
PRESIDENT OBAMA'S CONSTITUTIONAL LEGACY

SYMPOSIUM DISCUSSION: ERIC BERGER

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Ilya Somin: So I totally agree with much that was said, including that history will assess Obama in part in light of Trump, and in a certain sense, so far Trump has been doing everything he can to make the world great again by comparison, though he may end up (inaudible). My question is about what you said regarding the actions against ISIS there. You said Obama had to act because Congress would not give him the authorization and didn't want to take up the issue. I would suggest maybe one of the reasons Congress didn't want to take up the issue is because they knew Obama was going to go in anyway, and if he's going to go in anyway then it makes sense for them to wash their hands of the responsibility. And the other, if Obama said "I will go to war against ISIS if you give me the authorization that I seek," I think in that case they can back away, so at least currently they would have authorization that would court the whole republican criticism of Obama, and that issue is not that he was not wrong, but that he was aggressive. So in that case Congress, I agree, that is acting in bad behavior, it strikes weakness as a consequence. He was going to go in anyway, why should they take the political stand?

Eric Berger: So, I don't know if he would have gone in anyway. Maybe that's the case. Earlier with the case of the Red Line in Syria, he went to Congress for permission and didn't get it, and he didn't go in, so that's at least some reason to suggest that maybe he would have listened to Congress. I think the fact that lots of innocent people, Yazidis, were being slaughtered in ISIS made President Obama think that this was a serious humanitarian concern, and that he went in to protect basic human rights. Maybe that's an instance he would have gone in anyway. Maybe that's also an instance where the historical and the legalist analysis might diverge. I think reasonable people can differ on the legal question of whether a president can take unilateral action to constitutionally, in service of humanitarian goals—and I think I agree with what Professor Eastman gestured towards earlier—that it depends on existing treaties, and the analysis has to be done on a case-by-case basis, and can actually be quite complicated. But even if we assume that

the answer in this case was no, I think historians might judge the issue quite differently given how terrible ISIS was, and how many innocent people it was killing, and that the President thought he could try to save some lives. Again, I see myself more as asking questions than giving answers, so I'm not sure about that, but I think that's at least a perspective to think about.

John Eastman: Thank you, Professor Berger, very insightful I thought. I particularly like the line neither a Lincoln nor a Nixon, and I want to press that a little bit because the two things that led to Nixon downfall most prominently was the wire-tapping and his attempt to use the IRS to target his political opponents. That was one of the charges of impeachment that had been brought up against him. Even before the current scandal, and I realize we're still in the very early phases to know what's truth and what's alternate facts, and what's fake news and what have you. But even before the wire-tapping against Trump and his campaign associates issue has risen, we had the targeting, the wire-tapping of U.S. reporters by President Obama, which seems rather significant, and we also had not just the attempt to use the IRS to target political opponents, but the actual use of the IRS to target political opponents. And I'm wondering why those two things, at least as of yet, have not treated Obama more close to Nixon rather than Lincoln, rather than kind of somewhere more in the middle like you're saying.

Eric Berger: Thanks, those are good questions. On the IRS—and I have to admit, I would have to go back and look at those stories more closely—but the reports I read suggested that there was a reasonable explanation for what the IRS was doing, that it wasn't a sort of political witch hunt, that they were reading the statute and the instructions in a particular way. And in all events, I don't think the policy went all the way up to the President the way it did in the Nixon case, which would obviously be way different, now, if in fact it was a political witch hunt, that certainly doesn't justify it on legal grounds, but it suggests that the President might be judged quite differently in history than Nixon was, where it was quite clear that he was orchestrating it. On the wire-tapping of the press, and also frankly President Obama's record with regard to whistleblowers, I think some of that is quite troubling, and I think we need to learn more too. I think there's we don't know, so it's a hard question to answer, but provisionally based on what we do know, I think that those would be sort of notches against Obama. Though I think on the whole, I don't think it's fair to treat him as a Nixon.

Taunya Lovell Banks: I have, actually I have a couple of questions, and another one just came to mind, but I'll try to make it, I guess, my main question: We're a country that believes in the rule of law, not of men, and should it matter, you said at the beginning that when presidents act

unconstitutionally, it's better if they do so for noble causes as opposed to selfish causes. I'm saying, should it matter what the cause is? Doesn't acting unconstitutionally in some way weaken the Constitution? That brings my personal pet peeve with President Obama, the targeting and bombing of American citizens outside of the United States who were considered enemy combatants without affording them opportunity to be heard or defend themselves, and the Court's complicity by denying standing to Anwar Awlaki's father, who was trying to assert his rights. They did it clearly for political reasons because, how could they even enforce it, if they said the President can't do this, the President is going to assert his power as commander-in-chief. But that to me is the most damning aspect of the Obama legacy. The other sort of damning aspect of the Obama legacy is, granted the fact that Senate republicans were playing hardball, but there is some indication that he acted in a way that turned some of them off at certain points in terms of certain compromises, and that what has been created as a result of both is a reactionary response by the minority party at this point, the democrats, which I think weakens Congress and democracy. So I mean, that's sort of comments and questions. Make of it what you will.

Eric Berger: I'll see what I can make of it. So, on the first point, "we're a country of laws, not of men." It's obviously right. Does it weaken the Constitution when presidents violate it? Yes. But I also think as a country, whether we admit it to ourselves or not, there are constitutional transgressions that we forgive. And again, Lincoln is the primary example. Several of the things he did probably violated the Constitution, and yet he's very beloved, and I think for good reason. And I think a question to ask in response to that is "what does that tell us about the Constitution? What does that tell us?" Now, maybe one thing it tells us about the Constitution is that it is sufficiently flexible that we think the document can endure even its change. Its meaning has certainly changed through the generations, but even where we agree that it's been violated, and we point out that it's been violated, and yet we love the person who violated it. So I think that raises interesting questions about how we think of the Constitution. It's almost a national faith. It's heresy to denigrate the Constitution in this country, explicitly often, and yet we accept all kind of actions that a lot of lawyers or scholars agree go against the Constitution. So, I don't disagree with what Professor Banks said, but I think it shines an interesting sort of internal tension in how Americans think about the Constitution that we're perhaps not entirely honest about. On the drone strikes, I partially agree with you. I cited in my talk, for a reason, the drone strikes are one of the more trouble aspects of President Obama's constitutional legacy, so I agree with a lot of what you said. I guess I would disagree slightly in that my problem with them

was less that the targeted people didn't get due process, or didn't get a chance to attend a hearing, because that's sort of impractical and defeats the purpose. If you're going to kill a terrorist, you don't bring them in for a hearing. But I was troubled that it just wasn't clear to the public what the process was for determining who was going to be targeted, including when it was American civilians, and how careful they were to make sure that they were targeting someone who was in fact a terrorist killing innocent people versus the possibility of getting an innocent person. It could be that the processes they were using were actually quite rigorous, and I think they became a little bit more transparent as the Obama years went on, but I still would have liked more transparency, so I'm mostly sympathetic, partially sympathetic to you there. And finally, the point about President Obama's relationship with Congress, it's certainly true that politics is a two-way street, and President Obama obviously deserves some of the blame. I think it's very rare you have a situation like this where one side deserves all the blame. As you can tell, I put more of the blame with the congressional republicans, who I think really were trying to sabotage the Obama presidency, and wouldn't even work with things that you would otherwise think they would work on. And in a way, the Affordable Care Act is a good example. No one was really that happy with the content of the Affordable Care Act when it came out. Everyone agreed that it was a flawed bill, and that there were pretty easy fixes that could have improved it, and yet there was no willingness to even improve those kind of small things. Now obviously there was deeper ideological disagreement about the law writ large, but even on small things that would have kind of benefited all Americans, the President went to Congress and Congress just refused to do anything. I think their idea was "we would rather have the law be as bad as possible so we can run against it than try to find ways to improve it because that might give the President somewhat of a win." But again, I think reasonable people can disagree, but that's my take on it.