in the state. I don't get to say, "Well, the other sovereign has chosen not to criminalize this." So I think what Professor Zeisberg is pointing to are good reasons for thinking that under international law, the attacks against Libya were legal. Maybe she's giving us good reasons for why we have a reason to fight in Libya as a matter of policy.

But if you think the Constitution says that only Congress can decide whether we are going to wage war, that answer doesn't change just because a bunch of other people are doing something. A kid wouldn't be able to say

to his parents, “Other kids were doing it so I thought I should be able to do it, too.” If there’s an antecedent rule that says you can’t jump off a bridge or parents say, “If your friends jumped off a bridge would you jump off a bridge,” the answer is that you don’t get to jump off a bridge just because they do, even if you think it’s a good idea.

There’s an article by Curt Bradley and Jean Galbraith that talks about how presidents use the legal authority under international law as if it helps answer the domestic law question, but they’re analytically distinct. I’m doing, I suppose, what Professor Griffin criticized earlier, but I can’t help myself.

Stephen Griffin: I’ll make a comment I hope becomes a question. You discussed only two sources of presidential authority that said that the President could declare war: Congress could declare that the President would have authority or the President could cite the Commander-in-Chief Clause. But when I was reviewing how presidents have been making arguments, especially after 1945, it seems there’s another argument that presidents have made that resonates with something in your book because you defend the idea that the Vesting Clause is an independent source of presidential authority, and you say that has something to do with presidential authority in foreign affairs. From what I understand, some presidents are making a foreign affairs argument. They’re saying they’re in charge of foreign policy, and the use of military force—especially the use of military force short of war—is simply one of many ways of implementing foreign policy. It would seem they could call on another part of your book to support their uses of force as a matter of foreign policy.

The other point I was confused about is that your argument doesn’t seem to allow for a category, which many people think exists, of military action short of war. If we drop literally one bomb on Libya, are we at war with Libya? Is that your view?

Saikrishna Prakash: These are great questions, and it’s always gratifying to find the one person in America who’s read your book. It’s also dangerous. Let me speak to the last question first, and I think it’s a great question. I don’t think under any understanding of war at the Founding that dropping thousands of bombs on Libya isn’t war. The Framers had bombs, right? They could shell from canons right onto land, and of course they had canons. I don’t think that the scale at which we fought Libya and we deposed Moammar Qaddafi was like one bomb. But your question still stands, right? You must have some sort of dividing line. I don’t think there is a clear dividing line, but I don’t think Libya is the case for “use of military force that

doesn't rise to war." They could make that claim because they had other instances of military force in the recent past they had concluded were not war and therefore didn't infringe upon Congress's powers. But if you were to look upon those uses of military force from the frame of the Founding, they're clearly war. The Administration is clearly using military force to affect some political goal. I understand the point. If another nation used a nuclear weapon against us, it would be one bomb. However, if it said, "Oh, don't worry. We're not at war with you. We're just using military force against you," we'd think that was splitting hairs.

On the point about foreign affairs, that's chapter six, which talks about how the grant of executive power gives the President authority over foreign affairs when the Constitution doesn't otherwise allocate the authority to Congress. The way to look at the Constitution is that they stripped away many significant aspects of foreign affairs and gave it to Congress, including the power to declare war, the power to regulate foreign commerce, etc. They left other powers with the President but imposed a check, like the treaty power and the power to appoint ambassadors. Whatever was not given to Congress or not checked by the Senate was given to the President alone, and that would be recognition decisions, see the *Zivotofsky* case from last year. That would be control of U.S. diplomats overseas. He's able to instruct them, even though there's nothing in the Constitution suggesting as much. That would be the sort of sole organ power that you might have come across in the *Curtiss-Wright* case or elsewhere where the President gets to speak on the behalf of the United States. So it's not that the Vesting Clause doesn't vest foreign affairs powers. It just doesn't vest all of them with the President because some of the grants to Congress are exclusive. That's why everybody talking about the Constitution at the Founding says Congress, not the President, gets to decide whether we are going to wage war.

In fact, some people talk about it as if they've taken the power away from the Executive and given it to Congress. That's not literally true because there was no president prior to the Constitution, but they understand that they're taking something usually or often vested in a singular Executive and giving it to the Legislative Branch. They're doing something that became more common in the eighteenth century. As a formal matter, the English Crown has power to declare war, but as a practical matter, the English Crown never declared war unilaterally without first going to Parliament because the Crown couldn't wage war without first getting supplies. There were certain aspects of the British Crown in Scotland for instance, where the Scottish Parliament actually had limited the Crown's power to declare war. The French Constitution of 1791 had the same sort of structure as the

American Constitution. Only the legislature can decide whether to wage war, even though they had a monarch. So I would say it's not that the President doesn't have foreign affairs powers, it's just that they don't extend to initiating warfare, just like they don't extend to foreign commerce. That's something for Congress.

Stephen Vladeck: So, suppose Caroline Krass had read your book and suppose that she put it next to the AUMF and instead of writing the memo that you discussed, she writes an opinion that says, "We have the power to use force in Libya under the 9/11 AUMF because Libya is either a nation that has harbored terrorists who are responsible for 9/11 or because Libya is itself derivative of al Qaeda." I suspect your response would be to push back on the factual assertion underpinning that claim, but who's actually going to rebut the Executive in that context? And if there's even some factual support, would Libya therefore have been lawful?

Saikrishna Prakash: Caroline was a friend of mine so I'm not here to critique her. She's just using the materials in front of her to make...

Stephen Vladeck: I didn't mean to personalize.

Saikrishna Prakash: I know, but I want to make clear in case Caroline ever hears about this. She's a lawyer for the OLC. They have previous opinions. She probably doesn't view her role as to change all those opinions. So she's doing her job with the legal materials that she has, with the claim that she has which is practice matters for purposes of war powers. If you have that view, then what she has done is not remarkable at all. Since I don't have that view, I think she's from a mistaken premise about the Constitution. I guess for people that believe in the living Constitution generally with respect to rights, they have to think about what that means with respect to presidential power. Your question asks, what if the president says it's covered by the 2001 AUMF and I think...

Stephen Vladeck: Why doesn't your second argument swallow your first one?

Saikrishna Prakash: Because, as you said, I don't think that there are facts that suggest that Moammar Qaddafi was part of an organization that committed the 9/11 attacks. If there were facts that said Moammar pledges loyalty to Osama bin Laden and merges Libya into the al Qaeda umbrella, then we have a different set of circumstances. I think the second part of your question is, "What if the president says that? What can we do?" There's a generic problem of how to reign in a president that misuses his statutory and constitutional authority. In fact, Sandy Levinson in his book on democratic

constitutions made this point in 2005. It's a generic point that's been with us for a long time and my talk doesn't purport to answer it. I'm not sure I could give you an easy answer for what you do when a president, in my view given your hypothetical, engages in bad faith and says, "Oh well, Libya is part of al Qaeda or is part of Afghanistan or Moammar Qaddafi was with Osama bin Laden when the plane struck the Twin Towers." I don't know if there's an easy solution to that. The impeachment clauses impose too high a hurdle to be a meaningful check. Jefferson said they were a scarecrow because you couldn't use them effectively. But if the question is, "Is there basis for concluding the Libya is targetable under the 2001 AUMF?" I can't imagine there is one. It's telling, I think, that the Obama Administration didn't claim that the 2001 AUMF covered it, so...

Stephen Vladeck: I think the question is whether there is any way to stop a president who does claim that.

Saikrishna Prakash: I think there is not a neat and easy answer. If the president does something that you think is illegal, you have to find enough people who agree with that in such a way that you're able to convince the president either to halt whatever it is he or she is doing or to not engage in this sort of thing again. I think in this respect, the Constitution seems less than perfect because it doesn't have some sort of easy check. One answer is to pass a statute telling the president to stop. The problem with that is the president has a veto. If they try to pass a statute saying "Stop fighting in Libya," then he's going to veto it and he's going to claim he already has constitutional authority, and so they can't do anything. There's an endemic problem of trying to check presidential power.

Stephen Vladeck: What if you sue him?

Saikrishna Prakash: You're the fed courts guy, not me. That is your talk, not mine. There are problems of standing and political question that might prevent the courts from intervening. I don't want to steal your thunder.

Stephen Vladeck: I thought you'd agree with me before I ever started talking.

Saikrishna Prakash: I do agree with you. I'm sure I will.

Mariah Zeisberg: I want to just put in one piece to highlight a disagreement which will be developed more, certainly when I give my talk and we'll see when Professor Vladeck talks, but when you talk about the original allocation of war authority, you made it seem very clear the congressional supremacy argument sounds very clear in your handling of it.

I just want to resist a little bit and say that war has, from my point of view, never been only a question of material power or the extent to which violence is being unleashed. I think the most straightforward example of this is the genocide against Native Americans that was fought in this country. It was never labelled explicitly war by Congress. Many wars against Native Americans were authorized, but many of them were fought through appropriations. That doesn't have to do with the level of violence that Native Americans were suffering. It has to do with the extent to which political elites were willing to recognize Native Americans as sovereign people who could be in a state of war with the United States. So, the meaning of violence has always been very important when thinking about what counts as war and what doesn't. I actually agree with you, specifically on parts of your analysis on Libya, but I don't think it's so straightforward that war is just dropping bombs. The meaning of those bombs is really important for how political branches through time, not just today, have constructed for it.

Saikrishna Prakash: Professor Zeisberg has made an excellent point and I want to use it to discuss the declare war power and what it means to wage war under it. I don't think that to declare war you need to use the word "war," just like to regulate commerce, you don't need to use the word "regulate" or "commerce." When Congress passes an appropriation which says, "Use this money to fight off Native Americans," it has used a declare war power. When Congress authorizes the use of military force, that is an exercise of the declare war clause. You are fooled into thinking that we've only fought in five wars if you look at how many formal declarations of war there have been. Don't be fooled by that. We have fought many, and I'm not going to make a claim to whether this is good or bad, but we have fought many more wars. The Quasi-War with France, the war with Tripoli, the war with Algeria, the Native American Wars that Professor Zeisberg is talking about. They're all wars within the meaning of the declare war clause; they just don't use the word or phrase. People at the time understood that's what was going on and that they needed to go to Congress to get the authorization. That's what Jefferson said when he went to Congress to get an authorization to use military force against Libya. So don't get hung up on the labels or whether there is a document which says, "We declare war. We recognize that a state of war exists." Just ask yourself, has Congress authorized the action? If it has, then Congress has arguably fulfilled its function, and that's true whether it's an Indian war, a war against Tripoli, a war against France, a war against Iraq, or a war against Afghanistan and al Qaeda.

Audience Question: I was very interested in your historical perspective on the war powers. We really haven't talked much about it, and one thing

you didn't address was why, in the historical antitheses to our Constitution, war power was kept away from the monarch in a sense. I think it's an important questions for people who like to make distinctions between troops on the ground, let's say, and other kinds of war. What exactly was being protected? Was it a question of human life, the sort of drafting of people? Was it a question of monetary expenditures that hadn't been authorized and once the king went to war, they were going to have to pay for it? I don't know what the power or interest, whether it was in the people or the nobility or whoever it was, was that was being preserved. It's an important question when discussing an improper exercise of power by the Executive.

Saikrishna Prakash: That's interesting. There were limitations in British statutes on the executive's power, the Crown's power over the war, and there were limitations on the Scottish Parliament with respect to that, as well. The English Parliament had a statute that said, "We know we have this monarch who's partly Prussian, and we don't want British troops used oversees to protect those foreign possessions of the English Crown unless Parliament agrees to it." That's the statute, and you can speculate as to the reason. "We're English. We don't really care about your Prussian possessions just because we have both the English monarch and the Prussian monarch. We don't care about those." More precisely, "You want us to use English troops against them, and you have to come to us first." You can speculate as to what the reasons are.

The Scottish Parliament applied these rules in, I think, 1709 for a period of time before the Act of Union with England, so they only lasted for four or five years. They basically had the effect by my recollection that they did not want to wage war unless the Scottish Parliament, when it was a separate Parliament, agreed to it first. I suspect it's for the reasons you gave, that a) we're worried about losing peoples' lives as a party to war and b) that we're worried about how we're going to fund this war. I don't know if it would have been our modern human rights concerns about the effects wars have on other people. I doubt it. I don't think they were that progressive. But, those were the considerations, right? And when you talk about the Constitution, it's about why it would give the power to Congress and not the President. They thought that unitary executives are more apt to wage war than a legislative body would be. They thought it's better for the power to be vested in the Legislature rather than the Executive for that reason. Madison said that war aggrandizes executive power, and we don't want our Executives to be fighting these wars to aggrandize itself or his or her reputation at the time. William Treanor, the dean at Georgetown Law, has an article called "Fame, the Founding, and the Power to Declare War," and

it focuses on the War Clause. According to Treanor, they did this because they feared that presidents, like monarchs, generally would be prone to fighting war.

When you think about the United States in particular, you might suspect that at the time, they were not worried about fighting too few wars. They were worried about fighting too many. We were a weak nation. They did not want to fight a bunch of wars. We'd paid tribute to people in order to avoid fighting them prior to the Constitution, and we were paying tribute to all sorts of North African pirate states because we don't want to have to create a navy. So, if you don't want to fight a lot of wars you would presumably put a check on them by requiring that you go to the Legislature. I think that is the generic understanding.