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

SYMPOSIUM DISCUSSION: VLADECK

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Saikrishna Prakash: Professor Vladeck, thanks for the great presentation. I was wondering what you think about the following thesis about the courts' interactions with the Executive Branch that from 2001 to 2009: the courts were very suspicious of the Executive Branch and its claim that these things were unreviewable. They now see someone in office they don't distrust, so the Supreme Court is not getting involved. It has nothing to do with the type of the case. If Obama had been president in 2001, and he had been seen as a reluctant warrior and wasn't so intent upon precluding judicial review, they might have come to a different conclusion on all those cases. Therefore, it has nothing to do with whether it's civil or criminal or habeas. It has to do with the sense that some things went horribly wrong during the Bush Administration. They don't have the sense that President Obama views the courts as an enemy, so they're just not going to intervene.

Stephen Vladeck: I think that thesis is a fairly good description of the Supreme Court's work. I'm not sure it's a very good description of the lower courts. What I mean by that is there are actually a ton of examples of lower courts, long before President Obama won in November 2008, reflecting these principles of staying out of these disputes. Even while there were reasons to worry that the Bush Administration was violating various international rules, maybe even breaking domestic law, the lower courts were categorically staying out of these cases on the ground that it was just not something they ought to be doing, that the merits might be serious, that the merits might be problematic, but it's wartime. In wartime, it's not the lower courts' job.

I don't mean to make too much out of it. My point is simply that I think the story that when Obama comes into office, the courts breathed a sigh of relief misses the extent to which the courts had already been abdicating in all kinds of contexts and that in fact the lower courts had been abdicating even more categorically. It takes the Supreme Court pushing back in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* to get the more obviously aggressive side of these cases. I certainly think it's not irrelevant that the courts become less

worried after 2009, but long before President Obama came along, we already saw this pattern.

Saikrishna Prakash: That all makes sense, and what you're describing is lower federal courts that have a consistent view that the courts should stay out lose on some of those cases because they actually go to the Supreme Court, but where they don't lose, they continue to have the same views they had before in a context in which the court no longer seems interested in telling the Executive that it's doing anything wrong.

Stephen Vladeck: Sure, but I mean, these are the same lower federal courts that are hearing the Guantánamo habeas cases. These are the same lower federal courts that are hearing FISA cases. The Supreme Court has never reviewed a single FISA case. These are the same lower courts that are routinely handling really, really complex, messy questions of classification in military operations as part of the process of criminal prosecutions. I'm perfectly willing to accept that there is a mentality among lower courts that they ought not to be doing this. What I want to debunk is the notion that that's because they're not competent or capable of doing this. In my view, these three categories prove rather conclusively that this is something federal courts can—and do—do and that if they're choosing not to do it, it's for reasons other than lack of ability and competence.

Audience Question: So, we know what we think of emergency in terms of an absence of law and I think that partly explains the reluctance of courts. There's a pretty good view that as this becomes more common and prevailing and providing courts with powers and viewing what the courts are doing is a positive payoff in terms of human rights, but I'm wondering if that's a helpful way of framing some of the things you're talking about here.

Stephen Vladeck: You're right. Another way to look at this is of course in 2002 and 2003 courts are going to be very cautious because they don't know yet what's going on. The abuses haven't yet come to light. There's no obvious imperative yet for the courts to push back to protect human rights concerns, and maybe part of what happens is a kind of creeping incrementalism. And I think Professor Prakash was hinting that as the courts get both more confident that they're not going to screw everything up and more concerned that there are not sufficient checks elsewhere within the branches, inter-branchwise, and at the ballot box, they're going to assert themselves more aggressively.

That story works for a little while. That gets you to 2008 and *Boumediene*. What happens after that? Professor Prakash says that what happens after that is the courts see a president they're not worried about.

But is that really a reason to say we can't handle these cases, as opposed to "we just don't think there's a 'there' there"? For example, there has not yet been a single federal court ruling in a post-9/11 case about whether any detainee was actually tortured. The courts have found ways to avoid those cases. There have only been a couple of rulings about whether those various surveillance programs that Edward Snowden disclosed were legal, so I think there is a story where as we get further and further away from the moment of trauma, courts become more and more assertive.

The problem is that that's not what happened here. What's happened here is the courts have said, "We have the power to hear these cases, there are these three categories where we will handle them on a regular basis without even batting an eye, but otherwise, it's still not our job." You can come up with factual grounds to distinguish those cases from each other. I just don't know if those factual grounds are material to the judicial function.

Audience Question: Your comment that you can teach a whole federal courts course about this seemed exactly right. I don't teach federal courts, but I'm teaching Section 1983 right now, and you see the use of qualified immunity doctrines, heightened pleading and various techniques, but you do also occasionally see cases that are pro-claimants, and these same inconsistencies occur, so I thought that was a really nice observation.

My question is, could you be more pessimistic? When I read your blog materials, I've detected a little pessimism in terms of courts, particularly obviously the D.C. Circuit's way of handling things. Then you have the Linda Greenhouse pieces, how the court is just basically Gitmo averse.

Stephen Vladeck: "Gitmo fatigue."

Audience Question: Maybe that's why they have a little more faith. I don't know. Would it be fair to say that although courts can handle these cases, there is some pessimism and still some tendency to assume they may be more deferential than they should be, and this is not a good thing?

Stephen Vladeck: In other words, won't courts just screw them up? My short answer is, yes; courts screw things up all the time. I don't mean to make light of that. I don't mean to be overly harsh on judges. The point is simply that I don't believe that the fact some of these cases on the merits are coming out in ways that I really don't like (and as Professor Kende knows, I have devoted countless words of blog posts to criticizing) necessarily undermines the thesis that it's good that they're deciding them in the first place. Which is to say, I don't think one has to have a particular view about how these cases should come out on the merits to believe that it is in all of our interests

that they be decided on the merits—that having merits-based adjudication serves a settling function. Maybe I'm right and there have been widespread violations of individual rights and it would be nice to have some new Fourth Amendment jurisprudence and Fifth Amendment jurisprudence going forward. Maybe I'm wrong, in which case, wouldn't the government like to know that it can point in the next conflict or emergency to judicial precedents forged in the traumatic fires of 9/11, saying what the government can and can't do?

I think we have to be careful not to look at this as just outcome-oriented, and in my case, it's definitely not. I have serious problems with almost every word the D.C. Circuit has written in a Guantánamo case (except the spelling; the spelling has usually been pretty good). But I'm glad they're doing it. I think it is an amazing and historically unprecedented exercise of judicial power that they're doing it. The fact not only *that* have they done it, but that they've done it in a way that can be criticized as being even more deferential to the government than it ought to be, only further commends the project because it suggests that the courts *can* be trusted. It suggests that opening the door to courts coming in on these cases is not going to have a radical and destabilizing effect from the government's perspective.

Audience Question: Professor Zeisberg, does the appearance of the third branch finally make a little bit less of an argument for a third house for the international level?

Mariah Zeisberg: I don't think so. I really appreciate this, and it's in line with the effort to normalize this situation. If we're going to have a normal situation, let's normalize it, but I don't think there's any question that they're approaching these questions from the point of view of a concern for foreign audiences other than if those audiences have been able to reflect their interests in specific treaties and international law.

Stephen Vladeck: But look at the *Zivotofsky* case. Professor Prakash mentioned this briefly, but the *Zivotofsky* case is fantastic. How many of you have heard of the *Zivotofsky* case? The *Zivotofsky* case is what happens when Congress has too much time on its hands. So, in 2002, Congress passed a statute. Well, let me back up. Where is Jerusalem? That's the problem. The position of the Executive Branch since 1952 has been that Jerusalem has not been the capital of Israel—and that Jerusalem is not even "in" Israel—because if the Executive Branch said Jerusalem was in Israel, it would cause all kinds of negative foreign policy consequences. The United States actually recognizes Tel Aviv as the capital of Israel. That's where the embassy is and other diplomatic stuff. What this means among other things is that if you are

U.S. citizen parents whose baby is born in Jerusalem, their passport will not say, "Born in Jerusalem, Israel." It will just say, "Born in Jerusalem." Congress passed this statue in 2002 that said if those same parents want the passport to say "Jerusalem, Israel," the State Department must so provide.

This obviously sparks litigation. The D.C. Circuit initially tries to duck by saying it's a political question. This is the kind of dispute involving foreign powers that courts just ought not to be getting in the middle of. The Supreme Court reverses and *Zivotofsky* won. Only Justice Breyer is of the view that we should stay out of this case. So, of course the case goes back down to the D.C. Circuit. When it gets back on the merits, the court rules the Executive Branch wins, that on the merits, Congress lacks the constitutional power to override the Executive Branch's recognition of where the borders of particular countries are and what is and is not a particular country's territory. I don't mean to engage in the merits of that constitutional holding other than to point out Chief Justice Roberts's majority opinion's shamelessness that answering the question presented was something courts can, should, and had to do; that when you have this kind of dispute, even in the foreign relations sphere (if not *especially* in the foreign relations sphere), it is a quintessential *judicial* question. My whole thesis is that if *this* is the mentality that is pervading foreign relations litigation—which has been historically been beset with justiciability objections—why are the war powers different? I don't know if this ends up in a different place than Professor Zeisberg that foreign relations matters, but foreign relations matters only in my context in further proving how unbashful courts are in every context *except* a particular slice of civil suits challenging counter-terrorism policies.

Mariah Zeisberg: Just to be specific about some of the differences, the court is not talking about what would be a good resolution to that from the point of view of peace between Israel and Palestine.

Stephen Vladeck: Absolutely.

Mariah Zeisberg: They're not talking about that. They are talking about it even as this domestic constitutional question about the relationships. Scalia's dissent in that opinion is an homage to that pro-Congress position, beautifully written, but it's tracing out some very traditional domestic lines of cleavage that are not incorporating this perspective for peace abroad that I'm arguing it should be.

Stephen Vladeck: So the courts should do even more.

Mariah Zeisberg: Not by the court necessarily. In our constitutional politics.