## LIMITATIONS ON CONGRESSIONAL WAR POWERS

## Lovett v. US, 328 US 303 (1946)

### What did congress use a rider in the spending bill to do?

### What due process does this deny them?

### What is the constitutional limitation on this sort of law?

### What is the general principle?

### Can you use appropriations to accomplish things that Congress does not have the power to do directly?

### How is the Medicaid expansion an example?

### Can you think of other examples?

## Is congress prohibited from using appropriations to interfere with foreign policy?

### What is the problem in enforcing this?

### What if congress just shuts down the state department?

### Why does the use of omnibus bills make it difficult to fight about specific appropriations riders?

### If congress is prohibited from using appropriations to mess with foreign policy, does it follow that the president may divert money from other appropriations to accomplish foreign policy purposes?

## Remember Chadha?

### What power did Congress reserve to itself in Chadha?

### Why was this a violation of separation of powers?

### What does this leave as the only joint resolution of Congress with legal effect?

### What are the unilateral powers of the houses of Congress?

### Should there be a national security exception to Chadha?

### Why should the court be more flexible on national security?

### What if the president wants to use our first strike capabilities to slow down competition from China?

## Line Item veto - Note 4 - 122

### What is a line item veto?

### Why would congress give this to the president?

### What is the problem with using impoundment as a line item veto?

### What is the constitutional problem with a line item veto?

### Why did the founder's not think about a line item veto - how was the budget process different?

### Would the argument be different for national security bills?

### Does Congress have a way to give the president flexibility?

### What about the budgets for the CIA and NSA?

# Chapter 6 - The role of the Judiciary

## Getting into court

### Standing – Lujan

#### You have to have standing to get the other doctrines.

### Ripeness – is it ready for the court?

#### Exhaustion of remedies

#### Exhaustion of lower court review

### Deference

#### Chevron from Adlaw

#### Political question is the ultimate deference, but you do not get to it unless you have standing.

## Standing to Sue

## Smith v. Obama

### What are the facts?

### Why does he argue that the war is unlawful?

### Did the President notify Congress?

### What does the administration argue authorized the war?

### Does disagreeing with the President on the legality of the war satisfy the Lujan standing requirements?

### Plaintiff argues that Little v. Barreme requires him to disobey orders that he thinks are beyond the legal authority of the president. Does the Court agree?

### What does the court say *Little v. Barreme* does?

### Does not being immunized justify disobeying orders?

### When does an officer have a duty to disobey an order?

### The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.

### Does this even come up in peace time?

### What are the sort of acts that the duty to disobey orders contemplates?

### What is plaintiff’s theory of standing under the Oath of Office cases?

### What injuries were alleged in the Vietnam era cases that did meet the standing requirement?

### Is the plaintiff arguing that his own rights or liberty are being threatened?

## Notes

### What happened in Clapper?

### Why did the Court reject standing?

### Zaidan v. Trump, No. 17-581, 2018 WL 2976006 (D.D.C. June 13, 2018),

#### Was inferring that he was on a kill list from social media and other indirect sources of information enough to trigger standing?

#### What about five “near-miss” aerial attacks on him in Syria (including one using a Hellfire missile of the kind carried by U.S. drones)

### Suppose, for example, that an American who had been injured in Yemen by a Saudi air raid sued the President and other executive branch defendants for supplying military aid to the Saudi Air Force in violation of a statutory ban on military assistance to Saudi Arabia. What is the redressability problem?

### Except for Flast v. Cohen, what is the usual fate of taxpayer standing cases?

### Can members of Congress sue the president when he does things that they voted against?

### What sort of question will that always be?

### What does it mean when the court says that Congressional standing depends on the president completely nullifying the votes of Congress?

### Is this what happens in impoundment and reprogramming cases?

### The court found standing for private plaintiffs in Sierra Club v. Trump because its members would suffer injury from the wall. What about members of Congress? Do they still have things they can do?

## Political Questions

### What is a political question?

### What are the Baker v. Carr factors (p. 51 S)

### Which are the most important factors?

### Smith v Obama – Political question

#### What does the court say plaintiffs want it to do?

#### Would this require the court to evaluate facts about the war?

#### What is the particular problem with asking the court to review the wisdom and legality of military actions?

### What is the common thread in The Steel Seizure Case, Curtiss-Wright, Dames & Moore, Little v. Barreme, Bas v. Tingy, and Greene v. McElroy that allowed the court to find standing?

### Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990)

#### What is the factual posture in the case?

#### What was the legal claim?

#### Did the court find the that it could decide whether a war needed to be authorized, i.e., that it was not a political question?

#### Has there been an unauthorized war if the troops are just sitting on the border?

#### As long as the troops are sitting there, can the president withdraw them or seek authorization?

#### Is there claim ripe before the troops attack?

#### What is the problem with waiting until the attack?

### 1. A Cause of Action? - supplement

#### We will not cover the specific statutes but I will talk about Bivens and Tort Claims in class. This will include a discussion of qualified immunity.