## THE PRESIDENT’S EMERGENCY POWERS

### Intro discussion

#### What are the four mentions of emergency powers in the Constitution? S.p. 1-2

#### Has Congress passed additional emergency powers laws?

#### What did Nixon use the Feed and Forage Act of 1861 for?

#### Was this consistent with its original purpose?

#### When Congress passed the National Emergencies Act of 1976, what happened to all the old emergency powers laws?

#### What does the President have to do before using the powers in the National Emergencies Act?

#### Look at the text of the Act on the blog – does the Act define emergency?

#### Does the act provide an “intelligible principle” for the courts to use in reviewing the emergency declaration?

#### Where does this leave the courts when these declarations are challenged?

#### Think about what a statutory definition of emergency might look like.

### Presidential Proclamation No. 9844

#### Does an emergency imply something has changed?

#### Has there been a dramatic chance in border immigration?

#### International Emergency Economic Powers Act (IEEPA).

#### What is the IEEPA standard for sanctions?

#### How would you argued that is OK to use IEEPA as leverage in a trade war?

#### Terminating emergencies

##### NB – when the Act was passed, joint resolutions did not have to signed by the President. How is the functioning of the Act changed by the Chadha case, which requires that joint resolutions be signed by the president?

##### How long do declarations last unless renewed by the President?

##### How could Congress rewrite the Act to get back the control it had in 1976?

### Independent Executive Authority

#### How did this work out in the Steel Seizure Case?

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

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

#### Did Congress authorize marshals to protect Justices?

#### 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?

#### Since this provides statutory authority, does it make the constitutional justifications just dicta?

### What changed legally between the Pullman strike, which the Court enjoined, and the Steel Seizure case?

### The Emancipation Proclamation

#### Where did this free the slaves? (not in the book – look it up)

#### Why does this matter?

#### What would be the legal problem if he freed the slaves in the North? (Hint – Remember Douglass in Youngstown)

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

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

# Chapter 5 - Congressional National Security Powers

## A. Congressional Authorizations for War

## 1. Declaring a state 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?

## 2. The Obsolescent Declaration of War?

### How did the acceptance of defensive war make a declaration of war obsolete by the drafting of the constitution?

## 3. The Legal Domino Effects of War.

### What are examples the statutes triggered by a declaration of war?

## 4. Is Congress’s War-Declaring Role Strictly Judicial?

### Given that the president can make war without a declaration of war, what have some scholars argued is the purpose of declaration?

#### Triggering war related powers.

### If the president can make war without Congress, what is its real control over war?

#### Funding and impeachment.

## 5. Declaring War on Terrorists?

### Did Congress declare a war on terrorists?

### Does it make sense under the Constitution to declare war on an NGO (non-governmental body) rather than state?

## 2. Statutory Authorization for Use of Military Force

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

#### What are the facts?

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

#### What was the conditional provision in the 1799 law that is at issue in this case?

#### What does Bas argue about France?

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

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

#### What is an imperfect war?

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

#### Were we at peace with France?

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

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

#### Does this trigger the 1799 act?

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

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

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

### Notes

## 3. Authorizing the Use of Military Force by ‘‘Partial Congressional Declaration’’ or Congressional Silence

### Does Congress authorize military force by not objecting?

### What if it does not block the funding for the actions?

### Should this trigger the statutes that depend on war being declared?

## B. DELEGATIONS AND APPROPRIATIONS FOR NATIONAL SECURITY

#### How broad is the congressional power during war time? (Quote from Spaulding v. Douglas Aircraft )

### Lichter v. US, 334 US 742 (1948) - 114

#### What did the Court mean when it said that the power to wage war is the power to wage war successfully?

#### What does this imply is the war is a serious threat to the US?

### Greene v. McElroy 360 US 474 (1959) - 116

#### This case tests how far the President’s powers go under the general right protect national security.

#### What happened to Plaintiff?

#### What is the long-term effect on his career?

#### What is the due process problem?

#### This happens in the context of the process for classifying documents and preventing their unauthorized release. Does the court find that the president has the power to classify documents, even thought it is not spelled out in statute?

#### What is that a necessary power under the power to protect national security?

#### Did Congress specifically authorize the limited due process hearings at issue in this case?

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

#### Is the court comfortable with this informal authority for these hearings?

#### Why not?

#### What is the court dodging – could congress authorize these hearings or would they be unconstitutional? (This is before the New Property cases.)

### Notes

### a. Delegations of National Security Authority

#### Can Congress delegate the War power to the President?

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

#### If an imperfect war has the same legal implications as a perfect war, has Congress already effectively delegated the war power to the president by putting few restrictions on the use of the standing army?

## Supplement

### C. Wielding the Appropriations Power

#### How does the Appropriations Clause limit the president and even the courts?

#### 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 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?

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

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

#### Given judicial deference to agencies (Chevron), why are limits on appropriations more effective than direct legislation on agency authority?

#### What is the procedural advantage, i.e., why do modern appropriations bills with thousands of provisions make it more politically difficult to veto a bill to get rid of an appropriations limit?

### Sierra Club v. Trump

#### What is the history between Congress and the administration over border fence funding?

#### Has Congress provided border fence funding to previous administrations?

#### Has the Congress offered some border fence funding to this administration?

#### Not the in the book, but do you know the deal Congress was willing to make for border fence funding?

#### What is the narrow question before the court?

#### What are the four factors for a stay?

#### What did Madison say about the role of the appropriations clause in separation of powers?

#### What does the court say about the president’s power to reprogram funds without statutory authorization?

#### What is the judicial remedy if there is illegal reprogramming?

#### When does Section 8005 of the Department of Defense Appropriations Act of 2019 allow funds to be reprogrammed?

#### What did the court find was the problem with the need for funding being unforeseen?

#### How do defendants argue that Congress had not denied the funds?

#### Why does the court reject this narrow reading?

#### Why didn’t the court defer to the DOD’s interpretation under Chevron?

#### Does the agency provide a detailed record to support its request for deference? (This is part of why notice and comment rules get more deference.)

#### What statute gives plaintiffs a cause of action?

#### What is the problem with defendant’s claim that delaying the fence will head to an ocean of drugs entering the US?

#### What about the claim that they must spend the money or lose it in the next budget cycle?

#### What is the dissent’s argument that plaintiffs do not have a cause of action under the APA?

### In Trump v. Sierra Club, Dec 2019, the United States Supreme Court stayed the injunctions against spending the money until the litigation is over.