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Constitutional Law  
in a Changing America  
**Short Course** 7<sup>edition</sup>

# The Executive

## Chapter 5

# Article II: General

Framers knew they did not want a king, but the dilemma was how to elect a president in a:

- country with protective and jealous colonies
- country that is spread out geographically
- country that hated parties

# Article II: General

Dealt mostly with election and removal and not with powers of the president.

Very little indication of powers, and those set are vague:

- **Executive Power**
- **Faithfully execute laws**
- **Commander and Chief**

# Executive Power

## Two Theories of Power:

Executive Power is a designation of office and therefore limited in scope of power.

Executive is a general grant of power

- **Residual powers (cannot be specified)**
- **Section III**

# What would the Court do?

***In re Neagle*** (1890): Presidents have the power to enforce the laws of the nation, with or without congressional approval.

***In re Debs*** (1894): Presidents can do what they need to do to protect the general welfare.

***Youngstown Sheet & Tube*** (1952): Presidents cannot exert power incompatible with the express or implied will of Congress.

***Train v. City of NY*** (1975): EPA must allocate all funding for clean water program because president was given no discretion to act differently.

# Domestic Powers

President is much more constrained here than in issues of foreign policy!

Presidential Vetoes and the Presentment Clause (Article I Section 7)

Presidents can sign, ignore, or veto bills (as well as pocket veto them)

# Line Item Vetoes

Presidents want the LIV so that they can rid bills of unneeded pork in bills (Bridge to nowhere in Alaska)

Congress gave the president the LIV in 1996: **Why would it do so?**

Initially no standing in *Raines v. Byrd* (1997)

*Clinton v. City of New York* (1998)

# *Clinton v. City of New York (1998)*

**Question:** Does the line item veto violate Article I Section 7 Clause 2 (the presentment clause) of the constitution?

Yes. 6-3 vote. Majority opinion by Stevens.

The intent of the framers makes it clear that there is only one procedure for enacting laws.



# Appointment and Removal

Two key points in Article II Section 2:

Senate must confirm all appointments of major officers

Congress may vest the appointment of inferior officers to the president.

Key question is what is the difference between inferior and high level appt.

# Appointments and Removal

*Buckley v. Valeo* (1976): FEC commissioners not inferior officers!

*Morrison v. Olson* (1988): Special prosecutor. The special prosecutor is an inferior office in the federal government.

# Dismissing Executive Officials

No mention in the constitution, but arguments on both sides.

**Discretion:** Presidents need loyal people and must be able to get rid of those who are not.

**Senate approval:** If Senate must confirm appointments, it should confirm firings.

# Dismissing Executive Officers

**Myers v. U.S.** (1926): Cabinet officials must be the alter egos where the president has to exercise his authority.

**Humphrey's Executive v. U.S.** (1935): The legislative intent demonstrates that Congress did not want the FTC to be subject to any governmental official. That is, the FTC must be free of political domination, including from the president.

# *U.S. v. Nixon* (1974)

**Question:** Does the President's right to absolute immunity give him the right to not turn over tapes that have been subpoenaed by a court of law?

No. 8-0 vote. Majority opinion by Burger.

We reaffirm to *Marbury* which states that it is the province and duty of the Court to say “what the law is.” absent a claim of national security (or similar issue) neither the separation of powers, nor the privilege (without more) can sustain unqualified immunity.

# Executive Privilege: Supplying Information

Can the president refuse to supply information to other branches?

*Nixon v. Administrator of General Services* (1977)

*Cheney v. U.S. District Court for D.C* (2004)

U.S. attorney scandal in 2006.

# Executive Privilege: Lawsuits and Civil Suits

o what extent are presidents immune to lawsuits while in office?

***Mississippi v. Johnson*** (1867): The judiciary is forbidden from interfering with the exercise of executive discretion.

***Georgia v. Stanton*** (1868): Injunction to stop reconstruction acts (political question).

***Nixon v. Fitzgerald*** (1982): The act here is within the president's official responsibility and he cannot be questioned for carrying out this duty. Doing so would simply be too intrusive.

# *Clinton v. Jones* (1997)

**Question:** Is a sitting president immune from private law suits while in office?

No. 9-0 vote. Majority opinion by Stevens.

The principal rationale for immunity is to ensure that officials are not sued for carrying out their official duties. This reasoning provides no support for immunity for unofficial conduct.



# Presidents and Foreign Policy

Has special authority over foreign matters

Commander in Chief

Power to make Treaties

Power to appoint ambassadors, and so on and to receive ambassadors and so on.

# *U.S. v. Curtiss-Wright* (1936)

**Question:** May Congress issue a resolution that concerns external affairs that gives the president the power to control U.S. involvement in foreign affairs?

Yes. 7-1 vote. Majority opinion by Sutherland.

The president alone has the power to speak or listen as a representative of the nation. The president does not get this power from an act of Congress but from the Constitution.

# Times of Crisis

What is a time of crisis?

Do we have to declare war?

Who has the power: the president or Congress?

# The Prize Cases

**Question:** Does the president have the right to institute a blockade of ports under control of persons in armed rebellion against the government before Congress has acted?

Yes. 5-4 vote. Majority opinion by Grier.

Under his powers, the president must decide on the proper force. Because the blockade existed, by executive order, we were in a state of war.

# Civil War And World War II Cases

***The Prize Cases (1863)***: When does a state of war exist?

- This case increases presidential power over Congress!

***Ex Parte Milligan (1866)***: Military may not try citizens who are not rebelling.

- This case takes power from the president!

***Ex Parte Quirin (1942)***: Military tribunals okay.

- Why did the Court decide this case differently than it did in *Milligan*?

***Hirabayashi v. U.S. (1943)***: Curfew okay.

- This case led to *Korematsu (1944)*

# *Korematsu v. U.S.* (1944)

**Question:** May the president order the internment of all people suspected of being of Japanese ancestry?

Yes. 6-3 vote. Majority opinion by Black.

We are dealing with nothing more here than an exclusion order to protect the country. There is evidence that some citizens of Japanese ancestry were disloyal, and therefore action was necessary.

**Post Korematsu:**

The Court ruled against the U.S. in *Ex parte Endo* (the same day).

Reparations paid in 1988 (20K per person who was interned).

# *Youngstown Sheet and Tube v. Sawyer* (1952)

**Question:** May a president take over an industry in order to prevent a union from striking?

No. 6-3 vote. Majority opinion by Black.

The president's order does not direct that a congressional policy be executed in a manner consistent with the intention of Congress

# Questions about Youngstown

As in *Korematsu*, Black wrote the opinion and seemed to change his point of view of presidential power. Did he?

“Mere Designation” or enumerated approach?

Does this case square with *Neagle*? Why or why not?



# Keys to Youngstown

Clear SOP game here

Look to the historical context as well (First Amendment)

Key here is the power of concurrence

Next Big Case: Dames and Moore (1981)

# War on Terror Cases: *Hamdi v. Rumsfeld* (2004)

**Question:** May the executive branch detain citizens who qualify as enemy combatants? May an alleged enemy combatant challenge such status in a court of law?

Yes. Plurality vote—4. Yes. 8-1 vote. Plurality opinion by O’ Connor.

A citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for this classification and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.

Other War on Terror Cases: *Hamdan v. Rumsfeld* (2006)