**Constitution and Foreign Affairs: General Structure**

**CONGRESS (Article I):**

❒ War (§8, cl. 11): Broad power over all ways that force was legitimately used—

❒ Declare war (*today there are debates about the exclusivity of this; historically no debate*)

❒ Granting of *letters of marque* and reprisal ❒ Rules concerning capture

🕱 *Invasion*: It was accepted that, when the country was attacked, President could respond.

❒ Taxation (§8, cl. 1): Not only to tax, but to “provide for the *common defence* and general welfare.” Taxes were originally expected to primarily fund wars. (Federalist, Hamilton).

❒ Habeas/Suspension (§9, cl. 2): Cannot suspend habeas corpus except in times of *war or rebellion*. Though the clause does not specify who may suspend, the power is generally thought to rest in Congress.

❒ Raise and Support Armies (§8, cl. 12-13): Congress has power *over the military*. This clause represents a compromise between those who wanted no standing army, and those like Hamilton who did. So appropriations can only last for two years.

❒ Militia (§8, cl. 15-16): The militia is related to a Republican theory about resisting authoritarian government. *Two powers (compromise)—*

*Call forth the militia:* ❒ To execute the laws ❒ Insurrection ❒ Invasion

*Organization power*: ❒ Organize/arm/discipline 🕱 Appointment & training (states)

❒ Military regulation (§8, cl. 14): Rules for the governance and regulation of forces. This looks broad, but it was really about the *Articles of War*, focusing on internal rules.

❒ Foreign commerce (§8, cl. 3) ❒ Naturalization (§8, cl. 4)

❒ Define offenses against LON (§8, cl. 10): *To define and punish piracies and felonies committed on the High Seas, and Offenses against the Law of Nations*. This might be rather limited, referring to acts for which a State would be responsible if no remedy was provided.

❒ Necessary and Proper clause: *To make all laws which shall be necessary and proper for carrying into execution …* ***all other powers*** *vested [in any department of government]*.

❒ Section 9 prohibitions:

❒ Bills of attainder and ex post facto laws were being used by states against loyalists

❒ Titles of nobility also have a foreign affairs element

❒ Prohibitions on States:

🕱 Treaty/alliance/confederation 🕱 Bills of attainder, etc.

🕱 Imposts and duties 🕱 No agreements for war or storage of materiel

**JUDICIARY (Article III):** Jx over cases where U.S. is a party, admiralty, prize, ambassadors, alienage, and treaties. This gives the judiciary power to *interpret the law of war*.

**EXECUTIVE (Article II):**

❒ Commander-in-Chief (§2, cl. 1): This was thought a minor power at the founding.

❒ Take-care clause (§2, cl. 3): *Duty to execute the laws*. Includes LON?

❒ Treaty power (§2, cl. 2): Requires advice and consent of 2/3 of Senate

❒ Diplomats (§2, cl. 2, 4): Power to appoint and receive ambassadors. Hamilton calls the executive the “organ of intercourse.”

**International Law and the Constitution:** General

**THESIS:** There has been a tendency to “nationalize” the constitution, i.e. to see the constitution solely in terms of how the U.S. manages itself. However, *the driving force behind the adoption of the constitution was foreign affairs and international law*. (Golove & Huselbosch, 2010). The constitution was meant to enable the United States to be part of the civilized world.

**Examples from Early Constitutional History:**

❒ **Treaty of Peace (U.S.-G.B.):** The states refused to honor the Confederation’s obligations to repay existing debts owed to British creditors, and to cease reprisals against loyalists. In retaliation, the British refused to send an ambassador, and they maintained their forts in the West. They also refused to enter into a commercial treaty, thus effectively excluding the U.S. from the mercantile system.

❒ **Declaration of Independence:** Think of this as itself an international document—a message to the French that the Americans saw themselves to be sovereign, and thus military aid would not be an intervention into British internal affairs.

❒ **Articles of Confederation:** After independence, the Articles were negotiated as a *treaty* among the states.

❒ **Constitution and Treaties:** One of the early actions by the American government was to draft a model treaty for U.S. foreign relations. No country would sign, because the Confederation had demonstrated its inability to comply. The Constitution was drafted to solve this problem, *to gain recognition as a civilized power*.

**MONISM/DUALISM:** *Two views—*

❒ Monism: One legal order, in which international law is supreme over municipal law

This position is highlighted by *Pacificus*, which suggests at one point that even Congress must follow the Law of Nations. This is a classic monist position. Likewise, *Helvidius* argues that the president must execute the laws, such as treaties and LON.

❒ Dualism: Separate orders, each defining for itself the relationship of others to it

*Today, the U.S. is quite dualist, and generally accepts international legal obligations (custom or treaty) only when Congress passes implementing legislation*.

**NATURE OF EXECUTIVE POWER**

Madison (*Helvidius*): One can only understand the executive power in reference to the Law of Nations. The powers of the president are embedded in international law. *Consider—*

❒ Power to prosecute (*P&H*) ❒ ***Duty*** to execute treaties and LON (*Helvidius*)

**War Powers of the President and Congress**

*Issues*: ❒ Congressional and presidential authorization of force

 ❒ Law of War and the Constitution

**PRESIDENT’S POWER OVER WAR**

❒ Hamiltonian Vesting Clause (*Pacificus*): Article II is different, because it does not use the phrase “herein granted.” (*But see* art. III). Thus powers not listed may accrue to the president. Indeed, the clause should be seen as a **bulk grant** of all powers that are in their nature executive. Thus, any grants to Congress of traditionally executive powers should be *construed narrowly*.[[1]](#footnote-1)

❒ Locke and Montesquieu actually saw the war power as federative, though conjoined with the legislative power.

**EXAMPLES OF “EXTERNAL” WAR POWERS**

❒ Blockade (*July 4 message*)

**CONSTITUTION IN WARTIME**

*Theories—*

❒ ‘New Code’: *Pacficius and Helvidius* indicate that the law of war replaces or suspends the constitution insofar as the two are inconsistent.

**Domestic War and Emergency Powers**

*Issues*: ❒ Martial law and courts martial ❒ Suspension of habeas corpus

 ❒ Emergency powers of the president

**CONSTITUTION AND EMERGENCY POWERS**

*There are a number of theories about the president’s powers in time of emergency*—

❒ Extra-constitutional action: We must move beyond the constitution in order to save it. This is the idea implicit in the concept of martial law as extra-constitutional, and it is hinted at in the *July 4 message*, but pulled back from.

❒ Constitutional emergency powers (Art I, §9): The *suspension clause* is a broader grant of power than just *habeas*; tied with *commander-in-chief* power, the constitution provides for a broad range of emergency measures. (*E.g.*, Corning letter).

❒ Concurrent powers: A version of the above—president can take emergency action, subject to being overridden by Congress (*July 4 message* (Habeas power)). A more provocative version is that he may take extra-constitutional action, subject to ratification (*id.* (Army)).

**SUSPENSION OF HABEAS CORPUS**

*Background*: Habeas corpus (Blackstone’s “great writ”) is the judicial procedure to have one’s body brought before the judge. Today it means an action to challenge the legal conditions of one’s detention. The habeas corpus act of 1687 took away all power from the crown to suspend habeas, leaving the power with Parliament. Clearly, Article I further limits suspension. There is technically no *right* to habeas, though implied in the suspension clause.

**Theories of *habeas* suspension power:**

❒ Exclusive in Congress (*Merryman*; *Milligan*; *Hamdan* (majority and Scalia dissent))

❒ Concurrent power (*July 4 message*): Prez can exercise unless Congress overrides

❒ Presidential (*Binney* may be read this way; makes more sense on a martial law theory)

**What does *habeas* suspension do?**

❒ Narrow view (*Merryman*): You don’t have the right to invoke the writ (*still dramatic power*)

❒ Broader view: Might suspend other civil suits, constitutional rights

❒ Martial law theory (*see* *Corning letter*; *Bates opinion*): There is some thought that the suspension clause points toward a broader ability to declare martial law under the *commander in chief* power. This would suspend more rights than just *habeas*.

**MARTIAL LAW**

*Defined*: Applies to citizens within the territory of a state during some kind of emergency, where the military assumes power over the civil authority. The will of the commanding officer becomes the government. This is potentially extremely broad, and may displace constitutional rights to the extent they are inconsistent with the military operation. *Habeas* suspension may be a narrow measure within this category.

*Who declares martial law?* Chase (*Milligan* dissenting) describes “martial law proper” as “called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President.”

**MILITARY COMMISSIONS**

*Background*: Under Article I, Congress has the power to make rules for the military (Articles of War). For breaches, military members are tried before courts martial There is no way to get to a civil court except by *habeas* review. The Fifth Amendment grand jury requirement explicitly does not apply to MCs, and it’s also accepted that the Sixth Amendment is excepted. Now, the Bill of Rights has largely been extended to MCs.

**Three types of military commissions:**

❒ Martial law MCs: In the territory of the U.S. (“loyal” territory in Civil War) (*Milligan*)

These were the most radical steps that Lincoln took in the Civil War, and civilians could be tried for interference with the draft, hostile speech, exchange of information with the enemy, etc. According to *Milligan*, these can only be established by Congress.

❒ Occupation MCs: Wide jurisdiction in occupied enemy territory, extending to civilian crimes

❒ Law of War MCs: Offenses against the laws of war (Guantanamo cases).

*Two readings of the* Milligan *passage on law of war violations—*

❒ Never for civilians except when the courts are closed

❒ Never for “citizens in civil life,” as distinguished from rebels or bushwhackers

**How far can (martial law) military commissions extend?**

❒ Expansive theory: Anyone who obstructs the military mission (*Milligan*, Chase dissenting). This would extent martial law to everywhere the military operates.

❒ Limitations (*Ex Parte Milligan*): *Need both circumstances—*

❒ Actual/present necessity ❒ Effectually closes the courts/civil administration

**CONGRESSIONAL GRANTS OF IMMUNITY**

Amid major conflicts, Congress has attempted to grant immunity for government officials acting pursuant to a presidential order. (Habeas Corpus Act of 1863, §4; Military Commissions Act). We don’t have a clear answer as to the constitutionality of this immunity. One thought in the 19th century was that, if Congress can authorize the act, then it can immunize, but it cannot immunize unlawful or unconstitutional behavior (*cf. Ex Parte Young*).

**Treaties**

❒ Treaty power (art. II, §2, cl.2) ❒ Supremacy (*under authority*) (art. VI)

*Main issues*: ❒ President’s power to repudiate or interpret a treaty (Pacificus v. Helvidius)

❒ Supremacy and federal law ❒ Treaties and the bill of rights

 ❒ Executive agreements ❒ Supremacy and self-execution

**TREATIES AND THE EXECUTIVE**

❒ Hamiltonian Vesting Clause (*Pacificus*): President has the power to interpret obligations

**SUPREMACY AND FEDERAL LAW**

*Modern view has three general rules*—

❒ Last in Time: Treaties by the supremacy clause are the equivalent of statutes.

❒ Self-execution: Some treaties do not become the supreme law by their own force (*below*)

❒ Interpretation: Statutes should be interpreted so as not to violate treaties (*Charming Betsy*)

**THE SELF-EXECUTING TREATY DOCTRINE**

*Theories of self-execution*—

❒ Early doctrine: Generally, treaties were self-executing, by virtue of the supremacy clause, and self-execution was limited not by intent of the drafters, but by certain powers (such as the war power) that could not be circumvented by treaty (*P&H*).

**Customary International Law**

**Problematic:** The supremacy clause mentions only treaties, and does not specify the law of nations (customary law), though this is mentioned elsewhere in the constitution. It is peculiar that this, the main form of international law at the time, was not specified. *Two issues—*

❒ Incorporation/self-execution of CIL ❒ CIL’s place in the hierarchy

**INCORPORATION OF CIL**

*Arguments—*

* Golove’s historical thesis: Before the U.S., it was unusual to have self-executing treaties—parliament had to pass implementing legislation. But the great English commentators (e.g. Blackstone) thought that the law of nations was the law of the land, not because of an act of Parliament, but because the courts made it part of their common law. Thus incorporation, in Britain *and in the U.S., was simply assumed*. There was a broad self-executing doctrine, and the Framers did not feel the need to specify.
* CIL as Anti-Democratic: Many conservatives argue that customary law should never be part of our law. This leads to a **radical dualist view** that CIL is only incorporated when Congress passes implementing statutes. This parallels the move to non-self-execution.

**NORM HIERARCHY**

*Today’s views—*

❒ President: Thought to have the power to *disregard* CIL (one reading of *Paquette Habana*)

❒ Congress: CIL is both *non-binding* on Congress and *inferior to statutes*

❒ States: It’s unclear whether states are bound ❒ Courts: [Fed. Common Law?]

1. Hamilton unconvincingly says that the enumerated powers are either illustrative or qualified. [↑](#footnote-ref-1)