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

SYMPOSIUM DISCUSSION: ZEISBERG

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Audience Question: [inaudible]

Mariah Zeisberg: This is a continuous broader research agenda I have. I see the war powers question often treated as a question of legal authority, and then you have public policy: is this a good war or not? I argue that this is not accurate to either the history or the text that the Constitution establishes. In some areas such as impeachment, war powers, and other political questions, the Constitution is structured such that substantive policy questions interplay and interact with institutional questions in a way that calls for substantive judgments to be part and parcel of our overall constitutional judgments. I think when we talk about war powers, we're already talking about a capacious area calling for political and not just legal judgment. My argument about the Native American wars reflects this, as does my argument about U.S. imperialism in the early twentieth century.

In practice, in defining what counts as war, there have always been political actors who use substantive considerations as part of their arguments about what counts as war and what, then, is or is not regulable through this war powers framework. Ignoring that common practice takes you to some places in war powers theorizing that I think are factually inaccurate—and also counterintuitive and bizarre—places, and I explore that in my book. The question then is what kinds of substantive considerations and what processes for engaging those determinations make a war powers regime more or less authoritative or more or less legitimate. What I think was crucial about the Cold War and about today is that the exercise of global power makes foreign audiences relevant. Previously the same concern would have led us only to consideration of the inhabitants of the territories, as the relevant subjects of U.S. force. So, this transformation in the way U.S. force is projected creates new kinds of justification that I think are in alignment with an original founding logic.

Stephen Vladeck: If that's true, does that suggest that AUMFs are normatively preferable to declarations of war? Because an AUMF will

oftentimes reflect far more nuanced consideration of both the objectives of the conflict, of the target of the conflict, of the purpose of the conflict, where the declaration of war is basically Congress flipping the switch, a switch that once it's flipped has a hard time reigning back in.

Mariah Zeisberg: Well, I think they are preferable but not for the reasons that you're saying. There's disagreement about which is more specific, and there are folks who say a declaration of war is more specific, not because there is a switch being flipped but because of a set of very specific historic understandings about what a declaration of war entails and so they would argue...

Stephen Vladeck: And stand-by authorities are only triggered by declarations of war as opposed to an AUMF.

Mariah Zeisberg: Right. But about them being preferable now, I think the reason that we're seeing them now is because of the movement toward constructing international sources of authority which then are able to label more and more forms of force even between nations as "not war." Obviously the first moment of this is Korea, when Truman and Congress together said, "Although we're sending so many ground troops, and although we're repelling another nation, this is not war. This is exercise of police force." We laugh at that today, but what he's saying is that there is a new meaning of force that we're trying to launch internationally. According to this new meaning, when people violate international law, force is simply a legal response to a law-breaker, not the action of a sovereign nation who is exercising a sovereign war power. They're trying to transform the meaning of force and the meaning of war, and I think the use of authorizations instead of declarations is a part of that project. It's a project I don't have a problem with, and it arises because of a context where the United States and other nations are trying to create a new system of global legitimacy. The authorizations reflect that.

We already see how the constitutional languaging that we're giving to our own processes is changing in response to these foreign imperatives. We have authorizations and resolutions instead of declarations in order to express continuity with this international legal project. We are watching our categories being reshaped, and I want us to get more explicit about that.

Audience Question: I hear you advocating for a more responsible global governance in our foreign affairs politics, and I think that after 9/11, our foreign affairs politics has been really dominated by privacy and fear. In Iraq for example, where we go in and there is a concern to provide a better government for the Iraqi people, it's still dominated by a fear of chemical

and nuclear violence and weapons, smoking guns and mushroom clouds. I'm wondering if would you agree with that assessment that fear takes priority over any moral exceptionalism or impulses we have toward responsible global governance, and if you do agree with that, if you have any observations on what could kind of break that hold and move us in a better direction.

Mariah Zeisberg: That's interesting. Well, obviously fear is very important when you're making war decisions. I don't think the role of fear is always negative. I don't think it's bad to be fearful. I just think it's bad if fear is the only thing going on. Some things are very frightening. If there had been a true threat of a mushroom cloud, then it would be appropriate to be afraid of that. The question is about what else you have in addition to fear. Do you have a way of scrutinizing and challenging scary claims that aren't true, or of challenging the idea that war is the best way to address this fearful possibility? I would be interested to hear Professor Griffin's thoughts on this, but I do see a difference between now and the Cold War order. During Vietnam, the idea of holding hearings to challenge what Johnson was up to had to overcome many obstacles. There was this idea that it was inappropriate to challenge the presidency and today, in part because of Republican enthusiasm, there doesn't seem to be that concern or fear about embarrassing the president internationally. I am actually heartened by that. Not necessarily by the content of the challenges, but by the idea that there's nothing inappropriate in making challenges. If we're going to be fighting an endless war, it's appropriate to normalize the practice of subjecting war to the standards of criticism that we encounter in our own domestic politics. I see some tendencies in that direction that I think should be cultivated and enriched rather than feared.

Audience Question: In empowering and engaging Congress, how influential or how persuasive is the Geneva Convention in protocols? Is that effective at all?

Mariah Zeisberg: In empowering Congress?

Audience Question: Yes, and explaining and pointing out some of these challenges.

Mariah Zeisberg: Right. I think they're differently effective to different people. You know, I find John McCain to be an articulate spokesperson on behalf of the Geneva Conventions. This one of the ways in which the political uptake of treaties as opposed to their legal enforcement is important. Tracing this political uptake and facilitating the emergence of a public that is willing to take them up entails some challenges, but hopefully

it means some defenses against inappropriate war as well. So, there are politics around this. . . . Do you want to clarify your question?

Audience Question: Does Congress even care about the Conventions and protocols? Does it take them seriously in making some of the decisions on war powers and the debate on it at all?

Mariah Zeisberg: It matters differently in different contexts. I mean, they certainly care when they're designing the Executive Branch. Congress has participated in legalizing the Executive Branch in ways that will foster compliance with the Geneva Conventions, and so in that context, yes. For other contexts, no, as we've seen with torture and so forth. So, I think it depends on the context.

Stephen Vladeck: And Congress has implemented the Geneva Conventions for the war crimes after 1996, and it's meant to do that. I think one of the most interesting things about the 9/11 AUMF is that it has just been read to be incorporating IHL, not just Geneva but the whole body of IHL. So maybe then part of the international politics of it is how uncouth it would be today for Congress to pass an AUMF that overrode international law.

Mariah Zeisberg: Yes, thank you.

Audience Question: One of the areas neither you nor anyone else has touched on is how Congress influences foreign policy by creating the huge military presence in the world. It seems if you look back at the beginning of this country, Congress refused to have a standing army to just prevent presidents from going to war and now we're seeing just the opposite where Congress thrives to see [inaudible] ability to go to war.

Mariah Zeisberg: For me, that's part of the dilemma that congressional supremacists get into when arguing that appropriations can be a vehicle for assent to war or for authorizing a war. We have appropriations for the creation of a military state that the world has never seen the likes of. And so does that imply authorizations for wars that the world has never seen the likes of? On some level, I think that it does. I think there are also some failures of representation that are involved in congressional funding around the military establishment. There are some perverse incentives and some problematic ways that those incentives play out. Beyond that, I also think that there's a substantive commitment on the part of many members of Congress that the United States would be a global military force, that they want that, that they think that's good, that they'll defend it against other visions. That's a substantive policy judgment that legislators have come to

after the Cold War that I think needs to be talked about and engaged on its own terms. You can't get to the war powers question until you get to the more basic question: What kind of role should the United States be playing in terms of a global police or war force? And if you can't engage that question and have a very specific answer to that question, which would then have significant implications for military budgets, then the discussion of war powers is abstract.

Stephen Griffin: I'd just like to add on. That's what Professor Zeisberg and I are talking about when we talk about the Cold War constitutional order. We're talking about a choice to create a different kind of institutional structure, like a permanent standing army. This is fundamentally different from what the expectations were in the eighteenth century. We're posing questions that could only arise after you make that choice. Then you have a new platform that means for action globally, and that raises new questions. I'm kind of literalistic though. It almost sounds like you think there should be a third house of Congress to represent the global public where people could interact more directly with Congress. Of course, there's a well-understood way of interacting now in the U.S. You'd go through diplomatic channels even if you have U.S. troops sitting on your territory, it's pretty much Executive, although members of Congress occasionally. It really sounds like you're talking about a more direct interaction where the global public is sitting on Capitol Hill on a permanent basis.

Mariah Zeisberg: I'm not there yet, and the reason is because of those founding problems. If we just do this thought experiment of the United States creating another house for foreign citizens, citizens of the world, then we're creating a new context or condition for violence, and this is the founding problem that I spoke to. I'm actually not calling for creating a global constituency because I am so skeptical of efforts to create constituencies, especially by those who are already hegemonic. It's not that I don't think constituencies can't emerge. It's just that I'm skeptical of the hegemon doing it well.