PRESIDENT OBAMA'S CONSTITUTIONAL LEGACY

SYMPOSIUM DISCUSSION: JOHN C. EASTMAN

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Eric Berger: Thank you for your really interesting and well thought out remarks. One question I had is, your view that the War Powers Resolution infringes on the president's Article 2 powers, certainly a reasonable view, and you defend it well. I guess my question is—and you gestured toward this a little bit in your talk, but I was interested in expanding upon it—is how do you account in this issue, or really lots of constitutional issues, for sort of accumulated past practices to the extent lots of presidents in recent decades have initiated what we might call smaller wars without going to Congress, an apparent violation of that. How do you take that into account?

John Eastman: It's a very fact-specific inquiry, so look at President Reagan's intervention in Grenada for example, to stop the creation of a Soviet base so close to our shores. That's not a "rebuffing an attack" type of thing, like a response after Pearl Harbor or 9/11, but it's not quite a full-blown preemptive defense either. I mean, there was activity already going on that was posing a threat to the United States. And it was also fairly short, so even if you accept the War Powers Resolution, he's in and out within 60 days, so we don't need the congressional authorization. Congress has effectively given presidents a 60-day pass. The Haitian interventions, the Bosnian interventions, the extent to which UN Security Council resolutions and particularly NATO treaty obligations that not just allow us but obligate us to come to the defense of member nations in the treaty alliance. Because of the treaty obligation, which is of course ratified by the Senate, there is a congressional input giving the president the authority in a way that we didn't have such a treaty obligation in Libya. We did have UN Security Council resolutions, but I don't think a UN Security Council resolution is sufficient to give the president authority to act unilaterally because those US security resolutions, although they're backed up with our UN treaties, those treaties give us permission based on our domestic authority, not an obligation like the NATO treaty alliance. So each one of these things has to be looked at very carefully in light of a different circumstance.

Taunya Lovell Banks: I have a question that relates to your discussion

of the Immigration Power. When you were talking about the potential abuses by the Obama Administration, in none of those cases was the President's power, with regard to national security or power as Commander-in-Chief, called into question and yet, George Bush in enacting some of his policies post 9/11 and more recently President Trump in doing the same – well actually, President Trump did not, he should of, did not assert that he wasn't simply carrying out the power delegated to him by Congress to regulate immigration, but then he was also acting as Commander-in-Chief and asserting the national security concern, and so I guess my question is: how does that really operate?

John Eastman: That's a very good question and I think if President Obama deliberately did not make such an argument, then I think there is a very good reason. Because he was laying out a broader policy that applied in a context where such an argument would not be plausible. He wanted an across-the-board policy, so for. . . and we've all recognized, either by custom or by law, the president's ability to act in certain circumstances to respond to a particular flare up. So when President Obama issued waivers of deportation for folks who were from countries that had outbreaks of Ebola, perfectly permissible under his executive power, that kind of targeted emergency either humanitarian or military need, similar to the Haitian crisis that President Bush dealt with and some others. I think that those are within the executive power because they fall on the foreign policy side of that line, but he didn't want to rely on that power because there were lots of folks eligible for his program that would not be able to lay claim to such an argument and he wanted to make a different kind of argument and it's that different kind of argument that I think exceeded his authority. I think it exceeded the authority both on the categorical suspension of deportations, but I don't think that is a judicially enforceable line, so maybe something we have to live with, or rather the only response to that would be a political one in Congress rather a judicial one. But the next piece of that, the awarding of benefits, particularly the work authorization. I think exceeds any notion of a prosecutorial discretion and I think, particularly because it involves expenditure of appropriated funds, you've got an Article 1 Section 9 problem as well. He's now spending funds that haven't been authorized by Congress. It seems to me that that's a very dangerous precedent to set on executive power. And if the new president takes that precedent and runs with it, then I think people on both sides on the political aisle will see how dangerous it is.

Audience Question: I was wondering what your thoughts are to the extent that other issues than Article 2 influenced President Obama in the

Syrian matter, namely the Russian gambit on the law of war to acquire demand for remedial action. And too, my recollection is that Seymour Hirsch reported to the UN firm that Assad had not used chemical weapons, that the rebels had.

John Eastman: So that certainly colors it, and it depends on which rebel it is on whether it falls under the authority of the authorization for the use of force. And if we're talking about here was "were the actions authorized by Congress or did they need to be?" I'm not seeing any credible argument that the Assad regime was tied in any way to the 9/11 attacks, and so that's outside of the authorization for the use of force, so the president would have to rely in that context on his own Article 2 powers. And the chemical weapons treaty prohibits the use of chemical weapons by anybody, but it doesn't obligate us to respond in the way the NATO treaty obligates us to come to the defense of a member nation. And so, the international norms there that were violated are different from the question of "did it impose on us an obligation already ratified by our Congress that would authorize the president to take those steps?" And that I think is much less certain had he responded to the chemical weapons attacks, whether they were by Assad or by the rebel groups than he did with the targeted attacks on ISIS instillations, which I think were authorized.

Audience Question: First of all, thank you for being here. You talked a little bit about examining deference towards administrative agencies with much ado made about soon to be Justice Gorsuch's position on *Chevron* during the confirmation process, how do you think his addition to the court will advance that doctrine?

John Eastman: Terrific, terrific question. So, for those of you, it was a little quiet you might not have heard it: how does the addition of Justice Gorsuch to the Supreme Court affect these Deference Doctrine discussions. Look, you know one of the big impediments to revisiting many of these Deference Doctrines for years had been Justice Scalia because he not only agreed with many of those Deference Doctrines, heck, he authored one of the principle ones, the so-called *Auer* Deference, A-U-E-R, the deference to administrative agency interpretations of their own regulations. He authored that one and I think that there's a reason for that. Justice Scalia came of age in the 1960s, and was an administrative law lawyer in the Nixon Administration in the 1970s. The big fight in those days was the courts taking too much power upon themselves and so the administrative lawyers in the Nixon Administration said, "why don't we try and create doctrines that will push these decision-making points to the executive agencies that are at least nominally accountable to the president who is elected by the people." The

deference doctrines were therefore a move for political accountability for this law-making, for this extra congressional law-making power. It didn't work out so well and in his last year, Justice Scalia himself called in to question *Chevron*, but also said that he was going to overrule *Auer*, which was his own opinion on these things. Now, so, let me get back to the question on Justice Gorsuch. *Judge* Gorsuch was writing opinions questioning the ongoing vitality of some of these doctrines even before Scalia did in his last term. My own Supreme Court center started pushing these issues back in 2010, Justice Thomas picked up on it in several opinions, and Gorsuch picked up on that as well. So, in many ways, Gorsuch is the perfect fulfillment of the Scalia seat because he will now, it seems to me, take a step that Scalia said he was ready to take, but didn't get the opportunity to take.

Audience Question: You mentioned President Obama being (inaudible) all presidents before wanted this position on the War Powers Act. Do you think that this can, him being consistent on that throughout being a professor, campaigning, and then becoming President. Genuinely, do you think he felt like he was locked in on his record after becoming President?

John Eastman: Well, I think it's genuine. This is one of the great undecided questions in constitutional law and the reason it remains undecided 230 years after the adoption of the constitution is because I think the founders deliberately made it ambiguous. Why would they deliberately make it ambiguous? Divide the most important power of government between two branches and not draw the dividing line unambiguously or clearly? Well, because you can never anticipate the kind of threat that you're going to need an energetic executive to respond to. If you try to anticipate every potential threat, you're going to give that president pretty much unlimited power. And when you give anybody unlimited power, the risk that it will be abused is pretty high, so you need checks on it, but you don't want to write the checks in advance because those checks may end up handcuffing that president at the very moment he needs the power for our national survival the most. So I think the Founders studiously drew that line ambiguously. Had President Obama, along with a large number of very respected theorists, said that no action beyond defense against an attack on the United States can be done by the president without Congress declaring war or authorizing the use of force--it doesn't have to be a formal declaration of war, the authorizations of use of force are sufficient. But then you get these preemptive defense doctrines, so ok, we have to wait until a nuclear weapon hits us, does that change the dynamic? Can I take out the nuclear facility before they have the capacity to launch? Well, you know, that's

pushing the envelope, and I think President Obama would say "no, I still need authorization for that." What got him into the box was adhering faithfully to that position, which is certainly a respectable position, but then doing what he thought needed to be done in Libya, which runs contrary to that position. I don't think it's credible, the line that they drew. We're just launching missiles at them. They don't have the capacity of firing back therefore the War Powers Resolution doesn't apply. That's almost laughable. I would have rather him confront the constitutional issue, but he didn't.

Audience Question: The question of using discretion instead of a broad executive order that just says "ok, no more deportation," what if the president were to say, make this our last priority. After you put everybody who has a criminal record on this, you know, so that you effectively make it impossible. And maybe just to add to that, what if instead of executive order, you just appoint somebody who you know will do that? And is that power equally problematic?

John Eastman: Well, according to court's decision in the *Cheney* case, it is problematic because he's effectively changing the legislative rule. The way you describe it though, you know, set everything else a priority, and if you still have some resources available left, you can still deport these people, that wouldn't have changed the legislative rule. But that's not what happened here. In fact, I testified in Congress on this. One of the other people testifying at the hearing at the table with me was a DACA recipient, and she viewed—and I think rightly because this is what it was intended to convey—that her meeting the criteria gave her an entitlement to the deferred action. And you'll hear the number, well, you know, 10% of the applicants didn't get it. Well, 10% of the applicants, all 100% of those who didn't get it, didn't get it because they didn't meet the criteria. There was nobody who met the criteria that didn't receive the deferred action, and that starts making it look like we're changing the legislative rule rather than just setting priorities from on high, which the president is certainly within his power to do, and that's where the concern. So I do think it crossed the line. Where I run into trouble is how is a court going to enforce that line and that's even a much tougher question in my mind.