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# OBAMA'S CONSTITUTIONAL LEGACY

SYMPOSIUM DISCUSSION: ILYA SOMIN

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**John Eastman:** So Ilya, I want to push back on your criticism of the Bo Bergdahl deal. I think it was a terrible deal, but if we're going to draw the nuance between the president's power to declare war or to initiate a war and the president's power over the conduct of war, what to do with combatants who are detained as prisoners would seem to be about as clearly on the presidential side of that power divide as anything one can imagine, save maybe for only "are we going to land our troops in France at Dunkirk instead of Omaha Beach". And I've always thought that even if Congress passed a statute restricting the president's powers there, it would be the statute that's unconstitutional, not the president's actions. You seem to suggest otherwise, or you do suggest otherwise, in your criticism of the Bo Bergdahl deal. I wonder if you think that any statute limiting the president's conduct of war powers is valid.

**Ilya Somin:** Yeah, so I'd like to push back on your push back if I may. I think that Congress' powers are not limited to its power to declare war. They also have the power to make rules for the government and regulation of the land and naval forces. It has been for centuries agreed that this power, among other things, includes the power to regulate the treatment of prisoners, for example. This is why Congress has the power to forbid the torture of captured combatants and their other abuses, and by the same power I think they can forbid or limit prisoner exchanges, which is what was going on here. I would also argue that they have a broad power to do things like ban the use of chemical weapons, ban atrocities and the like. All of this I think was debated during the Bush Administration when I think the critics were in the right a bit when they rejected (John Yoo's) argument that the president could order the torture of prisoners, even if Congress forbade it, and I think this situation relates to the same exact principle. If Congress can forbid the torture and abuse of prisoners, they can also forbid—or in this case, restrict—prisoner exchanges as well.

**Audience Member:** Yeah, and I don't know if you can hear me.

**Ilya Somin:** I can.

**Audience Question:** Great. So when you were talking about Obama's actions against ISIS, you mentioned the 2001 AUMF, and then you said but ISIS broke with al-Qaeda. I have a couple questions about that. One is, if ISIS broke from al-Qaeda, doesn't the fact that ISIS was generated from al-Qaeda initially bring it within the scope of the AUMF as one of the organizations participating, or aiding and abetting, this attack? And my second question is, I know there's been a lot of criticism of Obama's refusal to use the phrase "radical Islamic terrorism." I think you used the phrase "Islamic extremism" or something to that effect. Do you think that classifying ISIS with it and al-Qaeda together under the umbrella of those radical Islamic terrorist groups would bring it within the scope of the 2001 AUMF?

**Ilya Somin:** So two interesting questions. I'll answer the second and simpler one first. I don't have any strong opinion on the use of the phrase "radical Islamic terrorism." Unlike some of Obama's critics, I don't think it's essential that we use it, but I don't think it's a bad thing that we use it either. But whether we use it or not, the mere fact the two groups have a similar ideology does not mean that the authorization of war against one of them means that we can fight against the other one as well any more than when we were at war with one communist nation, that meant that we were at war with every communist government in the world or every communist terrorist group, and so forth. On the issue of ISIS and its relationship to al-Qaeda, I do think that first point perhaps is the best argument that Obama could advance with respect to the ISIS war but I still don't think it cuts it. While some of the initial leaders of ISIS—some, not all—were previously with al-Qaeda, it is a separate organization. The vast majority of people involved in it were not people who were ever members of al-Qaeda. If the mere presence of a few people who were in the one organization in another one means justifying waging war against the second, then that's also a major hole in congressional power that any president can drive a truck through. There are very often examples where people affiliated with one group or one nation eventually join up with another one, and it doesn't mean that we can start a second major war against the second one anytime that this happens. There are many historical examples for instance, after World War II, a number of ex-Nazi soldiers and scientists worked for a variety of governments our own government as well, but also the Soviet Union, Egypt, and a good many others. Doesn't mean that we can initiate war against those other governments anytime we wanted to without congressional authorization, and I think the same point applies here.

**Audience Question:** Could you define war in a way that sort of, make

an analogy between sort of putting someone in jail for a period of time versus executing them. War would be where we try to bring about regime change or take down a power versus an effort such as Trump's use of the missiles which could be seen as a punishment for violation of an agreement on chemical weapons or a treaty, a general treaty. And at the same time it could also be seen as national security just in the sense that any use of chemical weapons or use of nuclear weapons or development of them is potentially destabilizing to what we understand as a legitimate warfare.

**Ilya Somin:** So I think wars are defined by the scale of the military action and by its nature, rather than by the objective. I don't think you can make it not a war by claiming that you're enforcing a treaty or that you're promoting US national security interests. In almost every war, the claim is made that this is necessary for national security, and similarly the fact that it's done because the other side violated some treaty, that doesn't make it any less of a war. I think what defines a war is the use of military force beyond a certain level, and you can argue about exactly where that level, where that line is drawn. You can make, I think, a reasonable argument perhaps that a very small-scale raid that's a one-off may not be a war, but certainly constant bombing over a period of many weeks, as in the case of Libya, that qualifies as a war. I think the conflict with ISIS is even more clearly a war. There's even some US troops on the ground. What happened, I guess, in this most recent strike against Syria, there things are more arguable, or at least are more arguable if there isn't further military action against Assad, and at this time obviously we don't know if there will be or not.