**Attack Outlines**

A. Can the Prez Act?

1. Is this a domestic war power? Does youngstown even apply?
   * No: arguably, Youngstown is only about internally directed war powers (martial law, etc.)
     + in Jackson's unpublished Quirin opinion and in Eisentrager, there's the idea that the BOR does not apply to foreign war powers exercised by the executive; the judiciary has no business intervening in these matters; thus Youngstown may not apply directly
     + John Yoo used similar ideas
   * If No, then what?
     + Then we apply LOW
   * Yes: even if it wasn't intended to, it has been so interpreted
     + ex. Dames and Moore (even though this isn't strictly a WAR powers case), Detainee cases
     + Detainee cases, especially Boumediene, apply Const. to detainees
     + there are much older cases (Bass, Little) suggesting that Congress has power to determine conduct of hostilities; the larger point is that YT isn't a *holding* it's a framework for examining the interaction of these powers
2. what act has Cong taken?
   * this determines what category you're in
     + Category 1: President has Congress’ delegated authority + own authority
       - explicitly or impliedly approving the action; only limit is things gov't can't do
     + Category 2: Zone of twilight; Congress hasn’t acted
       - silence/acquiescence
       - funding, but not actually approving
         * Green: even though Cong funded security clearance program, Ct. requires a clear delegation for a security clearance program which doesn’t provide customary DP standards
         * Kent: the statutory authority that Congress had adopted didn’t clearly delegate to Congress the power to deny passports on political grounds
         * Endo: clear statement rule; BUT, could also be const. avoidance
       - approving something similar in a number of other circumstances
         * Dames & Moore: Ct. looks at Hostage Act, Belmont and Pink, International Claims Settlement Act
         * but see Little: Ct. says president doesn't have the power to act beyond Congressional authorization, even if its in the spirit of that authorization
     + Category 3: President is acting contrary to Congress; has only own authority.
       - actually forbidding Prez Action
   * Make sure to demonstrate that the categories are not clear!
     + The difficulty is determining when Congress is saying nothing and acquiescing, saying nothing because they don't want to authorize, or saying nothing because they feel that they've already authorized in the past or it's a presidential power (some Republicans during Confiscation debates) Or a malfunction of the legislative process?
   * Can Ct. even effectively rule in cat 2? Or are they just ratifying Prez actions?
3. what is the scope/nature of the Prez powers?
   * this is YT question 2
   * so, Is this concurrent? Exclusively Presidential? exclusively Congressional?
   * START WITH TEXT of Const
     + Commander in Chief (art 2, sec 2) (but are we in a battlefield? Curtis, Youngstown)
     + Take care power
     + treaty power (recognition power gives power to breach/pull out Hamilton)
     + appointment power
     + vesting clause (Hamilton)
       - Art. 1 is different than language in Art. 2. 1 says “leg powers herein granted.” But Art .2 says “exec power shall be vested in one president.” There is no “hereinafter granted.” So it should be seen as a grant in bulk of all powers in their nature executive; the first clause grants him everything that an executive would have, consistent with the other provisions of the Constitution.
   * Move on to sources
     + threshold
       - status of individuals involved
         * can hold any enemy (Quirin, Hamdi)
         * Citizens always get HC
       - is action domestic? Or abroad?
         * Youngstown: domestically, the powers are weaker than in the battlefield/abroad
         * Curtis: CIC power is limited to battlefield
         * Milligan: similar, but not identical, idea
         * Boumedian: HC at Gitmo
         * Al Maqela: not at Bagram
       - Are we at war?
     + General
       - Paradigm
         * LOW paradigm offers largest powers; Prez exercises US belligerent rights

ex. Lowry, Conkling letter, Browning, Miller (accepts municipal/LOW distinction)

note LOW is not punitive

* + - * + Curtis: martial law, actions limited to those engaged in wrongdoing
      * Non-delegation
        + Curtiss-Wright: (Domestic, C1, war power) non-delegation works differently in area of FA; Prez is well positioned to make FA decisions; FA powers a different from others (this is a weak case, bc the rationale is so vague)
      * Binney: shouldn't reason from English const history to US prez; Prez and king are differently situated (Re: Merryman)
      * Korematsu: (domestic, war power) judiciary will defer to exec
      * Merryman: Prez is only able to execute laws (Also Madison); English history
      * Frankfurter: clear consistent and unbroken practice can indicate Presidential power
    - suspension of HC
      * Milligan: (domestic, C2/3, martial law) when civ courts are open, exec cannot try non-belligerent citizens in military courts (unless HC is suspended)
      * Binney: this is a denial of a privilege, not legislative act, thus, Congress not necessary (maybe sufficient, though)
      * Merryman: Prez lacks power to suspend HC
      * Boumedian: only in invasion or rebellion, and must be a clear statement
    - Use of force
      * Little: (foreign, C3, war power) Prez has to follow limits placed by Congress
      * Neagle, Debs: (domestic, C2, nat'l sec) prez can rely on implied “protective power” to protect framework of government
      * Prize Cases: Prez can respond to attack by bringing out war powers
      * Frankfurter test, or something less: Prez has earned this power or implied delegation
    - detention
      * Neagle, Debs: Prez has “take care” power, even where there may be no explicit power or statute on point; prez can rely on implied “protective power” to protect framework of government
      * Milligan: (domestic, C2/3, martial law) when civ courts are open, exec cannot try non-belligerent citizens in military courts
      * Quirin: (domestic, C1, military commissions) Ct. finds Cong auth, and claims that use of MC is ok to try war crimes, Cts have juris
      * Jackson in Quirin: Cts. have no jurisdiction here
      * Eisentrager: No HC outside of US territory
    - Military Commissions
      * Milligan: cannot use for civilians in civil life when Cts are still open
      * Hamdan
      * Quirin: MCs fine for enemies
    - breaching a treaty
      * Hamilton: Recognition power
      * Neagle, Debs: Prez has “take care” power, even where there may be no explicit power or statute on point; prez can rely on implied “protective power” to protect framework of government
      * Goldwater v. Carter: Not SC case; is a political question
    - entering a treaty
      * Executive agreements
    - seizing property
      * Dames & Moore: (domestic, C1/2) there are past FA practices, sympathetic statutes, Pink and Belmont which indicate that Exec can dispose of lawsuits
      * Confiscation debates
        + veto message: thought it was a municipal measure; thought commanders in field didn't need Cong auth
        + Browning: when in LOW/CIC mode, decisions must be based on military necessity, which is contextual, Congress is a bad place to make these decisions
        + Howard: as a practical matter, Cong may not be a good place for powers, but they DO have the power to limit Prez CIC power
      * Emancipation
        + Lowry: when in LOW mode, can seize property, BUT not as punishment
      * Miller: there is a municipal/LOW distinction, and exec can do things under LOW that he couldn't otherwise do; BUT, also implies that Cong has power over conduct
      * Youngstown (domestic, C3, war power) Distinction between executive and legislative power. Since this is legislative, Exec can’t do it. No delegated authority, and no independent authority.
      * Neagle, Debs: Prez has “take care” power, even where there may be no explicit power or statute on point; prez can rely on implied “protective power” to protect framework of government

1. are there any internal Const limits?
   * even if Congress has authorized, it could still be unconst
     + suspension clause, bills of attainder, BOR, non-delegation doctrine
       - Reed v. Covert: treaties can't overrule BOR
     + note that Non-delegation isn't really active anymore; Ct. tends to construe to avoid the problem instead of overruling outright
     + Federalism
       - Neagle, Debs: (domestic, C2) Prez has “take care” power, even where there may be no explicit power or statute on point
       - Missouri v. Holland: treaties can override a federalism concern
2. Is there an extra-Const reason to grant prize power
   * emergency power theory
     + ex-post ratification
       - Prez goes to Cong, asks it to ratify things he's done w/out their authorization, but which are within Const
       - Problems: they have little choice but to ratify, some things can't be undone
     + martial law
       - Jackson's Korematsu dissent: don’t want to pretend that this is constitutional, normalize under the constitution. In these circumstances, it is all outside the constitution. The courts aren’t involved.
       - Compare to Curtis and Lowry! Lowry says extra-constitutional powers, by which he means they are provided for by the constitution but are part of law of war.
         * Unconstitutional if not a military measure; might be valid as martial law.
       - Jackson's point is that martial law suspends the constitution.
     + Protective Principle
       - Neagle, Debs: (domestic, C2) Prez has “take care” power, even where there may be no explicit power or statute on point
   * Law of war? somehow not-enumerated?
   * so this is like Q 0

B. Can Congress Act?

1. this is probably going to be related to the conduct of war, after we're in the conflict
2. enumerated powers in the text
   * Declare war
   * suspend HC
   * regulate army, militia
   * raise/support army
   * regulate foreign commerce
   * define and punish violations law the law of nations
   * naturalization power
   * N&P
3. scope of congress' enumerated powers?
   * so here is where you put in sources
   * arguments for and against (bump up and down) every major cong power
     + General
       - Carolene Products: general point is that Carolene bumps powers up to BOR, not the text of the Const, iteself
       - Non-delegation
       - Lichter: (domestic war powers) Congress can delegate lots of power in FA context
       - Curtiss-Wright: (domestic war powers) strict non-delegation doesn't apply in FA
     + Clear Statement
       - Endo, Green, Kent: where Congress is doing something under FA or war powers, and it violates BOR, DP, etc. then Ct. may require a clear statement
     + power to declare war
       - fairly uncontroversial
       - Madison in Pac Hel; claims it's exclusive, and cannot be done via treaty (NATO may undermine this latter point)
       - Lincoln's July 4 Message: there's a recognition that Cong has power (Or he wouldn't be asking for ratification)
       - Bas: Cong can authorize activities short of full (perfect) war
     + to monitor the conduct of war
       - Bas: (foreign war powers) Cong can authorize activities short of full (perfect) war
       - Little: Congress can set upper limit of Prez' power
       - Hamdi: AUMF incorporates Laws of War; thus, Prez is limited (Reaffirms Bas, sort of)
       - Sumner/Howard: Congress can do anything! Can micromanage the war; Compares CIC power to Washington under Articles of Confed.
       - Obama follows Sumner/Howard, at least in practice (Bush followed Browning)
     + suspend HC
       - Endo, Green, Kent: appropriations isn't a clear statement
       - Boumediene: Suspension requires a clear statement, and only in rebellion or invasion
       - Lincoln's July 4 message
         * L thinks he can just suspend HC (Protective Principe)
         * BUT, asks for permission
       - Jefferson: asked for permission in Burr Affair
       - Merriman: Congress only
       - Bates: each branch interprets the Const in it's own way
       - Chase in Milligan: Can authorize Prez to suspend
     + captures/confiscation power
       - Prize: Law of war governs captures on high seas
       - Miller: captures are belligerent measures, Cong can authorize them
     + power to detain
       - Boumediene: Cong can set rules for process, Cong cant strip HC except by suspension
       - Boumediene: HC is going to be in fed courts
         * Hamdi seems to say the opposite
     + power to use Military Commissions
       - Hamdan: Cong can restrict the use of MCs, determine what they look like; almost plenary power over MCs
       - Milligan: Can't put civilians in Martial Law MCs when Courts are open, unless they're enemies, see Quirin
4. internal Const. constraints
   * same as above; look at BOR, suspension, bills of attainder, clear statement rule?
5. emergency/war powers theory?
   * is there an emergency/ware powers theory that allows them to move beyond scope of normal powers?
     + Korematsu: high deference from the Courts; probably not extra-Const theory
       - But see Jackson: don't constitutionalize this! Loaded gun!
     + Emergency Powers of Prez will take power away from Cong; see July 4 Message
       - can't reverse some decisions already made by Prez (money's already been spent, etc.)

C. Judiciary

* Jackson's Unpunished Quirin: Enemies should not be in our Courts (Overruled by detainee cases, Quirin)
* Quirin: Cts have jurisdiction over enemies
* Korematsu: high deference in wartime
* Jackson's Korematsu dissent: Court shouldn't constitutionalize; shouldn't have a role
* Youngstown: Cat 2 is a political decision; Courts aren't going to be able to police this
* Pac and Helv: don't think that the issue here is a justiciable issue (lack of judicial role is significant)
* Medellin
  + Court has role of interpreting the treaty
* Hamdan
  + Ct. won't defer to executive's interpretation of Geneva Common Art III
* detainee cases
  + DG thinks courts see a black hole in the law, and they're stepping in to fill it
  + Boumedine: Federal Courts can exercise HC in Gitmo, 3 part test
* General question
  + is there any real role for the Judiciary? Can they actually check the Prez? Or do they just end up blessing the Executive? (see Quirin)
  + Or is the judiciary forcing Exec to justify their decision? Like in Admin Law?

**Full Outline**

1. Misc.
   1. Theories of Emergency Powers
      1. View 1: No Emergency Powers
         1. there ought to be no emergency powers, unless they are explicitly provided for in the Constitution. Gov’t, acting within the Constitution, has all the powers that it needs. And the desire for more powers is just authoritarian, etc.
            1. Caveat that we have the suspension clause, which suggests that there is some provision for emergency powers.
            2. American constitution is extremely limited in recognizing emergency powers; nothing that refers to emergency powers in a direct way.
      2. View 2: Extra-Constitutional Powers
         1. emergency powers should be viewed as ‘outside’ the constitution. They are extra-constitutional.
            1. there are emergencies/national security crises. These cannot be overcome without powers more than are in constitution.
            2. But you shouldn't see these powers as consistent with the constitution.
         2. The Executive will, in fact, exercise emergency powers. We should require that the Executive openly acknowledge that he has done this and has suspended part of the Constitution. He will stand before the people, Congress, the courts, and have to make my case that what I did was strictly justified by necessity.
            1. There is ex-post accountability.
         3. Doesn’t degrade the constitution – because the President is not claiming to be acitng under the Constitution, so nothing he does is justified on a slippery slope which can be used during peace time.
      3. View 3: Constitutionalization
         1. emergency powers are necessary. But the best thing to do is to constitutionalize /legalize/control them.
            1. There is no legal check at all on the ‘extra-constituitonal’ view!! The Exec just does what it wants. This is a runaway!!
            2. What we ought to do is to find ways to find in the Constitution emergency powers, as well as limits on those powers.

e.g. the Executive cannot determine the conditions of the emergency. The leg has to define the scope of the emergency. SOP idea to control executive powers.

e.g. strategy of int’l human rights law. Allows for the derogation of certain human rights, but not others.

e.g. emergency powers of the Weimar Constitution.

* + - 1. We see this in Lincoln, at start of the Civil War
    1. One way of thinking about the modern doctrine: it eschews this clear, categorical thinking. In the contemporary era, we have a kind of balancing/proportionality to the question of powers and the limits that exist on powers.
       1. Instead of saying it’s either the municipal law or the law of way, we say – here are the restraints.
       2. Instead of resort to law of war/int’l law, it’s resort to internal resources – open-ended balancing approach to rights.
       3. Old view: conception that these kinds of powers are best exercised outside of the constitution. View that it’s a mistake that powers of gov’t can be limited the way they are at all other times.
          1. Danger on this view: when those extraordinary measures are taken and raitonalized under the constitution, they can be taken and used in more normal times.
          2. Rather than finding them within the constitution, it’s better to force the gov’t to acknowledge that they are acting outside the constitution, and they are subject to courts/people/etc. But at least no one is standing up and saying that this is consistent with the constitution.
       4. The modern approach to emergency powers: one that says that we should find the constitution to be flexible enough to accommodate what in fact we will always do when confronted with these circumstances.
          1. Internal to the constitution itself must be some way of accommodating/loosening constitutional restraints.
          2. You could have a traditional Mathews v. Eldridge-type balancing for emergency situations. Implicit in the constitution. Allows measures depending on the circumstances.
  1. Writ of HC
     1. What is Habeas Corpus?
        1. A judicial Process: When a person is detained, they can invoke the writ. Means “bring the body” in front of a judge.
        2. The court has to determine whether the individual is lawfully detained.
        3. Any person can challenge their detention by the executive on legal/constitutional grounds in front of an independent court. And the court has the authority if there is no legal basis for the detention, to order the person be released.
        4. Idea of HC: the judiciary stands between the executive and the people to protect the most important rights.
     2. Suspension clause:
        1. Doesn’t say that individuals have a right to HC; Instead, we have suspension clause.
        2. The privilege of the writ of HC shall not be suspended unless time of invasion/rebellion when public safety requires it.
     3. What is the suspension of HC?
        1. Intuitively: it is a huge thing. Has only happened four times:
           1. Civil War
           2. Reconstruction
           3. Phillippines
           4. Hawaaii after Pearl Harbour
        2. It means that constitutional rights are suspended. But what constitutional rights? How far? What is the consequence of a suspension of HC?
           1. Under the narrow view of the suspension:

The writ is a common law writ, or procedure in a court, where the judiciary is given jx to consider the lawfulness of the detention of an individual.

When you suspend HC, what you are doing at a minimum – you are saying that the person being detained can’t invoke that proceeding.

This is a very dramatic things to do. Someone is arrested but cannot ask to be heard from. Means as a practical matter that person’s constitutional rights, if violated are not going to be remedied by judiciary.

* + - * 1. Extreme end: use of military commissions.

used for criminal trials by the military. Not Art. 3 tribunals + they don’t follow the bill of rights.

They do, as a matter of practice, look similar to a civil trial. But there won’t be any jury. No grand jury indictment. Requirement of speedy trial won’t be applied. 6A public trial won’t apply.

BOR doesn’t directly apply to the military commission, although some of those will be right to fair trial.

* + - * 1. But the narrow view raises a lot of questions.

What if the person files civil suit for damages? Sue person who is detaining them for damages for violation of const. rights.

Would the suspension of HC suspend civil suits too? if it isn’t, how valuable is the suspension of HC to the executive?

* + - * 1. Generally, it's unclear.

can the executive just detain anyone on suspicion? Can they just lawfully detain anybody, probable cause or not?

Whole point is that the executive can pick up ppl without sufficient evidence and hold them so they can’t do damage. If they still require probable cause, does that undermine purpose of HC?

So does it allow preventive detention?

* 1. Models of MCs
     1. occupation courts.
        1. governed by the law of occupation (part of law of war).
        2. They have extensive jx.
           1. Military controls and occupies; becomes the gov’t of the occupied territory.
           2. these occupation courts might here cases of burglary, murder, etc. because they are the courts that govern in that territory.
           3. And the military will proclaim certain kinds of military orders of the occupation authority, which the people under occupation have to comply with. New laws made by the military authority.
     2. LOW military commission.
        1. These are military commissions which are more analogous to those in Gitmo.
        2. They try war crimes or offences against the law of war. They are used to prosecute members of the opposing armed forces who are accused of offences against law of war. Effectively they are war criminals.
  2. Role of Precedent
     1. one way of thinking about – imagine there is a statute which has certain provisions in it. e.g. public lands with oil on them should be leased to American citizens who apply for a lease.
        1. Presidents, on many occasions where something was happening that was unanticipated, e.g. people want land at unprecedented rates, President says “no more leases!” But the statute doesn’t give President this power. He calls a temporary halt and then send a message saying, “I’ve done this, tell me what to do.” Congress, had time and time again, had just agreed!! Then, in the mid-west oil case, individual challenges what the President did – President can’t shut it down; it’s a statutory program here. Court upholds the President, saying he did have power to temporarily halt the statutory process.
     2. In that case, if you think about that in Jackson’s terms, why should court have looked to past practice? On what theory is that relevant?
        1. Sometimes past practice of the President which has been accepted, so this is implied power that Congress has delegated to President.
        2. Or this was a legitimate Presidential power! When something has to be done immediately, President can deal with this!
        3. Maybe this is limited form of executive emergency power?
     3. What is at stake: this is a version of a living constitution.
        1. Mostly takes place outside the courts. But which radically affects the structure of the American gov’t.
        2. One worry – violating the Constitution changes the constitution. It’s a customary constitution. President violates it 10, 20 times – at what point do you say it’s no longer the Constitution? Do you never want to say this?
        3. One version of this: warpowers question. Some Presidents claim exclusive war powers. But short of that many Presidents have said that Congress has limited powers over use of force. And President has acted on those views on many occasions – President has used force without authorization on many cases.
           1. Could respond by saying that President just violates constitution a lot
           2. or that the constitution has fundamentally changed.
     4. Frankfurter (in Youngstown) gives clear account of how to think about this problem which is quite strict: Clear, unambiguous practice of President taking action on claim of right, and Congress doesn’t object
        1. Past practice can’t change the constitution. But it can tell us how to interpret the constitution.
        2. Claim: strong presumption that gov’t operates in the way it’s supposed to operate. A workable scheme is made from vague constitution. It’s an interpretive add.
        3. Frankfurther wants something very strict: you would expect Congress to react to the President’s behaviour by prohibiting it. Could declare that President has no such power – he is acting unconstitutionally. Or they could agree/embrace the claim of power that he is making.
        4. Formulation works for mid-west oil case. But it’s poorly designed to help in most questions, because it’s too strict. Requires President taking action on claim of right, and Congress doesn’t object. But it really just doesn’t work that way in most cases.! If Frankfurter’s view was followed, we’d be stuck with more original understanding.
     5. Is there something in between Frankfurter and just fully following practice (many ppl believe that President earns powers by executing them) (this latter is evolutionary, common law understanding)? Is there a middle ground?

1. Creation and Early Competing Visions
   1. The Text
      1. Separation of Powers
         1. Congress has lots of power; the text is “strikingly modest” with respect to the President (compare with contemporary view, which we’ll come to, where President has more power)
         2. Generally, know the powers that the text gives each branch with respect to foreign affairs
      2. Law of nations
         1. There appear to be ‘gaps’ in the constitution with respect to foreign affairs, but actually if you understand the text in historical context, it’s clear that the founders were more explicit
         2. Solution to the gaps: The law of nations was incorporated in many clauses
            1. one rationale: if LoN is “natural law,” then it make sense that it is incorporated into the Const.; the state ought not do things it ought not do...

Law of nature: idea that the source of law is not in some positive exercise of political authority, but in reason/morality. You could deduce what the law should be by reasoning, rather than in some process of law making.

Positivism: there is no necessary connection between law and morality. Laws are laws because some political process made it so. We know something is a law not because it is moral but because Congress passed it (e.g. the Erie debate is sometimes characterized as the move from the natural law conception to a positivist conception).

Note that, in modern era, we've turned away (and then doubled back again to some extent) from natural law conception

* + - 1. The Constitution was designed with an international audience in mind
         1. goal of Const was not ind. and isolation; rather, Const sought to allow US to reenter/reintegrate Euro system of states
         2. Rev War takes place in Int'l context

it's part of a larger war in Europe

we never would have won without help from French and Dutch

* + - * 1. post-Revolution

US Signs treaty with Britain; two provisos

US has to stop discriminating against Loyalists

US has to pay back debts in Pounds Sterling

BUT, US States won't comply, and Articles dont' give Federal gov't power to make them; result

UK won't send ambassadors

UK won't leave forts; so US only has what it controls

UK won't sign commercial treaty

this is economically damaging bc US is trade based economy

also bc, as independent state, US is excluded from UK mercantile system

Euro states won't sign model treaty; dont' think US can carry out obligations

So negotiation of Constitution was partially motivated by desire to fix foreign relations powers

* + 1. Powers given to Congress (Art. 1, section 8):
       1. Power to declare war
          1. Power to declare war: today there are debates about this. Historically, there was no debate; It was the power to decide to go to war. Exception: when country was attacked, and President would respond.
          2. not only power to declare war, but also to grant letters of marquee and reprisal and to make captures on land and sea.
          3. War, Marque, Reprisal were the ways that force was used legitimately in int’l law, at the time of the founding; Framers listed all of the mechanisms for engaging in military conflict.
          4. And they didn’t just leave the decision over war to Congress

framers gave Congress to pay and collect taxes, to pay the debts, and to provide for the common defense and general welfare; the appropriations power was really about war – if you look at the federalist papers. At that point, budgets were all about going to war! Taxes were mostly about fighting wars.

* + - * 1. So Congress was given the power to decide about war and to fund war.
      1. Habeas corpus/suspension power
         1. Seems to (and has been read to) imply right to habeas corpus.
         2. Cannot suspend except in times of war/rebellion.
         3. Note, though that this isn’t really a war power – because it’s not about invasion – it’s about domestic issues.
      2. Regulate the armies/Raise and support armies
         1. Congress decides whether there will be an army. And how big it will be. And what weapons they will have.
         2. The significance of this power is easily underestimated from a modern perspective.
         3. Republican principle: there should be no standing armies. This was a basic principle at the founding. This was a theory of English liberty!

The federalists (particularly Hamilton) prevailed in the view that there should be standing army, however. They were worried about prevailing over aboriginal peoples, etc. Hamilton convinced the framers that to prohibit a standing army in peacetime would be dangerous.

Compromise: appropriations of money would only be for two years. You could not fund a permanent military establishment.

Think about the significance of the idea of no standing army. If the President has no money and no army to fight a war, his dependence on Congress for foreign policy adventures is complete (according to the text of the Constitution).

* + - 1. Regulate milita
         1. Note that militia were about defending the people; Was understood in Republican theory as the bastion of protection against a tyrannical gov’t, and to respond in case of invasion while Congress was raising an army.
         2. There were federalism issues about how would be in control of militates.
         3. The result: compromise. President is the commander of the militias, but officers are state. But the power to call them out was in Congress.
      2. Power to make rules for governance over land of military.
         1. it looks broad, but DG doesn’t think it actually is
         2. It was about articles of war.

every military force had to have its own internal rules

These were generally embodied in something in the English tradition were in the articles of war.

Idea was to borrow the British articles of war and apply them to the US.

Today the Uniform Code of Military Justice was just the codification post-WWII of the Articles of War. These are the internal rules of the military. e.g. Court martial procedure; rank; privilege; punishment, etc.

* + - * 1. It’s not about interaction with the enemy.
      1. Power to regulate foreign commerce
         1. We typically think about this among the states. But it’s also with Indians and foreign states; Framers didn’t think you could regulate foreign commerce effectively unless you could regulate interstate commerce.
         2. This foreign commerce power was essential at the time. Related to core idea that US would be free port for the whole world! Idea that we would have no tarrifs. Neutral power which is the free port for trade, and the model treaty was designed to bring that into effect.
      2. Power to define and punish offences against law of nations
         1. This is the only mention of law of nations (LON) in the constitution
         2. DG thinks this is a limited provision
         3. Arose after a French ambassador was attacked in the US, and the federal authorities couldn't do anything about it; they had to rely on the states to prosecute. The federal authorities found themselves urging the states to impose criminal sanctions. But they could only beg and plead.
         4. We find in Blackstone offences against LON. E.g. disregard of flag of truce. Or certain torts against foreign interests for which the state would be responsible if it didn’t provide a remedy.
         5. Others have tried to read into this clause a power over int’l law generally. DG things this is in the constitution, but not here!
      3. Power of naturalization
         1. We could say immigration power. But this isn’t really about that. It’s about deciding which immigrants have citizenship
         2. it’s not about immigration, so immigration is a “missing” power.
      4. Necessary and proper clause.
         1. Allows Congress to pass laws not just for Congress’s own powers, but for President’s powers!
         2. Congress could pass laws N+P to execution.
      5. Section 9
         1. Bill of attainder clause and ex post facto clause also have int’l implications
         2. Bill of attainder – this was about loyalists! Lots of bad things were done for them.

concept rooted in the SOP. Meaning – that legislatures cannot be trusted to engage in evenhanded application of laws (particularly in the criminal context). Bill of attainder are punishments directed at individuals. And they are SOP violation. Because only courts can engage in evenhanded application of law

Bill of attainder limits states (one of the only clauses of the constitution which does so).

* + - * 1. This is paired with no ex post facto laws, which the states also engaged in. Similar concept.
        2. Those provisions actually do have this foreign affairs/national security element.
        3. As does the prohibition on titles of nobility!
      1. Article 1, section 10 – important federalism provision
         1. States can’t do a series of foreign affairs activities.
         2. Trying to keep states out of field of foreign affairs activity.
         3. (however, there are still unanswered questions here)
    1. foreign affairs powers are given to the President
       1. Commander in chief of the armed forces of the US (Art. 2, section 2)
          1. This is clearly a momentus power.
          2. Not thought to be such at the time of the founding.
          3. Q: what is the relationship between the commander in chief’s office and the war powers given to Congress?

Some modern presidents will say: Congress can’t do anything. Congress can help me, but they cannot stop what I’m doing. This is the Bush interpretation.

* + - 1. “Take care” power
         1. This is the core of the executive.

Power to faithfully execute the laws.

It’s actually a duty to execute the laws, and it has important foreign affairs powers.

* + - * 1. Two views

weak view: it’s important but subsidiary to Congress because they pass the laws. But ultimately authority lies in Congress.

Stronger view: Duty to execute laws includes LON and treaties, as understood at the founding! But this has extreme implications for contemporary issues. e.g. it means that President is bound by int’l law.

ex. President Washington ordered the prosecution of the privateers under the law of nations, even though there was no US statute!! And I can even incorporate it into a criminal offense without an action by the legislative body.

Also see this in Pacificus-Helvidius

* + - * 1. Generally, these means that President’s powers shrinks and grows depending on the laws that Congress passes. But including the law of nations gives him, even from the beginning, a whole body of law that executive has power to execute. He can execute the duties and rights of the US under the LON!!
        2. This may provide a good explaination for the missing foreign affairs powers in the Executive.
      1. Treaty power
         1. President can make treaties with the advise and consent of Senate.
         2. This is parallel to the appointments power, which is majority (whereas this is 2/3rds)
         3. requires a two-thirds majority in the Senate.

Senate must pass a resolution of consent. That requirement of two-thirds turns out to be extremely difficult to achieve. Major feature of American history is the difficulty in getting treaties approved. So practices have evolved to develop other ways of making agreements, e.g. Executive agreements (made by President) or Congressional-Exec agreements (authorized by Congress).

* + - * 1. application of legislative constraints are treated differently. e.g. if a treaty says that there is no picketing near a foreign embassy, which might violate the 1A, this is still okay.
        2. Treaties are made by the supremacy clause supreme law of the land. Treaties are made law in the US. Gives rise to what we call the self-executing treaty doctrine.
      1. Appointments power/power to appoint ambassadors
         1. This means that President can appoint diplomats/ambassadors
         2. He is the “organ of intercourse”. Hamilton says “sole organ”
         3. Curtiss-Wright case – President is the “sole organ of the nation” in foreign affairs.
      2. note: this is the end of the President’s powers. We can build these powers up, but compared to Congress, they are small. It’s tough to understand where the President gets lots of power.
    1. The Judiciary: Article 3
       1. Disputes where US is a party, admiralty/maritime law, prize.
          1. These are extremely important – means that judiciary is in charge of interpreting law of war!
       2. All cases with ambassadors. All cases where suit is brought by foreigners. And most importantly, it has power to interpret and apply treaties.
       3. So the judiciary is playing a very large role, something which tends to be under-appreciated.
    2. Arts. 4, 5, and 6 are the miscellaneous parts of the constitution. Art. 4 isn’t really relevant to this class. Art .6 contains supremacy clause.
    3. Supremacy clause of the constitution (Art. 6).
       1. Says that federal law is supreme over state law, includes treaties
    4. the supremacy doesn’t refer to the law of nations (LON). It specifies treaties and leaves out the LON. This is a big puzzle!! Has given rise to great disputes about what the significance of this.
    5. Another open question: can federal gov’t do things wrt foreign affairs powers that it can’t do wrt its other powers?
  1. International Law
     1. Monism v. Dualism
        1. Relationship between int’l law (LON)/public law and domestic (municipal) law.
        2. There are two views about this relationship:
           1. Monism: there is only one legal order in the world. And it has a hierarchy. Usual hierarchy: int’l law is at the top, and municipal law is below. And within municipal law there is a hierarchy of laws (e.g. constitution is supreme law, statutes, common law, etc.).

Monism on treaties: a country makes a treaty, and it is part of its law. There is only one system, and the treaty is part of our law.

Basically there is only one system of law.

* + - * 1. Dualism: actually hierarchy is not the way to think about this. There are two different legal orders. Int’l legal order and municipal legal order. They are separate, and each defines for itself what the relation of the other is to it.

Basic proposition of int’l law: state cannot excuse int’l legal duty by passing a law in the leg. So int’l law is supreme over municipal law.

On the other side, the question of how the municipal law understands int’l law. Ordinarily this is something that countries define in their constitution. Could say that int’l law is supreme over the constitution, or that int’l law inconsistent with the constitution isn’t part of our law.

the trick is that, under a dualist view, even where the municipal law refuses to recognize the validity of an obligation as inconsistent with the constitution itself doesn’t meant that int’l law is not valid. Just means that it’s not part of domestic law.

This would mean that the Exec, leg, and judiciary doesn’t have to apply it.

The takeaway: you can have a weird situation where country is bound at the int’l level but is incapable of acting at the domestic level.

Dualism says that municipal law is where you look to see the extent to which int’l law is part of our law.

Seems to clash with supremacy clause (says that that treaties are the supreme law of the land)

Accepted view today: a treaty, via the supremacy clause, is maybe equivalent in municipal law to a statute. Therefore the principle of the “last in time” rule applies. So if you want to know what the law of the land is, you look at whichever was made most recently/last expression of legislative will, as between statutes and treaties.

This is subject to the Charming Betsy doctrine, which says that a statute must have a clear statement to violate a treaty.

* + - 1. Bottom line: today, when determining whether statutes or treaties are supreme, look at which is last in time
    1. self-executing versus non-self-executing treaties
       1. there are certain types of treaties which are not the law of the land (the supremacy clause not-with-standing) because there is something about the treaties itself which means that it is not the supreme law.
       2. Where something is non-self-executing, Congress is supposed to execute, to pass legislation – so the municipal law is not the treaty but the legislation. So the treaty isn’t directly incorporated into the law of the land.
       3. Again, this is a distinction that exists in current law which is very much challenged in the history.
    2. CIL
       1. the main form of law at founding, which was LON, is not be mentioned in the supremacy clause, and that treaties (which were the less important law at the time) would be specified. (Same issue in Art. 3 “arising under” jurisdiction.)
       2. Note on history:
          1. US was unusual to have self-executing treaties. In the UK, parliament has to pass implementing statutes – king cannot just agree. It was an innovation of the American constitution to incorporate the law directly.
          2. The great English commentators (e.g. Blackstone) thought that common law was the law of the land in England, not because Parliament had said this but because the courts had said this; Common law was just treated by courts as part of the law of the land.
          3. So, CIL (the Law of Nations) was incorporated like the Common Law; the idea of incorporation was simply assumed – that this same doctrine applies to the US!
          4. Art. 3 applies to admiralty/maritime law. These were part of the LON. If you give courts jx over certain kinds of LON, they will incorporate it as part of the law of the land.
          5. The framers of the constitution didn’t feel the need to specify that the LON was part of the law of the land.
          6. Still leaves the question: we still don’t know what LON is hierarchical to domestically.
       3. From a contemporary point of view, the last in time rule is a well-established principle. This is taken to mean (today) that if Congress wants to violate a treaty, they just have to pass a law, and so it’s no longer a law of the US.
       4. We have moved from early period where people thought that CIL/treaties were part of our law automatically, to today, where they are only part of law when Congress passes laws to enforce statutes through domestic law.
          1. This is a radical dualist view.
          2. Normative rationale: int’l law is undemocratic.
       5. With respect to CIL, there is a strong view that it is not part of our law at all, that incorporation is wrong. This isn’t the conventional view, however. We might be moving that way because of the contemporary views of jurisprudence. But that hasn’t happened yet. We still adhere to an incorporation doctrine wrt CIL.
          1. Today the crucial debates are about what it means for it to be incorporated. e.g. must states comply with CIL?
          2. Is the President bound by CIL? Can he violate CIL? The standard wisdom is that the President has the power to disregard CIL. We will read the Paquete-Habana case, which has been interpreted to mean that the President has the power to disregard CIL. (DG things this is a serious misinterpretation of the case!!)
    3. It’s seen also that Congress can pass a law to violate CIL. On the other hand, CIL won’t override an earlier statute. It’s not like treaties, which are equal to statutes – it is inferior to statutes.
    4. So CIL might be the lowest form of law in the US. Courts will apply so long as no other law is contrary. Or perhaps states are bound but no others are. Some debate but basically it’s a lower from of law.
  1. The Pacificus-Helvidius Debate
     1. law of neutrality
        1. Law of neutrality exists as part of the law of war. Deals with the commercial activities of neutral powers.
        2. very important for the US bc US is trade-based economy, and has policy of neutrality in European wars
     2. dispute is about whether the President should/can declare neutrality (Hamilton) versus whether President shouldn’t/can't declare neutrality but US is still neutral until at war so it’s proper to warn Americans of their duties as a neutral power, even being the basis for criminal prosecutions without statute (Jefferson/Madison)
        1. Is the proclamation a statement to foreign powers that gov’t doesn’t think we must go to war? Or is it just a statement that we’re not at war yet and telling citizens about their legal duties?
           1. Hamilton is desperate to establish that the US will be neutral in the war. And the treaty which is the obstacle to US remaining neutral… he wants to interpret the proclamation as prejudging that issue!
           2. Jefferson: wants to leave open the whole question of the treaty. Partly to leave open the question of what to do, partly we don’t want to throw this in France’s face.
     3. SOP (Does the President have the Constitutional authority to declare neutrality?)
        1. They disagree on:
           1. What the proclamation implies

Ham: this is a proclamation that says the US is at peace. It’s also a proclamation that the US isn’t under an obligation under treaty (meaning Art. 11 of the alliance) to go to war. Says that the President has interpreted (officially) Art. 11 and nothing in it requires us to go to war.

* + - * 1. Relative power/roles of Congress and the President.

Hamilton never says that Congress cannot disagree with his interpretation of the treaty. So it’s an official interpretation of the treaty but it’s not necessarily binding on Congress.

Madison: he is talking to the warring parties and he is saying that we don’t have obligation under treaty as the official representative of the US; So it’s partly an interpretive debate about what the proclamation is about.

* + - * 1. Whether there are concurrent powers

Hamilton: lots of things that President can do will affect how the legislature conducts its powers. They cannot be hermetically sealed. E.g. President has a duty to interpret treaties. So here you have a concurrent power!

Madison: the idea of concurrent powers is incoherent. What a mess if you have two powers that operate independently of one another.

The President can do lots of things that affect the leg – this has to be true.

BUT, If the argument is that the President has the duty to execute the laws, which include the duty to execute the laws when the US is at piece, assuming he looks at the treaty and finds it says we have to go to war, what does he do? Would the leg have to declare war, in that case?? If that is true, then what function is the Exec playing to interpret the treaty? Isn’t he just meddling? Isn’t it just a potential to embarrass the leg?

* + - * 1. Role of the judiciary
        2. Treaties

Hamilton: Treaty power is in the President and Senate. In the exercise of some of his powers, there may be situations where he could legitimately suspend the operation of the treaty. e.g. President has power to receive ambassadors, etc. Hamilton is making the argument is that the power to receive ambassadors isn’t a merely formal power but it’s a substantive power about the decision to recognize foreign gov’ts. And it can affect whether treaties continue to have affect.

Madison: you can only understand the scope of the President’s powers if you look at the law of nations! If you want to know what the power to receive ambassadors is, you look at the LON and the consequences of non-recognition.

under the LON there is a duty to recognize. Only time it is legitimate under the LON not to recognize is where there is no de facto gov’t.

* + - * 1. Whether warmaking is executive or legislative in nature

Madison: If Congress has power to declare war, and power to decide whether to go to war is part of power to declare war, and this is exclusive, how can there be concurrent power

* + - 1. Madison: Yes, the President can issue a proclamation which notifies Americans we are neutral, because only Congress has the right to declare war.
         1. Limited understanding of President’s role in foreign affairs
         2. Judiciary has supervisory role
         3. Foreign affairs are legislative in nature
         4. Don’t give more power to Executive, as war is the nurse of Executive aggrandizement.
      2. Hamilton: President has the power to decide what to do – not just keeping the peace, but deciding US stance. Proclamation is saying that we have no obligation to go to war with France (judging meaning of the treaty)
         1. Textual vesting clause argument

Argument: the language in Art. 1 is different than language in Art. 2. 1 says “leg powers herein granted.” But Art .2 says “exec power shall be vested in one president.” There is no “hereinafter granted.” So it should be seen as a grant in bulk of all powers in their nature executive.

So the first clause grants him everything that an executive would have, consistent with the other provisions of the Constitution.

There are two gross embarrassments to the argument:

1. Art. 3 has the same language as Art. 2… and we have always thought of judicial power as limited.

2. If they gave Pres everything that an Exec should do, why did they bother specifying in the rest of Art .2 the specific powers, which aren’t even limits on Exec power?

Other objections

History: it was added by the Committee on Style at the very end.

Structural argument: The constitution is meant to be one of limited and enumerated powers.

* + - * 1. Proposed interpretive rule: should narrowly construct Congress’s war powers
        2. Concurrent powers theory
        3. Antecedent state of things (President can create antecedent state, even where Congress has power)
        4. Role of judiciary: more limited, although still have judicial enforcement of treaties and judicial independence)
        5. Foreign affairs are executive in nature
        6. Congress bound by LON when it exercises its authority
      1. However, they both agree that President can issue proclamation, that President cannot initiate force of own authority, that President has no authority to terminate treaties (because it’s a law).
    1. Int’l law/domestic
       1. Both agree that treaties are self-executing (although they also agree that some are not)
       2. LON is part of law of US under the Constitution, and Exec has duty to execute it
          1. Madison’s view: you can only understand the scope of the President’s powers if you look at the law of nations! If you want to know what the power to receive ambassadors is, you look at the LON and the consequences of non-recognition.

under the LON there is a duty to recognize. Only time it is legitimate under the LON not to recognize is where there is no de facto gov’t.

on power to declare war – when the decision is made to go to war, what happens is a whole new body of law becomes part of the law of the United States.

A “new code for the Executive.”

Idea: when the US is at war, the law of war suddenly comes into being, and supercedes the law of peace (ordinary laws) to the extent that they are inconsistent. This is quite a radical idea!

Idea is that there is something that we call the municipal law. And there is something we call the public law of nations/law of nations/law of war.

When the gov’t acts during peace time, and in relation to its own citizens within its own territory, it is enacting its own municipal law.

When the gov’t is acting within the international realm, or it is acting not as municipal powers but under powers of law of war... the law that applies becomes the law of nations/law of war, not the municipal law. Municipal law is superceded by the law of nations.

* + - 1. Hamilton implies that the executive has a duty to execute the law of the nations, just like he has duty to execute all the laws of the United States.
         1. LON was part of our law that the executive had the power to execute. So the scope of executive power varies with the scope of law of nations.
         2. this gives president a lot of power; LON very permissive body of law. Lets them do a lot in the int’l realm.
         3. So it wasn’t a constraining idea. It was a radically empowering itdea for the Executive.
      2. Hamilton arguably goes so far to suggest that even Congress has obligation to follow the law of nations.
         1. Hamilton has a monist view here. The power to declare war is in Congress. Where it is up to US to go to war, it is up to Congress. But when Congress is obligated under a treaty to go to war, then Congress is obligated (maybe constitutionally obligated) to go to war!
         2. Suggestion in Hamilton (present in his other writings) is that even leg is obliged to follow the law of nations

1. Lincoln and the Civil War
   1. Civil War Themes
      1. In the civil war, the exercise of war powers by the President and Congress can be divided into three categories (not tightly sealed):
         1. Domestic war powers
            1. Domestic: suspension of habeas corpus is primary example. Special powers that the gov’t has during a time of war/emergency wrt citizens/residents of the US in the territory of the United States. e.g. Japanese internment in Korematsu. Emergency powers fall within this category.
         2. Int’l war powers
            1. Int’l war powers: Rules of constitutional law that govern conduct of hostility with the enemy, usually outside of the United States. The main point is that it deals with enemies, the way in which war can be conducted vis-a-vis enemies or neutrals (but not vis-a-vis our own citizens)
            2. Sub-category: law of military occupation
         3. military law: regulating the internal affairs of the military; begins w Articles of War; readopted right after Constitution is adopted, pursuant to Congress’ power to make rules for forces; amended various times; given new name after WWII – Uniform Code of Military Justice
      2. Habeas Corpus:
         1. Who has the power to suspend the writ? [Merryman; Lincoln’s message; Bates; Binney] (Was Lincoln’s suspension of the writ constitutional?)
         2. What is the scope of the suspension (does it get you to martial law)? [Milligan; Lincoln’s letter to Corning]
      3. Theories of the war:
         1. Law of war
         2. Municipal law/criminal law
         3. Emergency powers under the domestic constitution/martial law
         4. law of occupation
   2. Sources
      1. on Suspension
         1. The Merryman case
            1. Facts:

One of the Maryland militia men. Allegedly engaged in blowing up bridges etc. to prevent troops from coming through Baltimore. Arrested. Picked up by military in the middle of the night. Brought to military fort.

Writ of HC is filed on his behalf.

* + - * 1. Opinion: Prez lacks power to suspend HC

Location within the Constitution. It is in the part about limits on Congressional power. Seems like it would be odd to have it in Art. 1 if it weren’t connected to Congress’ powers. Seems to be implicit in its location.

Binney has a number of replies. Lengthy discussion of how it ended up there in the Philadelphia Convention. It went all over the place. It was even in the judiciary.

HC is an Anglo procedure; a clear reference to English history. Want to prevent grave abuses of monarchy. This was at the core of English constitutional history: success of parliament in wrenching HC suspension from the Crown. It would have been amazing if the framers would give it to the executive, where they were trying to cut back on Executive powers across the board

Binney: it’s an error in theory to act as if you should reason from English constitutional history to the constitution of the US and the President.

The President and the King are not similarly situated.

It would be unsafe to reason from the kinds of concerns that make Parlliament take powers from King to reasons Congress should take from President.

Prez has a duty to execute the laws! He can’t make law! if it involves making on law, he can’t do it.

Binney: this is why they give him the power to suspend HC, because he doesn’t have any of the powers that make it dangerous; e.g. he is elected; short terms; doesn’t have power to declare war, etc etc.

If it comes from Congress, who knows who is accountable?

* + - * 1. In the end, though, L ignores Taney
      1. Lincoln's July 4, 1861 Message to Congress
         1. when Lincoln is elected in November of 1860, the response of the South is to move to succession. Buchanan is President and really does nothing. Conflict begins in South Carolina.
         2. Happens that Congress is not in session. Lincoln decides to call for a special session of Congress (this is his Constitutional right). But he waits a while AND he delays it for ten weeks! Disputes about why he delays that long. Seems possible that he doesn’t want them there because he knows that there is going to be a huge dispute! He delays it until July 4. Sends them this message

Explains what happened

Explains why sucession is unconstitutional

Explains what he has done in their absence.

announces that the US gov’t, through the navy, will impose a naval blockade on all of the ports of the South.

Suspends HC along rail lines leading into DC

enlarges the army

calls out militia

* + - * 1. There are problems with each thing Lincoln did

Suspension of HC

Different from other issues: L doesn't ask Cong to ratify

He knows that they are going to ratify the other decisions. But here, he finds this middle ground. Says – I think I can do it. And I didn’t need you to do it. But I will abide by your legislative authority.

Youngstown could provide a solution

L is saying this is a concurrent power. He is not claiming that the President has the exclusive power to decide about HC. Just that he has it too! In contrast to enlarging the army, which he DOESN’T have the power to do concurrently.

the concurrent power argument seems weak. The clause itself doesn’t say anything. He is claiming a general concurrent power. But why there would be a general concurrent power from this clause doesn’t really make sense

Political motivations

there was huge division within Congress. It wasn’t clear that they could have agreed about anything. It takes them 2 years to pass the HC act – which authorizes the suspension of HC.

They can’t come to an agreement. So L says – I will abide by your judgment. It is a concurrent power, so I could act on my own. But If you tell me I can’t do it, I’ll stop.

blockade.

Blockade is a term of the law of war, which has to do with the law of war.

One of the rights of belligerent parties under the law of war is the right of blockade. When a belligerent party blockades the ports of the other party, it closes those ports to neutral trade. Any neutral power that attempts to enter port and “run the blockade,” their ships are subject to capture, seizure, and taking as prize.

requirement of a blockade: it must be effective. You have to have your naval vessels outside of that port, and enough of them that it is reasonably difficult to run the blockade.

This is a huge problem, because the US has no military forces. No standing army; very limited navy. Washington isn’t even defended.

Lincoln orders the whole navy to go blockade the southern ports, but there is really no way to do this.

If he had just closed the ports, this would have made any neutral power guilty of a criminal offence. But if they were tried they would have a right to a jury trial/usual rules under municipal constitutional law. AND they would have to be caught when they were in American jx. Because countries at that time had no municipal criminal jx on the high seas.

Law of neutrality

Neutrals: you guys have a war, we are not involved, we should be able to carry on as we were. Can trade with the belligerent powers.

1. Accepted exceptions: neutral cannot carry contraband to a belligerent during time of war. If neutral merchant that is carrying contraband – ship can be stopped on the high seas.
2. Can’t carry enemy-owed property. Any property of the enemy carried on the high seas, can be confiscated.
3. Blockading belligerent can stop ships from going in. If neutrals are blockade running, they are subject to confiscation

If Britain and France recognize the south, this could be a prelude to them intervening. And if the North doesn't accept that mediation, they could have come in and this would have dramatically changed the strategic balance!

But at the same time when Lincoln imposes the blockade, he is treating the South as an entity. Looks like he is calling it a separate country!

So Seward has to convince them that they shouldn’t recognize as separate country but as a belligerent power.

Britain and France issue proclamation of neutrality in the conflict between belligerents, but refusing to recognize the independent states.

L claims this power under his commander-in-chief power. Imposing a naval blockade is something he can do under his own authority.

Lincoln’s theory is that it is a defensive war. US was attacked. So in that situation, he can consider this a war which is imposed on the US. Can respond using powers.

The Armies:

Constitution says that Congress has the power to raise and support armies

The President doesn’t have the power to do this. This is a legislative power.

And he spends money, which hasn’t been appropriated.

The militia:

Lincoln is on a stronger footing here;

President doesn’t have the power to call up the militia, under the constitution. The militia clauses only allow the President to call forth the militia after Congress has provided for it.

But what Congress does, very very early on, is pass the militia acts.

In the case of an invasion, or in the case of a combination too difficult to suppress by the ordinary means of law enforcement, the President is authorized to call out the militia. SO there is a law on the books which gives the President the power to decide whether therei s an incurrection great enough to warrant calling out the militias.

Using money

Lincoln used money to raise and support army, which wasn’t appropriated by Congress.

* + - * 1. Suggests a Theory of Emergency Powers

Prez says, “I don’t generally claim to have my powers expanded by war/emergency. But if the body that has the power to act isn’t in session, in their absence, I can take actions that they would have been able to do. And when Congress comes back into session, they can ratify.”

President’s powers are only there because the branch who has the authority is absence.

This is a wide theory of Executive power. If something has to be done immediately, the Exec can act

Here, nothing L did was beyond CONGRESS’S power. This is important because that means it wasn’t unconstitutional. And L assumed Congress would have ratified.

This rationale: this is Lincoln’s theory of emergency powers (one of them).

Problem with this theory: it’s a theory of fait accompli! There is an ‘antecedent state’ set up. Things cannot be undone, always!!

* + - 1. Attorney General Bates Opinion on the Suspension of Habeas Corpus
         1. Argument from departmentalism: Idea is that each branch has the authority/duty to interpret constitution within their own branch, But they don’t bind the other branches. There isn’t one authority that has the meaning over the constitution. It’s kind of a diplomatic question of how you resolve conflicts among them.

Lincoln ignored Taney. This was legit because he doesn’t have to listen to the judiciary.

* + - * 1. Oath clause as a grant of power

The President’s oath is different from the other oaths. “Defend and preserve” rather than just “uphold” constitution...

* + - * 1. Bates seems to equate suspension of HC with martial law

it follows from the suspension itself that the judiciary would be unable to get involved in military situation.

So President has power to suspend HC: as commander in chief, he has authority to declare martial law. Which includes power to suspend HC. This is why suspension clause is in funny negative.

let’s not think about this as subordination of civil to military, because Pres is really military.

* + - 1. Horace Binney Pamphlet on Habeas Corpus
         1. Binney is concerned about exec/leg powers.

If clause said that habeas be suspended, then it would be suspending law of Congress – which would be a legislative act; but it doesn’t say that – it says the privilege of the writ.

It’s not a suspension of the law. It’s just a denial of the privilege of exercising the right in individual cases.

* + - * 1. English analogy doesn’t work.

Parliament has the power to suspend the writ when it choses.

The Constitution didn’t allow that. There is a constitutional standard... e.g. in times of national emergency.

It’s like a Constitutional ‘law’ which already determines the circumstances.

So figuring out if those conditions hold is a finding of fact, which is just an executive act.

The President is the right person to decide about whether we are in a situation where the facts obtain.

ultimately not persuasive

all of the constitutional clauses can be read in this way

e.g. raise and support an army; all of Congress’s war power – they are ALL judgments of public safety in the context of war.

The Constitution consistently gives these powers to Congress. Not because Congress knows more. But we don’t want the President making these judgments. We worry about the Executive making these types of judgments.

President might not have the right incentives.

* + 1. Commander-in-Chief Powers, Martial Law and Military Courts
       1. Ex Parte Milligan
          1. Background

So what Milligan seems to be about is a martial law military commission,

it is in the North/in the Union, dealing with civilians, not actually charged w LOW violations, but having engaged in activities that threaten the armed forces/military effect of the US. E.g. obstructing the draft; speech activity that the military authority feels threatens the effectiveness of the military.

One way of understanding some of these tribunals: it might be that Lincoln is thinking that they have the right to arrest. Which allows preventive detention of Milligan. And purpose of military commission is to decide whether they are justified in holding him and for long.

You could reinterpret what they are doing as just figuring out whether it was justifiable to hold these people. Military commission can decide how long people should be held for.

As long as it is limited by the period of war, maybe military commissions are just a way of mitigating the lack of HC.

Could understand as a LOW tribunal

He is charged with violation of the law of war. So maybe they were not thinking about it as prosecution under martial law but under law of war

It might be that there was kind of confusion about the whole thing... maybe it shifts from law of war rationale to martial law rationale and is then rejected on that basis.

* + - * 1. Decision

Basic holding: If civilian courts are open, you cannot try a civilian citizen in a military tribunal

broadest interpretation: you can’t apply law of war, in military commissions, except if the courts are closed. DG things this is too broad an understanding.

Narrower: You cannot used military commission against “citizen in civil life.” He is distinguishing between person who has never been in the Confederacy/isn’t a guerrilla but rather is traitorous citizen.

Martial law is local: it only applies where there is actually fighting going on

It doesn’t take up the unilateral suspension issue, but it suggests that Congress can control President. Congress has plenary, if not exclusive, power over suspension.

What does Milligan say about the powers of Congress and President over suspension, in view of the 1863 Act?

All 9 justices agree that t hey are enforcing the restrictions on the suspension which are in the 1863 act. At a minimum, they accept Lincoln’s position that it is concurrent power. Congress has plenary authority to control the suspension of HC, even if it doesn’t have exclusive authority.

Maj and Concurrence disagree on the scope of Congress’s authority to authorize martial law.

They all agree that the HC Act of 1863 implicitly prohibited use of military commissions and so Lincoln acted unconstitutionally when he used them.

Majority: Congress couldn’t have authorized even if they wanted to.

Chase: wants to preserve that power in Congress.

* + - * 1. Chase Concurrence

based more on separation of powers reasoning; power to suspend is in Congress

* + - 1. The Prize Cases
         1. Facts:

Naval blockade: closing off the ports in the Confederacy to shipping/travel.

Lincoln’s position: South has not seceded. No de jure existence. Non-entity in law. Ports in south – are territority of the US (on Lincoln’s view).

Any country, on its municipal authority, can close its ports. Problem: there was no law allowing closure of ports.

He doesn’t call for a closure of the ports. Instea,d he imposes a naval blockade. This is a reference to the law of war/law of nations. Int’l law blockade. Directed to the rest of the world.

Prize courts

It was completely accepted that any enemy ship on the high seas could be captured and confiscated.

Procedure: whenever a belligerent vessels seizes a ship for any of these reasons, they were obliged to take it before a prize court (admiralty), which was just the district courts.

Federal court would adjudicate the int’l law claim.

IF there was no probable cause for the seizure, the captor would be required to pay damages. Int’l prize law.

Question is – what is the constitutional authority for the President for imposing this naval blockade, then applying the LOW to confiscate the property of citizens of south + neutrals. Court upholds this power.

* + - * 1. Opinion

In a sense, the justices are ruling on L's theory of the war; whether Int'l law of Prize applies at all

For all practical purposes, all justices agree, and affirm the most far-reaching theory under which the federal government is acting in the Civil War.

the President can respond to attack on the US by bringing out the war powers. It doesn’t have to wait for Congress to decide

Int’l law recognizes a civil war as a war. And therefore the President is authorized to exercise the rights of the US in war.

the property of anyone who resides in the hostile territory is considered enemy property. Doesn’t depend on personal allegiance

Tradition of law of war: when two nations are at war, everyone residing in the territory of enemy state is an enemy.

* + - * 1. Dissent

Congress has the power to declare war and also to provide for the calling out of the militias. President can’t do anything until Congress acts.

They acknowledge that President can use military forces and militia to respond.

BUT, this is the case because of various laws passed by Congress (the Militia Acts).

One that says that the President has the power to call out the militia in the event of foreign invasion. Another – to respond to large insurrection. Another – military forces can be used.

* + - * 1. Brown case is in the background.

President may, as a general rule, exercise the belligerent rights of the US.

But Brown requires separate authorization by Congress.

Dealt, in particular, with property of the enemy that was in the territory of the US when the war broke out.

Move in Brown to place limits on the President is a separation of powers move. They could have made a 5A argument, or something. But Court doesn’t do this!! Presumably because the Court thinks that there is no constitutional inhibition from the Bill of Rights

* + - 1. Lincoln Letter On Martial Law and Habeas
      2. Benjamin Curtis, Executive Power
         1. Most of article is based on Sep of Powers and Federalism
         2. His basic argument against the EP:

Problem 1: claims that the President is annulling law. In any event President cannot do this. You might see him like Chase for this reason.

But he frames the whole point in federalism/SOP terms. Shows the deep structural similarity between SOP and federalism.

Problem 2: it is beyond federal power. Not only is he annulling a law (which is what legislatures do, not Executive), but he is annulling law of the states, which are protected by the 10A.

federalism argument very strongly in relation to the military commissions.

He is taking all of these legislative acts and is usurping Congress’ role.

Doesn’t argue that it’s violating rights.

* + - * 1. What powers does the President have, on his account?

He has the powers of a general. He mentions the law of war, but DG thinks that his general category here is martial law.

He conceives of it in a geographical way. Martial law is on the battlefield. The commander can do many things in the zone of military conflict, but that’s the limit of his powers.

He suggests that even within that there are constitutional limitations on the commander. But the first and most important step is seeing martial law as coextensive with the battlefield.

* + - * 1. doesn’t accept the whole view that we see in the prize cases that this is a war, in the international sense

We don’t have situation where everyone in the south is an enemy subject to martial law!

If this really were an int’l war, and American troops were in Canada, that would be a situation where the law of war applies. Whereas here, since it’s all the US... it doesn’t apply.

In principle, martial law is t he power being exercised by the military, and they can use it when they are in zones of military conflict. And in those situations, the commanding general has extensive powers. But not beyond that.

this is a way of thinking about the civil war which is very different from what we’ve talked about. Seeks to avoid the problem of creating enemies out of citizens.

* + - * 1. Takeaway from Curtis: there is large alternative vision of how the Constitution applies during the civil war, which is in some sense the road not taken.

idea that war is the wrong legal category.

The way to think about the conflict is the way to think about civil disorder/riots. You have to bring out heavy hitters to suppress. And martial law prevails.

But you would only go after the people engaged in riots. You wouldn’t be able to sweep more broadly.

Lincoln, and the administration: were attracted to this idea! He didn’t want to recognize confederacy as a belligerent.

Wanted to treat them as traders.

Didn’t want to have int’l repercussions.

There were lots of reasons for not liking war.

But we see that he imposed the naval blockade, and there was no other way to justify other than a war, and that becomes the dominant view.

* + - 1. Grosvenor Lowry, The Commander in Chief
         1. prefigures the Prize Cases.
         2. Curtis has the wrong model. Citizenship is not the primary status. Enemy status is relevant. In rebel territory, citizenship status is supervened by enemy status.

This doesn’t depend on whether they are member of hostile territory. But rather by virtue of residence, the south is hostile territory, and the law that applies to enemy is the LOW, rather than the Constitution.

* + - * 1. Relationship with LOW is strange

Constitution brings into it non-constituitonal law, Lowry calls “Extra-constitutional”

But the source of it is the constitution; The Constitution provides what is needed. These are perfectly constitutional measures, that the Constitution embraces.

Idea that we have moved away from Hel-Pac that we have incorporated the law of war. Lowry accepts the basic premise but is more aware of the difference between int’l law and the constitution

* + - * 1. Lowry’s first reply: President has not actually annulled state law. He has just suspend their particular implementation.

here is no sense in which EP actually annuls/ends/overrules slavery, on Lowry’s account.

So the myth that Lincoln ended slavery, it’s not true that EP annulled slavery as a legal matter. Every state that still had laws allowing slavery still had them.

* + - * 1. To the extent to which EP is a penalty, it's problematic for LOW framework: the law of war is not penal.

It is not punative. It is a preventive regime. You can’t confiscate property under LOW to punish someone. If you punish them, you are violating the law of war. You can only take property that you need for military purposes, at most.

At a minimum there must be military use for property. It’s not taken for punishment.

Counterargument: the reason to do this is that the slaves do to things:

1. They support and sustain the economy of the south, in order to enable to confederate army to fight. Crucial part of the Southern war effort.

2. If they come to our side, which is what I’m encouraging them to do, then they can be part of our military forces!!

So you’re both harming enemy’s effort and helping our side.

* + - 1. Sidney George Fisher, Trial of the Constitution
    1. Emancipation
       1. Lincoln's Letter to Conkling Concerning the Emancipation Proclamation
          1. Gathering of mostly democrats in Illinois. Gathering to challenge EP; use of freed blacks in the military. Letter is directed answering their objections
          2. L Says that the President has the law of war in the time of war. Means that the President can exercise the belligerent rights of the US in time of war.

Implicitly he categorizes the conflict as war, in that sense.

If we take the southern position that the slaves are property, then they can be confiscated under the law of war.

* + - 1. Reality is more complex. Property capture was permitted, BUT there's a distinction between property captures at sea and on land and between public and private property.
         1. The law of prize which applies to property on the sea: at this period in history there was a broad principle that any enemy property on the sea was subject to confiscation as part of the law of prize.
         2. Property on land (booty): the law had developed quite a bit. In fact, US was strong proponent of humane law of war. Wanted to promote more and more liberal ideas about the law of war. Early treaties – e.g. Ben Franklin and treaty with Prussia.
         3. So there is a problem with Lincoln stating so boldly that all enemy property is subject to confiscation as a part of the law of war. This is insufficiently conservative.
         4. But the move is that L says – although the law of war has liberalized in this respect, the principle remains that if it’s justified to take enemy property, then it can be taken. The restrictions are guidelines. But in strict necessity, there is underlying idea that LOW has a kind of flexibility in it. Cotton and slaves in the south have a special status even though they are private property. They are major part of war effort in the South.
    1. Confiscation: Congress v. the President Confiscation Act Debate
       1. Speech of Browning I
          1. Status of Southerners

He rejects that they are enemy aliens.

They are not enemy aliens, but they can be belligerent enemies. They are belligerent subjects of the law of war.

Or they can be seen as citizens/insurgents.

* + - * 1. He says – we have a constitutional choice, at least in principle, whether to treat them as belligerents under the war or citizen traitors. But legal consequences follow from which choice we make.

We can treat them as insurgents or belligerents, but not both during the conflict. And he then says – we don’t really have a practical choice. If we treat them as treasonous citizens, what is available to you is the ordinary criminal law. This requires execution. And this would lead to mass slaughter.

Basically he is saying that the criminal law is not humane. It is uncivilized warfare and slaughter. It will be so aggravated that the British/French will intervene; Law of war takes account the nature of mass conflict.

Idea is that reciprocity that exists when you have relatively equal military forces up against each other compels both to comply with the law of war.

* + - * 1. Confiscation acts provide for an in rem proceeding against the property itself.

Browning says that this is unconstitutional

First, in rem proceeding are normally about the property itself being guilty; Browning’s point: this is actually changing someone with a crime, finding them guilty, and imposing a punishment. Through in rem process. What happened to 4A, 5A, 6A?

Second, it’s permanent rather than for life of offender; it violates the Treason Clause; Cannot take real property forever. Can only take real property for the length of the life of the traitor.

* + - * 1. We saw that he makes a very sharp distinction between measures of the gov’t that are taken under the municipal powers of the state/sovereign powers, which include the constitution itself/bill of rights. Difference between those acts taken in accordance with municipal powers and those taken in accordance with intenraitonal/public law powers. In this context, it’s belligerent powers.

If the gov’t acts in accordance with municipal or sovereign powers, it can take some harsh measures, but they are all measures within the ordinary criminal law.

If a measure is taken pursuant to the belligerent, international powers of a state, the restraints are lifted, and what is substituted is the law of war.

* + - * 1. In Browning’s view, this is what the constitution contemplates. The framers were familiar with the public law of their time. Although they didn’t say these words, this is what underlies their conception of power.
        2. On Browning’s view, Congress has war powers, but they are all decisions over whether to have war and governing the army, but not about how to conduct the military hostilities once they are in operation. That is power of President.
        3. In fact, Browing thinks that Congress may be a bad place to vest war powers

The idea is that military necessity is always a requirement. Law of war may allow the military to make some measures. But it’s subject to background requirement that it is necessary. Military necessity is always out there, and military commander must take this into account.

It’s a judgment which is context-laden. Depends on what is needed here and now. Judgment that the military commander must make in a more contextual way than Congress is able to do, legislating for the future.

Congress would be purporting to make judgments about military necessity where it doesn’t have ability to assess military necessity.

President’s decisions are typically contextual because down the chain of command means that decision is exercised closer to the point of necessity.

Browning is worried that Congress is not in the best position to judge military necessity.

Difficult to tell how far this argument goes

Is Browning saying that Congress cannot pass a law saying that President cannot torture? is this beyond Congress’s powers?

Is it that Congress can’t force the President to do things which are not justified by military necessary, But they can place limits on how he acts, within the law of war?

* + - 1. Speech of Browning II
      2. Speech of Sumner
      3. Speech of Howard
         1. rejects Browning

Accepts that Congress’s powers over war measures are unlimited, although as a practical matter they can’t actually control.

Howard really thinks that Congress has power to say “take this hill, not that hill.” This seems inconsistent with Chase in Milligan, who thinks that the conduct of campaigns is in President.

Obama administration has adopted this view, to some extent

This is coming to a head because Congress passed legislation (using power of purse) saying that President can’t send detainees into US for civil trial. And that they cannot be released to foreign countries. Obama objected to it not on the ground that it was unconstitutional.

How does this argument go?

History of the word of commander in chief.

Idea of the military being subordinate to civil authority

Points out that Washington was appointed literally commnder in chief.

Yet he is subject to constant supervision of the Congress.

In the constitution, they use the term they had used for Washington.

Had an understood meaning; subject to the authority of Congress.

Follows that they wouldn’t have used the same word.

Basic reply: change to the Articles of Confederation meant that the word is different. The idea was to reject the old meaning – where Congress was meddling with Washington’s authority.

* + - 1. the way we get to this debate is that both sides come to see a similar set of problems. That the effort to pass the Confiscation Act as a municipal law measure was deeply problematic constitutionally. Violated various provisions: Due Process, Treason Clause (no trial, just in rem proceeding), Corruption of blood.
         1. At the end of the debate, the others seem to fix on alternative that Browning offers: that this is not a municipal measure but an action under law of nations.
         2. That’s why the debate turns to being about the separation of powers.
         3. If everyone agrees that the national gov’t can take these acts of confiscation, then the question becomes: which branch has this authority. And what Browning is saying – it’s not Congress who has this authority, it’s the President. Whereas Sumner and the others are saying that Congress has plenary authority.
      2. Miller v. United States
         1. Issue is the Constitutionality of the Confiscation Acts
         2. Court begins by discussing the measures which are subject to belligerent measures. Goes so far as to suggest that Browning was right. If this were an act of municipal legislation, this would clearly be unconstitutional. But if this is belligerent measure ,the BOR woudln’t apply – it would be the law of war we would look to.
         3. SCOTUS says “Of course, the power to declare war means the power to prosecute in any war which is legitimate.”

They seems to accept the Sumner/Howard view. It’s constitution because it’s a belligerent measure.

SC says that it would be unconstitutional as a municipal measure. But because this is a Congressional measure and Congress can take belligerent measures, then it is okay.

* + - * 1. The case doesn’t stand for the proposition that Congress is bound by law of war or not. Court says it’s unnecessary to decide in this case, because this particular measure doesn’t violate the law of war.

Why does the Court hesitate at using LOW as the limit on Congressional action?

There were two kinds of scepticism about application of LOW in the Civil War.

1. Conservative view (see Curtis). This is not a war, in the belligerent sense. This is an internal conflict, and it’s not the same as int’l conflicts, and the powers of the President and Congress are limited. It’s only when martial law is properly present but only in those limited geographical areas.

2. Howard, more radical view. Sure, this is a belligerency. For all intents and purposes it’s a war. But int’l laws of war shoudln’t be fully applicable to a civil war conflict. All of the limits on the law of war aren’t necessarily applicable in the civil war context. Laws of war have fundamental provisions, which he calls rules of humanity, or natural law portion of civil war.

These are of course applicable in civil war.

But law of war also contains a lot of provisions which are like reciprocal rules of convenience, which nations have agreed to wrt other nations. But those don’t apply when a war doesn’t involve foreign powers. There is no need to abide by these types of rules in this type of context.

This is important! Howard is thinking – about Reconstruction! We have lots of obligations as occupiers. Occupier is supposed to leave everything in tact. Republicans are already imagining that when they occupy the South, they want to do reconstruction which is radical. And a LOW theory wouldn’t let them do it.

So they want the LOW but they don’t want all of the LOW!

A third reason: the changing statute of the LOW. This is around the time when the court starts to say that Congress can disregard int’l law. Int’l law is becoming more positivistic. Maybe the court is more far-cited in this sense. Seeing where doctrine is going in a way that isn’t anticipated fully.

* + - * 1. court accepts, in the most explicit way, the belligerent measure/sovereign power distinction\*\*\*\*

Government has two kinds of power.

LOW powers and domestic powers.

This is commonly accepted between the majority and the dissent.

Browning’s view is simply accepted by the SC as the correct understanding.

* 1. Suspension of Habeas:
     1. Martial law:
        1. General category that applies to citizens within the territory of the state, during some kind of time of war or emergency, where the military authority assumes power over civil authority. Will of commanding military officer becomes the gov’t.
        2. Martial law is concept which is potentially extremely broad, where entire civil law is suspended on the order of the commanding officer.
        3. And in the process, constitutional rights are either entirely suspended or suspended in so far as the commander decides to suspend them.
        4. Martial law looks like broad category; suspension of HC looks like a narrow measure which might be taken during a period of martial law.
        5. But could take a number of measures (e.g. curfews, military commissions, defining offences).
        6. Bare in mind that we can think about suspension of HC as one kind of emergency measure which fits in with larger military government theory
     2. Sources:
        1. Merryman: Taney finds that Lincoln’s suspension is unconstitutional (Prersident has no authority to suspend); Congress has the power.
        2. Lincoln’s July 4 Message: Explains his actions.
           1. Calling up the militia: statutory justification
           2. Naval blockade under law of war theory
           3. Authority for enlarging the army: Congress can ratify.
           4. Suspending HC: Constitution is silent about who can suspend; it was legal to suspend. Alternative theory – concurrent power
        3. Bates (bad argument): only ‘the privilege’ is suspended; Departmentalism; executive power in emergencies (oath clause)
        4. Binney (better argument): argues President can suspend; comparative law argument; structural argument
  2. Commander-in-Chief Powers, Martial Law, and Military Courts:
     1. Scope of Habeas suspension:
        1. Narrow view: Davis in Milligan
        2. Broader view: Lincoln in Corning letter – whatever is necessary for public safety
     2. Sources:
        1. HC Act of 1863: Lincoln suspends HC on his own authority; suggests that he thinks there is concurrent power
        2. Milligan: narrow view of what suspension entails (habeas was lawfully suspended; military commission is unconstitutional because LOW doesn’t apply to Milligan (he is a civilian in civil life) and there is a necessity requirement for martial law (can only apply when the courts are closed).
        3. Chase concurrence: Congress could authorize the use of military commissions (mostly because of power to declare war); suggests geographic distinction in what theory applies; radical argument about the government of military power as a source of authorizing martial law.
        4. Corning Letter: whatever is necessary for public safety
        5. Prize Cases: LOW theory of the constitution was a success, so the blockade was justified; sinews of war theory; President limited by LOW/powers defined by LOW
        6. Dissent: Only Congress could declare this a war in the international sense of the term (mimicking Madison/Hamilton)
  3. Emancipation:
     1. What exactly does the Emancipation Proclamation do?
        1. Slaves in rebel territory are declared free. Slaves in the border states stay slaves.
        2. The slaves were freed as property. You confiscate the property, then you free it. Two-step process. Another area where you see uneasiness. They don’t want to acknowledge the second step. But there is debate over whether Congress or President can free.
     2. Lincoln is assuming responsibility to do this. And not relying on act of Congress, let alone worrying about the bill of right
     3. Again, more about the theory of the war & powers
     4. Sources:
        1. Lincoln’s Conkling letter: says he has authority under the LOW.
        2. Curtis: this is beyond federal power; President is annulling a law (federalism/SOP issues); President has CIC powers on the battlefield. Doesn’t accept the LOW paradigm
        3. Lowry: accepts LOW paradigm (like the Prize cases)
  4. Confiscation:
     1. Background
        1. Thrust of the debate: that Lincoln has frustrated the more radical Republicans. Basically they think he has been too slow/prudent in how he has fought the war (particularly on slavery issue). He needs to be pushed. So one of the aims of the Confiscation Act was to force him to confiscate property of people in rebellion, and particularly slave property.
     2. Again, more about the theory of the war & scope of the powers
     3. Sources:
        1. Browning: CA would be justifiable as a belligerent measure but can’t be done by Congress as a municipal measure because it violates the BOR/is unconstitutional (there aren’t emergency powers) [two reads – Cong can’t make Pres do anything v. Cong can’t push Pres to act]
        2. Sumner/Howard: Congress has power over war; historical/structural argument
        3. Lincoln’s Veto Message: Congress can’t limit President when he is acting under belligerent power/can’t push him further than where he wants to go (but note that Lincoln uses municipal language)
        4. Miller: Confiscation is constitution under LOW theory/belligerent measure; but it’s in Congress’s powers (Howard/Sumner view); would be unconstitutional under municipal law
        5. Field dissent: this is a municipal measure, so it’s unconstitutional; LOW theory

1. World War II
   1. Major Themes and Changes
      1. External Doctrinal changes
         1. Change in constitutional doctrine (move from structural limitations on government power to rights-based limits on gov’t power (Carolene Products)).
            1. Congressional power expands, mostly through Comm Clause, and Ct. uses personal rights to limit gov't power via Carolene Products
            2. This clashes with “Browning view” – war powers are limited by LOW.
            3. This creates a dangerous situation

Int’l law is downgraded. Idea of LOW as a limit on gov’t powers is downgraded. Limited powers is downgraded.

So what we might get: there are no longer limits on what Congress/President can do! LOW doesn’t apply. But neither does the BOR, because it was never seen to apply there.

This is the imperial constitution. There are no limits (wrt foreign affairs) in what Congress/President can do.

* + - 1. Changes in international law (move from natural law to positivism)
    1. Separation of Powers
       1. Growth in executive power/Presidents assert more unilateral power (at the time of the civil war, there was no thought that the President could initiate conflict; this comes under major pressure as the 19th and 20th century continue).
       2. E.g. growth of executive agreements has altered the SOP. [Destroyers for Bases]
       3. Classic statement of SOP is Youngstown: modern analysis flows from this case.
    2. International law v. domestic law v. emergency powers
       1. Idea of law of war as a limit on gov’t powers is downgraded; coupled with ‘imperial constitution’ (Constitution applies everywhere!) (see Black in Eisentrager)
       2. Bill of Rights comes to be seen as major source of limits on foreign affairs power of government, as opposed to the law of war.
       3. Beginning of breakdown of distinction between BOR when acting under domestic powers versus LOW when acting under belligerent powers.
       4. Granting access to court in Quirin + territorial theory in Eisentrager begins to change the framework. Makes it less about theory of law government is operating under and more about territory (and citizenship) distinctions.
       5. Normalizing of emergency powers within the Constitution [Korematsu]; no more declarations of martial law (lost of the category) [see also Youngstown]
  1. Ex parte Quirin
     1. Facts: Nazi saboteurs, at least one of whom was an American citizen, tried by military commission in US under LOW and other charges and hanged.
     2. Holding (Stone):
        1. Court asserts jx/grants habeas, despite military order and long-standing LOW rule that enemy aliens in time of war are not entitled to invoke the jx of the courts.
        2. Court says that use of military commission was not violation of constitutional rights, because this is a war crime . It’s a constitutional measure because it’s a real war crime. In essence, the scope of Congress’s authority is defined by the LOW!
        3. No SOP power problem with President creating military commissions (like Chase found in Milligan) because Articles of War (Art. 15) acts as authorization.
     3. Doctrine:
        1. Golove argues that this case generally employs the framework in place during the Civil War (compare with Miller; Prize cases). Saboteurs (enemies) are dealt with under belligerent measures and the LOW. BOR would not have been an obstacle during the Civil War.
        2. The fact that the Court takes jx is different here, though, and is extremely important (a big inroad). Unlike Miller where Congress had given access to courts.
           1. traditional rule: enemy aliens in time of war didn’t have access to court. There was exception for aliens in territory when war breaks out, so they could try and establish their American citizenship. But that was all their right of judiciary review.
           2. The Court just rejects this view, without explanation
        3. And the Court gives a long explanation as to why rights weren’t violated, which is different. (Beginning of the New Deal/rights revolution influence.)
           1. Court spends time trying to show that they are inapplicable, but somehow in their own terms. Instead of just saying municipal and LOW are separate, they say that the BOR was never meant to be applicable to these kinds of measures.
        4. Golove is critical of the holding wrt the President’s power to create military commissions – doesn’t look like Art. 15 authorizes. It’s just a savings clause.
        5. Distinguishing Milligan from Quirin: former wasn’t about citizenship, it was about status of belligerency.
     4. Jackson’s Separate (unfiled) Opinion: (Note, this is not a real opinion – it was abandoned)
        1. Seems to critique granting access to civil courts to enemies (influenced by Ludecke case?). Decision as to whether enemy aliens have access to courts is entirely political decision. Judiciary doesn’t have a role here. (Reciprocity idea.)
        2. Seems to argue that creating military commissions is a unilateral Presidential power – no need to use Art. 15 to justify. And besides, they don’t justify, because they don’t apply to enemies – they’re about a different kind of military commissions than those used in wartime.
        3. Golove thinks that Jackson is more similar to the Civil War approach because he says it’s absurd to say they have BOR claim and he believes that it’s the LOW that constrain the President in this context (not domestic laws) (This is very Browning-esque).
  2. Ludecke
     1. Facts: Deals with Enemy Alien Act – law passed at same time as Alien and Sedition Act. Allows for President to detail enemy nations during time of declared war. Was habeas jx available for enemy alien to challenge what was happening to them?
     2. Holding: No, but individual can challenge whether they are enemy alien (i.e. not national of enemy state).
     3. Doctrine: Seems to influence Jackson in his unpublished Quirin opinion.
  3. Eisentrager v. Johnson
     1. Facts: prisoners convicted in China by American military commission then transported to Germany. Habeas challenge.
     2. Holding (Jackson): No jx. Court doesn’t have authority to review.
        1. Distinguishes Quirin: this is not in US/not in territory controlled by US (as in Yamashita).
           1. So distinction is based on control of territory
           2. Jackson uses this distinction not because it is the really relevant one (the really relevant one is whether under belligerent powers or municipal powers, or enemies versus friendly person).
        2. Four arguments, which will become important in WOT (e.g. functional argument)
           1. “protection” argument

The argument is for why resident aliens, like Quirin, entitled to access to the courts, but non-resident enemy aliens are not.

His explanation – when you admit aliens into your territory, they take on a temporary allegiance, which is an implied promise and an implied promise of protection from them.

So we have no duty of protection to these guys in Germany, as opposed to resident aliens.

* + - * 1. Second argument:

sometimes we might want to relent a little bit about rule about enemy aliens in court because they’re not really hostile. But these guys were actually fighting us, so there is nothing that suggests they are friendly.

* + - * 1. Third, he gives a functional argument.

habeas corpus means producing the body. But if detainee is abroad, you have to bring everyone to the US. This is huge undertaking which will interfere with military decision making.

puts military and judiciary in potential conflict

(These are the kinds of reasons Scalia will rely on later.)

* + - * 1. Fourth, there is a reciprocity argument

If we recognize jx in this case, there won’t be reciprocity.

Of course, this argument applies to Q and Y as well

* + - 1. Jackson then goes on to rule on whether they have constitutional rights. He says that there were not rights violated.
         1. finds that actually if we did the Q/Y analysis, we would find that there is proper allegation, because they are accused of continuing to fight after gov’t surrenders, so they were charged with war crime.
    1. Dissenters: intuition that BOR should always apply, everywhere. Liberal imperial American constitution. Black rejects LOW tradition.
       1. relies on Yamashita and Quirin. We just entertained habeas petitions from enemies. And if you’re saying that BOR doesn’t apply abroad, that’s broad doctrine!
       2. The dissenters, some of the great liberals of the period, seem to have the intuition that the BOR should always be applicable, and they too seem to be moving away from the LOW tradition.
       3. BUT, Once you say that the Constitution has universalistic status (no distinction between municipal law and belligerent measures/LOW), you have to ask the question whether BOR applies in full
          1. Current dominate view, maybe: due process applies, substantive due process applies. This is what Kennedy thinks
    2. Doctrine:
       1. Theory Jackson uses is inconsistent with what the court has done in Quirin, over his informal objections. We see the beginning of a new approach where territory/control become central to determining rights, as opposed to the theory of law which the government is acting under. But note that all of Jackson’s reasons in the opinion are about enemy/friend distinction, rather than territory/control. So opinion doesn’t really address the extraterritoriality question – it is the status of the person that matters in this case.
          1. the very point that he begins opinion making – that disabilities are based on enemy status not citizenship – doesn’t make sense if Quirin is in court but Eisentrager is not. They are all enemies! It might well be that Jackson was right in his Quirin opinion that enemy aliens were not entitled to invoke the jx of the courts. Problem is that he is still relying on that theory. He is still looking backwards to history, and it might be that Quirin/Yamashita are inconsistent with that. The idea that Q/Y have jx is inconsistent with 19th C.
       2. We see good exposition of traditional LOW tradition (e.g. enemies/allegiance). But it’s done from a ‘memory,’ not explicitly. The strict formal categories and reasoning of the earlier period is missing, and you instead get references to practices of other states.
       3. Strange aspect of the case – Jackson denies jx but rules on the merits!
    3. Word on int’l military commissions:
       1. Question arose about whether US military could grant habeas over person convicted by int’l military commission (Harota).
          1. In Japan, the int’l quality of the commission is more of veneer. It was essentially US military commission.
       2. Case came to US: and Court said no, there is no jx! Rationale: as a genuine int’l tribunal, it’s not subject to authority of US alone. It’s not a conviction of an American court but of int’l authority, and therefore it’s beyond the jx of any national court.
          1. (Problem in Harota: it wasn’t int’l military commission in any substantive sense)
    4. Statutory note:
       1. 2254 and 2255 are the important habeas statutes. They are largely post-conviction challenges to constitutionality of trial
       2. 2241 is the general habeas statute. Successor to section 13 of Judicary Act. General right to challenge custody in violation of laws, treaties, and statutes of US.
       3. Remember, jx in US is always statutory. Contitution is not self executing.
       4. 2241 is the habeas jx statute.
       5. What if Congress repeals habeas jx?
          1. Boumediene suggests that they cannot do this. Once they passed habeas statute, they can’t get rid of.
  1. Destroyers for Bases Agreement
     1. Basic issue: Does Prez have authority to do this?
        1. Because it was a novel form of agreement, there was an emphasis on the potential unconstitutionality of what President did.
     2. Jackson’s AG Opinion:
        1. President has authority because there is no obligation imposed on Congress.
           1. We can think of Senate as protecting Congress' interest in treaties
           2. But here, Prez isn't making Congress do anything ; agreement that is immediately executed, so that after that execution, there are no further obligations.

You might say – President sold scrap to private party in South America – no one would think about that as either a treaty or a EA. Or if he sold it to neutral country that doesn’t affect war, this also looks just like a commercial transaction. So here, if he had sold it to Britain in a form of K for sale of goods, it too doesn’t look like an EA at all either!

* + - * 1. Although there is an obligation on US – to give good portion of navy to Britain! This is 50 destroyers! So to say that there is no obligation imposed on Congress isn’t to say that there is no obligation on US.
      1. President doesn’t have to disregard any statutory requirements, here.
      2. Cites to Vattel (this is consonant with international law).
         1. if you look in Vattel, which the framers loved, there are passages where he discusses treaties/compacts.
         2. Compacts: agreements made once for all!

Seems to just explain int’l usages. Says that nothing turns on it.

But this is how we use the term.

The states were allowed to make compacts, albeit with congressional consent.

Is it imaginable that the President had less power than the states?

So perhaps implicitly reserved for the President was the ability to make compacts.

* + - * 1. Now, this is a gigantic leap from a textual point of view. It’s in silence in Constitution.
      1. Textual argument: if states could make compacts, then why not President?
      2. Cites to CIC and sole organ power.
         1. His actual argument here is unclear; Maybe all he is really saying is – as CIC, it’s part of his duties to advance the strategic posture of the US where he is otherwise authorized to act.
         2. This is within the realm of appropriate action for the commander in chief of the army
         3. But he doesn’t actually say that this justifies him entering into the agreement
      3. But President didn’t have authority wrt the mosquito boats.
    1. Different kinds of EAs
       1. EAs are treaties from Int'l law perspective
          1. Int'l law doesn't care how a state carries out its obligations/makes/operationalizes them; the state is, in a sense, a black box
       2. During interwar period, Treaty Clause comes to be seen as a major flaw
          1. some see failure of the US to join the League that was the cause of WWII. This is strong claim but was in fact somewhat widely held.
          2. US has trouble making tariff treaties, etc.
          3. Structural problems

there isn't a level playing field (minority has a veto) means that isolationist wing of US politics was greatly strengthened.

framers of the constitution were opposed to political parties, which they thought of as factions. Since they rejected the idea of political parties, they didn’t consider the constitution for a system with stable political parties. They didn’t anticipate w 2/3rds rule how treaties would become battleground for party politics.

If President put forward important treaty, this would be seen as a big victory for President. So party that doesn’t control the White House has strong incentive to block treaties.

That, mixed with problems of individual ambition (e.g. Henry Cabot Lodge, rival of Wilson’s).

* + - * 1. EAs emerge as a way of avoiding the minority veto in the Senate
        2. there was some prior practice, but generally limited until late interwar ear

So some 19th C agreements were more like gentleman’s agreements – not binding but just coordinating behaviour.

Others were agreements that President/military commanders made during time of war, e.g. capitulations (exchange of POWs), which were made as EAs.

There were agreements settling claims – when American citizens had claims against foreign gov’ts for mistreatment/confiscation of their property, the state department would negotiate a claims settlement agreement with a foreign country, and this was a recognized Presidential function.

Modus Vivendi – whether there was dispute over treaty e.g. how far American waters went – President would enter into Modus Vivendi to “hold the status quo” in order to prevent outbreak of hostilities while treaty could be reached or arbitration could be employed.

Another example: armistice. End of fighting in war. Creates end to ongoing hostilities.

* + - 1. Modern Practice
         1. Sole Executive Agreements

agreements made purely on executive authority. DOesn’t claim authority under treaty, etc. Just authority as President, which includes making of this agreement.

* + - * 1. Congressional Executive Agreements

Ex ante

Congress passes statute, which delegates to President authority to make certain kinds of int’l agreements, within certain parameters.

Authority is delegated in advance, before agreement is entered into

Ex post

Dramatic category – President goes out and negotiates an agreement with a foreign country, and he stares at Congress. Says I can give this to Senate as treaty, or I can give this to Congress and let them approve it.

I choose Congressional executive agreement.

So it’s precisely the same/interchangeable with treaty, it’s just a different process.

Treaty = approved by Senate in two-thirds vote, whereas Congressional Executive agreement is just Congress.

* + - * 1. Executive agreements pursuant to treaty

there is international treaty. Agreement negotiating under treaty. So Executive argues that since Senate consents to treaty, then executive gets to negotiate these other agreements.

* + 1. Facts: Congress passes neutrality acts to keep US out of WWII. Roosevelt makes deal with Churchill.
    2. Briggs’ Article:
       1. Critical of Jackson’s interpretation of IL. Agrees that statutes must be interpreted in light of IL.
       2. Last passage of Briggs: none of these statutes apply because this is the government acting, not private individuals; cites the Hague Convention which seems to support the principle he is arguing for.
       3. If, in fact, it was a profound violation of the neutral duties of the US and to send these destroyers to Britain, then there is a question – why isn’t it unlawful for President to do it? Two reasons why it might be a problem:
          1. Duty to comply with international law on President
          2. If this places US in violation of neutral duties, it gives just cause of war to Germany. Makes US appropriately subject to attack under international law. This would intrude on Congress’s power over declaring war.
    3. Doctrine:
       1. Effect on SOP.
       2. Golove thinks it’s not clear (under international law) whether US violated their neutral duties.
       3. Even if they did
          1. It’s not clear to DG that when nation violated its neutral duties that it was, strictly speaking, violating international law.
          2. Deciding to join a war isn’t prohibited by int’l law at the time.
          3. So it’s funny to say that sending destroyers to Britain is illegal under international law because we could join the war.
          4. So it looks like the violation might be more about the fact that this interferes with Congress’s powers.
  1. Japanese Internment: Korematsu:
     1. Facts: Korematsu (US citizen of Japanese descent) is excluded under Exclusion order. Resists. Is charged with criminal offence.
        1. Can think of this as similar to Milligan; domestic war powers used against citizens
        2. problem of martial law. There has always been an ambiguity about what martial law covers
     2. Holding (Black): Exclusion upheld. Constitution applies. Justified under war powers.
        1. Doesn’t cross the line into measures inconsistent with the BOR (not martial law/detention).
        2. BOR is applied, and strict scrutiny applies, but this survives.
           1. Emergency war powers mean this is still consistent with the BOR.
           2. Ct. relies on power to declare war; because we're at war, we defer to military authorities
     3. Concurrence (Frankfurter): compare with Jackson. He is like Curtis.
        1. Frankfurter attacks Jackson on his “extra constitutional” powers statements
     4. Dissent (Jackson):
        1. Protest against understanding of emergency powers – does not want them to be normalized within the Constitution.
           1. We don’t want to taint the federal courts getting involved in martial law. We don’t want to pretend that this is constitutional. Don’t make it business as usual. In these circumstances, it is all outside the constitution. The courts aren’t involved.
        2. Compare to Curtis and Lowry! Lowry says extra-constitutional powers, by which he means they are provided for by the constitution but are part of law of war.
           1. Unconstitutional if not a military measure; might be valid as martial law.
           2. This is a funny way of making the point that martial law suspends the constitution.
        3. Wants to force the executive to admit it’s acting outside the Constitution. Potential for civil liberties violations.
        4. Again, Jackson upholds the traditional doctrine. Like Chase in Milligan.
     5. Dissent (Murphy):
        1. Only one to recognize that Milligan is on point. Martial law not declared so this must be an ordinary Art. 1 exercise of power.
        2. Strict scrutiny applies, but this cannot survive.
     6. Doctrine:
        1. Golove thinks that this also corresponds to the Civil War tradition. US citizens are like Milligan (at very general level) and so come under US constitutional law. Case is a domestic war powers case.
        2. Martial law isn’t discussed because the Court doesn’t want to overrule Milligan. Court focuses on exclusion measure, as opposed to detention, which was ruled unlawful (not a constitutional holding, though – just imposed clear statement rule) in Endo. Court is drawing a line between exclusion and detention. Why? Because of Milligan’s martial law holding/lack of suspension of habeas. By calling it exclusion, could say it was an exercise of war powers, not martial law, so it’s still within constitution and consistent with BOR.
           1. Korematsu seems like it is the end of martial law. Maybe they overrule Milligan by pretending it doesn’t exist
     7. Court changes the approach to emergency powers – normalizes them by finding them within the Constitution.
  2. The Steel Seizure Case
     1. Facts: During Korean war, Truman seized private property and treated it as subject to gov’t control for military purposes/war effort. Truman asserted independent authority to act. Constitutional?
        1. Int'l law is probably irrelevant for this case: it's a question of Prez's authority
        2. DG: this is more like Milligan; it affects US citizens (not belligerents) during a time of war; so we're looking at martial law/suspension type issues
        3. Compare to Korematsu
           1. Koramatsu: even during the war, the court/President was reluctant to employ martial law. (Only place during WWII where martial law was applied was Hawaaii after Pearl Harbour.)
           2. Martial law is never invoked. And he doesn’t invoke martial law here.
           3. We seem to have lost the category, in a sense. Perhaps to do so you have to overthrow Milligan, because Milligan says martial law only applies when the courts are closed and there is imminent invasion. Here (in Youngstown) there is no threat of invasion at all.
        4. Compare to Lincoln July 4th Message
           1. Remember L has two theories

the calling the militia – I am waiting for Congressional approval (don’t have concurrent power).

the suspension of habeas – I think I have independent authority to suspend.

* + - * 1. So Lincoln has theory of emergency power that says – where there is emergency, President has ability to act if Congress authorizes afterwards. If they don’t authorize, he has to reverse!
        2. But as to habeas, he doesn’t do this – he has independent authority

This is what Truman does here.

DG thinks that if Truman had taken the first Lincoln tact, there would have been support from the Court for his action. Instead he asserted independent authority to act.

* + 1. Holding (Black): not permitted.
       1. Distinction between executive and legislative power. Since this is legislative, Exec can’t do it.
       2. No delegated authority, and no independent authority.
    2. Concurrence (Jackson):
       1. Gives us the three categories:
          1. Category 1: President has Congress’ delegated authority + own authority
          2. Category 2: Zone of twilight; Congress hasn’t acted

Includes both concurrent powers and clear authority (Art. II powers)

Category 2 as political category? Political science hat?

Where there's no explicit authorization or confused/confusing to figure out what exactly the President's powers are, you’re in a zone of twilight, and there is asserted claim of Presidential authority, then whether or not he is upheld or not upheld depends on imponderables and no abstract doctrine. Almost becomes a political question. Maybe no judicially manageable standard.

The courts don’t stop Presidents from acting in Cat. 2. Implicitly, judiciary just don’t have the position and power to do this. This is an area of struggle. When Congress acts and is clear, then it controls. But when it doesn’t act, it gives the President large room to act in.

* + - * 1. Category 3: President is acting contrary to Congress; has only own authority.

President can act here when power is exclusive.

it’s clear that there are some things that Constitutional authorizes him to act. So this is convention. This is the sense in which the majority proceeds.

* + - 1. Says we are in Category 3, because Congress considered and did not adopt this power. And President didn’t have exclusive power under various clauses
         1. Claim:

Commander in chief power

duty to faithfully execute the laws, and this is somehow an execution of the laws

vesting clause of executive powers, and this is exercise of executive power, which is usually tied to duty to execute the laws, but sometimes is used to give executive emergency powers. Undefined power in the President to act in the face of emergency circumstances.

These are the independent Art. 2 powers that President asserts to justify.

* + - * 1. The Court makes short work of these

You’re not executing a law of Congress – they prohibited you to do this.

commander in chief – this breaks the very concept of theatre of war

* + 1. Dissent: Congress hasn’t prohibited (the sound of silence is interpreted differently); relies on take care clause. And can’t make President reliant on Congress during times of emergency.
       1. Vinson's opinion: nature of war has changed. War today is industrial warfare. Whole country is mobilized in order to produce a sufficient amount of military hardware that distinction between the battlefield and production of steel doesn’t have a functional distinction. it’s just as urgent that the steel mills continue to operate, as it was for Lincoln to seize the RRs.
    2. Doctrine:
       1. Major problems with Jackson’s theory:
          1. Sounds of silence in Category 2

Is there any reason to think that the informal activity here is equivocal?

One argument – this is really just silence. The only way Congress can speak is if they speak expressly. Problem with this – this isn’t the only case where Court will interpret absence of action is prohibition.

See Daimes and Moore, where Rehnquist seems to do the same thing in opposite direction

* + - * 1. And President will just assert he is in Category 1 all the time.
      1. Modern SOP framework comes from this case. (Category 2 is the innovation.)
         1. Early period: Cat. 2 was very narrow. It has been expanded throughout history. This is the foundation of the modern Presidency. Cat. 2 allows the President initiative.
         2. More power that President has in Cat. 2, the more the office of the President is able to carry out policy he develops on his own.
         3. how do we determine the scope of C2?

One way: by broadly interpreting the Art. 2 powers of the President. If you expand that, you expand Cat. 2.

Another way: do something like what Jackson discusses, and something all the opinions discuss: how do think about precedent/past practice? How does that influence the scope of the powers?

Expands partly through precedent-based reasoning.

* + - 1. This case is about domestic war powers (like Milligan, not Prize cases).
         1. Jackson makes sharp distinction between exercise of CIC in war against enemies (referencing Lincoln) and when it’s going inward (Milligan/Korematsu/martial law tradition). Sometimes he is taken as having backed away from opinion in Quirin and Eisentrager. But we saw there that he was concerned about the external and internal uses of CIC powers
         2. J doesn’t deny that there are some martial law powers, but would have reversed and forced military to be responsible for the actions without involving the courts/blessing the behaviour at all.

It’s soft, in Youngstown – but he is preserving the same view that he was taking before.

* + - * 1. It’s important to point this out because among the many battles over the torture memos – Yoo was criticized for implausibility of the legal advice he made. One critique: he didn’t cite to Jackson’s opinion in Youngstown. More charitable reading: he thought that Jackson’s scheme was only about internal war powers not external war powers

1. The Modern Framework of the National Security Powers:
   1. Overview of the Modern Period:
      1. International law/domestic law relationship
         1. Move from monism to dualism changes formal role of international law.
            1. At extreme dualist position

Medellin; treaties are only part of US law if specifically enacted by Congress or the text provides for direct judicial enforcement

Detainee cases; movement away from LOW constraints on executive, to application of BOR/Const abroad

* + - * 1. But see Sosa; Ct. is not willing to totally exile int'l law
      1. Growing skepticism about international law more generally.
      2. Move to apply the Constitution abroad, culminating in Boumediene.
    1. Separation of powers
       1. Cases go in various directions, but there is trend towards Executive power (versus Congress).
  1. Presidential Powers
     1. Dames & Moore (1981)
        1. FACTS: 1979 Iranian revolution. Led to hostage taking of Americans, in violation of all int’l law. Carter finally reaches a settlement with Iran over the hostages. Iranian hostages agreement did a number of things.
           1. Hostages were released
           2. The Americans sued Iran in the US, because at that time standards on foreign sovereign immunity were in process of change, those suits could go forward.
           3. The American claimants get attachments of Iranian property.
           4. Iran hostages agreement suspends all of those claims. Undoes all of those attachments. Sends all of those claimants to make claims to be held in front of Iran-US Claims Tribunals.
        2. Issue: one of these co’s which has had attachment undone (terminated and dismissed) and send over to litigate in the Hague says EA is unconstitutional
        3. Majority applies Youngstown
           1. two issues of executive power here: 1) attachments and 2) suspension of lawsuits.
           2. Attachments

it’s easier to justify lifting of attachments than it is to justify suspension of lawsuits; they're C1

Ct finds statutory authority – IEPIA

In 1970s, under TWEA, Presidents had declared emergencies and imposed embargoes. And it was thought to be among abuses of Executive powers (like War Powers Resolution) and Executive agreements.

Congress amending TWEA so it applied only during time of war and passed the Intentional Economic Emergency Act.

This has been the source of most economic sanctions.

General law, although meant to restrict Presidential powers, actually gives him wide powers. Lets him impose restrictions on property of state, as defined.

President issues declaration of emergency + imposes some sort of embargo legislation.

Here, Rehnquist is saying that when the hostages were taken, President froze the assets of Iran in US. And issues licenses for attachments. Although these transactions were licensed they didn’t create a vested property right that couldn’t be reversed. They were defeasable by action of the executive branch. So, C1

But even when you are talking about C1, it doesn’t meant it’s Constitutional.

Two major ways that C1 can be unconstitutional

Non-delegation doctrine (although it doesn’t have any real teeth)

Violates some principle of BOR

Ct. claims that BOR has been interpreted differently in the context of foreign affairs.

Another example: 1A case about demonstrations outside of embassy of foreign gov’t – court is willing to accept foreign policy reasons for restrictions on free speech.

* + - * 1. Lawsuits

court says, we can’t find statutory justification for dismissing the lawsuits. Lawsuits aren’t property in which Iran has an interest; doesn’t come within the statute. So we're in C2

There is no claim that congress has prohibited what President did, but no statutory authority.

but Rehnquist uses practice to edge towards C1 (through Congressional acquiescence, bills which looked sympathetic, practice of President settling claims, and Belmont and Pink).

Statutes: Opinion looks like it’s saying: even if there isn’t explicit authorization, if there is past legislation which seems sympathetic to President needing broad powers, this is going to affect C2 analysis. This is going to move us up towards C1. This is sympathetic Congress rather than unsympathetic Congress.

Past FA practice

Belmont case and Pink cases upholding Litvenoff assignment

settlement of claims. Soviet Union assigns to the US their claims for property, and whatever the US recovers that was Soviet property can be used to compensate Americans.

Court accepts idea that the way to think about the Sole Executive agreement power is whether it is incident to President’s Art. 2 powers. Allowed him to override state law, but not federal law. So how far does this go? Pink: this is incident to his foreign affairs power. Modest, implied power of the President. Pink is narrower than Belmont, which says it is pursuant to his sole organ power, which is really expansive.

also notes that Congress hasn’t disapproved of the action! Which suggests if we take this for all it’s worth, in C2, not only can Congress authorize informally, but by passing other legislation which seems sympathetic and having acquiesced in similar context, this can be taken as evidence that there is approval.

In general, there is long history of President’s settling claims, and Congress seems to have accepted this practice, in general – they have cooperated with the President. E.g. passed something called Int’l Claims Settlement Act.

* + - * 1. Another way of understanding D&M: trying to restrict this broad executive agreement power! Rehnquist seems uncomfortable saying President has lots of authority. SO they say we’re really close to C1
    1. Curtiss-Wright (1936)
       1. FACTS: Actual case is about statute which authorizes President to impose arms embargo if he wishes, and criminal statute for anyone who violates; So we’re in C1. Congress has clearly delegated power to President.
       2. Issue: Is delegation so broad it violates non-delegation doctrine?
       3. Majority
          1. A Youngstown C1 case (Congress authorized) (although dicta has implications for C2 and C3 – scope of President’s exclusive authority)
          2. Strict non-delegation rules don’t apply in foreign affairs

Standard that applies to foreign affairs doctrine is different.

Idea that foreign affairs is somehow different is long-standing idea, but DG thinks this is weird in today’s world

* + - * 1. extravagant claim that foreign affairs powers are different because they exist outside the Constitution. Has historical account as to why they are different.

Crown is equivalent to federal gov’t. (Lots of problems with this, as a historical matter.)

Idea that there are unenumerated powers that Congress holds outside the Constitution is a radical idea. And controversial historical theory is supposed to explain.

“Plenary power doctrine”; SC repeatedly said these powers were derived from law of nations. But these cases were interstitial.

* + - * 1. Rest of the discussion is mostly dicta explaining Presidential authority in foreign affairs.

President is in charge of diplomats.

Diplomats abroad report to President.

He has CIA/intelligence officers.

He has more expertise.

unity is important so President needs to have greater authority in foreign affairs.

* + 1. Little v. Barreme (1804)
       1. Facts: Quasi-war with France. Congress passes no trading with enemy statute. Applies to ships bound to French port. President instructs navy to pick up any ship. Captain Little picks up ships leaving French port. Owners sues Little for damages for seizure of ship.
       2. Majority
          1. Congress can tell commander in chief how to carry out laws, even those which pertain to conduct of military hostilities; President can’t act contrary to Congress’s statute.
          2. This is C3 and so President loses, even though this CIC kind of activity.
          3. Seems to give Congress kind of plenary authority.
          4. And President can’t immunize officials against illegal action, under domestic or international law.
    2. In re Neagle (1890)
       1. Facts: Justice Field attempted murder case. No specific statute justified federal marshal to be used this way.
       2. Majority
          1. no specific statute was needed; Justifies under Take Care clause; inheres in Constitution itself.

Maybe it’s the sounds of silence, but there seems to be plausible that the reason there was no law was because Congress didn’t want law here!

Didn't want to create a federal police force, etc.

Not implausible that SC justice should be protected by state police!

He is responsible for superintendence of all of the laws. When the frameworks are in danger, the duty to execute allow President to act

has to make sure that Congress' legislative programs aren't undermined

* + - * 1. Ct. also relies on “protective power of presidency”; idea is that Prez must have power to protect framework of government

generally seen as a power in C2. Like the sole organ power. We don’t know exactly where it comes from or what its limits are. Notion about appropriate role for the executive.

See Vinson's dissent in Youngstown

* + - 1. Expands President’s powers, at least in C2, sounds of silence
    1. Debs (1895)
       1. Facts: Strike, blocking mail and commerce. President decides to send in troops, then brought suit in federal court seeking injunction against strike (no law allowing injunction in this context).
       2. Majority
          1. Court inferred ability to grant injunction because President was acting in protective, Neagle-like function.
          2. High water mark of how far Court was willing to go in allowing President to use this kind of power.
  1. Congressional Powers
     1. Bas v. Tingy (1800)
        1. Important from historical perspective, but not clear how much weight it holds today
        2. Facts: Congress’s series of naval measures allow different compensation scheme for salvage. Conflict of statutes – does first or second apply?
        3. Majority:
           1. Court finds that the second (later in time) applies.
           2. Ct. assumes that Congress, under it’s power to declare war, has plenary control over the scope of war (subject to the LON); Court upholds Congress’s ability to define the scope of the war

Perfect (full scale war) v. imperfect war (more limited war)

Congress is recognized as having a power to be able to do something different from all-out declare war. But to authorize war/military hostilities in a more limited sense and to define the scope of this.

The Court never considers what the President’s powers here. But that seems like a technical point. It’s clear that the Court assumes (in these cases) that President couldn’t have gone beyond the statutes and invade France.

* + - * 1. One way to read the case: it’s a version of a one-way ratchet.

All the court is saying that Congress, in exercising its powers over war, can limit war in whatever way it thinks is appropriate. But once it authorizes hostility at a certain level, it can never go backwards. So this is recognizing some Executive exclusive power.

DG thinks this doesn’t seem like a plausible read.

* + - * 1. Perfect (full scale, declared war) v. imperfect war (more limited war)

in a declared war, the President is authorized to carry out all of the belligerent rights recognized in the LOW. Whereas if the war is limited, then the rights of war are deceased/controlled by municipal law.

there are many many statutes Congress has passed which remain in force and which authorize the President to exercise special powers in time of declared war.

* + - 1. There is a long-standing position that the only way the US can legitimately engage in armed conflict (unless US is attacked) by declaration of war by Congress. Every other form of war is unconstitutional. Insistence that term “declaration of war” be used.
         1. But this case seems to indicate that from the beginning it was understood that Constitution doesn’t require declaration of war, it requires some form of authorization by Congress.
    1. Lichter v. United States (1948)
       1. Renegotiation Act, passed during WWII. Major statute dealing with military procurement. Gave very broad, somewhat vaguely defined authority to relevant agencies, to modify existing contracts, on the grounds that the co was making excessive profits.
          1. Domestic war powers case
       2. Majority
          1. Delegation: finds no problem with this delegation – Congress can give away a lot of power in the foreign affairs context. (similar to Curtiss-Wright)
          2. Civil Liberties: during wartime, people can be conscripted, so they can have their contractual rights limited (war powers almost exempt from BOR).
       3. C1 case
    2. Green v. McElroy
       1. Facts: P's security clearance revoked; no explicit authorization from either branch. Has congress delegated, or does President have inherent authority to implement this program?
       2. Majority
          1. Court reads group of national security statutes to have permitted/authorized security clearance framework, even though they actually don’t. Interprets statutes in the broadest possible way except when they come up against an internal constitutional limit

Court doesn’t say it would strike down the security clearance program. It’s happy to uphold that Congress has delegated the authority, even though that touches on civil liberties.

BUT what requires a clear delegation is a security clearance program which doesn’t provides customary DP standards. Allows someone’s clearance to be denied without hearing that conforms to customary DP standards.

* + - * 1. Clear statement rule: where Congress is delegating authority which could infringe on civil liberties, it needs to say so explicitly
      1. C1 case; is there constitutional restraint (DP)?
         1. But note that the Ct. is stretching to reach C1; probably more of a C2
    1. Kent v. Dulles
       1. Wouldn’t give passports to suspected communists.
       2. Court found that there is an important liberty interest at stake and that they won’t find that legislature authorized this unless clear statement.
    2. Endo
       1. High point of Court’s refusal to find Congressional acquiescence through appropriation.
       2. Clear statement rule/Const avoidance
  1. Judicial Powers (we didn’t cover any cases specifically in this section, but think about what the modern law on this would be, e.g. cases like Korematsu).
     1. Korematsu
     2. detainee cases
        1. Eisentrager
        2. Modern Detainee Cases

1. Domestic Effect of Int’l Law:
   1. Types of international law:
      1. Treaties
      2. Congressional-Executive Agreements
      3. Sole Executive Agreements
      4. Customary International Law (Law of nations)
   2. Hierarchy of law in the United States:
      1. Federal Constitution
      2. Federal statutes
      3. Federal common law
      4. State law
   3. Treaties and Executive Agreements
      1. Brief sketch of the history of jurisprudence wrt the history of self-execution.
         1. Virtually all treaties were seen as self-executing, throughout history. May not be judicially enforceable, but they were part of our law.
         2. Initially, a presumption in favour of self-execution.
            1. BUT, there are some treaty provisions which are non-self-executing according to the Constitution.
            2. e.g. the President couldn’t decide that the treaty with France required us to go to war with France. Both Hamilton and Madison agreed that when it came to a decision to go to war, Congress had to make that judgment.
            3. AND, a treaty cannot create a crime. All crimes in the United States are statutory. (but see Henfield’s case early on)
         3. After WWII, the self-executing doctrine comes until question.
         4. Development of a highly incoherent body of doctrine.
            1. Trying to figure out how you can find out the difference between a self-executing and non-self-executing provision of a treaty.
            2. Openly embraced the idea that it was a policy judgment, whether something should be self-executing.
            3. Bottom line: the courts engaged in foreign policy making.
         5. Recently, courts have become more sceptical about policy making in these ways, and would prefer to have bright line rules.
         6. New idea: self-executing has some limited force from the supremacy clause, but whether or not the treaty is self-executing is determined by the President and the Senate. Discretionary decision made at the time of ratification.
      2. Reid v. Covert
         1. Facts: Case about wives of American servicemen who were murdering their husbands abroad. US has agreement with UK that Americans will prosecute in their own courts. This was implemented by subjecting everyone to court martial.
            1. Issue: can wife, a civilian, be subjected to court martial?
         2. Majority
            1. Court finds that treaties are subject to the Constitution/BOR.
            2. Because she's not in the military, any courts used to prosecute her must accord with the BOR
            3. Beginning of effort to narrowly interpret the power of the military so it only applied to servicemen. Controlling expansion of otherwise broad power.
      3. Missouri v. Holland
         1. FACTS: US signs treaty with Canada to regulate hunting of migratory birds. Congress had tried to pass legislation to do this, but it was struck down under Hammer jurisprudence.
         2. Majority
            1. Suggests that treaty power is not limited by same federalism issues as legislative power. Can override state law through treaty without specific legislative power to do so.
      4. Medellin
         1. FACTS: Mexicans on death row who were not given their consular rights under treaty.
         2. Question 1: what does self-execution mean?
            1. Answer: whether part of US law at all (not whether judicially enforceable). So, whether Congress must pass enacting legislation or whether there is something *about the treaty* which means that it is automatically part of US law
         3. Question 2: How do we decide whether self-executing or not?
            1. Answer: look to the language of treaty provisions; see whether it requires state parties to automatically enforce through judiciaries.

e.g. if treaty says “shall” then there is automatic judicial enforcement, but “undertake to” is not self-executing.

* + - * 1. conflates the question of the obligation with judicial enforcement.
      1. Question 3 (the Youngstown issue): Does President have authority to force compliance with ICJ judgment?
         1. Answer: since it’s not self-executing, we’re in C3, and President has no authority. if treaty were self-executing, then we would be in C1. But if it’s non-self-executing, then President and Senate have denied ability to act.
         2. Rejects analogy to Belmont/Pink/Dames & Moore. Dismisses Neagle (close to overruling).

Garamendi – CA state law on Holocaust claims – Wanted to try and coerce the Swiss insurers to give out information which would enable claims to be made. President entered into EAs with German insurers. Court says – the President has entered into this EA and therefore the state law is invalid.

Belmont and Pink – in both cases, the EA of the President with the Soviet Union was held by the SC to override state law.

* + - 1. Problems:
         1. Mistakes question of whether a treaty is self-executing with whether a treaty requires that it be self-executing (no treaty ever requires judicial enforcement without legislation)
         2. The self-executing treaty doctrine is a US doctrine; there will thus never be a treaty that addresses itself to self-execution in the way Roberts wants
         3. has the potential to eviscerate self-executing treaty doctrine

Self-executing treaty doctrine is American invention.

Specifically a rejection of the British system. British constitution – crown can make treaty on its own. Parliament succeeds in earning power to implement treaties. Functionally that meant that crown better consult parliament on treaty which will require domestic enforcement. So he ought not be able to enter into a treaty if he knows that parliament doesn’t support.

(Modern day-Britain, this isn’t as relevant)

But there is a non-self-executing treaty doctrine, which remains the rule. has the potential to eviscerate self-executing treaty doctrine

* + - * 1. International law is not concerned with self-execution; int'l law just says “comply,” but doesn't care how compliance is reached
        2. Wrong/offensive to say that since US has SC veto, non-compliance contemplated
        3. Court confuses delegation of interpretation authority to the ICJ with self execution

amounts to delegation by the state of some of its interpretive authority over treaties, and that creates binding obligations. Similar to any delegation to int’l agency, e.g. once that could create law about global warming.

Instead, Ct. talks about self-execution; but the question of whether the consular notification is self-execution is DIFFERENT from whether judgment of ICJ is self-executing

* + - 1. Monism v. dualism
         1. case pushes US towards more radically dualist position
  1. Customary International Law:
     1. Paquete Habana
        1. Issue is: are fishing vessels of a small size manned by enemy nationals in a war exempt from capture as prize? Is there humanitarian exemption in CIL?
        2. Majority
           1. Int’l law is part of our law. Modern affirmation of idea that CIL is part of law of US.
           2. But added qualifying phrase – in the absence of a treaty or controlling legislative or executive act, the courts in the US will apply CIL.
           3. DG: initially, case is about ability of Fed gov't to limit its int'l law powers; saying that treaty or statue which provided humanitarian exemptions to law of capture would be enforced. And President always had authority to not apply the harsh rights of war... Presidents could always limit the ships that they took.
        3. Modern reinterpretation: has become understood as a statement that President can disobey CIL.
     2. Filartiga & Sosa
        1. Facts: Alien Torts statute is part of judiciary act of 1789. states that Federal courts will have jx over suit by alien for a tort in violation of LON. Statute basically dies away until 1980, when 2d Cir. in Filartiga discovers the statute. Paraguyana official conducts interrogation; allegedly tortures individual to death. Family and the official end up in Brooklyn. Family brings suit. Court upholds the use of the statute – grounds lawsuit.
        2. ATCS results complaints about universal jx. Forum for human rights litigation in the US.
        3. Issue: there is int’l law principle which means “no torture.” Nothing in int’l law says that victims of torture have a right to damages. Substantive prohibition without a rule about the type of relief a person is entitled to.
        4. Majority
           1. Ct. states that this is jx statute – it doesn’t create a cause of action. Neither does substantive law. Courts don’t make up with the remedy is.
           2. Turns to original understanding of the statute; when passed, they believed that when they gave the courts jx over certain kinds of claims/parties, the courts would supply (under the common law) the relevant cause of action and remedies.
           3. Doing this means that courts will create federal common law. Cts. are constrained, though, via framework

UNIVERSALITY. A cause of action must be universally recognized by the law of nations as a prohibited norm in order to be actionable. Consists of: mutual obligations that nations have traditionally observed in conduct with one another; "arbitrary law of nations," or norms that nations have voluntarily agreed to either explicitly (e.g., via treaties) or implicitly (e.g., via customary practice); and jus cogens.

OBLIGATORY NATURE. The prohibitive norm must be binding or obligatory, not merely hortatory, in order to be actionable.

SPECIFICITY. Sosa requires specificity similar to the 18th century common-law causes that were actionable under the ATS at the time of its passage... causes such as piracy, torts against foreign ambassadors, and violations of safe passage.

PRUDENTIAL CONSIDERATIONS. A cause of action can be nonjusticiable even though it meets the criteria discussed above IF prudential factors weigh in favor of nonjustificability... factors such as: public policy, separation of powers, political questions, reticence of domestic courts to command foreign relations, and judicial restraint in legislating new common law.

* + - 1. Problems
         1. Debate was over whether int’l law is part of our law

if it’s federal common law, it’s supreme over state law, President is bound, and federal courts have arising under jx.

If it’s not federal common law, Presidnet doesn’t have duty to execute. And doesn’t fall within Art. III jx of the courts.

* + - * 1. But in fact, what the court openly says is that we are creating a federal private right of action, which just creates federal common law. So whether CIL is federal common law doesn’t need to be answered.
      1. Majority is not willing to exile CIL. Seems to see it as part of federal common law, but subject to “close supervision.”
    1. Goldsmith’s view of CIL:
       1. Several threads
          1. CIL Was federal common law, which no longer exists after Erie.

Critique: Erie didn’t contemplate CIL at all.

* + - * 1. Realist strain: Prez should be able to break CIL
        2. Democratic argument: CIL hasn't been enacted by political branches, thus lacks democratic legitimacy

1. War On Terror

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Detainee | Yr | Ct | US-Territory? | Citizenship? | PD / pros.? | Jdx / merits? |
| Hamdi | 2004 | SC | Captured in Afg. Held in US | US | PD | Merits |
| Padilla | 2005 | 4th | Captured and held in US | US | PD |  |
| Al-Marri | 2008 | 4th (EB) | US | Alien | PD |  |
| Rasul | 2004 | SC | Gitmo | Alien | PD | Jdx |
| Boumediene | 2008 | SC | Gitmo | Alien | PD |  |
| Al Maqeleh | 2010 | DC | Bagram, Afg. | Alien | PD |  |
| Hamdan | 2006 | SC | Gitmo | Alien | Pros. by MC |  |

* 1. Important concepts/distinctions:
     1. comparing current approach to international conflict under law with previous approach. How different from 19th C? Golove doesn’t think it’s that different.
        1. New Framework
           1. Carolene Products doctrine: yields new structure to the Constituitonal jurisprudence, where Congress’s powers are largely unlimited in nature, and limits on Congress’s powers are found in the BOR.

Rights prohibitions come the dominant form of thinking about types of limits. And int’l law as a limit on Congressional power is a version of a limited power doctrine.

* + - * 1. BUT, there is a sense that things are coming full circle; the Ct. uses statutes to bring Int'l Law in to constrain executive

O'Connor in Hamdi via AUMF

in Hamdan via UCMJ

* + - 1. Old Framework
         1. Power to conduct war etc. aren’t unlimited powers. They are found in principles of limited warfare.

Law of nations is limit on scope of power that is granted to Congress.

Idea that the BOR applied was rejected.

* + 1. war v. crime models – how does the GWOT fit?
       1. consensus is war; that war is the best analogy for GWOT
          1. in Euro, there's more of a crime model
       2. court is trying to work out a third way/hybrid between war/crime
          1. problems:

was is conflict between two sovereigns, with clear end, clear participants, detention is about neutralizing a threat, never about punishment

crime is an act by an individual, handled by domestic statutes, punishment is acceptable

* + - * 1. it’s an example of the flexibility of the judiciary. Trying to figure out what a third way of thinking would be, although the rubric is always war. But the rulings don’t make sense if this is really war.
        2. We would expect much greater deference to Executive; maybe Korematsu level deference
    1. what makes a difference in the cases:
       1. US v. outside world
       2. citizens v. Aliens
          1. Hamdi and Padilla: American citizens held inside territory of US. Hamdi was captured outside US and brought into US and held. Whereas Padilla was captured and held in US. Held in preventive detention.
          2. Almari: non-US citizen held in preventive dentention in US.
          3. Rasul and Boumediene: aliens held outside the US at Gitmo, in preventive detention.
          4. All preventive detention.
          5. Almalaqueh: held in Bagram.
          6. Hamdan: alien held in Gitmo but not in preventive detention – held for military commission.
          7. Rasul and Boumediene: aliens, outside the US, in Gitmo, in preventive detention

that category of cases corresponds to Eisentrager!

One distinction: Eisentrager – they have been prosecuted/convicted.

More direct analogy: Germans held in US POW camps in France during WWII in preventive detention.

* + - 1. resident aliens v. non-resident aliens
      2. preventive detention v. prosecution
         1. Model of LOW: person has done nothing wrong. But they are a threat, and they need to be disabled, until we can end the war. Duration of hostilities because they have a duty of allegiance. Whether they can be held has nothing to do with their intentions. (Reminds us of the Prize cases – it’s status not intention)
         2. Military prosecution: prosecution for those who have committed offense against law of war. They can be prosecuted in a military context for a military crime.
         3. This is confused because the way in which individuals were held in Gitmo etc. was so clearly punitive! Distinction between preventive detention and prosecution was thin!
         4. Preventive detention is great because you can be as punitive as you want but don’t need to give them process.
      3. jx v. the merits
         1. There is an initial question about access of detainees to American courts (to habeas jx – but really boarder point of what access they have to our courts); to what extent are courts obliged to say that there is simply no jx.
         2. When you say there is no jx to hear the claim, you are not saying that there is no claim. Not saying that their legal rights haven’t been violated. It’s just that the court house doors are shut.
    1. preventive detention – from war ; but application in GWOT is problematic because:
       1. enemies because of intentions, not nationality
       2. crucial distinctions:
          1. enemy status is contested and uncertain (problem determining whether they are enemies in the first place)
          2. detention is potentially indefinite (no structure to know when war will end; no criteria for what the end of the conflict is)
          3. Also no reciprocity – no one to exchange prisoners with. Traditionally there was parole, etc. And if they weren’t exchanged, the war would end!
  1. History:
     1. Detainees in Gitmo brought their petitions for habeas to the US courts.
        1. Gov’t responds citing Eisentrager, which says that enemy aliens outside the US have no access to the courts.
     2. Rasul (habeas for gitmo – statutory)
        1. This was probably the most significant ruling.
        2. If the judiciary is involved, everything change
     3. Hamdi
        1. resolution of the merits. You have to give some sort of due process.
     4. Gov't establishes CSRTs – Combatant Status Review Tribunals.
        1. They tried to pre-empt ruling on due process.
        2. And interpret process due in the most minimal way. If we give a gesture, we have to defer!
        3. These were extremely limited hearings. In most cases, most of the evidence was classified. Detainees didn’t know what evidence was being used. Were only allowed to call witnesses in Gitmo. Weren’t represented by counsel.
     5. DTA
        1. Strips jurisdiction
        2. gives direct appeal from CRST determination to the DC Circuit.
        3. Standard of review: did the CRST follow the regulations of the Sec. of Defense. and if so and if US Constitution/statutes comply with those regulations?
     6. Hamdan (can’t assume habeas jx has been stripped for pending cases)
     7. MCA amended to say it’s stripped in all cases. ONLY CSRTs allowed
        1. repeats the detainee Treatment act but applies it to detainees anywhere in the world.
     8. Boumediene
  2. Cases
     1. Padilla:
        1. American citizens held inside territory of US.
        2. captured outside US and brought into US and held in preventive detention; later charged w crime and tried in federal court
        3. decision on the merits
        4. pretty much like hamdi
     2. Rasul: Jurisdiction case
        1. alien held outside US at Gitmo in preventive detention
        2. Holding: Court found jx over case in statutory holding
           1. Court founds that there is jx under 2241; should mean that there is jx over official anywhere in the world.
           2. But the court doesn’t want to go that far. Introduces presumption against extraterritorial application of statutes (which it misapplies).
           3. Test here is whether us has “complete jx and control”; getting at problem of legal black hole
        3. Doctrine:
           1. G thinks this this is first case where they shred Eisentrager

thinks there is a const element

there's a worry here about legal black holes

* + - 1. Rasul was highly unprecedented.
         1. Eisentrager: categorically denied jx.
         2. Prior to Quirin, the enemy status meant that they didn’t have access to the courts during time of war. Didn’t matter if you were a citizen.

It was Quirin, over the objections of Jackson, where the Court gave jx to enemies. Courts were open!

BUT, in Quirin, they were in the US

* + - * 1. Yamashita: they were in US territory so they were maybe in US.
        2. Rasul – court asserts jx over enemies during time of war in the US AND outside the US! So in that sense they are overruling Eisentrager.
      1. May not be as radical as it looks if we compare to things like prize cases (situation where facts were in dispute in the LOW in the past)
    1. Boumediene: jurisdiction case
       1. alien held outside US at Gitmo in preventive detention
       2. Holding: Habeas applies (but an adequate substitute would be okay)
          1. Issue 1: Is there HC?

Congress didn't suspend HC, they stripped

Could only suspend in rebellion or invasion

Kennedy’s three-pronged test for whether there is habeas:

1. citizenship and status and process used to determine status

2. Nature and place of apprehension and detention

3. practical obstacles to application

* + - * 1. Issue 2: Is there a substitute for HC?

DTA doesn't provide it, so no

the reason why the court does what it does – these people have been held for 6 or 7 years without any DP. If habeas is a meaningful remedy, then something has to be done now, not later. It would be laughing stock of habeas if we kept deferring. So if they have constitutional right to habeas, then we should give it to them. This is judicial statesmanship type argument.

* + - * 1. doesn’t resolve whether DP applies abroad, and leaves open where else HC applies
      1. Extraterritorial application
         1. In the history of US and the SC, the Court has never before held that the BOR applies outside the territory of the US. So it’s quite extraordinary.

All of these cases, the Court has denied the extraterritorial application of the US (except the Insular cases, but those were colonies, and there only limited constitutional rights applied).

When the US acted outside the territory of the US, which could raise a constitutional question, the simple answer is that the LON governs. This is reason for historical derivation of this rule.

* + - * 1. There are at least two major circumstances which have changed:

the status of the LON as a limitation on the power of the gov’t has fallen away. LON doesn’t seem to serve/is insecure, in terms of providing a restraint on activities of gov’t abroad

US has extended municipal jx abroad in a new way (we purport to be acting abroad under our municipal law authority). With that extension of municipal jx, we haven’t seen a corresponding extension of constitutional rights.

* + - 1. odd things:
         1. Type of process used determines whether you get HC

which is inversion; usually, you use HC to determine wither you got process

here, the amount of process given initially, is used to determine whether you get more

* + - * 1. doesn’t review admin procedure but takes it out altogether; doesn't say, CSRTs are inadequate, redo them

The agency deprives the person. The person goes into federal court asserting judicial jx bc the agency proceeding was said not to be adequate. Federal courts doesn’t give the process but says – agency, you can’t deprive him of right without process.

Close analogy to Gitmo. Military is the executive agency. Military makes decision to put person into detention. Give him a certain process.

* + 1. Maqaleh v. Gates: Jurisdiction case
       1. Held in bagram
       2. Holding: no jx
          1. difference from Gitmo using Boumediene factors.

From a constitutional reasoning point of view, they rely on the local sovereign + war zone factors.

And control over base isn’t the same as jx and control over Gitmo.

* + - * 1. DG doesn't think this is a very principled decision
      1. Why do we extent in one situation but not others?
         1. Habeas corpus right doesn’t come into play immediately. On battlefield, it isn’t relevant. Only comes into play when they have been placed in secure location.
         2. This seems to go to the practical obstacles of applying habeas. You don’t want courts to immediately interfere. But so long as Bagram airbase is relatively secure, what does being in war zone DO? What IS the practical obstacle?
    1. Hamdi v. Ramsfeld: substantive law case
       1. American citizens held inside territory of US.
       2. captured outside US; held in preventive detention
       3. Holding: decision on the merits
          1. Two major points

you have to give some sort of due process

Mathews balancing for DP

you can do this in military tribunal. And look to Geneva Conventions to get due process.

One might make two observations:

idea of using Mathews balancing seems a leap!

But on the other hand, she seems to come up with a LOW rule! Uses the balancing test to point to the Geneva Conventions.

President can preventatively detain US citizen by declaring him enemy combatant. (AUMF ; incorporates the law of war. President can take measures justified by LOW)

Status is what matters.

* + - * 1. Discussion of Milligan: O’Connor says that Milligan would have come out different if he had been a confederate army and captured on battlefield. DG thinks this is right.
      1. Notice that there is an underlying SOP move. Non-Detention Act – no US citizen can be detained except pursuant to act of Congress + clear statement (following Endo).
      2. Ct refuses (like in Quirin) to uphold the Exec on C2 grounds. Doesn’t uphold as a CIC matter. But finds that it’s authorized by the AUMF.
         1. Says that President may use all necessary and appropriate force against those who harbour. Effectively interprets the AUMF to use all measures and techniques which are traditionally embraced by the LOW.
         2. Interprets the AUMF consistently with the laws of war. Like the Charming Betsy doctrine. OC interprets the AUMF as a kind of statutory incorporation of the laws of war.
         3. OC is upholding a “restraint on the executives use of war measures.” Congress is limiting President in war measures. They are only limiting to the laws of war. But finds that Congress has the ability to limit what the President can do!
         4. Whereas in 19th C President and Congress recognized that LOW controlled what they could do, O’Connor finds a war of recreating this. War of getting the law of war in through the back door through the bill of rights.
      3. Scalia dissent:
         1. Irony in his dissent: it’s extremely appealing for liberals.

It says there is no preventive detention for US citizens.

Rejects the idea that enemy status can affect US citizens’ rights.

And it’s based not on normative claim but on historical claim. This is the original intent of the founders.

His history is so completely misinformed.

Everything he says turns everything on its head.

* + - * 1. It is true that his interpretation of Milligan can rely on some language.
        2. But if you read Milligan in light of Prize cases, practice of Lincoln, etc., it just falls apart!
        3. The trick is that Milligan doesn’t distinguish between martial law and the law of war. For him, it all looks like martial law! Law of war isn’t going to enter into it for him. And when citizens are involved, he has civil libertarian situation, and when non-citizens are involved, there are no civil liberties. This is just a nationalist opinion.
    1. Hamdan v. Rumsfeld: substantive
       1. alien held in Gitmo but not preventive detention – military commission
       2. Holding: Congress could restrict present’s use of military commission. And must use commissions that comply w LOW (through the UCMJ)
          1. so it’s like a C3 case
          2. There are two grounds for finding that the commissions are not in accordance with law.

Violate the law of war because they are not regularly constituted courts (requirement of the Geneva Conventions)

they violate provision of the UCMJ which requires that military commissions have the same procedures as courts martial

Both are really law of war rulings. Law of war requires them both.

Military commissions are not used to provide summary justice/inadequate justices. They are not meant to allow unfair trials.

* + - * 1. In'tl law rulings in the case:

Ct. says that “necessary and appropriate force” means that President must comply with law of war, which implicates Geneva Conventions. But if they’re not self-executing, then they wouldn’t apply.

Court says that reference of law of war incorporates the law of war, including executes the GCs, so we have to look at Common Art. 3 to determine lawfulness. Exec branch; we have interpreted Common Art. 3, which says it applies to non-int’l conflict. So it doesn’t comply but neither do the rest of the GCs.

Assuming that Congress has effectively implemented the Geneva Conventions

Same ruling in Hamdan – reference to offenses against the laws of war effectively incorporates the law of war.

Even though in Eisentrager the obvious scheme of Geneva Conventions is that they were in the hands of military/political authorities and not hte court.

* + 1. Bahini case
       1. issue of detention authority for alleged al qadea cook
       2. Judge Rodgers: insists that the law of war doesn’t serve to guide our interpretation of AUMF.
          1. This is highly hostile/sceptical attitude to LOW.
       3. Single most important question: over the LOW definition of who is detainable. Who is enemy combatant who can be detained.