# Chapter 3 - The Gloss of History: An Introduction to the Separation of National Security Powers

## The Korean War

## Background for Youngstown

### What was going on in 1952 that is the backdrop for Youngstown?

### Why does it make steel manufacture a national security issue?

### Why prompted Truman to seize the mills?

### How is going to run the mills?

### Who is going to pay for their operation?

## What is the form of the president's law?

### Executive orders were used in Youngstown

### National Security Decision Directive - NSDD

### Presidential Decision Directives - NDD

### Regulations promulgated through the agency process

### What is the difference between Executive Orders and NSDDs?

### What is the problem of secret law?

## Labor Law in Youngstown

### Is there a statute that governs the federal government's intervention into strikes?

### What does it provide as remedies that are relevant to this case?

### Does it provide for enjoining the strike or seizing the business and operating by the government?

### Is there evidence that enjoining the strikes was considered and rejected by congress?

### Why is this significant?

## The Seizure

### What administrative law device did the president use to seize the mills?

### Who did the president tell to operate the mills?

### Who is opposing the president's order?

### Did they cooperate in operating the mills?

### What would the president's recourse if they had not?

### How did the district court rule on their injunction against the seizure?

## Justice Black

### What sort of constitutional analyst was Black?

### Is he sympathetic to implied powers?

### What was he looking for to justify the president's action?

### What about the Defense Production Act?

### Why didn't Truman use it?

### Had congress addressed seizures in strikes before?

### What does the Taft-Hartley Labor Management Relations Acts history tell us?

### Did Black find authority?

## Justice Frankfurter

### What is the significance of the Labor Management Relations Act to Frankfurter?

### How does this act provide for seizure of industry in a strike?

### INS v. Chadha was decided in 1983, finding the legislative veto unconstitutional. How does it complicate statutes requiring congressional consent or authorization?

### What about seizures by Lincoln during the Civil War?

### Why is this seizure different from those in WW II?

### Would he allow the president to use powers beyond on those in the Constitution if it were a long-standing practice that was not specifically banned by Congress?

### Is this a disagreement with Black?

### What is the danger of this analysis?

### Under this theory, who has to change the law?

## Justice Douglas

### How does Douglas characterize the seizure?

### What would the president have to do to make it legal?

### Why can't he do this?

### Why does he say this statement is an unavoidable part of separation of powers?

## Justice Jackson

### What were Justice Jackson's three classes of presidential action and the level of deference that these trigger?

### What does Jackson say determines the legality of the action in this case?

### How does this look like Chevron, i.e., deference to agency/executive decisionmaking?

### What level of deference should the court give when the president is acting against the will of Congress?

### What does the Solicitor General claim is the legal authority?

### Does this sound familiar?

### What does Jackson think of this?

### Does Jackson believe that Congress could seize the mills?

### What constitutional provision would he use?

### How would Jackson limit the notion of Commander in Chief?

### How does Jackson think the President is trying to use his power over foreign affairs to leverage his domestic powers?

### What prophetic statement does Jackson make about Congress is a crisis?

### Is this a realistic fear?

### What examples have you seen since 9/11?

## Justice Burton

### Is Justice Burton comfortable with expansive presidential powers in an emergency?

### Why does he not grant them in this case?

### Did the subsequent effects of the strike support his view?

### Should judges be deciding what is an emergency?

## Justice Clark

### Is he sympathetic to "extra constitutional" powers?

### What does he mean when quotes Lincoln: is it possible to lose the nation and yet preserve the constitution?

### Is the reverse also possible?

### Why does he reject the president's power here?

### Do you think he was also affected by the belief that this was not really a crisis?

## The Dissent - Vinson, Reed, and Minton

### Does the dissent take a different view of the level of crisis?

### Why do they think the country is on war footing, despite no declaration of war?

### The dissent points to the Price Stabilization Act that was in force at the time as limiting the president's power to grant price increases to allow the mills to pay the worker's more.

### How do they say this allows him to act against the implicit direction of the Labor act to not use injunctions and seizures?

### Why are they not worried about this leading to dictatorship?

### What is the constraint they see on the president's actions?

### Why is the Labor Relations Act not this legislation?

## Notes

## Youngstown as Delegation Doctrine Case (review from adlaw)

### How is this just an example of general problem of delegation?

### Why did the courts hesitate about allowing the legislature to delegate power?

### Why did they have to accept this?

### What standard did they decide to use to determine if the delegation is proper?

### Is there law to apply when deciding if the delegation is proper?

## Congressional Inaction

### How can the president make law by "going first"?

### What are the reasons for congressional inaction?

### Do they all equally support president action?

### Does it matter if Congress considers the matter after the president acts and still does not pass legislation?

### What if they pass legislation on the topic and do not address the president's actions?

### What if this has been going on for a long time, since the early Congress?

### Why does acquiescence by the early Congress matter more?

### Does it matter if the president's action is Constitutional gloss, i.e., something that is not contemplated by the Constitution, as opposed to just something that Congress has not thought of?

### What if it is forbidden by the Constitution?

## The President's Emergency Powers Post Youngstown

### What are examples of emergency powers that were used post 9/11?

### Does Youngstown pose a real obstacle to presidential emergency powers?

## Public Citizen v. DOJ, 491 U.S. 440 (1989)

### Does the Federal Advisory Committee Law require that the president make public the recommendations of the ABA on judicial candidates?

### What is Kennedy's analysis?

### What is an example of a purely presidential power?

### What is the Constitutional issue in Public Citizen?

### What are the issues with the appointment's power?

### What are the administrative law issues that court did address?

### The majority did not reach the Constitutional issue

### Kennedy concurred and did - did he think the statute violated the Appointment's Clause?

### Where does this leave us with emergency powers?

## Review: THE SEPARATION OF NATIONAL SECURITY POWERS: SUMMARY OF BASIC PRINCIPLES

# Chapter 4 - The President’s National Security Powers

## Three cases, none directly on point of the extent of the President’s foreign national security powers. But, as we will see later, that might be because an on point case would be a political question.

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

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

### Review of non-delegation doctrine.

#### The old view – no delegation of legislative or judicial power.

#### The new view – is there a standard for the court to use in reviewing the executive’s action under the delegation?

#### Is it a standardless delegation? If so, it is just ultra vires, not unconstitutional.

#### Is this a blanket grant of power, or are the limitations on presidential action?

#### Would it pass the modern test for delegation?

### What is the government trying to stop?

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

### What does this court say about the effect of this joint resolutions on domestic law? (Chadha complicates this.)

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

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

### Does this court see this 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 is meant by extra-constitutional powers?

#### Are there powers that are implicit to a nation state?

#### Could the constitution have limited those?

#### Did it?

### What did a Senate report find in 1816? P.58

### 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?

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

### 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?

### What limits the value of Curtis Wright today?

## 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?

### Has the senate’s control over treaties been diminished by Executive Agreements?

### In the absence of enabling legislation, can a treaty do more than an executive agreement?

## Dames & Moore v. Regan, 453 US 654 (1981) - 62

### 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?

### 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 affect diplomacy?

### What is the flip side for us?

### What about prosecutions of heads of state?