# Chapter 4 - The President’s National Security Powers

## US v Curtis Wright, 299 US 304 (1936) - 61

### What is the government trying to stop?

### Why did we care about Bolivia?

### What was the form of the congressional action?

### What does Chadha tell us about joint resolutions as law?

### What do they need to have the force of law?

### Is Curtis Wright pre-Chadha?

### What does this court say about the effect of joint resolutions on domestic law?

### What does the president have to do to make use of the joint resolution?

### Where does the underlying events take place, in or outside the US?

### Does this court see this as a foreign affairs issue?

### Why is that critical?

### In this court's analysis, who held the domestic powers between the Declaration of Independence and the signing of the Constitution?

### Who held the foreign powers during this period?

### What does this mean for the transfer of powers in the Constitution?

### What did a Senate report find in 1816?

### Why does it matter what the Congress thought in 1816?

### Why is it important if Congress has acted in a certain way since the founding?

### How can Congress affect foreign policy?

### Can it forbid specific actions?

### Did this court think that congress should try to specifically direct the president on foreign affairs?

### What is the legal question? - Remember the year - what else is going on at the United States Supreme Court?

### Why does the court find that this is not a delegation case?

### Why was the court willing to accept the joint resolution?

### While the president may have power over foreign affairs, what must congress do if the president wants to prosecute someone for selling arms to Bolivia?

## Extent of powers outside the US

### Does the constitution apply to actions outside the US?

### What about on military bases abroad?

### What about snatching or killing foreign nationals?

### Does it allow the president to conduct covert actions with unappropriated funds?

### How is this different from CIA covert actions?

### What did the president do for funds when he created the Homeland Security Office before Congress had approved funding?

### Where could unappropriated funds come from?

### What can the president do to raise such funds?

### Could he ask for donations from other countries?

### What did the White House do to raise money to support the US backed rebels in Nicaragua?

### What if Congress tells him not to carry out the action? (Iran-Contra)

### What do we know about the covert actions budget?

## The Sole Organ clause

### Does the president get to make all the foreign policy or does this mean he is just the spokesman for the US?

### What about congressional delegations and fact finding junkets to foreign countries?

### We will revisit all of these topics

## Dames & Moore v. Regan, 453 US 654 (1981) - 48

### What was the Iranian hostage crisis?

### What did President Carter have to agree to as a condition of the hostages being released?

### What specific power does the International Emergency Economic Powers Act give the president that was used as part of the resolution of these claims.

### What did Carter do that the court found was not specifically authorized by any statute?

### What legal authority did Congress give the president to resolve claims against foreign governments?

### Did Congress review President Carter's actions?

### Did Congress take any action to counter the President's actions?

### Why does the court say this inaction is acquiescence?

### How are claims against the states and federal government handled?

### Is there any international law right to private claims against states?

## Private claims affecting foreign policy

### Should private claims be allowed against foreign governments?

### How can these effect diplomacy?

### What is the flip side for us?

### What about prosecutions of heads of state?

## The Prize Cases, 67 U.S. (2 Black) 635 (1863) - 67

### What precipitated this case?

### Why didn't the president go to Congress for a declaration of war?

### What did the president order?

### What is the plaintiff trying to get in this case?

### Where does the law of prize and capture come from?

### What is the legal prerequisite to legally seizing ships at a blockade?

### Can the president declare war?

### What war powers did the early congress give the president?

### What was the president responding to?

### Did Congress authorize the action once they were back in session?

### How does the majority treat this ratification?

### Does the majority say that this authorization was necessary?

### Assuming that it was necessary, what was the dissent's problem with a post action authorization?

### Why does the majority reject this position?

### Has this view prevailed?

### What does the superfund laws tell us about this?

### What did the dissent say was necessary before the president could take this as an emergency action?

### How do the dissenters see this action in the absence of a declaration of war?

## Note 2 - Repealing Invasions

### Martin v. Mott - 1813

#### Congress passes a law saying the president can repel invasions and deal with insurrections.

#### What does the Court say about who gets to decide if there is an invasion?

#### Is this decision reviewable in court?

#### Is this classic agency deference?

## Presidential Uses of Military Power

### Review the list of presidential uses of military power

## How does this ratify Napoleon's assertion that Authority belongs to he who uses it?

## 9/11 and War

### What did the president say about war with al Quada?

### Why is this legally significant?

### How is this war different from recent wars?

### What have been the effects on domestic policy?

### What does it mean to a prisoner of this sort of war?

## Can Congress limit the president's power to carry out war?

## Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804)

### Who is the defendant?

### Why were we seizing ships that were headed to France?

### Was this ship bound for France?

### What did the statute provide?

### Why did the captain think he could seize a ship headed from a French port?

### What legal theory did the ship's owners use to sue the Captain?

### Does the court decide whether, had there not been a law, would this have been within the president's powers?

### What is the effect of the law in this courts' view?

### What is the impact on the captain of the court's decision?

### Who would have to pay the damages today?

### What was different in that period?

## Note 1 - The Mexican War

### Fleming v Page - 1851

#### President orders seizure of a Mexican port

##### Does this make it US territory?

##### What is the president's legal role in directing the seizure?

##### Military commander or policy maker?

##### Does the president's seizure of the port make it US territory?

##### What does the court say about this?

##### Remember the Halls of Montezuma in the Marine Hymn?

## Note 2 – What did the Torture Memo tell us about the president’s power as commander in chief?

## Note 3

### What have some scholars argued substitutes for a formal declaration of war in the post-WW II conflicts?

### Does it matter for international law whether the constitutional niceties are followed if we make it clear when we are at war and with who?

## THE PRESIDENT’S EMERGENCY POWERS

### In re Neagle, 135 U.S. 1 (1890)

#### What happened and what is the court reviewing?

#### Did Congress forbid this action?

#### How does the court justify this with section 2, article 3, the "take care" clause?

#### Could a sheriff in CA do this under CA law?

#### Why is this relevant to the federal case?

#### What could the feds have done to protect the justice that would not have led to this controversy?

#### What happened in the case of Kostza?

#### Why does it matter where Kostza was grabbed?

#### What if he was grabbed by France?

#### Why does the dissent reject the use of the "take care clause"?

### Note 3 - The Pullman strike - p 86

#### What where Pullman cars?

#### What were Pullman porters?

#### Why does the carrying the mail create a federal issue?

#### Why would their strike affect the mails?

#### How was the legal basis for the president's injunction to stop the strike different from that in Youngstown?

### Note 4 - The Emancipation Proclamation - p 85

#### Where did this free the slaves?

#### Why does this matter?

#### What would be the legal problem if he freed the slaves in the North?

#### What did free the slaves in the North?

#### Why did it need to be an amendment?

### Presidential emergency powers

#### What does this mean: Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.

#### Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 425-426 (1934):

##### Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the powers of the States were determined in the light of emergency and they were not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

##### What emergency was this case looking at?

##### Compare and contrast with Lincoln's question of whether we can save the Constitution but lose the nation.

#### What does it mean to say that the president has the power, but not the legal authority, to act in domestic emergencies?

#### What can happen if he does acts unconstitutionally?

#### Is this better than having congress give him unlimited emergency powers?

#### Can congress limit these emergency powers?

#### Does it matter where they are trying to limit them domestically or for foreign actions?

# Chapter 5 - Congressional National Security Powers

## A. Congressional Authorizations for War

## 1. Declaration of War

### How was the country different in 1800 from today as regards the relative power of congress versus the president to wage war?

### What resources did the president have available then and now?

### How does this affect the basic shift of powers?

### Would the second Iraq war have played out differently if congress had to declare war, initiate the draft, and appropriate money to raise an army?

### Declaration of War

#### Procedurally, how does congress declare war?

#### Is the presentment clause involved?

#### Can the president veto a declaration of war?

#### What if the president disagrees - can he refuse to fight the war?

### Brown v. US, 12 US 110 (1814)

#### Did the declaration of war allow the president to seize British property held in the US (trees)?

#### What if the forest was seized as a strategic objective during a battle?

#### What if it was used by the troops for fuel?

## 2. Statutory Authorization for Use of Military Force

### Bas v. Ting, 4 US 37 (1800)

#### What are the facts?

#### What did the lower court award Captain Tingy?

#### What is a privateer?

#### Are Halliburton and Black Water privateers or mercenaries?

#### What did the 1799 law require ship owners to pay if a ship was recaptured?

#### What is a solemn or perfect war?

#### Was there a declaration of war with France?

#### Were we at peace with France?

#### What war-like actions did we take?

#### Could the President have deployed land forces to invade France or French possessions?

#### Could he have deployed the Navy to take the war to French ports?

#### What is an imperfect war?

#### How do you know you are in an imperfect war?

#### Does an imperfect war create a legal enemy?

#### Does this trigger the 1799 act?

#### Where does the court look to find congressional authorization for an undeclared war? (Orlando v. Laird (1971).

##### What is congress authorizing money for?

##### What about joint resolutions and sense of the house or senate motions?

#### What were the four actions that Congress authorized that Justice Chase saw as evidence that a state of war existed?

#### How did Justice Paterson say an imperfect war differs from a perfect war?

#### Does the Captain get to keep his 1/2?

#### What does this add to our knowledge of the Little case?

### Notes

#### Do the president's powers differ in declared and undeclared wars?

#### Does the president have to wait until Congress recognizes that we are in an imperfect war?

#### Does the declaration of war mean anything beyond triggering statutes?

#### Is it judicial in nature, meaning that it does not affect the president's right to conduct war?

#### Is the declaration of war obsolete?

##### Was Viet Nam the enemy in the Viet Nam war?

##### Is Iraq the enemy in the Iraq war?

#### Did Congress declare war on al Quada?

##### What did they do?

#### What is evidence that a declaration of war was already obsolete in 1789?

#### How does the war on terror differ from previous declarations of war?

#### Could Congress declare war on a non-state?

#### Should such a declaration trigger the usual war measures, including international law issues?

#### What is the vagueness problem for foreign countries and their citizens?

#### What does it mean to declare war on crime, drugs, cancer, etc?

#### Is it a useful metaphor?

#### Could Congress declare a limited war, i.e., a declaration of war that specifically limits the president's actions?

## B. DELEGATIONS AND APPROPRIATIONS FOR NATIONAL SECURITY

### Lichter v. US, 334 US 742 (1948) - 102

#### What was the purpose of the Renegotiation Act

#### What is the selective service?

#### Got your draft card?

#### What clause authorized it

#### How is the Renegotiation act like the selective service act?

#### What advantages do the merchants have over the draftees?

#### What was the delegation theory attack on the law?

#### What is the takings argument on excess profits?

#### How is the modified by the "raise armies" and "take care clauses"?

#### What did Justice Hughes tell us in his address, ‘‘War Powers Under The Constitution, about construing the Constitution in the face of conflicts?

#### Is the argument different for state laws, where there is no US Constitutional provisions that modify the takings clause?

#### What about modern gouging laws?

#### How did the court rule?

### Greene v. McElroy 360 US 474 (1959) - 105

#### What are the new property cases?

#### Is this a new property case?

#### What happened to Plaintiff?

#### What is the long term effect?

#### What is the due process problem?

#### Is this a delegation case? What analysis would we use?

#### What step does case this fail and why?

#### Why does congressional ratification based on funding the procurements fail?

#### What is the court dodging?

#### How has the delegation doctrine been revised by the United States Supreme Court post Chevron?

#### What is the test now for a proper delegation?

#### What about delegating the power to declare war?

#### What about the power to ratify treaties?

### Notes

### a. Delegations of National Security Authority

#### How broad is the congressional power during war time?

#### When was the last time the United States Supreme Court overturned a delegation of lawmaking authority to the executive?

#### What does *Skinner v. Mid-American Pipeline, 490 US 212 (1989)* tell us about the delegation of power of Congress to delegate national security powers to the president?

### b. Authorization by Defense Appropriation

#### What is the difference between bills that authorize and those that appropriate?

#### How do you argue that an appropriation bill is also an authorization bill for specific executive powers?

#### What does a modern budget bill look like?

##### How does the modern budget process undermine the ability to infer intent through funding?

#### What do you look to in the appropriations bill to support an authorization argument?

#### Impoundment - what if the president disagrees with an action of congress and just refuses to spend the money?

#### What has the United States Supreme Court said about impoundments?

#### What does Spaulding v. Douglas Aircraft tell us about the power of congress to put strings on appropriations?

##### Given Chevron, why are limits on appropriations more effective than direct legislation on agency authority?

##### What is the procedural advantage?