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First PRINCIPLES SERIES

No. 4

Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism

John Yoo

Conduct of the war on terrorism raises novel, complex, and unprecedented legal and policy issues. This should be expected from a conflict that knows no borders and involves enemy combatants who do not fight on behalf of any nation. But critics go beyond claiming that President George W. Bush has made poor policy decisions to alleging that he has acted unconstitutionally by seizing Congress's authority to wage war.

For instance, in December, *The New York Times* reported that President Bush had authorized the National Security Agency (NSA) to engage in the warrantless interception of international phone calls and e-mails linked to terrorist activity. The Bush Administration claimed that both the President's constitutional powers as commander in chief and chief executive and Congress's authorization for the use of military force passed a week after the September 11, 2001, attacks allow the surveillance to take place outside the warrant process required by the Foreign Intelligence Surveillance Act (FISA) of 1978.

Claims that the surveillance is illegal are not just limited to the usual suspects of liberal newspaper columnists, Democratic Congressmen, and law professors. George Will, for example, claims that the Bush Administration has created a new danger by arguing that:

> because the president is commander in chief, he is the "sole organ for the nation in foreign affairs." That non sequitur is refuted by the Constitution's plain language, which empowers Congress to ratify treaties, declare war, fund and regulate military forces, *and make laws "necessary and proper" for the execution of all presidential powers.* Those powers do not include deciding that a law—FISA, for example—is somehow exempted from the presidential duty to "take care that the laws be faithfully executed."[1]

Will's statement that the President is the "sole organ for the nation in foreign affairs," however, was not manufactured by the Bush Administration, but in fact represents the view of the Supreme Court, first articulated in the case of *Curtiss-Wright Export Corp.* Congress does not ratify treaties; the Senate does. The Constitution's Necessary and Proper Clause may give Congress the power to implement the other powers of the government, but it also does not allow Congress to change the separation of powers in its favor by reducing the powers of the President.

Finally, the President has the duty to take care that the laws are faithfully executed, but because the Constitution is the highest form of federal law, the President cannot enforce acts of Congress which are themselves unconstitutional. Will seems to imagine the Commander-in-Chief Clause as being substantively empty—the President's sole function is to execute the war policies of Congress.

[1] George F. Will, "No Checks, Many Imbalances," *The Washington Post*, February 16, 2006, p. A27.

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Richard Epstein, perhaps the nation's leading libertarian legal scholar, similarly believes that Congress has the upper hand in setting war policy, primarily through its powers to declare war, to make rules for the regulation of the armed forces, and to fund the military. Epstein does have a broader view of the Commander-in-Chief Clause, which he suggests guarantees civilian control over the military and prevents Congress from issuing orders or evading the chain of command. But it is nowhere near the powers held by Congress. "The precise detailed enumeration of powers and responsibilities in Article II just do not confer on the president a roving commission over foreign and military affairs. He is a coordinate player, not a dominant one."[2] According to Epstein, Congress's power goes so far as to allow it to prohibit the military from using live ammunition in combat.

These critics misread the Constitution's allocation of war-making powers between the executive and legislative branches. This is nowhere more true than where their case should be its strongest: who gets to decide whether to start a war. For much of the history of the nation, Presidents and Congresses have understood that the executive's constitutional authority includes the power to begin military hostilities abroad.

As I argue in *The Powers of War and Peace*,[3] the Constitution does not create a legalistic process of making war, but rather gives to the President and Congress different powers that they can use in the political process to either cooperate or compete for primacy in policy.

During the last two centuries, neither Presidents nor Congress have ever acted under the belief that the Constitution requires a declaration of war before the U.S. can engage in military hostilities abroad. Although this nation has used force abroad more than 100 times, it has declared war only five times: the War of 1812, the Mexican–American and Spanish–American Wars, and World Wars I and II. Without declarations of war or any other congressional authorization, Presidents have sent troops to oppose the Russian Revolution, intervene in Mexico, fight Chinese Communists in Korea and remove Manuel Noriega from power in Panama, and prevent human rights disasters in the Balkans. Other conflicts, such as both Persian Gulf Wars, received "authorization" from Congress but not declarations of war.

Critics of these conflicts want to upend long practice by appeals to an "original understanding" of the Constitution. But the text and structure of the Constitution, as well as its application over the last two centuries, confirm that the President can begin military hostilities without the approval of Congress. The Constitution does not establish a strict war-making process because the Framers understood that war would require the speed, decisiveness, and secrecy that only the presidency could bring. "Energy in the Executive," Alexander Hamilton argued in the *Federalist Papers*, "is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks."[4] And, he continued, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[5]

Rather than imposing a fixed, step-by-step method for going to war, the Constitution allows the executive and legislative branches substantial flexibility to shape the decision-making process for engaging in military hostilities. Indeed, given rogue states' increasing ability to procure weapons of mass destruction (WMD), and the rise of al-Qaeda and international terrorism, maintaining this flexibility is critical to preserving American national security.

CONSTITUTIONAL TEXT AND STRUCTURE

Many prominent scholars have criticized the wars of the post-war period by appealing to the intentions

[2] Richard A. Epstein, "Executive Power on Steroids," *The Wall Street Journal*, February 13, 2006, p. A16.

[3] John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005).

[4] Alexander Hamilton, *Federalist* No. 70, "The Executive Department Further Considered" (Jacob E. Cooke ed., 1980), at 423.

[5] Alexander Hamilton, *Federalist* No. 74 (Jacob E. Cooke ed.), at 447.

of the Framers. But interpretation of the Declare War Clause, like any other constitutional provision, should begin with analysis of the constitutional text and structure.

Critics of the President's war powers appeal to an understanding of declaring war that is probably taught in most high school civics classes. Professor Michael Glennon, for instance, has written that the Declare War Clause not only "empowers Congress to declare war," but also "serves as a limitation on executive war-making power, placing certain acts off limits for the President."[6] It is perhaps a commonsense notion to equate the power to "declare" war with the power to "begin" or "commence" war.

This view comports with a popular imagery of declarations of war as marking American entry into the most significant conflicts of the 20th century—namely, the two World Wars. The constitutional text, however, does not support such an expansive reading.

First, note that the Constitution uses the word "declare" war rather than "make," "begin," "authorize," or "wage" war. At the time of the ratification, "declare" carried a distinct and separate meaning from "levy," "engage," "make," or "commence." Samuel Johnson's English dictionary, perhaps the definitive dictionary of the time, defined "declare" as "to clear, to free from obscurity," "to make known, to tell evidently and openly," or to "publish or to proclaim."[7] This suggests that declaring war recognized a state of affairs—that is, it clarified the legal status of the nation's relationship with another country—rather than authorized the commencement of hostilities. As I will soon discuss, constitutional history provides further convincing evidence of this conclusion.

Second, the Declare War Clause should not be considered in isolation. In fact, the Constitution does not consistently use the word "declare" to mean "begin" or "initiate." Rather, when discussing war in other contexts, the Constitution's phrasing indicates that declaring war referred to something less than the sole power to send the nation into hostilities.

For instance, Article I, Section 10 withdraws from states the power to "engage" in war. If "declare" meant "begin" or "make," the provision should have prohibited states from "declaring" war. Certainly, granting Congress the sole authority to "engage" the nation in war would have been a much clearer, much more direct method for vesting in Congress the power to control the actual conduct of war.

Similarly, Article II defines treason as "levying War" against the United States. Again, if "declare" had the clear meaning of "begin" or "wage," the Constitution should have made treason the crime of "declaring war" against the United States. The evidence suggests that 18th century English speakers used "engage" and "levy" broadly to include beginning or waging warfare, but not "declare," which carried the connotation of recognition of a legal status rather than of an authorization.

Aside from the constitutional text itself, the structure of several constitutional provisions suggests that declaring war does not mean the same thing as beginning, conducting, or waging war. As just mentioned, Article I, Section 10 generally prohibits the states from engaging in war. It allows states to conduct hostilities, however, if Congress approves. The provision reads: "No States shall, without the Consent of Congress...engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

This provision is significant because it creates the exact war powers process between Congress and the states which critics want to create between Congress and the President. It makes resort to force conditional on the "Consent of Congress," and it even includes an exception for defending against sudden attacks.

Pro-Congress scholars believe that this exception must be read into the Declare War Clause to allow the executive to use force in response to an attack without having to seek a declaration of war from Congress. Otherwise, their strict interpretation would prevent

[6] Michael J. Glennon, *Constitutional Diplomacy* 17 (1990).

[7] Samuel Johnson, *A Dictionary of the English Language* (W. Strahan ed., 1755).

the President from engaging in even defensive uses of force without legislative pre-approval—a *modus operandi* utterly unworkable in the real world. Article I, Section 10 shows the faults of this approach because it requires us to believe that the Framers did not know how to express themselves in one part of the Constitution but did in another part of the Constitution on exactly the same subject.

Therefore, if one believes that the Framers were consistent throughout the Constitution, they should have written that "the President may not, without the Consent of Congress, engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Instead, the Constitution only allocates to Congress the declare-war power and to the President the commander-in-chief power without specifically stating—as it does in Article I, Section 10 with regard to the states—how those powers are to interact. The Constitution's creation of a specific, detailed war powers process at the state level but silence at the federal level shows that the Constitution does not establish any specific procedure for going to war.

The absence of a defined process for going to war is telling because the Constitution usually makes very clear when it requires a specific process before the government can act. This is particularly the case when the Constitution imposes shared power on the executive and legislative branches. Article I of the Constitution, for example, establishes a finely tuned system of bicameralism and presentment necessary to enact federal laws, and Article II, Section 2 declares that the President can make treaties subject to the advice and consent of two-thirds of the Senate, while appointments can be made subject to consent of a bare majority of the Senate. Both provisions establish a process, the order in which each institution acts, and the minimum votes required.

In contrast, the Constitution does not define a process for war-making. This suggests that the absence of a defined war-making process is an intentional element of constitutional design.

The Constitution is not merely a list of unassociated ideas; articles, sections, and even clauses often have specific functions or themes. The Declare War Clause is housed in Article I, Section 8, Clause 11. In addition to the power to declare war, that provision also vests in Congress the now-obscure powers to grant letters of marque and reprisal and to make rules concerning captures. Significantly, both of these powers relate to the recognition or declaration of a legal status rather than the authorization to carry out a specific activity. Rules on capture, for instance, do not authorize captures in wartime, but only determine their ownership, while letters of marque and reprisal extend the benefits of combat immunity to private forces. Reading the clauses to share a common nature because of their grouping suggests that the Declare War Clause similarly vested Congress with a power devoted to declarations of the international legal status of certain actions.

Indeed, when the Framers employed "declare" in a constitutional context, they usually used it in a juridical manner in the sense that courts "declare" the state of the law or the legal status of a certain event or situation. An example from early American political history—no less than the Declaration of Independence—illustrates this meaning. The Declaration did not "authorize" military resistance to Great Britain, as hostilities had existed for more than a year. Instead, it announced the new legal relationship between the mother country and its former colonies.

This begs the question: Are declarations of war merely useless window dressing devoid of substance? Absolutely not. Declarations of war serve a purpose, albeit one that does not amount to the sole authority to initiate hostilities: They place the nation in a state of total war, which triggers enhanced powers on the part of the federal government.

And we should not forget the commander-in-chief power. It is not empty of substance, nor is it simply a command to the President to carry out Congress's wishes. Several of the state constitutions drafted during the post-Revolutionary period, for example, contained quite extensive definitions of the commander in chief. Massachusetts, which adopted its constitution in 1780, and New Hampshire, which ratified a similar

document in 1784, both provided for strong executive power in war:

> The president of this state for the time being, shall be commander in chief of the army and navy, and all the military forces of the state, by sea and land; and shall have full power by himself...to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of this state to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist... and in fine, the president hereby is entrusted with all other powers incident to the office of captain-general and commander in chief, and admiral....[8]

These war powers provisions not only gave the governor the commander-in-chief power, but also assumed that the governor had authority to make war. These provisions do not just limit executive war-making authority to defensive responses to attack; they also explicitly provide for offensive operations under the direct authority of the executive, who may use any means he sees fit ("kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means") to achieve his war aims. Given the governor's duty to secure the safety of the state, these military provisions placed in the executive's hands the responsibility and incentive to act first.

Massachusetts and New Hampshire's provisions also indicate the role of a declaration of war as a judicial announcement rather than a legislative authorization for executive action. The power to declare war is vested in the legislature, but only acts as a triggering device for the governor's authority to declare martial law.

The Framers also had practice as a guide. New York's constitution, much admired by the Framers,[9] simply vested the commander-in-chief power in a governor. George Clinton, New York's first governor, sent the militia on his sole authority to reinforce General Gates's campaign against British forces during the Revolution. He later notified the legislature of the move in his first inaugural address.[10]

Throughout the war, Clinton (himself a military officer) worked closely with General Washington and his subordinates to coordinate operations against the British. Although it expressed its views when appropriating funds for the war effort, the legislature generally obeyed Clinton's wishes. He encountered such success in running the war and the state that the voters returned him to office for 18 consecutive years even though for most of the war New York City remained in the hands of the enemy. But it is important to note that New York's example was significant not because it granted the executive broader substantive war powers than other states. Rather, New York's allocation of powers remained fairly unexceptional. It was only when these substantive powers were combined with a structurally independent and unitary executive that vigorous government emerged. These lessons did not go unnoticed by the Framers. New

[8] N. H. Const. (1784), reprinted in 4 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 2463–64 (1909).

[9] See Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* 34–35 (1922).

[10] See E. Wilder Spaulding, *His Excellency George Clinton: Critic of the Constitution* 95–98, 114–18 (1938).

York's experience influenced not only the later constitution-writing efforts of Massachusetts and New Hampshire, but also the work of the Philadelphia Convention.[11]

The Framers were also heavily influenced by the understanding that the first President would be America's greatest commander in chief, George Washington, who had operated with significant independence and initiative in war policy, especially as the Continental Congress often was under flight and could not even raise funds and supplies to pay the Continental Army.

CONSTITUTIONAL HISTORY

Historical context further supports the understanding that the President retains broad war powers under the Constitution. The Framers would have understood the distribution of war powers between the executive and legislative branches in the context of the British Constitution, the source of many of the legal concepts found in the American Constitution.

Under the formal British system, as articulated by the influential and widely read Blackstone, the King exercised all of the war power, including the power to declare war.[12] A declaration of war was not needed either to begin or to wage a war, however, but rather served as a courtesy to the enemy and as a definition of the status of their relations under international law. It notified the enemy that a state of war existed so as to formally invoke the protections of international law.[13] It also played a domestic legal role by informing citizens of an alteration in their legal rights and status: During periods of formal war, citizens of the contending nations could "annoy" the persons or property of the enemy and lawfully keep captured vessels.

British governmental practice in the 18th century indicates that Parliament's control over funding, rather than the role of declaring war, provided a sufficient check over executive war-making. Indeed, in the 100 years before enactment of the Constitution, Britain engaged in eight significant military conflicts but only once "declared" war at the start of a conflict. The usual British course toward war involved months, if not years, of direct armed conflict without a declaration of war. Many of these wars remained vivid in the minds of the Framers, whose fathers fought in them as subjects of the British Empire.

If any of these conflicts impressed on the Framers the idea that declarations of war were unnecessary to the conduct of hostilities, it was the Seven Years War. George Washington saw his first significant military action in the conflict, and it was also the first war between the great powers that began in America. American and British troops had engaged in direct conflict with French troops since July 3, 1754, but Britain did not declare war until May 1756.[14]

Thus, by the time of the framing, the British constitutional system had reached an accommodation concerning the royal prerogative over war. The legislature was not powerless, however. Parliament's true check on executive power came through control over the raising of armies and the power of the purse. Parliament's consent was necessary to wage war; otherwise, soldiers would not be paid, armies would not be properly equipped, and the King's war power would be rendered largely illusory.

This allocation of war powers was not the result of mere happenstance. Rather, the distinction between the war power and the powers to fund and legislate

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[11] See Clinton Rossiter, *1787: The Grand Convention* 59, 65 (1966). Afterwards, during the struggle for ratification, Publius expressed the thoughts of many when he declared that the New York constitution "has been justly celebrated both in Europe and America as one of the best of the forms of government established in this country." Federalist No. 26, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[12] I William Blackstone, *Commentaries on the Laws of England* 252.

[13] See *id.* at 249–50.

[14] Even in the early decades of the 19th century, American legal scholars such as Chancellor Kent still remembered that the Seven Years' War had broken out in America several years before England formally declared war. See I James Kent, *Commentaries on American Law* 54 (2d ed. 1832).

was a core element of the separation of powers and the rise of parliamentary democracy.

After independence, the revolutionaries did indeed turn against executive authority, in part due to overbearing colonial executives and perceived abuses by the Crown. The new state constitutions sought to weaken the executive by placing explicit restrictions on its power and by diluting its independence and structural unity. For instance, in all but one state, governors were elected by the legislature, and many states eliminated the structural unity of the executive branch by providing for powerful advisory councils. Pennsylvania even took the radical step of replacing the single governor with a 12-person executive council. Critics of the presidency today forget that the Constitution rejected these innovations.

Details from the framing debates themselves also provide evidence that some of the Constitution's supporters believed that it replicated the British system. It is true that the Constitutional Convention transferred the power to declare war from the British King to the Congress, but an earlier draft of the Constitution had given Congress the power to "make" war, and the delegates subsequently changed the power to the lesser power to "declare" it. Charles Pinckney had opened the debate by arguing that the power to make war should rest only in the Senate rather than in Congress as a whole because the full legislature's "proceedings were too slow."[15] Others went further than Pinckney in their skepticism of Congress, proposing an expansion of the executive role in war-making. Pierce Butler, for instance, argued for "vesting the power [to make war] in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."[16] Immediately after Butler's comment, Madison and Elbridge Gerry of Massachusetts moved "to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Though subsequent debate shows that the Framers did not possess a clear consensus on the Declare War Clause, changing the phrase from "make" to "declare" certainly reflected an intention to prohibit Congress from encroaching on the executive power to conduct war.

When, in the all-important state ratifying conventions, opponents of the Constitution criticized the presidency as a potential monarch, its defenders never trumpeted—although they had every incentive to do so—Congress's power to declare war. Rather, pressed during the Virginia ratifying convention with the charge that the President's powers could lead to a military dictatorship, James Madison argued that Congress's control over funding would provide enough check to control the executive.[17]

CONSTITUTIONAL DESIGN

But suppose we conceded that the constitutional text and history did not provide a clear answer to the question of which branch controls the decision for war. We should then ask whether requiring congressional approval for war would provide significant functional benefits to American national security.

Proponents of congressional war power often argue that the executive branch is unduly prone to war. In this view, if the President and the Congress have to agree on war-making, then the nation will enter fewer wars and those wars that do occur will arise only after sufficient reason and deliberation. It is far from clear, however, that outcomes would be better if Congress alone had the power to begin wars.

First, congressional deliberation does not necessarily ensure consensus. And even if it does represent consensus, it is no guarantee of consensus after combat begins. Thus, the Vietnam War, which was initially approved by Congress, did not meet with a consensus

[15] I *The Records of the Federal Convention of 1787*, at 292 (Max Farrand ed., 1911).

[16] *Id.* at 293.

[17] Madison declared: "The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America as far as any analogy can exist." See 10 *The Documentary History of the Ratification of the Constitution* 1282 (John P. Kaminski and Gaspare J. Saladino eds., 1986) (Madison speech of June 14, 1788).

over the long term but instead provoked some of the most divisive politics in American history. It is also difficult to claim that the congressional authorizations to use force in Iraq, either in 1991 or in 2002, reflected a deep consensus over the merits of the wars there. Indeed, the 1991 authorization barely survived the Senate, and the 2002 authorization received significant negative votes and has become a deeply divisive issue in national politics.

It is also not clear that the absence of congressional approval has led the nation into wars that it should not have waged. The experience of the Cold War does not clearly come down on the side of a link between institutional deliberation and better conflict selection. War was fought throughout the world by the two superpowers and their proxies during this period. Yet the only war arguably authorized by Congress was the Vietnam War. The United States fought against Soviet proxies in Korea and Vietnam, the Soviet Union fought against American-backed forces in Afghanistan, and the two very nearly came into direct conflict during the Cuban missile crisis.

Aside from bitter controversy over Vietnam, there appeared to be significant bipartisan consensus on the overall strategy of containment, as well as the overarching goal of defeating the Soviet Union. We did not win the four-decade Cold War by declarations of war. Rather, we prevailed through the steady presidential application of the strategy of containment, supported by congressional funding of the necessary military forces.

On the other hand, congressional action has led to undesirable outcomes. Congress led us into two "bad" wars, the 1798 quasi-war with France and the War of 1812. Excessive congressional control can also prevent the U.S. from entering conflicts that are in the national interest. Most would agree that congressional isolationism before World War II harmed U.S. interests and that the United States and the world would have been far better off if President Franklin Roosevelt could have brought us into the conflict much earlier.

Congressional participation does not automatically, or even consistently, produce desirable results in war decision-making. Critics of presidential war powers exaggerate the benefits of declarations or authorizations of war. What also often goes unexamined are the potential costs of congressional participation: delay, inflexibility, and lack of secrecy. Legislative deliberation may breed consensus in the best of cases, but it also may inhibit speed and decisiveness. In the post–Cold War era, the United States is confronting several major new threats to national security: the proliferation of WMD, the emergence of rogue nations, and the rise of international terrorism. Each of these threats may require pre-emptive action best undertaken by the President and approved by Congress only afterwards.

Take the threat posed by the al-Qaeda terrorist organization. Terrorist attacks are more difficult to detect and prevent than those posed by conventional armed forces. Terrorists blend into civilian populations and use the channels of open societies to transport personnel, material, and money. Despite the fact that terrorists generally have no territory or regular armed forces from which to detect signs of an impending attack, weapons of mass destruction allow them to inflict devastation that once could have been achievable only by a nation-state. To defend itself from this threat, the United States may have to use force earlier and more often than was the norm during the time when nation-states generated the primary threats to American national security.

In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the executive branch needs flexibility to act quickly, possibly in situations where congressional consent cannot be obtained in time to act on the intelligence. By acting earlier, perhaps before WMD components have been fully assembled or before an al-Qaeda operative has left for the United States, the executive branch might also be able to engage in a more limited, more precisely targeted, use of force.

Similarly, the least dangerous way to prevent rogue nations from acquiring weapons of mass destruction may depend on secret intelligence gathering and covert action rather than open military intervention. De-

lay for a congressional debate could render useless any time-critical intelligence or windows of opportunity.

LEGALITY OF NSA WIRETAPPING PROGRAM

That brings us back to the NSA program. The legality of the NSA wiretapping program rests on several pillars, most of which bear directly on the nature of the executive war power.

First, the United States is in fact at war. Both the President and Congress agree that the September 11 attacks created "an unusual and extraordinary threat" to the national security of the United States. Suppose, for example, that a hijacked airliner headed for Washington refused to respond to air traffic control. Under the civil libertarian approach, the government could not monitor the suspected hijackers' phone or radio calls unless they received a judicial warrant first. What civil libertarians forget, however, is that because we are in a state of war, our military can intercept the communications of the plane to determine whether it poses a threat and to target, if necessary, the enemy. A judicial warrant is not necessary, especially since the purpose of the interceptions is not to arrest someone for trial for a crime committed, but to prevent an attack.

Second, the President as commander in chief has the constitutional power and responsibility to wage war in response to a direct attack against the United States. During World War II, for instance, the Supreme Court recognized that once war has begun, the President's authority as commander in chief and chief executive gave him access to the tools necessary to wage war effectively. The President has the power "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war" and to issue military commands using the powers to conduct war "to repel and defeat the enemy."[18] In the wake of the September 11 attacks, even Congress agreed that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States...."[19] This statement recognizes the President's authority to use force, and any powers necessary and proper to that end, to respond to al-Qaeda.

Third, the Constitution's grant to the President of the power to wage war successfully, once begun, carries with it the authority to gather intelligence, through secret means if necessary. This has been recognized by the Supreme Court in several cases, most notably *United States v. Curtiss-Wright Export Corporation,* in which the Justices found that the power to set foreign policy ought to rest with the presidency because its structure allowed it to act with unity, secrecy, and speed.[20]

Fourth, a practice has long existed of Presidents, under their power to conduct intelligence activities to protect the country, ordering electronic surveillance without any judicial or congressional participation. Every President, until FISA's passage, conducted national security surveillance without a warrant, and even the Carter Administration made clear during FISA's passage that it could not infringe on the President's constitutional rights in the area—a view later shared by the Clinton Administration.[21] This is not to say that such surveillance was conducted willy-nilly, although in the case of President Nixon it was certainly abused. Such wiretaps were placed only on the approval of the Attorney General or his designate and underwent reviews by lawyers within the Justice Department. Furthermore, this record of surveillance occurred primarily during peacetime and did not involve a period of

[18] *Ex Parte Quirin,* 317 U.S. 1, 28 (1942).

[19] Authorization for Use of Military Force, Pub. L. 107–40 (Sept. 18, 2001).

[20] 299 U.S. 304 (1936). As recently as last year, the Court upheld the longstanding doctrine that courts should not exercise review when the success of secret espionage is at stake. See *Tenet v. Doe,* 544 U.S. 1 (2005).

[21] See Foreign Intelligence Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (Statement of Attorney General Griffin Bell); Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence, 103d Cong., 2d Sess. 61 (1994) (Statement of Deputy Attorney General Jamie Gorelick).

heightened presidential power during wartime after a direct attack on the United States, when the need for intelligence would be even greater. If Presidents could order the interception of the communications of foreign spies and terrorists in the absence of war, the September 11 attacks and the state of war they ushered in would only strengthen executive authority.

Fifth, courts have never opposed the President's exercise of the authority to engage in electronic surveillance without a warrant to protect national security. When the Supreme Court first considered this question, in the 1972 *Keith* case, it held that the Fourth Amendment required a judicial warrant if a President wanted to conduct surveillance of a purely domestic group that posed a threat to the government.[22] Obviously, the Court was concerned that warrantless surveillance of domestic groups could turn into the suppression of political dissent, but it also made clear that its ruling did not reach surveillance of foreign threats to national security and left the question open. In the years since, as a federal appeals court specially created to hear challenges to the surveillance laws noted in late 2002, every lower federal court to have addressed the question has agreed that the executive branch possesses such power.[23]

Sixth, it is arguable that Congress implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States. On September 18, 2001, Congress enacted a law authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[24] This authorization is sweepingly broad; it has no limitation on time or place—only that the President pursue al-Qaeda wherever it may be, even inside the United States. Although the President did not need, as a constitutional matter, Congress's permission to pursue and attack al-Qaeda after the attacks on New York City and the Pentagon, its passage shows that the President and Congress fully agreed that military action would be appropriate. Congress's support for the President cannot be limited only to the right to use force, but to all the necessary subcomponents that permit effective military action.[25] If Congress approved the capture rather than killing of al-Qaeda members, then it must also include the ability to locate the operatives in the first place.

The Constitution thus creates a presidency that is uniquely structured to act forcefully and independently to repel serious threats to the nation. Instead of specifying a legalistic process to begin war, the Framers wisely created a fluid political process in which legislators would use their funding power to control war. As we confront terrorism, rogue nations, and the proliferation of weapons of mass destruction, we should look skeptically at claims that radical changes in the way we make war would solve our problems, even those stemming from poor judgment, unforeseen circumstances, and bad luck.

—John Yoo is a professor of law at the Boalt Hall School of Law at the University of California, Berkeley, and visiting scholar at the American Enterprise Institute. He has also served as general counsel for the Senate Judiciary Committee; as a law clerk to Justice Clarence Thomas and Judge Laurence H. Silberman; and, from 2001 to 2003, as a Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice.

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[22] *United States v. United States District Court,* 407 U.S. 297 (1972).

[23] *In re Sealed Case,* 310 F.3d 717, 742 (For. Intell. Surv. Ct. Rev. 2002).

[24] Authorization for Use of Military Force, Pub. L. 107–40, § 2 (Sept. 18, 2001).

[25] See Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," 118 Harv. L. Rev. 2048, 2092 (2005).

The Founding Fathers and Executive Power

By Richard R. Beeman
The Chronicle of Higher Education
March 17, 2006

We find ourselves at a moment when Americans are bitterly divided on the question of the constitutional limits of presidential power. It is certainly not the first time in our nation's history when the issue has presented itself. From Andrew Jackson's "war" on the Bank of the United States to Abraham Lincoln's suspension of habeas corpus during the Civil War to Franklin D. Roosevelt's attempt to pack the Supreme Court to Harry S. Truman's attempted seizure of the country's steel mills to Richard M. Nixon's incursions on civil liberties in the name of "national security," we have a long history of American chief executives' seeking to expand their powers in the name of the "public good."

I am old enough to have lived through the last two of those presidential controversies, and I will confess that the current controversy over presidential power whether over the ability of the president to issue "signing statements" that allow him to implement only selected parts of a bill enacted by Congress or the legality of ordering electronic surveillance on his authority alone — seems to me both more serious and more seriously compromised by partisanship on both sides than anything I have experienced in my lifetime. In this climate of confusion and consternation, perhaps an appeal to the wisdom of the founding fathers might provide us with some perspective.

In fact, the task of discerning the "original intent" of the 55 men who took part in the framing of the U.S. Constitution is tricky business indeed. Not only did the delegates disagree on virtually every important subject that came before them, but they also frequently shifted their positions on those issues over the course of the convention. Nor is the task of discerning the "original meaning" of the words finally inscribed on the final draft of the Constitution, signed by 39 of the delegates on September 17, 1787, much easier. Such was the experimental nature of the new government that emerged from the convention that concepts so central to our contemporary understanding of the Constitution — "federalism," "commerce," "necessary and proper" — were subject to a multitude of meanings among those who were asked to add their assent to the document. In no case is this uncertainty and confusion more evident than in the matter of "executive power."

The first sentence of Article II of the Constitution is both remarkably simple and maddeningly vague. "The executive Power shall be vested in a President of the United States of America." But what did "executive power" mean? James Wilson and Gouverneur Morris, of Pennsylvania, were outspoken in support of a strong executive capable of giving "energy, dispatch, and responsibility" to the government. Toward that end, they urged their fellow delegates to give the president an absolute veto over Congressional legislation. At the other end of the spectrum, Roger Sherman, of Connecticut, spoke for many delegates when he declared that the "Executive magistracy" was "nothing more than an institution for carrying the will of the Legislature into effect." This led Sherman to the conclusion that the president could be removed from office "at pleasure," any time a majority of members of the legislature disagreed with him on an important issue.

There were other issues that divided the delegates. Many wanted not a single but a plural executive; Edmund J. Randolph, of Virginia, believed that a single, powerful president would constitute "the foetus of monarchy," and he, along with his Virginia colleague George Mason, refused ultimately to sign the Constitution, in part because of their fear of excessive executive

power. Still others thought the executive should be elected by the state legislatures or by the governors of the states, a mode of election that would have made the president a broker among the varying interests of the state governments.

James Madison kept changing his mind. His initial version of the "Virginia Plan" called for the president to be elected by and answerable to the national legislature. Although supposedly one of the foremost proponents of the doctrine of separation of powers and checks and balances, he muddled things by proposing a merging of the executive and judicial powers in a "Council of Revision," composed of both the president and a "convenient number of the National Judiciary" and empowered to "examine every act of the National Legislature before it shall operate." Madison gradually came around to the idea that the executive and judicial functions should be separated, but he continued to argue in favor of some form of presidential election by the Congress up until the final days of the convention. After reading Madison's notes on the debates in the convention, one gets the sense that his eventual acquiescence to the idea of an electoral college as the method of presidential election was marked as much by weariness as by enthusiasm.

The framers' conception of the president's powers in time of war was even fuzzier than their conception of his power in the domestic realm. On the one hand, virtually all of the delegates agreed that the power to declare war should rest with Congress. On the other, many delegates, when they endorsed the decision to substitute the word "declare" instead of "make" war among Congress's powers, did intend to give to the president, as commander in chief, considerable discretion as to how actually to carry out the conduct of a war. But the ambiguities persist. No one in the convention ever ventured to draw a precise line between the authority of Congress and that of the president in time of war, but there was at least a vague understanding that the decisions both to go to war and about how to conduct a war were ones in which both branches of government had a part. Not only did Congress, with its power over the purse, have the ability to control military appropriations, but it also possessed, by the language of Article I, Section 8, the power to "make Rules for the Government and Regulation of the land and naval Forces." These ambiguities have presented formidable obstacles to determining the limits of presidential power even during those times when our nation has been engaged in a war formally "declared" by Congress; the obstacles are obviously even greater when a nation is engaged in a metaphorical "war against terror."

Whatever the differences among the framers of the Constitution about the nature of presidential power or about the precise relationship between the president and the legislative and judicial branches of government, nearly all Americans agreed on what they did *not* want their president to be. Memories of the tyranny of King George III shaped virtually every debate on the issue of presidential power, with even the strongest supporters of a powerful executive taking great pains to emphasize the Constitution's many checks on a unitary exercise of presidential power. Wilson, for example, insisted that "the only powers he conceived strictly executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the legislature." Madison was of the same mind, believing that the president's powers should be "confined and defined." To do otherwise, he reasoned, would bring upon the country "the Evils of elective Monarchies."

There was only one person in the Constitutional Convention who argued unequivocally for an aggressive and expansive definition of presidential power, and it is no accident that the opinions of that person — Alexander Hamilton — are the ones most often cited by those who advocate an open-ended definition of presidential power.

Current proponents of the aggressive use of presidential power in the war against terror, for example, are fond of citing Hamilton's Federalist Paper No. 70, in which he declares that "Energy in the Executive" is "essential to the protection of the community against foreign attacks" as well as to "the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." What Hamilton's contemporary admirers fail to note, however, is that his views on an "energetic executive" found no support whatsoever from any of his fellow delegates in the Constitutional Convention. In a five-hour speech on June 18, Hamilton proclaimed that "the British Govt. was the best in the world," and he urged the delegates to do everything possible to emulate it. Since the new nation lacked a hereditary monarch, the best Americans could do, Hamilton argued, was to appoint their chief executive for life and to give him sweeping powers that would enable him to withstand the pressures of popularly elected legislatures.

Hamilton's conceptions of the presidency — driven by a concern for order and security rather than for the preservation of personal liberty — were far removed from those of every other delegate on the convention floor. In the words of Connecticut delegate William Samuel Johnson, Hamilton's five-hour soliloquy was "praised by everybody [but] he has been supported by none." More important, his thoughts on executive power were entirely at odds with the spirit that moved Americans to declare their independence from Britain. Whatever disagreements and confusion may have existed among the founding fathers, they did share a common understanding that the new American government was to be one of limited powers in which no single branch, and no single person, could lay claim to unilateral authority.

It may not be possible to discern with precision either the "original intent" of the founding fathers or the precise "original meaning" of the words on the document they crafted, but if we are seeking to comprehend their general understanding of the limits of executive power, then it is best to regard Hamilton as an exception to be avoided, not an authority to be cited in defense of extraordinary uses of presidential power. As George W. Bush ponders his place in the history of the American presidency, he might be better served if he paid less attention to the words of Hamilton, an avowed admirer of monarchy, and more attention to the overwhelming majority of founding fathers who greatly feared the evils of an "elective monarchy."

Richard R. Beeman is a professor of history at the University of Pennsylvania and is currently at work on a book on the Constitutional Convention of 1787.

http://chronicle.com/temp/email2.php?id=5FhHWhykspPFrb2VZKTjhzsrw5Ngqfck

No Checks, Many Imbalances

George F. Will, Washington Post, February 16, 2006
http://www.washingtonpost.com/wp-dyn/content/article/2006/02/15/AR2006021502003.html

The next time a president asks Congress to pass something akin to what Congress passed on Sept. 14, 2001 -- the Authorization for Use of Military Force (AUMF) -- the resulting legislation might be longer than Proust's "Remembrance of Things Past." Congress, remembering what is happening today, might stipulate all the statutes and constitutional understandings that it does not intend the act to repeal or supersede.

But, then, perhaps no future president will ask for such congressional involvement in the gravest decision government makes -- going to war. Why would future presidents ask, if the present administration successfully asserts its current doctrine? It is that whenever the nation is at war, the other two branches of government have a radically diminished pertinence to governance, and the president determines what that pertinence shall be. This monarchical doctrine emerges from the administration's stance that warrantless surveillance by the National Security Agency targeting American citizens on American soil is a legal exercise of the president's inherent powers as commander in chief, even though it violates the clear language of the 1978 Foreign Intelligence Surveillance Act, which was written to regulate wartime surveillance.

Administration supporters incoherently argue that the AUMF also authorized the NSA surveillance -- and that if the administration had asked, Congress would have refused to authorize it. The first assertion is implausible: None of the 518 legislators who voted for the AUMF has said that he or she then thought it contained the permissiveness the administration discerns in it. Did the administration, until the program became known two months ago? Or was the AUMF then seized upon as a justification? Equally implausible is the idea that in the months after Sept. 11, Congress would have refused to revise the 1978 law in ways that would authorize, with some supervision, NSA surveillance that, even in today's more contentious climate, most serious people consider conducive to national security.

Anyway, the argument that the AUMF contained a completely unexpressed congressional intent to empower the president to disregard the FISA regime is risible coming from this administration. It famously opposes those who discover unstated meanings in the Constitution's text and do not strictly construe the language of statutes.

The administration's argument about the legality of the NSA program also has been discordant with its argument about the urgency of extending the USA Patriot Act. Many provisions of that act are superfluous if a president's wartime powers are as far-reaching as today's president says they are.

And if, as some administration supporters say, amending the 1978 act to meet today's exigencies would have given America's enemies dangerous information about our capabilities and intentions, surely FISA and the Patriot Act were both informative. Intelligence professionals reportedly say that the behavior of suspected terrorists has changed since Dec. 15, when the New York Times revealed the NSA surveillance. But surely America's enemies have assumed that our technologically sophisticated nation has been trying, in ways known and unknown, to eavesdrop on them.

Besides, terrorism is not the only new danger of this era. Another is the administration's argument that because the president is commander in chief, he is the "sole organ for the nation in foreign

affairs." That non sequitur is refuted by the Constitution's plain language, which empowers Congress to ratify treaties, declare war, fund and regulate military forces, and make laws "necessary and proper" for the execution of all presidential powers . Those powers do not include deciding that a law -- FISA, for example -- is somehow exempted from the presidential duty to "take care that the laws be faithfully executed."

The administration, in which mere obduracy sometimes serves as political philosophy, pushes the limits of assertion while disdaining collaboration. This faux toughness is folly, given that the Supreme Court, when rejecting President Harry S Truman's claim that his inherent powers as commander in chief allowed him to seize steel mills during the Korean War, held that presidential authority is weakest when it clashes with Congress.

Immediately after Sept. 11, the president rightly did what he thought the emergency required, and rightly thought that the 1978 law was inadequate to new threats posed by a new kind of enemy using new technologies of communication. Arguably he should have begun surveillance of domestic-to-domestic calls -- the kind the Sept. 11 terrorists made.

But 53 months later, Congress should make all necessary actions lawful by authorizing the president to take those actions, with suitable supervision. It should do so with language that does not stigmatize what he has been doing, but that implicitly refutes the doctrine that the authorization is superfluous.

The Federalist No. 67

ALEXANDER HAMILTON[1] March 11, 1788

To the People of the State of New York:

THE constitution of the executive department of the proposed government, claims next our attention.

There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticised with less judgment.

Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

Attempts so extravagant as these to disfigure or, it might rather be said, to metamorphose the object, render it necessary to take an accurate view of its real nature and form: in order as well to ascertain its true aspect and genuine appearance, as to unmask the disingenuity and expose the fallacy of the counterfeit resemblances which have been so insidiously, as well as industriously, propagated.

In the execution of this task, there is no man who would not find it an arduous effort either to behold with moderation, or to treat with seriousness, the devices, not less weak than wicked, which have been contrived to pervert the public opinion in relation to the subject. They so far exceed the usual though unjustifiable licenses of party artifice, that even in a disposition the most candid and tolerant, they must force the sentiments which favor an indulgent construction of the conduct of political adversaries to give place to a voluntary and unreserved indignation. It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense of a similitude between a king of Great Britain and a magistrate of the character marked out for that of the President of the United States. It is still more impossible to withhold that imputation from the rash and barefaced expedients which have been employed to give success to the attempted imposition.

In one instance, which I cite as a sample of the general spirit, the temerity has proceeded so far as to ascribe to the President of the United States a power which by the instrument reported is EXPRESSLY allotted to the Executives of the individual States. I mean the power of filling casual vacancies in the Senate.

This bold experiment upon the discernment of his countrymen has been hazarded by a writer who (whatever may be his real merit) has had no inconsiderable share in the applauses of his party2; and who, upon this false and unfounded suggestion, has built a series of observations equally false and unfounded. Let him now be confronted with the evidence of the fact, and let him, if he be able, justify or extenuate the shameful outrage he has offered to the dictates of truth and to the rules of fair dealing.

The second clause of the second section of the second article empowers the President of the United States "to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other OFFICERS of United States whose appointments are NOT in the Constitution OTHERWISE PROVIDED FOR, and WHICH SHALL BE ESTABLISHED BY LAW." Immediately after this clause follows another in these words: "The President shall have power to fill up VACANCIES that may happen DURING THE RECESS OF THE SENATE, by granting commissions which shall EXPIRE AT THE END OF THEIR NEXT SESSION." It is from this last provision that the pretended power of the President to fill vacancies in the Senate has been deduced. A slight attention to the connection of the clauses, and to the obvious meaning of the terms, will satisfy us that the deduction is not even colorable.

fill vacancies

The first of these two clauses, it is clear, only provides a mode for appointing such officers, "whose appointments are NOT OTHERWISE PROVIDED FOR in the Constitution, and which SHALL BE ESTABLISHED BY LAW"; of course it cannot extend to the appointments of senators, whose appointments are OTHERWISE PROVIDED FOR in the Constitution3, and who are ESTABLISHED BY THE CONSTITUTION, and will not require a future establishment by law. This position will hardly be contested.

appt. officers

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the Senate, for the following reasons: First. The relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate JOINTLY, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen IN THEIR RECESS, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, SINGLY, to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Secondly. If this clause is to be considered as supplementary to the one which precedes, the VACANCIES of which it speaks must be construed to relate to the "officers" described in the preceding one; and this, we have seen, excludes from its description the members of the Senate. Thirdly. The time within which the power is to operate, "during the recess of the Senate," and the duration of the appointments, "to the end of the next session" of that body, conspire to elucidate the sense of the provision, which, if it had been intended to comprehend senators, would naturally have referred the temporary power of filling vacancies to the recess of the State legislatures, who are to make the permanent appointments, and not to the recess of the national Senate, who are to have no concern in those appointments; and would have extended the duration in office of the temporary senators to the next session of the legislature of the State, in whose representation the vacancies had happened, instead of making it to expire at the end of the ensuing session of the national Senate. The circumstances of the body authorized to make the permanent appointments would, of course, have governed the modification of a power which related to the temporary appointments;

and as the national Senate is the body, whose situation is alone contemplated in the clause upon which the suggestion under examination has been founded, the vacancies to which it alludes can only be deemed to respect those officers in whose appointment that body has a concurrent agency with the President. But lastly, the first and second clauses of the third section of the first article, not only obviate all possibility of doubt, but destroy the pretext of misconception. The former provides, that "the Senate of the United States shall be composed of two Senators from each State, chosen BY THE LEGISLATURE THEREOF for six years"; and the latter directs, that, "if vacancies in that body should happen by resignation or otherwise, DURING THE RECESS OF THE LEGISLATURE OF ANY STATE, the Executive THEREOF may make temporary appointments until the NEXT MEETING OF THE LEGISLATURE, which shall then fill such vacancies." Here is an express power given, in clear and unambiguous terms, to the State Executives, to fill casual vacancies in the Senate, by temporary appointments; which not only invalidates the supposition, that the clause before considered could have been intended to confer that power upon the President of the United States, but proves that this supposition, destitute as it is even of the merit of plausibility, must have originated in an intention to deceive the people, too palpable to be obscured by sophistry, too atrocious to be palliated by hypocrisy.

I have taken the pains to select this instance of misrepresentation, and to place it in a clear and strong light, as an unequivocal proof of the unwarrantable arts which are practiced to prevent a fair and impartial judgment of the real merits of the Constitution submitted to the consideration of the people. Nor have I scrupled, in so flagrant a case, to allow myself a severity of animadversion little congenial with the general spirit of these papers. I hesitate not to submit it to the decision of any candid and honest adversary of the proposed government, whether language can furnish epithets of too much asperity, for so shameless and so prostitute an attempt to impose on the citizens of America.
PUBLIUS.

1 Essay from The Independent Journal, January 12, 1788. Also appeared in The New-York Packet and The Daily Advertiser, January 15, and The New-York Journal, January 25 and 26. This essay appeared originally as number 37 in the series, but it took its present place in the first collected edition in 1788.

2 New Jersey delegates, on June 23, 1778, submitted a "representation" to the Continental Congress. It objected to several parts of the Articles of Confederation and recommended that Congress be given exclusive power to regulate foreign trade. It also suggested former crown lands should be given to the United States. These proposals were discussed in Congress on June 25 and the "representation" is reported in the Journals of the Continental Congress for that date. (Editor)

3 Maryland refused to ratify the Articles of Confederation until certain demands were met concerning the cession to the Union of all state claims to western lands. Therefore, Maryland did not ratify the Articles until March 1, 1781. (Editor)

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Barbara Jordan

Statement on the Articles of Impeachment

Delivered 25 July 1974, House Judiciary Committee

AUTHENTICITY CERTIFIED: Text version below transcribed directly from audio

Thank you, Mr. Chairman.

Mr. Chairman, I join my colleague Mr. Rangel in thanking you for giving the junior members of this committee the glorious opportunity of sharing the pain of this inquiry. Mr. Chairman, you are a strong man, and it has not been easy but we have tried as best we can to give you as much assistance as possible.

Earlier today, we heard the beginning of the Preamble to the Constitution of the United States: "We, the people." It's a very eloquent beginning. But when that document was completed on the seventeenth of September in 1787, I was not included in that "We, the people." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation, and court decision, I have finally been included in "We, the people."

Today I am an inquisitor. An hyperbole would not be fictional and would not overstate the solemnness that I feel right now. My faith in the Constitution is whole; it is complete; it is total. And I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction, of the Constitution.

"Who can so properly be the inquisitors for the nation as the representatives of the nation themselves?" "The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men."[1] And that's what we're talking about. In other words, [the jurisdiction comes] from the abuse or violation of some public trust.

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It is wrong, I suggest, it is a misreading of the Constitution for any member here to assert that for a member to vote for an article of impeachment means that that member must be convinced that the President should be removed from office. The Constitution doesn't say that. The powers relating to impeachment are an essential check in the hands of the body of the legislature against and upon the encroachments of the executive. The division between the two branches of the legislature, the House and the Senate, assigning to the one the right to accuse and to the other the right to judge, the framers of this Constitution were very astute. They did not make the accusers and the judgers -- and the judges the same person.

We know the nature of impeachment. We've been talking about it awhile now. It is chiefly designed for the President and his high ministers to somehow be called into account. It is designed to "bridle" the executive if he engages in excesses. "It is designed as a method of national inquest into the conduct of public men."[2] The framers confided in the Congress the power if need be, to remove the President in order to strike a delicate balance between a President swollen with power and grown tyrannical, and preservation of the independence of the executive.

The nature of impeachment: a narrowly channeled exception to the separation-of-powers maxim. The Federal Convention of 1787 said that. It limited impeachment to high crimes and misdemeanors and discounted and opposed the term "maladministration." "It is to be used only for great misdemeanors," so it was said in the North Carolina ratification convention. And in the Virginia ratification convention: "We do not trust our liberty to a particular branch. We need one branch to check the other."

"No one need be afraid" -- the North Carolina ratification convention -- "No one need be afraid that officers who commit oppression will pass with immunity." "Prosecutions of impeachments will seldom fail to agitate the passions of the whole community," said Hamilton in the Federalist Papers, number 65. "We divide into parties more or less friendly or inimical to the accused."[3] I do not mean political parties in that sense.

The drawing of political lines goes to the motivation behind impeachment; but impeachment must proceed within the confines of the constitutional term "high crime[s] and misdemeanors." Of the impeachment process, it was Woodrow Wilson who said that "Nothing short of the grossest offenses against the plain law of the land will suffice to give them speed and effectiveness. Indignation so great as to overgrow party interest may secure a conviction; but nothing else can."

Common sense would be revolted if we engaged upon this process for petty reasons. Congress has a lot to do: Appropriations, Tax Reform, Health Insurance, Campaign Finance Reform, Housing, Environmental Protection, Energy Sufficiency, Mass Transportation. Pettiness cannot be allowed to stand in the face of such overwhelming problems. So today we are not being petty. We are trying to be big, because the task we have before us is a big one.

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This morning, in a discussion of the evidence, we were told that the evidence which purports to support the allegations of misuse of the CIA by the President is thin. We're told that that evidence is insufficient. What that recital of the evidence this morning did not include is what the President did know on June the 23rd, 1972.

The President did know that it was Republican money, that it was money from the Committee for the Re-election of the President, which was found in the possession of one of the burglars arrested on June the 17th. What the President did know on the 23rd of June was the prior activities of E. Howard Hunt, which included his participation in the break-in of Daniel Ellsberg's psychiatrist, which included Howard Hunt's participation in the Dita Beard ITT affair, which included Howard Hunt's fabrication of cables designed to discredit the Kennedy Administration.

We were further cautioned today that perhaps these proceedings ought to be delayed because certainly there would be new evidence forthcoming from the President of the United States. There has not even been an obfuscated indication that this committee would receive any additional materials from the President. The committee subpoena is outstanding, and if the President wants to supply that material, the committee sits here. The fact is that on yesterday, the American people waited with great anxiety for eight hours, not knowing whether their President would obey an order of the Supreme Court of the United States.

At this point, I would like to juxtapose a few of the impeachment criteria with some of the actions the President has engaged in. Impeachment criteria: James Madison, from the Virginia ratification convention. "If the President be connected in any suspicious manner with any person and there be grounds to believe that he will shelter him, he may be impeached."

We have heard time and time again that the evidence reflects the payment to defendants money. The President had knowledge that these funds were being paid and these were funds collected for the 1972 presidential campaign. We know that the President met with Mr. Henry Petersen 27 times to discuss matters related to Watergate, and immediately thereafter met with the very persons who were implicated in the information Mr. Petersen was receiving. The words are: "If the President is connected in any suspicious manner with any person and there be grounds to believe that he will shelter that person, he may be impeached."

Justice Story: "Impeachment" is attended -- "is intended for occasional and extraordinary cases where a superior power acting for the whole people is put into operation to protect their rights and rescue their liberties from violations." We know about the Huston plan. We know about the break-in of the psychiatrist's office. We know that there was absolute complete direction on September 3rd when the President indicated that a surreptitious entry had been made in Dr. Fielding's office, after having met with Mr. Ehrlichman and Mr. Young. "Protect their rights." "Rescue their liberties from violation."

The Carolina ratification convention impeachment criteria: those are impeachable "who behave amiss or betray their public trust."[4] Beginning shortly after the Watergate break-in and continuing to the present time, the President has engaged in a series of public statements and actions designed to thwart the lawful investigation by government prosecutors.

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Moreover, the President has made public announcements and assertions bearing on the Watergate case, which the evidence will show he knew to be false. These assertions, false assertions, impeachable, those who misbehave. Those who "behave amiss or betray the public trust."

James Madison again at the Constitutional Convention: "A President is impeachable if he attempts to subvert the Constitution." The Constitution charges the President with the task of taking care that the laws be faithfully executed, and yet the President has counseled his aides to commit perjury, willfully disregard the secrecy of grand jury proceedings, conceal surreptitious entry, attempt to compromise a federal judge, while publicly displaying his cooperation with the processes of criminal justice. "A President is impeachable if he attempts to subvert the Constitution."

If the impeachment provision in the Constitution of the United States will not reach the offenses charged here, then perhaps that 18th-century Constitution should be abandoned to a 20th-century paper shredder.

Has the President committed offenses, and planned, and directed, and acquiesced in a course of conduct which the Constitution will not tolerate? That's the question. We know that. We know the question. We should now forthwith proceed to answer the question. It is reason, and not passion, which must guide our deliberations, guide our debate, and guide our decision.

I yield back the balance of my time, Mr. Chairman.

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[1] Federalist. No. 65

[2] Federalist. No. 65

[3] Federalist. No. 65

[4] *Commentaries on the Constitution of the United States*

Separation of Powers
The Issue: When do the actions of one branch of the federal government unconstitutionally intrude upon the powers of another branch?

http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm
Introduction

The Constitution contains no provision expliciting declaring that the powers of the three branches of the federal government shall be separated. James Madison, in his original draft of what would become the Bill of Rights, included a proposed amendment that would make the separation of powers explicit, but his proposal was rejected, largely because his fellow members of Congress thought the separation of powers principle to be implicit in the structure of government under the Constitution. Madison's proposed amendment, they concluded, would be a redundancy.

The first article of the Constitution says "ALL legislative powers...shall be vested in a Congress." The second article vests "the executive power...in a President." The third article places the "judicial power of the United States in one Supreme Court" and "in such inferior Courts as the Congress...may establish."

Separation of powers serves several goals. Separation prevents concentration of power (seen as the root of tyranny) and provides each branch with weapons to fight off encroachment by the other two branches. As James Madison argued in the Federalist Papers (No. 51), "Ambition must be made to counteract ambition." Clearly, our system of separated powers is not designed to maximize efficiency; it is designed to maximize freedom.

EXECUTIVE ENCROACHMENTS

Two very different views of executive power have been articulated by past presidents. One view, the "strong president" view, favored by presidents such as Theodore Roosevelt essentially held that presidents may do anything not specifically prohibited by the Constitution. The other, "weak president" view, favored by presidents such as Howard Taft, held that presidents may only exercise powers specifically granted by the Constitution or delegated to the president by Congress under one of its enumerated powers.

Our readings include two cases dealing with the breadth of executive power. **Youngstown Sheet & Tube Co. v Sawyer (1952)** arose when President Harry Truman, reponding to labor unrest at the nation's steel mills during the Korean War, seized control of the mills. Although a six-member majority of the Court concluded that Truman's action exceeded his authority under the Constitution, seven justices indicated that the power of the President is not limited to those powers expressly granted in Article II. Had the Congress not impliedly or expressly disapproved of Truman's seizure of the mills, the action would have been upheld.

Dames and More v Regan (1981) considered the constitutionality of executive orders issued by President Jimmy Carter directing claims by Americans against Iran to a specially-created tribunal. The Court, using a pragmatic rather than literalist approach, found the executive orders to be a constitutional exercise of the President's Article II powers. The Court noted that similar restrictions on claims against foreign governments had been made at various times by prior presidents and the Congress had never in those incidents, or the present one, indicated its objection to the practice.

CONGRESSIONAL ENCROACHMENTS

In INS v Chadha (1983), the Court considered the constitutionality of "the legislative veto," a commonly-used practice authorized in 196 different statutes at the time. Legislative veto provisions authorized Congress to nullify by resolution a disapproved-of action by an agency of the executive branch. Chadha contended that congressional action overturning an INS decision suspending his deportation constituted legislative action that failed to comply with the requirements for legislation spelled out in Article I, Section 7 of the Constitution. The Court agreed.

In Bowsher v Synar (1986), the Court invalidated a provision of the Balanced Budget Act that authorized Charles Bowsher, as Comptroller General of the U.S., to order the impoundment of funds appropriated for domestic or military use when he determined the federal budget was in a deficit situation. The Court concluded that allowing the exercise of this executive power by the Comptroller General, an officer--in the Court's view--in the legislative branch, would be "in essence, to permit a legislative veto."

Morrison v Olson considered the constitutionality of the "Independent Counsel" (or "special prosecutor") provisions in the Ethics in Government Act. The Court had considerable difficulty in identifying in which of the three branches of government the independent counsel belonged. Justice Rehnquist's opinion for the Court in Morrison took a pragmatic view of government, upholding the independent counsel provisions. Rehnquist noted that the creation of the independent counsel position did not represent an attempt by any branch to increase its own powers at the expense of another branch, and that the executive branch maintained "meaningful" controls over the counsel's exercise of his or her authority. In an angry dissent, Justice Scalia called the Court's opinion "a revolution in constitutional law" and said "without separation of powers, the Bill of Rights is worthless." Justice Scalia dissented again in Mistretta v U. S.(1989), a decision upholding legislation which delegated to the seven-member United States Sentencing Commission (a commission which included three federal judges) the power to promulgate sentencing guidelines.

EXECUTIVE PRIVILEGE AND IMMUNITIES

Executive privilege, the right of the President to withhold certain information sought by another branch of government, was first claimed by President Jefferson in response to a subpoena from John Marshall in the famous treason trial of Aaron Burr. The Supreme Court's first major pronouncement on the issue, however, did not come until 1974 in **United States v Richard Nixon**. The case involved the refusal to President Nixon to turn over to Watergate Special Prosecutor Leon Jaworski several hours of Oval Office tapes believed to concern the Watergate break-in and subsequent cover-up. Although the Court unanimously concluded that the Constitution does indeed contain an executive privilege, the Court said the privilege was "presumptive" and not absolute. Balancing the interests in the Nixon case, the Court found the privilege not to extend to the requested Watergate tapes.

Finally, in **Clinton v Jones (1997),** the Court rejected President Clinton's argument that the Constitution immunizes him from suits for money damages for acts committed before assuming the presidency. The case arose when Paula Jones filed a suit alleging sexual harrassment by Clinton in an Arkansas hotel room in 1991 while Clinton served as Governor of Arkansas.

Executive Privilege and the Treason Trial of Aaron Burr
In 1807, Chief Justice John Marshall sat as the trial judge in the treason trial of former Vice President Aaron Burr. Burr, who was accused of working with Spain to start a war in the Southern territories and Texas (with the suggestion that he would become the leader of a newly-created western empire), requested that the court subpoena certain letters of Thomas Jefferson that might demonstrate that his arrest was politically motivated. Marshall issued the subpoena stating, "Courts should issue subpoenas based on the character of the information sought, not the character of the person who holds it." In letters to John Marshall, Thomas Jefferson respectfully disagreed, but turned over the letters anyway, thus avoiding a constitutional showdown. To read more about the case, and to read Jefferson's letters to Marshall click on the following link:

CONGRESSIONAL IMMUNITY UNDER THE SPEECH AND DEBATE CLAUSE

The framers sought in various ways to guarantee the independence of each of the three branches. The President was protected against criminal prosecutions while in office, answerable only in an impeachment trial with a super-majority required to convict. Members of the federal judiciary were given lifetime tenure, with a guarantee that there compensation would not be reduced. To ensure free discussion of controversial issues in Congress, the framers immunized members of Congress from liability for statements made in House debate: for their "speech or debate" they "shall not be questioned in any other place."

In 1979, in Hutchinson v Proxmire, the Court considered whether the immunity for Senate and House debate extended beyond the floor to cover press releases and statements made to the media. The Court concluded that the Speech and Debate Clause protected only official congressional business, not statements for public consumption.

CONGRESSIONAL ENCROACHMENT ON JUDICIAL POWERS

In Ex Parte McCardle (1868) the Court decided it lacked jurisdiction to consider the habeas corpus petition of William McCardle, a Vicksburg, Mississippi newspaper editor arrested by military official for writing incendiary editorials about the federal officers then in control of Mississippi during Reconstruction. Although McCardle made his petition under the 1867 Habeas Corpus Act, Congress repealed the provision authorizing McCardle's petition AFTER the Court had heard arguments in his appeal. Although it was obvious that Congress repealed the provision in an attempt to specifically deprive McCarldle of the opportunity to gain release from military custody, the Court nonetheless upheld the validity of the Act and found itself without jurisdiction. Many subsequent commentators, including conservative judge Robert Bork, have criticized the Court's decision in McCardle and have predicted that it would not be followed today.

Executive Encroachments on Legislative Powers
Youngstown Sheet & Tube Co. v Sawyer (1952)
Dames & Moore v Regan (1981)

Congressional Encroachment on Executive Powers
INS v Chadha (1983)
Bowsher v Synar (1986)
Morrison v Olson (1988)
Mistretta v U. S. (1989)

Executive Privilege and Immunities
United States v Nixon (1974)
Clinton v Jones (1997)

Congressional Immunity: Speech & Debate Clause
Hutchinson v Proxmire (1979)

Congressional Encroachment on Judicial Powers
Ex Parte McCardle (1868)

Separation of Powers Provisions in the Constitution

- Article I, Section. 1:
  All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

- Article II, Section. 1:
  The executive Power shall be vested in a President of the United States of America.

- Article III, Section. 1:
  The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

- Article I, Section. 7:
  All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law....If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Questions

1. What are some of the weapons each branch is given by the Constitution to fend off encroachment by other branches?

2. Which view of presidential power under the Constitution makes the most sense to you--the "strong" view or the "weak" view? Why? Which view has the Court come closer to adopting?

3. How should a history of congressional inaction in response to an assertion of presidential power be interpreted?

4. Did the Constitution empower President Lincoln to issue his famous Emancipation Proclamation?

5. It is not obvious that the Court has the power to review presidential assertions of power. What do you think about the suggestion that the Court should refrain from reviewing these exercises of power under "the political question" doctrine?

6. Why do you think Congress came to rely so heavily on "legislative veto" provisions? What are the alternatives?

7. Among the many ways of evaluating justices, one is to measure their willingness to accept as constitutional "pragmatic" solutions to the problems of modern governance. On such a scale, with respect to recent justices, might Justice White be called the "most pragmatic" and Justice Scalia the "least pragmatic" justice?

8. The Court seems to view the power of removal as key to placing an official in one or another branch of government. Why is the power of removal so important?

9. Have special prosecutors made a positive or a negative contribution to public life?

10. Do you accept Justice Rehnquist's argument that the Court should be concerned when one branch seems intent on increasing its power at the expense of other branches, but much less so when that is not the intent of an alleged separation of powers violation?

11. Is Justice Scalia right in suggesting, after Morrison, we now have a "standardless judicial allocation of powers"?

12. What do you think about the guidelines of the U. S. Sentencing Commission? Have they served to provide more uniform sentencing? Have they taken too much sentencing discretion away from trial judges and juries?

13. Could it be argued that the Federal Rules of Civil Procedure violate constitutional separation of powers principles?

14. Could Congress delegate all of its law-making power to a super agency and take a long vacation? Why would such a broad delegation violate the Constitution? How far can Congress go in delegating its law-making powers? When are standards for the exercise of administrative discretion sufficient for constitutional purposes?

15. What is the best argument for recognizing constitutional protection for claims of executive privilege?

16. What would happen if the President were to ignore a direct order from the Supreme Court to respond to a legislative or judicial branch request for information? President Nixon promised to obey "a definitive opinion of the Supreme Court." What do you think he meant by "definitive opinion"?

17. Should the doctrine of executive privilege apply differently in impeachment proceedings?

18. What's the case for making the President immune from suits for damages while in office?

Background on Ex Parte McCardle

An Example of one of McCardle's editorials in the Vicksburg Times (Nov. 6, 1867):

"There is not a single shade of difference between Schofield, Sickles, Sheridan, Pope and Ord [generals in charge of Reconstruction]:...They are all infamous, cowardly, and abandoned villains who, instead of wearing shoulder straps and ruling millions of people should have their heads shaved, their ears cropped, their foreheads branded, and their persons lodged in a penitentiary."

President Johnson's Message in Vetoing the Repeal Act (Johnson's Veto was subsequently overrridden.):
"I cannot give my assent to a measure which proposes to deprive any person restrained of his or her liberty in violation of the Constitution...the right of appeal to the highest judicial authority known to our government....The Supreme Court combines judicial wisdom and impartiality to a higher degree thatn any authority known to the Constitution; andy any act which may be construed into or mistaken for an attempt to prevent or evade its decision on a question which affects the liberty of the citizens and agitates the country cannont fail to be attended with unpropitious consequences."

19. What should the Court have done in Ex Parte McCardle? Consider these options:
(1) Conclude that it had already determined it had jurisdiction and ignore the repeal act;
(2) Consider the act, but hold it inapplicable because it was enacted after oral argument had occurred;
(3) Hold that the act violated Article I, Section 9, Clause 2 in that the suspension of habeas corpus was not rrequired by public safety;
(4) Hold the act violated the Fifth Amendment because it deprived McCardle of due process of law;
(5) Hold the act violates basic separation of powers principles and that Congress cannot curtail the jurisdicion of the Court;
(6) Uphold the act and dismiss the case for want of jurisdiction.

Lincoln's Crackdown
Suspects jailed. No charges filed. Sound familiar?

David Greenberg, Nov. 30, 2001
http://www.slate.com/id/2059132/

Civil libertarians are crying foul over the indefinite detention of hundreds of Sept. 11 suspects and plans to try accused terrorists in military tribunals. In defense, some Bush administration loyalists cite another wartime leader who locked up civilians and resorted to army courts, Abraham Lincoln—even though Lincoln faced a radically different situation, and, more important, his civil liberties record stands as a rare blot on his reputation.

In his authoritative Fate of Liberty: Abraham Lincoln and Civil Liberties (1991), Mark Neely has argued that during the Civil War these two policies—summary arrests and military justice—were of a piece. Both stemmed from the emergency of having an armed rebellion in the nation's midst, and they were viewed as two parts of a single policy. Yet today we think of the policies as separate, if related. So this week I'll consider Lincoln's more famous action, his suspension of the privilege of the writ of habeas corpus. Next week, I'll tackle what at the time was considered the more egregious violation, the use of military tribunals to prosecute civilians.

First a definition: The Latin phrase habeas corpus means "you have the body." The privilege of the writ of habeas corpus refers to a common-law tradition that establishes a person's right to appear before a judge before being imprisoned. When a judge issues the writ, he commands a government official to bring a prisoner before the court so he can assess the legality of the prisoner's detention. When the privilege of the writ is suspended, the prisoner is denied the right to secure such a writ and therefore can be held without trial indefinitely. Habeas corpus is the only common-law tradition enshrined in the Constitution, which also explicitly defines when it can be overridden. Article I, Section 9 of the Constitution says, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Several times during the war, Lincoln or his Cabinet officers issued orders suspending the writ. The first came early in his presidency. Lincoln had been in office for barely a month when Confederate troops attacked the federal garrison at Fort Sumter in April 1861, starting the Civil War. One of his immediate concerns was how to keep an unobstructed route between Washington, D.C., and the North. He worried that if Maryland joined Virginia and seceded from the Union, the nation's capital would be stranded amid hostile states. On April 19, 20,000 Confederate sympathizers in Baltimore tried to stop Union troops from traveling from one train station to another en route to Washington, causing a riot. So on April 27 Lincoln suspended the habeas corpus privilege on points along the Philadelphia-Washington route. That meant Union generals could arrest and detain without trial anyone in the area who threatened "public safety."

Controversy followed. The most explosive incident centered on John Merryman, a Marylander arrested for insurrectionary activities. Summarily jailed, Merryman petitioned for a habeas corpus writ, which Chief Justice Roger Taney granted. But the commanding officer at Fort McHenry, where Merryman was held, refused to release the prisoner, citing Lincoln's edict. With the army loyal to Lincoln, Taney couldn't enforce his order and railed against the president while Merryman stewed in jail for seven more weeks. After being freed, he was never tried.

The Merryman case and others like it ignited a debate over Lincoln's actions. Democrats argued they were unconstitutional. Taney noted that Article 1 of the Constitution, where habeas corpus is discussed, deals exclusively with congressional powers, meaning that Congress alone can authorize the privilege's suspension. Although correct, Taney's argument framed the debate around a legalistic and secondary issue, that of congressional versus presidential power. It skirted the question of whether the situation warranted a suspension of habeas corpus at all. Thus when in March 1863 Congress passed the Habeas Corpus Act, effectively endorsing Lincoln's actions, civil libertarians were stripped of their main argument. (Taney also criticized Merryman's detention, noting that civilians aren't subject to military justice—an issue I'll get to next week.)

Where Democrats marshaled constitutional arguments against Lincoln's order, Republicans replied that in an emergency, only the president could act fast enough to protect the public safety. Lincoln himself took this line in a famous July 4, 1861, speech to Congress. He also, more memorably, used a pragmatic argument. "Are all the laws but one to go unexecuted," he chided his critics, "and the government itself go to pieces, lest that one be violated?" The phrase has been quoted ever since and even provided the title of a recent apologia by Chief Justice William Rehnquist for wartime suppression of freedoms.

Despite the rhetorical power of Lincoln's speech, there's no evidence the government would have gone to pieces. By the time he issued his April 27 order, Union troops had made their way through Baltimore, and it should have been clear that Washington wasn't going to be fatally isolated. As for dissuading Maryland from seceding, contemporaneous accounts suggest that whatever the administration's fears, no such move was imminent.

If Lincoln's Maryland actions were dubious, a wave of arrests the following summer under another habeas corpus suspension was downright indefensible. The wave began after Congress instituted the first-ever military draft in July 1862. Because the draft proved highly unpopular and hard to enforce, Secretary of War Edwin Stanton, at Lincoln's behest, issued sweeping orders on Aug. 8 suspending habeas corpus nationwide—the first time the writ was suspended beyond a narrowly defined emergency area. Stanton decreed that anyone "engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States" was subject to arrest and trial "before a military commission."

The exceedingly broad mandate precipitated a civil liberties disaster. It allowed local sheriffs and constables to decide arbitrarily who was loyal or disloyal, without even considering the administration's main goal of enforcing the draft. At least 350 people were arrested in the following month, an all-time high. Some of the accused had done nothing worse than bad-mouth the president. (That was also true before Aug. 8. On Aug. 6, for example, Union Gen. Henry Halleck arrested one Missourian for saying, "[I] wouldn't wipe my ass with the stars and stripes.")

On Sept. 8, the federal official overseeing these arrests decreed that law enforcement agents were enforcing the Aug. 8 orders too stringently. It was evident that people were being arrested who posed no threat to the public safety. Thereafter, the arrests subsided. Still, Lincoln himself reiterated the suspension on Sept. 24, and arrests without trial continued. Overall between 10,000 and 15,000 people were incarcerated without a prompt trial. On balance, their detention almost certainly did not enhance American security nor hasten the Union victory.

In the last 140 years, America has not faced a crisis anything like the Civil War, and the power to suspend habeas corpus has mostly gone unused. Although (as I'll explain next week) the Supreme Court never definitively ruled Lincoln's suspensions unconstitutional, his actions did come to be

seen as a blemish on an otherwise heroic record of wartime leadership. That disrepute into which his behavior fell just may have helped deter his successors from using such measures themselves.

In the days after Sept. 11, George W. Bush was seen conspicuously toting around a new best-seller about the Civil War, as if to suggest he were reading up on the historical lessons of wartime leadership. It would be good if he brushed up not just on our greatest president's heroics but also on his sad mistakes.

Print Sources

The best book on Lincoln and civil liberties during the Civil War is, as mentioned, Mark Neely's The Fate of Liberty: Lincoln and Civil Liberties (1991). James McPherson's Battle Cry of Freedom: The Civil War Era (1988) is reliable for anything Civil War-related. Dean Sprague's Freedom Under Lincoln (1965) is dated but helpful. Overviews of wartime suppressions of civil liberties include Michael Linfield's Freedom Under Fire: U.S. Civil Liberties in Times of War (1990), which is generally critical toward such suppressions, and William Rehnquist's All the Laws but One: Civil Liberties in Wartime (1998), in which the chief justice generally defends them.

Exploring the Limits of Presidential Power after 9/11: Lessons from Abraham Lincoln's Use of Executive Power during the Civil War

The American Political Science Association
http://www.apsanet.org/content_24447.cfm

Washington, DC--The use of discretionary executive power by presidents grows in times of national crisis. Constitutions can limit that expansion, but only if the extraordinary use of executive power is exercised openly and temporarily. So concludes research by political scientist Benjamin A. Kleinerman (Virginia Military Institute) that draws lessons from the use of executive power by President Abraham Lincoln during the Civil War.

Kleinerman's article is entitled "Lincoln's Example: Executive Power and the Survival of Constitutionalism" and appears in the December issue of Perspectives on Politics, a journal of the American Political Science Association. It is available online at /imgtest/PerspectivesDec05Kleinerman.pdf.

As demonstrated by the current NSA eavesdropping controversy, after 9/11 the Bush administration has robustly employed executive power to meet the threat posed by terrorism. These and other actions have raised questions about the proper sphere for executive power in a constitutional system during a crisis. Kleinerman's research speaks directly to this current debate as Lincoln's actions are cited by both advocates and opponents of expanded executive power. The author draws three lessons from Lincoln:

First, "justifications...should pass the 'necessity test' within which the preservation of the constitutional order itself is at stake." Accordingly, "a concern for the public good is insufficient grounds for the executive to exercise discretionary power." This, Kleinerman notes, is because "only political necessity and not popular or congressional approval can legitimate any discretionary action taken by a president."

Second, "discretionary action should only take place in extraordinary circumstances and should be understood as extraordinary." Lincoln himself articulated clear boundaries on his use of discretionary power and repeatedly emphasized that powers assumed in times of crisis must be given up when the crisis subsides. This is important, the author observes, because as in the case of Nixon "Lincoln's precedent can empower presidents to take actions they might not otherwise take, serving as their... justification for taking any action deemed necessary for the public good." Lincoln also expended significant effort to foster public attachment to the Constitution to compel presidents to justify their behavior in terms of their constitutional responsibility. To do so today would require a restoration of "the notion of executive prerogative to the sphere of public discourse."

Third, "a line must separate the executive's personal feeling and his official duty. He should take only those actions that fulfill his official duty, the preservation of the Constitution, even...if the people want him to go further." Legislation such as the Patriot Act points toward the institutionalization of expanded executive power--but once such

power is entrenched, it is no longer prerogative or discretionary. "Because [Lincoln's] overriding concern was the survival of a constitutional Union," states Kleinerman, "any departure from the bounds of the Constitution must also point back to its restoration."

The question of the proper role of executive power today touches on core questions of constitutional order and American politics, including checks and balances, popular will, executive prerogatives, civil liberties, and national security. The author affirms that "we must beware of simply asserting that current presidents must "be like Lincoln'" and concludes by asking "are we...a constitutional people attached enough to the rule of law so as to prevent the overextension of executive power? In other words, are we capable of insisting upon our Constitution even when presidents do not?"

# # #

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Abraham Lincoln and Civil Liberties in Wartime

The Honorable Frank J. Williams, Heritage Lecture #834, May 5, 2004
http://www.heritage.org/Research/NationalSecurity/hl834.cfm

This month, several individuals detained as "enemy combatants" will make their appeals for freedom to the highest court in the land. Perhaps now, more than any other time in recent memory, the eyes of the world are intensely focused on the United States Supreme Court. In making their decisions, they must walk a fine line between protecting the civil liberties we all hold so dear and guarding the safety of our country's citizens. These nine Justices, with their decisions in these cases, will shape the course of history and, no doubt, further fuel debate surrounding the indefinite detention of "enemy combatants" and the use of military tribunals.

Military tribunals hold a significant place in American history, and they have always spawned public debate. During the American Civil War, Abraham Lincoln declared martial law and authorized such forums to try terrorists because military tribunals had the capacity to act quickly, to gather intelligence through interrogation, and to prevent confidential life-saving information from becoming public.

In 1942, the United States Supreme Court decided Ex parte Quirin,1 a case in which prisoners detained for trial by military commission appealed a denial of their motions for writ of habeas corpus. The Supreme Court held that "military tribunals are not courts in the sense of the Judiciary Article [of the Constitution]."2 Rather, they are the military's administrative bodies to determine the guilt of declared enemies, and pass judgment.

Ex parte Quirin has since become the foundation of President George W. Bush's claim that the government has the right to hold "enemy combatants"--even Americans--indefinitely, without evidence, charge or trial. I never thought, as a veteran, lawyer, and now a judge, that I would be living through a situation where the issue of homeland security--not to be confused with that new Cabinet department--and civil liberties would once again be in conflict as it was during the Civil War.

A Nation at War
As we were during Lincoln's era, we are once again a nation at war, and the laws of war are different. I know that this is a difficult concept to grasp, because most people today are not used to thinking in terms of wartime and peacetime. But in reality, the laws o Think about this: We lost 620,000 people over the four years of the Civil War. We could lose that many people in one day if we realized a chemical or biological attack at the hands of terrorists.

The horror of, and after, September 11, 2001, has again raised tensions between and dialog about American security and personal liberty. As Lyndon B. Johnson said on January 20, 1965, while taking the presidential oath, "We can never again stand aside, prideful in isolation. Terrific dangers and troubles that we once called `foreign' now constantly live among us."3

Today, I hope to provoke not only thought, but also comments and questions from you regarding those issues that President Lincoln confronted in the area of civil liberties and those facing our current Commander in Chief.
Abraham Lincoln: The Verdict of History

During Lincoln's presidency, he was criticized for taking what were considered "extra-constitutional measures." But in the end, the verdict of history is that Lincoln's use of power did

not constitute abuse since every survey of historians ranks Lincoln as number one among the great presidents.4

Far harsher would have been his denunciation if the whole American experiment of a democratic Union had failed--as seemed possible given the circumstances. If such a disaster occurred, what benefit would have been gained by adhering to a fallen Constitution? It was a classic example of the age-old conflict in a democracy: how to balance individual rights with security for a nation.

In the words of historian James G. Randall: "No president has carried the power of presidential edict and executive order (independently of Congress) so far as [Lincoln] did.... It would not be easy to state what Lincoln conceived to be the limit of his powers."5

In the 80 days that elapsed between Abraham Lincoln's April 1861 call for troops--the beginning of the Civil War--and the official convening of Congress in special session on July 4, 1861, Lincoln performed a whole series of important acts by sheer assumption of presidential power. Lincoln, without congressional approval, called forth the militia to "suppress said combinations,"6 which he ordered "to disperse and retire peacefully" to their homes.7 He increased the size of the Army and Navy, expended funds for the purchase of weapons, instituted a blockade--an act of war--and suspended the precious writ of habeas corpus, all without congressional approval.

Lincoln termed these actions not the declaration of "civil war," but rather the suppression of rebellion.8 We all know that only Congress is constitutionally empowered to declare war, but suppression of rebellion has been recognized as an executive function, for which the prerogative of setting aside civil procedures has been placed in the President's hands.9

For example, at this very moment, our country is involved in a war with Iraq. The war has not been formally declared. Where Lincoln used the term "suppression of rebellion," President Bush has couched this effort as a movement to liberate Iraq's people from their dictator and to prevent acts of terrorism against Americans and the citizens of other countries.

Suspending Habeas Corpus

Lincoln suspended the writ of habeas corpus, a procedural method by which one who is imprisoned can be immediately released if his imprisonment is found not to conform to law. With suspension of the writ, this immediate judicial review of detention becomes unavailable. This suspension triggered the most heated and serious constitutional disputes of the Lincoln Administration.

In April 1861, a dissatisfied Marylander named John Merryman dissented from the course being chartered by Lincoln. He expressed this dissent in both word and deed. He spoke out vigorously against the Union and in favor of the South and recruited a company of soldiers for the Confederate Army. Thus, he not only exercised his constitutional right to disagree with what the government was doing, but engaged in raising an armed group to attack and attempt to destroy the government.

On May 25, Merryman was arrested by the military and lodged in Fort McHenry, Baltimore, for various alleged acts of treason. His counsel sought a writ of habeas corpus from Chief Justice Roger B. Taney, alleging that Merryman was being illegally held at Fort McHenry. Taney issued a writ to fort commander George Cadwalader directing him to produce Merryman before the Court the next day at 11:00 a.m. Cadwalader respectfully refused on the ground that President Lincoln had authorized the suspension of the writ of habeas corpus.

Taney immediately issued an attachment for Cadwalader for contempt. The marshal could not enter the fort to serve the attachment, so the old justice, recognizing the impossibility of enforcing his order, settled back and produced the now-famous opinion, Ex parte Merryman.10 The Chief Justice vigorously defended the power of Congress alone to suspend the writ of habeas corpus.

Keep in mind that the Constitution permits the suspension of the writ in "cases of rebellion and when the public safety" requires it. But it is unclear who has the power, Congress or the President.

Taney relied on the fact that the right to suspend the writ was in Article I, section 9 of the Constitution, the section describing congressional duties. Dean of Lincoln historians Richard Nelson Current believes that it was put in this article because the Committee on Style could find no other place for it.

Taney failed to acknowledge that a rebellion was in progress and that the fate of the nation was, in fact, at stake. Taney missed the crucial point made in the draft of Lincoln's report to Congress on July 4:

[T]he whole of the laws which I was sworn to [execute] were being resisted...in nearly one-third of the states. Must I have allowed them to finally fail of execution?... Are all the laws but one [the right to habeas corpus] to go unexecuted, and the government itself...go to pieces, lest that one be violated?11

Two years later, Congress resolved the ambiguity in the Constitution and permitted the President the right to suspend the writ while the rebellion continued.12 Imagine the reaction of our fellow American citizens today if an anti-war demonstrator was treated as Merryman was in 1861 or if the writ of habeas corpus was suspended.

The Emancipation Proclamation

What about the Emancipation Proclamation? Nothing in the Constitution authorized the Congress or the President to confiscate property without compensation. The Emancipation Proclamation declared slaves in the states still in rebellion to be free. By the time of the final Emancipation Proclamation on January 1, 1863, Lincoln had concluded his act to be a war measure taken by the Commander in Chief to weaken the enemy:

Now, therefore, I, Abraham Lincoln, President of the United States by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do...Order and declare that all persons held as slaves within said designated States and parts of States are, and henceforward shall be free.13

The Proclamation may have had all "the moral grandeur of a bill of lading," as historian Richard Hofstader later charged,14 but everyone could understand the basic legal argument for the validity of Lincoln's action. To a critic, James Conkling, the President wrote:

You dislike the Emancipation Proclamation, and perhaps would have it retracted. You say it is unconstitutional. I think differently. I think the Constitution invests its Commander-in-Chief with the law of war. The most that can be said--if so much--is that slaves are property. Is there--has there ever been--any question that by the law of war, property, both of friends and enemies, may be taken when needed? And is it not needed whenever taking it helps us, or hurts the enemy?15

In his 1991 Pulitzer prize-winning book, The Fate of Liberty, historian Mark E. Neely, Jr., closes by admitting:

If a situation were to arise again in the United States when the writ of habeas corpus were suspended, government would probably be as ill-prepared to define the legal situation as it was in 1861. The clearest lesson is that there is no clear lesson in the Civil War--no neat precedents, no ground rules, no map. War and its effect on civil liberties remains a frightening unknown.16

Neely's point is well-taken today. Since September 11, 2001, many scholars and citizens have questioned how President Bush's actions and reactions to the problems of national security and war will affect his legacy and civil liberties.

Many parallels can be drawn from Lincoln's experience with that facing President Bush, though it is yet too soon to know what legacy he will leave to history. Even though Lincoln improvised on civil liberties during the Civil War, he ultimately preserved the American system itself--especially by permitting elections in 1862 and 1864. While "it is encouraging to know that this nation has endured such troubles before and survived them,"17 measures regarded as severe in Lincoln's time seem mild when compared to those of Osama bin Laden or Saddam Hussein.

Dealing with "Enemy Combatants"

After Osama bin Laden and his forces of al-Qaeda admitted to masterminding the horror that was September 11, hundreds of suspected al-Qaeda associates were arrested and detained in Guantanamo Bay, Cuba, as "enemy combatants." Soon after September 11, President Bush proposed the use of military tribunals to try those individuals charged with terrorism.

Such commissions do not enforce national laws, but a body of international law that has evolved over the centuries. Known as the law of war, one of its fundamental axioms is that combatants cannot target civilians.

Historically, military commissions during wartime began as traveling courts when there was a need to impose quick punishment. Military tribunals, rather than the normal justice system, were used not only during the Civil War, but also during the Revolutionary War, Mexican War, and both World Wars.

During the Civil War, the Union Army conducted at least 4,271 trials by military commission, which reflected the disorder of the time. Lincoln answered his critics with a reasoned, constitutional argument. A national crisis existed, and in the interest of self-preservation he had to act. At the same time, he realized Congress had the ultimate responsibility to pass judgment on the measures he had taken.

He found the right of self-preservation in Article II, section 1 of the Constitution, whereby the chief executive is required "to preserve, protect and defend" it, and in section 3, that he "take care that the laws be faithfully executed." All of the laws which were required to be "faithfully executed" were being resisted and "failed of execution" in nearly one-third of the states.

Clement Laird Vallandigham, the best-known anti-war Copperhead18 of the Civil War, was perhaps President Lincoln's sharpest critic. He charged Lincoln with the "wicked and hazardous experiment" of calling the people to arms without counsel and authority of Congress, with suspending the writ of habeas corpus, and with "coolly" coming before the Congress and pleading

that he was only "preserving and protecting" the Constitution and demanding and expecting the thanks of Congress and the country for his "usurpations of power."19

Vallandigham was speaking at a Democratic mass meeting at Mt. Vernon, Ohio, when he was arrested by Major General Ambrose E. Burnside. He was escorted to Kemper Barracks, the military prison in Cincinnati, and tried by a military commission. He was found guilty and sentenced to imprisonment for the duration of the war.20

After being denied a writ of habeas corpus, he applied for a writ of certiorari to bring the proceedings of the military commission for review before the Supreme Court of the United States. In the opinion Ex parte Vallandigham,21 his application was denied on the grounds that the Supreme Court had no jurisdiction over a military tribunal.22

Of course, when the Court addressed the issue five years later in Ex parte Milligan,23 after the war was over, it held that the writ of habeas corpus could only be suspended by Congress, and even then only in a situation where the civil courts were not operating--not even if the charge was fomenting an armed uprising in a time of civil war. The Supreme Court, in Ex parte Quirin, distinguishes Milligan by saying the defendants in Quirin were in the German military but Milligan was a civilian.

The arrest, military trial, conviction, and sentence of Vallandigham aroused excitement throughout the country. Orator after orator expressed outrage against the allegedly arbitrary action of the Administration in suppressing the liberty of speech and of the press, the right of trial by jury, the law of evidence and the right of habeas corpus, and, in general, its assertion of the supremacy of military over civil law.

Rationale for Military Tribunals

Like Lincoln's critics during the Civil War, many today have expressed their concern about the modern use of military tribunals.24 Today, the issue of whether or not military tribunals should exist is simply one layer of this complex debate.

Terrorists are not members of an organized command structure with someone responsible for their actions; they do not wear a military uniform so that the other side can spare civilians without fear of counterattacks by disguised fighters; they do not carry arms openly; and there is no respect for the laws of war.

In order for the Geneva Conventions to apply, the detainees must be members of an adversary state's armed forces or part of an identifiable militia group that abides by the laws of war. Al-Qaeda members do not wear identifying insignia, nor do they abide by the laws of war. Similarly, our soldiers are facing renegade fighters in Iraq--who wear no uniform and drive non-military vehicles.

To address some of the confusion, the Pentagon issued regulations to govern tribunals. Under Military Commission Order No. 1, issued in March 2002, the Secretary of Defense was vested with the power to "issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials."25

The military commissions established under President Bush will be composed of military personnel sitting as trier of both fact and law. Some of you may be aware that I have been chosen to be one of four individuals who will sit on a military Review Panel for military commissions. I

It is clear that our nation is engaged in another conflict that may be as difficult as it is different from the Civil War. It is a war waged against us by an almost unknown and indiscernible enemy.

How do we account for President Lincoln's continuing reputation for leadership and as a supporter of democracy? Clearly, for the 16th President to have survived the Civil War and his use of war measures, he needed the support of a majority of Americans. This he received. No President can successfully conduct a war, with the actions that go with it, without the support of a large segment of the American people.

That Lincoln emerges from the perennial controversy that afflicted his Administration over civil liberties with a reputation for statesmanship may be the most powerful argument for his judicious application of executive authority during a national emergency. As historian Don E. Fehrenbacher has noted, "Although Lincoln, in a general sense, proved to be right, the history of the United States in the twentieth century suggests that he brushed aside too lightly the problem of the example that he might be setting for future presidents."31

Whether President Bush will emerge similarly unscathed--and we hope he will--is yet to be determined. While the full impact of Lincoln's legacy on President Bush is yet to be fully realized, the United States was and still is, in Lincoln's words, "the last best hope of earth" and the survival of democracy in the world.

Rhode Island Supreme Court Chief Justice Frank Williams was recently appointed to the review panel for appeals from the military commission to be held at Guantanamo Bay. A former Army infantry officer, he will be commissioned as a Major General. He also serves on the U.S. Abraham Lincoln Bicentennial Commission. The author is deeply grateful to his former law clerk, Andrea H. Krupp, Esquire, for her invaluable assistance in the preparation of this speech.

1. 317 U.S. 1 (1942).
2. 317 U.S. at 39.
3. Lyndon Baines Johnson, Inaugural Address, January 20, 1965.
4. See, e.g., Arthur M. Schlesinger, Jr., "The Ultimate Approval Ratings," New York Times Magazine, Dec. 15, 1996, at 46-51. Lincoln did well, too, in a survey of "famous" people in the second millennium. He ranks 32nd behind Gutenburg (1) and Hitler (20). See Agnes Hoope Gottlieb et al., 1,000 Years, 10,000 People: Ranking the Men and Women Who Shaped the Millennium (Kodansha International, Ltd., 1998).
5. J. G. Randall, Lincoln the Liberal Statesman 123 (Dodd, Mead & Co., 1947).
6. See 4 The Collected Works of Abraham Lincoln 332 (Roy P. Basler et al. eds., Rutgers University Press, 1953-55) (hereinafter referred to as Coll. Works).
7. See id.
8. See id.
9. The Oxford Companion to the Supreme Court of the United States 428-29 (Kermit L. Hall ed., Oxford University Press, 1992).
10. 5 U.S. 137 (1803).
11. 4 Coll. Works 430.
12. Habeas corpus Act of March 3, 1863.
13. 4 Coll. Works 29-30.
14. Richard Hofstader, The American Political Tradition 169 (Vintage Books, 1974).
15. 6 Coll. Works 29-30.
16. Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 235 (Oxford University Press, 1991).
17. John Lockwood, "We Had Terrorists Even in the Time of Lincoln," Washington Post, Feb. 16, 2003, at B8; see also Edward Steers, Jr., "Terror: 1860s Style," North & South, Vol. 5, No. 4 (May 2002).

18. "Copperhead," a reproachful epithet, was used to denote Northerners who sided with the South in the Civil War and were therefore deemed traitors, particularly those so-named Peace Democrats who assailed the Lincoln Administration. It was borrowed from the poisonous snake of the same name that lies in hiding and strikes without warning. However, "Copperheads" regarded themselves as lovers of liberty, and some of them wore a lapel pin with the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury.
19. Congressional Globe, 37th Cong., 1st Sess., 23, 100, 348. See also Frank L. Klement, The Limits of Dissent: Clement L. Vallandigham and the Civil War (Fordham University Press, 1998).
20. Congressional Globe, 37th Cong., 2nd Sess., Appendix 52-60.
21. 68 U.S. 243 (1864).
22. See id. at 171.
23. 71 U.S. 2 (1866).
24. Ironically, the case of Lincoln assassin John Wilkes Booth was tried before a military tribunal. Although Booth was already dead, eight defendants were put on trial. Among them was Dr. Samuel Mudd, the physician who set Booth's broken leg and sent him on his way. Dr. Mudd was accused of abetting Booth's escape. He escaped the death penalty and served four years of a life sentence. See James H. Johnston, "Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder," at www.washingtonpost.com/ac2/wp-dyn/A9010-2001Dec7?language=printer, Dec. 11, 2001, at F1. Interestingly, Dr. Mudd's grandson brought the case before a federal appeals court in September 2002. He sought to have the conviction overturned, arguing that his grandfather had only been doing his duty as a doctor. Unfortunately for Dr. Mudd's family, in November 8, 2002, the court dismissed the case. Judge Harry Edwards wrote that the law under which the Mudd family was seeking to have Samuel Mudd's conspiracy conviction expunged applied only to records involving members of the military. Although Mudd was tried by a military tribunal, he was not a member of the military.
25. Department of Defense, Military Commission Order No. 1, March 21, 2002.
26. Id.
27. William J. Haynes II, Council on Foreign Relations (visited April 18, 2004), www.cfr.org/publication.php?id=5312.
28. See Quirin, 317 U.S. at 37-38.
29. See Haynes, supra, note 27.
30. Linda Greenhouse, "Detention Cases Before Supreme Court Will Test Limits of Presidential Power," New York Times, Apr. 18, 2004, at 18.
31. Don E. Fehrenbacher, Lincoln in Text and Context: Collected Essays 139 (Stanford University Press, 1987).

Ex Parte Milligan (71 U.S. 1, 1866) *Trials in Wartime*

http://www.abanet.org/publiced/youth/sia/holtcases/milligan.html

The Issue

Does an armed conflict within the United States justify imposing military law?

What's at Stake?

For five men, this case literally meant life or death. In constitutional law, it provides guidance about the extent of legal guarantees in wartime.

Facts and Background

In 1864, during the Civil War, the Union Army arrested Lambdin Milligan and four other men in Indiana. They were charged with plotting to steal weapons and free Confederate soldiers held in prisoner-of-war camps. A military court sentenced them to die, but they appealed for their release under the Constitution's right of habeas corpus.

President Lincoln was very concerned about Southern sympathizers undermining the war effort in the North. These "Copperheads" were especially active in the southern parts of Ohio, Indiana, and Illinois. To combat this threat, President Lincoln issued a number of orders putting certain civilian areas in the North under military control and imposing martial (military) law. This enabled the military to arrest and try civilians whom they suspected of being disloyal.

However, the Constitution explicitly guarantees habeas corpus, which means that people have the right to go to court and have a judge determine if it is legal for them to be held. This is an important right, which prevents the authorities from acting illegally.

In the Milligan case, the Court had to decide whether Lincoln had followed the law and the Constitution when he authorized martial law.

The Decision

The decision was issued a year after the war ended. The unanimous Supreme Court held that the President had gone too far. The Court stressed that Indiana was not under attack and that Milligan was not connected with Confederate military service, nor was he a prisoner of war. He was arrested at home, not on a military maneuver. Even more important, the courts in Indiana were open and functioning normally during the war. The government could have charged him with treason and tried him in the courts, where he would have had the right to a jury and the right to a fair trial, under the Constitution.

The Reasoning

The justices were eloquent in defending the rule of law. Here are some excerpts from the Court's opinion, which was written by Justice David Davis:

It is the birthright of every American citizen when charged with crime, to be tried and punished according to law.... By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. Civil liberty and ... martial law cannot endure together...in the conflict, one or the other must perish.

The nation...has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this [broad power of martial law] be conceded, the dangers to human liberty are frightful to contemplate.

The Impact of the Decision
Milligan was released from prison and never convicted by a civilian court.

Fun Facts
One of Milligan's lawyers was James A. Garfield, later President of the United States.

Justice Davis, who delivered the Court's opinion critical of President Lincoln's executive order, was not only appointed to the Court by Mr. Lincoln, but was also his close friend and in fact had served as Lincoln's campaign manager in the 1860 presidential election.

IN RE DEBS
http://law.jrank.org/pages/13578/In-Re-Debs.html

Defendant: Eugene V. Debs
Crimes Charged: Contempt of court and conspiracy.
Chief Prosecutors: John C. Black, T. M. Milchrist, Edwin Walker
Chief Defense Lawyers: Clarence Darrow, S. Gregory, Lyman Trumbull
Judges: Peter Grosscup, William A. Woods
Place: Chicago, Illinois
Date of Decision: 12 February 1895

Decision
Guilty of contempt, no verdict on conspiracy.

Significance
In one of the most egregious cases of the courts siding with industry againstlabor, a federal judge issued an injunction ordering the American Railway Union to stop a strike against the Pullman Company and sentenced the strike's leader, Eugene Debs, to six months in jail for violating the injunction. The government then put Debs on trial for conspiracy but dropped the case in mid-trial. The Supreme Court upheld Debs's sentence for contempt of court in a major confirmation of federal judges' power to enforce their orders.

In the late nineteenth century, as heavy industry grew and railroads spread across the country, commercial centers like Chicago and other cities mushroomed. With this industrial growth, however, came growing abuses. Ownership of industry was concentrated in a handful of wealthy men, while the factory workers and others who made industrialization possible were not protected by the government. Companies were able to get away with paying workers low wages for long hours. Furthermore, most companies did not give workers benefits such assick leave or disability pay. To make matters worse, there were many "companytowns" where workers rented their houses and bought food from stores--all owned by the very company that employed them.

The city of Chicago, where the famous Haymarket Riot occurred, was home to one of the most flagrant abusers of industrial power. George M. Pullman's Pullman Palace Car Company manufactured world-famous railroad cars. The company operated its own company town just outside of Chicago. Not surprisingly, it wasnamed Pullman, Illinois.

The company charged workers higher than average rent to live in company-ownedhousing while paying substandard hourly wages. Furthermore, in 1893 the company responded to an economic depression by cutting wages 25 percent. In the winter of 1893, conditions were grim in Pullman, Illinois.

The "Debs Rebellion"
Eugene Debs was born in 1855 to a blue-collar Midwestern family. He began hiscareer as a lowly railroad worker. However, he soon discovered that his realgift was in politics, and he rose quickly in the budding union movement. By1893 Debs was president of the American Railway Union. Although the ARU was primarily a railroad-track workers union, in the spring of 1894 many Pullman employees joined. On 11 May 1894, the smoldering discontent in Pullman ignitedand all 3,300 workers went on strike. Although it is likely that the strikewas a spontaneous local event not called by the ARU, Debs quickly went to Pullman and assumed leadership of the strike. Because the ARU represented workers in nearly every railroad system in the United States, and the railroads threw their support behind Pullman, the strike soon became a nationwide

railwaywork stoppage. The resulting paralysis of the American rail network was dubbed the "Debs Rebellion."

President Grover Cleveland was alarmed by the strike and sided with Pullman and the railroads. His attorney general, Richard Olney, went to federal judgesPeter Grosscup and William A. Woods to ask for a court order stopping the strike. Ironically, one of Olney's arguments in asking for the injunction was that the ARU strike violated the Sherman Anti-Trust Act of 1890. The Sherman Anti-Trust Act was intended to break up large corporate monopolies and gave federal judges broad powers to issue orders stopping actions they deemed harmful to interstate commerce. At Olney's suggestion, Grosscup and Woods twisted the act's meaning and, on 2 July 1894, used their power to order Debs and theother ARU leaders to abandon the strike. The order even made answering a telegram from the strikers a violation of the terms of the injunction.

Furious, Debs and the ARU leadership resolved to ignore the injunction. Because violating a court order constituted contempt of court, Judge Woods had Debs hauled into court and sentenced him to six months in jail. Contempt of court is the traditional means by which judges enforce their authority, requiringno trial or jury. The government also charged Debs with conspiracy to blockthe federal mail: the ARU's nationwide railroad work stoppage had halted a Rock Island Railroad train carrying mail for the post office. In the meantime,the federal government's actions were not limited to legal arenas. PresidentCleveland sent federal troops to Chicago to crush the strike.

Debs Tried for Conspiracy

Unlike with the contempt charge, the government had to try Debs before a juryon the conspiracy charge. The ARU retained the famous lawyer Clarence Darrow, who was assisted by S. Gregory and former Illinois Supreme Court Judge Lyman Trumbull. The prosecutors were John C. Black, T. M. Milchrist, and Edwin Walker.

When the trial opened 26 January 1895, Darrow made it clear to the jury thatthe issue at trial was not Debs's guilt but the government's desire to crushthe union movement. Referring to an executive committee of the railroads called the General Managers' Association, Darrow said:

> “This is an historic case which will count much for liberty or against liberty . . . Conspiracy, from the days of tyranny in England down to the day the General Managers' Association used it as a club, has been the favorite weapon of every tyrant. It is an effort to punish the crime of thought.”

Darrow cleverly decided to subpoena George Pullman and the members of the General Managers' Association to testify at the trial. While the real oppositionto the "Debs Rebellion" was being served with legal process, the prosecutorsgrilled Debs. They hoped to provoke him into a socialist tirade against American industry and thus alienate the jury. Prosecutor Walker asked Debs how hedefined the word "strike." Debs, however, merely responded in a detached manner:

> “A strike is a stoppage of work at a given time by men actingin concert in order to redress some real or imaginary grievance.
>
> Walker: Mr. Debs, will you define the meaning of the word "scab"?
>
> A scab in labor unions means the same as a traitor to his country. It means a man who betrays his fellow men by taking their places when they go on strike for a principle. It does not apply to non-union men who refuse to quit work.

After Debs's testimony, events took a surprising turn. Judge Grosscup, probably influenced by George Pullman and the General Managers' Association, who were reluctant to testify in open court, stated on the day after Debs's testimony that:

> "Owing to the sickness of a juror and the certificate ofhis physician that he will not be able to get out for two or three days, I think it will be necessary to adjourn the further taking of testimony in this case."

Grosscup then adjourned the case. In a remarkable turn of events, the trial never reconvened. In effect, the government dropped the conspiracy charge. Ithas never been conclusively determined whether this decision was the result of Pullman's influence or the weakness of the government's case. Darrow and Debs's other lawyers appealed the still-valid contempt conviction.However, on 27 May 1895, the U.S. Supreme Court rejected their pleas and refused to overturn Woods's decision. (Legal citation reflects the Supreme Courtcase.) Debs served his six-month sentence in Illinois's Woodstock Prison with other ARU leaders jailed for contempt. In Re Debs has been cited many times since to demonstrate the sweeping powers of federal judges to punishthose who violate court orders.

Debs' Political Career Continued

Although his strike was crushed, Debs left prison with his political reputation intact. He became the leading spokesman for the American left, and was thepresidential candidate for the American Socialist Party in every election (except 1916) from 1900 to 1920. He lost every election. When the United States entered World War I, Debs was outraged. He criticizedPresident Woodrow Wilson in the harshest terms, and in United States v. Debs was charged with treason. For the most part, the charges against Debswere the result of his support of the International Workers of the World, known as the "Wobblies." This time, however, a court found Debs guilty. Debs's appeals to the Supreme Court were unsuccessful. While in prison, Debs ran forthe fifth and final time as the Socialist Party's candidate for president. Again, he was unsuccessful in his bid to become the nation's chief executive. Stung by Debs's criticism, President Wilson refused to pardon him. Among Debs's choice comments about Wilson were such gems as:

> "No man in public life in American history ever retired so thoroughly discredited, so scathingly rebuked, so overwhelmingly impeached and repudiated as Woodrow Wilson."

Warren G. Harding, who won the 1920 presidential election, was more charitable. Harding pardoned Debs in December of 1921 and even invited him to the White House on Christmas Day. But Debs found that the Socialist Party had lost its political force. He spent his final years with his wife in quiet retirement and died in 1926.

Related Cases

* Northern Securities Co. v. United States, 193 U.S. 197 (1904).
* Patton v. United States, 281 U.S. 276 (1930).
* Nebbia v. New York, 291 U.S. 502 (1934).
* Ex Parte Quirin, 317 U.S. 1 (1942).

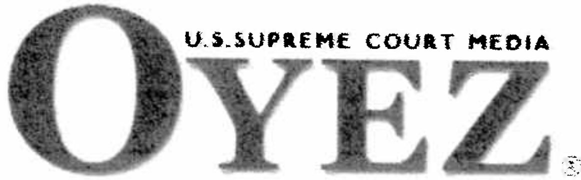
Contempt of Court

Conduct that defies or undermines the authority and justice of a court is considered contempt of court and is punishable by jail, fines, and other forms of retribution. A court can charge plaintiffs, defendants, lawyers, court personnel, jurors, witnesses, and observers with contempt of court for

inappropriate behavior. In addition, a court generally has considerable latitude in making contempt charges. Contempt of court charges also can be categorized as civil or criminal and direct or indirect. Contempt of court charges intend to discourage behavior that undermines the court's authority and prevents the court from administering justice.

However, because courts have ample latitude for determining what amounts to contempt of court and how to punish it, some legal scholars argue that the courts have too much power and leeway for determining and punishing contempt ofcourt. Because judges who make criminal contempt charges sometimes hear thesecases, they may issue punishments that are too severe, especially when theyare the offended party. Critics point to cases where judges imposed excessivefines and jail sentences relative to the offenses committed. In some cases people who have refused to give courts requested evidence have been incarcerated for several years as a result.

West's Encyclopedia of American Law. Minneapolis, Minnesota: West Publishing, 1998.
http://law.jrank.org/pages/13578/In-Re-Debs.html#ixzz0HhxXIkLr&D



United States v. Curtiss-Wright Export Corp.

http://www.oyez.org/cases/1901-1939/1936/1936_98/

Advocates
Martin Conboy (Argued the cause for the United States)
Neil P. Cullom (Argued the cause for appellees Barr Shipping Corp)
Homer S. Cummings (Argued the cause for the United States)
William Wallace (Argued the cause for appellees Curtiss-Wright)
Case Basics

Docket No.: 98

Petitioner: United States

Respondent: Curtiss-Wright Export Corp.
Decided By: Hughes Court (1932-1937)

Opinion: 299 U.S. 304 (1936)
Argued: Thursday, November 19, 1936
Decided: Monday, December 21, 1936
Categories: international relations, jurisdiction, presidency

Facts of the Case:
Curtiss-Wright was charged with conspiring to sell fifteen machine guns to Bolivia, which was engaged in an armed conflict in the Chaco. This violated a Joint Resolution of Congress and a proclamation issued by President Roosevelt.

Question:
Did Congress in its Joint Resolution unconstitutionally delegate legislative power to the President?

Conclusion:
The Court agreed that the President was allowed much room to operate in executing the Joint Resolution; it found no constitutional violation. Making important distinctions between internal and foreign affairs, Justice Sutherland argued because "the President alone has the power to speak or listen as a representative of the nation," Congress may provide the President with a special degree of discretion in external matters which would not be afforded domestically.

United States v. Curtiss-Wright Export Corp.

http://en.wikipedia.org/wiki/United_States_v._Curtiss-Wright_Export_Corp.

Argued November 19–20, 1936
Decided December 21, 1936

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)[1], was a United States Supreme Court case involving principles of both governmental regulation of business and the supremacy of the executive branch of the federal government to conduct foreign affairs.

Facts

In Curtiss-Wright, the Supreme Court relied on just such inferences to conclude not only that the foreign affairs power vested in the national government as a whole, but that the President of the United States had "plenary" powers in the foreign affairs field not dependent upon congressional delegation.

Congress, acting by joint resolution, had authorized the President to place an embargo on arms shipments to countries at war in the Chaco region of South America. Acting pursuant to the resolution, President Franklin Roosevelt proclaimed such an embargo. When Curtiss-Wright Export Corp. was indicted for violating the embargo through the sale of disguised bombers as passenger planes to Bolivia, it defended itself on the grounds that the embargo and the proclamation were void because Congress had improperly delegated legislative power to the executive branch by leaving what was essentially a legislative determination to the President's "unfettered discretion."

In 1936 the defendant Curtiss-Wright Corporation was charged with illegally sending arms of war to Bolivia prior to the revocation of the first proclamation.[1] Despite the controversy surrounding it, the Curtiss-Wright decision is one of the Supreme Court's most influential. Most cases involving executive branch–legislative branch conflicts involve political questions that the courts refuse to adjudicate. Therefore, the sweeping language of Curtiss-Wright is regularly cited to support executive branch claims of power to act without congressional authorization in foreign affairs, especially when there is no judicial intervention to interpret the meaning of that text.

Issue

The defendant raised several issues for consideration by the Court:
- Did the Joint Resolution passed by Congress grant too much authority (and legislative power) to the President, in violation of the non-delegation doctrine?
- Was the President required by due process considerations to make findings of fact in support of the proclamation?
- Did the revocation of the May 1934 proclamation operate to eliminate the penalty for its violation?

Decision of the Court

The Court has not recognized the full scope of executive power suggested by Justice Sutherland's sweeping language. Congressional authorization may be necessary to legitimize many executive acts. In Regan v. Wald (1984), for example, the Supreme Court cited Curtiss-Wright in upholding the constitutionality of the president's regulations restricting travel to Cuba expressly on the ground that they had been authorized by Congress. On the other hand, in Federal Energy Administration v. Algonquin SNG, Inc. (1976), the Court validated presidential restrictions on oil

imports based on very broad congressional language delegating apparently unlimited regulatory authority to the executive branch. In an opinion written by Justice Sutherland, the Supreme Court rejected these arguments and found in favor of the government. The Court reasoned that, while the Constitution may not explicitly say that all ability to conduct foreign policy on behalf of the nation is vested in the President, such power is nonetheless granted implicitly. Moreover, said the Court, the Executive, by its very nature, is empowered to conduct foreign affairs in a way which Congress cannot and should not. The Court stated that "there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries."[1]

The upshot of this ruling not only upheld export limitations on the grounds of national security (similar ones still exist today) but also established the broader principle of executive supremacy in national security and foreign affairs – one of the reasons advanced in the 1950s in favor of the almost-successful attempt to add the Bricker Amendment to the Constitution.

Ex Parte Quirin

http://law.jrank.org/pages/13645/Ex-Parte-Quirin.html#ixzz0Fy8L4lGw&A

Petitioners: Richard Quirin, et al.
Respondent: Albert Cox, Brigadier General, Provost Marshal of the Military District of Washington

Petitioners' Claim
That the president lacks the power to set up special military tribunals to try war crimes, and that civil courts have the right to review decisions made by these special military courts.

Chief Lawyer for Petitioners: Kenneth C. Royall
Chief Lawyer for Respondent: Francis Biddle, U.S. Attorney General

Justices for the Court: Hugo Lafayette Black, James Francis Byrnes, William O. Douglas, Felix Frankfurter, Robert H. Jackson, Stanley Forman Reed, Owen Josephus Roberts, Harlan Fiske Stone (writing for the Court)

Justices Dissenting: None (Frank Murphy did not participate)
Date of Decision: 31 July 1942

Decision
The Supreme Court held that the president has the power to set up military courts in time of war, but that the decisions of these tribunals can be reviewed by civil courts.

Significance
Ex Parte Quirin established the principle that, in times of war, enemyagents can be tried by military courts. Such defendants do not have the right to a civil jury trial, although the decisions of the courts martial are subject to review by civilian courts.

Richard Quirin was one of eight German saboteurs captured just after the United States entered World War II. The eight were accused of violating the unformalized international law of war and the Articles of War enacted by the U.S.Congress. The petitioners had been detained for trial on charges of attempting to undermine the American war effort. Their trials were to be held before amilitary commission set up for that purpose by President Franklin D. Roosevelt.

The eight saboteurs applied to the District Court of the District of Columbiafor permission to file petitions for habeas corpus, challenging theirconfinement, in the U.S. Supreme Court. When the district court turned themdown, they applied directly to the Supreme Court. In their petitions, they challenged the authority of the president to set up the military tribunal and asserted their right under the Fifth and Sixth Amendments to trial by jury, aprocedure with more safeguards than are observed in military courts.

Supreme Court Holds Special Session as Saboteurs Face Death Penalty

The military trial went forward, even while the Supreme Court considered their petitions. By 27 July 1942, all the evidence had been submitted at the military trial. The case was closed except for the arguments of prosecutors and defense lawyers. On 28 July 1942, the Supreme Court met in special session toconsider the saboteurs' petitions. (This was an ex parte proceeding because

the petitioners were not present, having been confined in military prisons.) The Court rejected all eight. Six of the prisoners were executed a little morethan a week later.

The Court did not consider the guilt or innocence of the alleged saboteurs. The only issue in the case was the authority of the military tribunal. In an opinion finally released 29 October 1942, Chief Justice Stone, writing for a unanimous Court, cited the president's powers as commander-in-chief to upholdthe creation of a military tribunal in times of war. The legitimacy of the tribunal was also supported by congressional legislation authorizing military trials for those accused of violating the law of war. Although they did not have a right to ordinary civilian procedures such as a grand jury hearing or trial by jury, defendants such as the eight German saboteurs do have the rightto have the judicial denial of petitions for writs of habeas corpus reviewed by federal appellate courts, including the Supreme Court.

In 1866, in Ex parte Milligan, a case resulting from restrictions on civil liberties during the Civil War, the Supreme Court ruled that military courts have no jurisdiction over civilians in time of war in areas where civilcourts remain open. Lambdin P. Milligan was a northerner with Confederate sympathies who attempted to seize arms from federal arsenals and to liberate Confederate soldiers from northern prisons. Now, in Quirin, the Court distinguished its earlier ruling by declaring that the German saboteurs, unlikeMilligan, were "enemy belligerents":

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemycombatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are examples of belligerents who are . . . offenders against the law of war subject to trial and punishment by military tribunals.

Related Cases

Ex parte Milligan, 71 U.S. 2 (1866).
In re Debs, 158 U.S. 564 (1895).
United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).
Belknap, Michael R. "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case." Military Law Review, Vol. 89,1980, pp. 59-95.
Fellman, David. The Defendant's Rights Today. Madison: Universityof Wisconsin Press, 1976.

Youngstown Sheet & Tube Co. v. Sawyer

http://www.oyez.org/cases/1950-1959/1951/1951_744/

Petitioner: Youngstown Sheet & Tube Co.
Respondent: Sawyer
Decided By: Vinson Court (1949-1953)
Opinion: 343 U.S. 579 (1952)
Argued: Monday, May 12, 1952
Decided: Monday, June 2, 1952
Categories: separation of powers, war powers, justiciability, labor, presidency

Facts of the Case:
In April of 1952, during the Korean War, President Truman issued an executive order directing Secretary of Commerce Charles Sawyer to seize and operate most of the nation's steel mills. This was done in order to avert the expected effects of a strike by the United Steelworkers of America.

Question:
Did the President have the constitutional authority to seize and operate the steel mills?

Conclusion:
In a 6-to-3 decision, the Court held that the President did not have the authority to issue such an order. The Court found that there was no congressional statute that authorized the President to take possession of private property. The Court also held that the President's military power as Commander in Chief of the Armed Forces did not extend to labor disputes. The Court argued that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

The Steel Seizure Case and Inherent Presidential Power

Youngstown Sheet & Tube represents the rare moment in American history when the Supreme Court stands up to a president. In a 6-3 decision, the majority decided that President Harry Truman did not have the authority to seize the nation's steel mills to avert a labor strike, despite his claims that the war in Korea demanded that he exercise emergency powers.

Justice Jackson's famous footnote:

"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

The Steel Seizure Case and Inherent Presidential Power

Journal article by David Gray Adler; Constitutional Commentary, Vol. 19, 2002

The historic American debate on the nature and scope of executive authority, punctuated and dramatized by the renowned eighteenth-century exchange between James Madison and Alexander Hamilton, and spiked in our time by sweeping assertions of unilateral presidential power in foreign affairs and warmaking, and by claims of privilege, secrecy and immunity in domestic matters, took center stage once more in the extraordinary case of Youngstown Sheet & Tube Co. v. Sawyer.

Justly celebrated in the pages of this volume, on the occasion of its 50th anniversary, for its landmark status and deserving rank in the pantheon of great cases--alongside Marbury, McCulloch, and Brown Youngstown has been assured of immortality in the annals of constitutional jurisprudence. The Steel Seizure Case, like the Pentagon Papers Case and the Watergate Tapes Case, was suffused with richly-textured historic dimensions. Moreover, it triggered high political drama and pitched conflict, generated great tides of public opinion, and plunged the Supreme Court into a white-hot cauldron of decision-making responsibility in which it faced issues of surpassing importance to the nation, including the fundamental question of the president's power, if any, to meet an emergency in the absence of statutory authorization. When measured against Youngstown, C. Herman Pritchett observed, "all other [separation of powers] cases pale into insignificance." Youngstown featured the most thorough judicial exploration of presidential powers in the history of the Republic, and it constituted the most significant judicial commentary in the 20th century.

United States v. Reynolds

http://www.oyez.org/cases/1950-1959/1952/1952_21

Case Basics
Docket No.: 21
Petitioner: United States
Respondent: Reynolds
Decided By: Vinson Court (1949-1953)
Opinion: 345 U.S. 1 (1953)
Argued: Tuesday, October 21, 1952
Decided: Monday, March 9, 1953

Facts of the Case:
An airplane carrying several military personnel and several civilians crashed while conducting tests of "secret electronic equipment." The widows of the three civilians killed sued and asked for full disclosure of the Air Force?s accident investigation report. The report included information pertaining to the secret electronic equipment. The Air Force refused to provide the information, saying that to do so would threaten national security. Absent the report, the District Court and Court of Appeals viewed the question of negligence in the widow's favor and ruled for the plaintiffs.

Question:
If the government invokes privilege to withhold information in civil proceedings, must the trial court view the point on which evidence is withheld in the plaintiff's favor?

Conclusion:
No. In a 6-3 opinion by Chief Justice Fred Vinson, the court held that cause for privilege must be reasonably demonstrated. As a result, the government may withhold information for reasons of national security even when that information is vital to the plaintiff's case. On remand, the plaintiffs lost.

U.S. SUPREME COURT MEDIA
OYEZ

Dames & Moore v. Regan

http://www.oyez.org/cases/1980-1989/1980/1980_80_2078/

Advocates
Thomas G. Shack, Jr. (Argued the cause for intervenor-respondent Islamic Republic of Iran)
C. Stephen Howard (Argued the cause for the petitioner)
Eric M. Lieberman (Argued the cause for intervenor-respondent Bank Markazi Iran)
Rex E. Lee (Argued the cause for the the federal respondents)

Case Basics: Docket No.: 80-2078
Petitioner: Dames & Moore
Respondent: Regan
Decided By: Burger Court (1975-1981)
Opinion:
453 U.S. 654 (1981)
Argued: Wednesday, June 24, 1981
Decided: Thursday, July 2, 1981
Issues:
Due Process, Takings Clause
Categories:
foreign affairs, jurisdiction, presidency, property

Facts of the Case:
In reaction to the seizure of the U.S. embassy and American nationals in Iran, President Jimmy Carter invoked the International Emergency Economic Powers Act (IEEPA) and froze Iranian assets in the United States. When the hostages were released in 1981, Treasury Secretary Donald Reagan affirmed the agreements made the Carter administration that terminated all legal proceedings against the Iranian government and created an independent Claims Tribunal. Dames & Moore attempted to recover over $3 million owed to it by the Iranian government and claimed the executive orders were beyond the scope of presidential power.

Question:
Did the president have the authority to transfer Iranian funds and to nullify legal claims against Iran?

Conclusion:
The Court held that the International Emergency Economic Powers Act constituted a specific congressional authorization for the President to order the transfer of Iranian assets. The Court further held that although the IEEPA itself did not authorize the presidential suspension of legal claims, previous acts of Congress had "implicitly approved" of executive control of claim settlement. The Court emphasized the narrowness of its ruling, limiting the decision to the facts of the case.

Decisions
Decision: 8 votes for Regan, 1 vote(s) against
Legal provision: 50 U.S.C. 1702

OYEZ U.S. SUPREME COURT MEDIA

Nixon v. Fitzgerald

http://www.oyez.org/cases/1980-1989/1981/1981_79_1738

Advocates
Herbert J. Miller, Jr. (Argued the cause for the petitioner)
Elliot L. Richardson (on behalf of the Petitioners Harlow and Butterfield)
John E. Nolan, Jr. (Argued the cause for the respondent)

Case Basics: Docket No.: 80-2078
Petitioner: Dames & Moore
Respondent: Regan
Decided By: Burger Court (1975-1981)
Opinion: 453 U.S. 654 (1981)
Argued: Wednesday, June 24, 1981
Decided: Thursday, July 2, 1981

Issues:
Due Process, Takings Clause

Categories:
foreign affairs, jurisdiction, presidency, property

Facts of the Case:
In 1968, Fitzgerald, then a civilian analyst with the United States Air Force, testified before a congressional committee about inefficiencies and cost overruns in the production of the C-5A transport plane. Roughly one year later he was fired, an action for which President Nixon took responsibility. Fitzgerald then sued Nixon for damages after the Civil Service Commission concluded that his dismissal was unjust.

Question:
Was the President immune from prosecution in a civil suit?

Conclusion:
Yes. The Court held that the President "is entitled to absolute immunity from damages liability predicated on his official acts." This sweeping immunity, argued Justice Powell, was a function of the "President's unique office, rooted in the constitutional tradition of separation of powers and supported by our history."

Decision: 5 votes for Nixon, 4 vote(s) against

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INS v. Chadha

462 U.S. 919 (1983)

Docket Number: 80-1832

Abstract

Participants
Resources
Audio
Printer Friendly

Argued: February 22, 1982
Reargued: October 7, 1982
Decided: June 23, 1983

Subjects: Miscellaneous: Legislative Veto

Facts of the Case

In one section of the Immigration and Nationality Act, Congress authorized either House of Congress to invalidate and suspend deportation rulings of the United States Attorney General. Chadha had stayed in the U.S. past his visa deadline and was ordered to leave the country. The House of Representatives suspended the Immigration judge's deportation ruling. This case was decided together with United States House of Representatives v. Chadha and United States Senate v. Chadha.

Question Presented

Did the Immigration and Nationality Act, which allowed a one-House veto of executive actions, violate the separation of powers doctrine?

Conclusion

The Court held that the particular section of the Act in question did violate the Constitution. Recounting the debates of the Constitutional Convention over issues of bicameralism and separation of powers, Chief Justice Burger concluded that even though the Act would have enhanced governmental efficiency, it violated the "explicit constitutional standards" regarding lawmaking and congressional authority.

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Clinton v. Jones

http://www.oyez.org/cases/1990-1999/1996/1996_95_1853/

Advocates
Robert S. Bennett (Argued the cause for the petitioner)
Gilbert K. Davis (Argued the cause for the respondent)
Walter E. Dellinger, III (On behalf of the United States, as amicus curiae, supporting the petitioner)

Case Basics Docket No.: 95-1853
Petitioner: Clinton
Respondent: Jones
Decided By: Rehnquist Court (1994-2005)
Opinion: 520 U.S. 681 (1997)
Argued: Monday, January 13, 1997
Decided: Tuesday, May 27, 1997

Issues: Economic Activity, Governmental Liability
Categories: gender, immunity, presidency, separation of powers, sex discrimination

Facts of the Case:
Paula Corbin Jones sued President Bill Clinton. She alleged that while she was an Arkansas state employee, she suffered several "abhorrent" sexual advances from then Arkansas Governor Clinton. Jones claimed that her continued rejection of Clinton's advances ultimately resulted in punishment by her state supervisors. Following a District Court's grant of Clinton's request that all matters relating to the suit be suspended, pending a ruling on his prior request to have the suit dismissed on grounds of presidential immunity, Clinton sought to invoke his immunity to completely dismiss the Jones suit against him. While the District Judge denied Clinton's immunity request, the judge ordered the stay of any trial in the matter until after Clinton's Presidency. On appeal, the Eighth Circuit affirmed the dismissal denial but reversed the trial deferment ruling since it would be a "functional equivalent" to an unlawful grant of temporary presidential immunity.

Question:
Is a serving President, for separation of powers reasons, entitled to absolute immunity from civil litigation arising out of events which transpired prior to his taking office?

Conclusion:
No. In a unanimous opinion, the Court held that the Constitution does not grant a sitting President immunity from civil litigation except under highly unusual circumstances. After noting the great respect and dignity owed to the Executive office, the Court held that neither separation of powers nor the need for confidentiality of high-level information can justify an unqualified Presidential immunity from judicial process. While the independence of our government's branches must be protected under the doctrine of separation of powers, the Constitution does not prohibit these branches from exercising any control over one another. This, the Court added, is true despite the procedural burdens which Article III jurisdiction may impose on the time, attention, and resources of the Chief Executive.

Decision: 9 votes for Jones, 0 vote(s) against Legal provision: Article 1, Section 7, Paragraph 2: Separation of Powers

Supreme Court Deletes Line-Item Veto
Clinton disappointed; Opponents of veto call it a victory for the Constitution

http://www.cnn.com/ALLPOLITICS/1998/06/25/scotus.lineitem

WASHINGTON (June 25) -- The line-item veto is unconstitutional, the Supreme Court decided Thursday, ruling that Congress did not have the authority to hand that power to the president.

The 6-3 ruling said that the Constitution gives a president only two choices: either sign legislation or send it back to Congress. The 1996 line-item veto law allowed the president to pencil out specific spending items approved by the Congress.

In his majority opinion Justice John Paul Stevens upheld a lower court's decision, concluding "the procedures authorized by the line-item veto act are not authorized by the Constitution."

If Congress wants to give the president that power, they will have to pass a constitutional amendment, Stevens said. "If there is to be a new procedure in which the president will play a different role in determining the text of what may become a law, such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution," Stevens said.

The court's ruling was a defeat for the Clinton Administration, which asked the high court to reverse the lower court's ruling. President Bill Clinton, traveling in China, said he was "deeply disappointed."

Clinton was the first president to exercise the veto, which he did 82 times last year. Many of the vetoed programs are under court challenges and should now win their appeals.

Stevens was joined in his opinion by Chief Justice William Rehnquist and Justices Anthony Kennedy, David Souter, Clarence Thomas and Ruth Bader Ginsburg.

Justices Antonin Scalia, Sandra Day O'Connor and Stephen Breyer dissented. Scalia, who wrote the dissent, made clear his disagreement by taking the unusual step of using nine minutes in court to read from his opinion.

"The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court," Scalia said. "The president's action it authorizes in fact is not a line-item veto."

A federal judge in Washington ruled the law unconstitutional in February. Once a bill becomes law, the president's sole duty is to carry it out, U.S. District Judge Thomas F. Hogan said.

The case was brought by an Idaho potato growers' group and New York City.

New York City sued to restore a provision that would have let the city and New York state raise taxes on hospitals and use the money to attract federal Medicaid payments.

The Snake River Potato Growers sued over Clinton's veto of a tax measure that would have allowed agricultural processors to defer capital gains taxes when they sell such facilities to farmers' cooperatives.

Clinton, Republican supporters 'disappointed'

The line-item veto had been a hallmark of the GOP "Contract With America," when Republicans took control of Congress in 1994, and was the only plank of that agenda that Clinton supported

In a written statement, Clinton said: "The decision is a defeat for all Americans, it deprives the president of a valuable tool for eliminating waste in the federal budget and for enlivening the debate over how to make the best use of public funds. ... I am determined to do everything in my power to continue to cut wasteful government spending, maintain fiscal discipline and create opportunity through continued economic growth."

In addition to allowing him to strike specific projects from spending bills, Clinton said the line-item veto was useful as a negotiating tool -- a weapon to discourage Congress from adding pork-barrel spending to legislation.

Key Senate supporters of the veto power, Sens. Dan Coats (R-Ind.) and John McCain (R-Ariz.) said they would try to work around the court's objections, perhaps by requiring each spending item to be sent to the president as a separate bill.

"This is a temporary defeat -- a temporary defeat for the American people, for fiscal responsibility. But anyone who knows John McCain and anybody, hopefully, who knows Dan Coats knows that this is one battle in a war to address the issue of fiscal responsibility and to represent the American taxpayer so that the light of day can be shed on the way in which the Congress spends their money."

McCain had suffered an earlier blow last week as his tobacco legislation was scuttled in the Senate. Even so, the former Vietnam prison of war was able to keep a light view of the defeats.

"I would just like to point out that this has been a wonderful two weeks for me personally," McCain said to laughter during the press conference. "I'm really on a roll. I really haven't had quite so much fun since my last interrogation in Hanoi."

House Budget Committee Chairman John Kasich (R-Ohio) said Congress should still try to pass a constitutional amendment, but has offered in the meantime legislation forcing Congress to act upon any reductions in spending that the president earmarks in legislation.

Kasich said that under his proposal "what this says is the president sends us something he wants eliminated, then we've got to vote whether we agree or disagree with him." Kasich called his proposal "a pretty good remedy for what we lost today," in the Supreme Court ruling.

Under the current system, the president can sign a piece of legislation, but send Congress his recommendations that certain spending portions be cut out of the bill, with Congress not required to act upon those recommendations.

Under the Kasich proposal, both Houses of Congress would be required to vote on the rescissions proposed by the president, passing them by a simple majority.

The court ruling comes as Congress is preparing the budget for 1999. And with an unusual budget surplus tempting it to spend more, Congress may have to exert its own fiscal discipline, since Clinton will no longer have the line-item veto as leverage.

Strict constitutionalists praise decision

But lawmaker who had fought against the line-item veto legislation three years ago were thrilled with the Supreme Court's ruling that the statute is unconstitutional.

Sen. Robert Byrd (D-W.Va.) called it " a great day for the U.S. Constitution."

"We feel that the liberties of the American people have been assured," said Byrd. "Without adequate control by the citizens represented in Congress, liberty is threatened."

Sen. Carl Levin (D-Mich.) said the law of the land -- the Constitution -- applies to all, including the president.

"Congress, in this particular line-item veto bill struck down today, tried to bend the Constitution. The court said it will not allow that to happen. Thank God it did, because this particular line-item bill would have given the president the power to repeal the law of the land without Congress participating," said Levin.

The law let the president sign a bill and within five days go back to reject specific spending items or tax breaks in it. Congress could then reinstate the item by passing a separate bill.

Nearly every president in the past century has sought the line-item veto as a tool for controlling "pork barrel" programs added by lawmakers. Most governors have similar authority over state spending.

Clinton v. City of New York

http://www.oyez.org/cases/1990-1999/1997/1997_97_1374

Advocates
Charles J. Cooper (Argued the cause for the appellee City of New York)
Louis R. Cohen (Argued the cause for the appellee Snake River Potato Growers)
Seth P. Waxman (Argued the cause for the appellants)

Case Basics: Docket No.: 97-1374
Appellee: City of New York
Appellant: Clinton
Decided By: Rehnquist Court (1994-2005)
Opinion:
524 U.S. 417 (1998)
Argued: Monday, April 27, 1998
Decided: Thursday, June 25, 1998

Issues: Miscellaneous, Miscellaneous
Categories: Congress, presidency

Facts of the Case:

This case consolidates two separate challenges to the constitutionality of two cancellations, made by President William J. Clinton, under the Line Item Veto Act ("Act"). In the first, the City of New York, two hospital associations, a hospital, and two health care unions, challenged the President's cancellation of a provision in the Balanced Budget Act of 1997 which relinquished the Federal Government's ability to recoup nearly $2.6 billion in taxes levied against Medicaid providers by the State of New York. In the second, the Snake River farmer's cooperative and one of its individual members challenged the President's cancellation of a provision of the Taxpayer Relief Act of 1997. The provision permitted some food refiners and processors to defer recognition of their capital gains in exchange for selling their stock to eligible farmers' cooperatives. After a district court held the Act unconstitutional, the Supreme Court granted certiorari on expedited appeal.

Question:

Did the President's ability to selectively cancel individual portions of bills, under the Line Item Veto Act, violate the Presentment Clause of Article I?

Conclusion:

Yes. In a 6-to-3 decision the Court first established that both the City of New York, and its affiliates, and the farmers' cooperative suffered sufficiently immediate and concrete injuries to sustain their standing to challenge the President's actions. The Court then explained that under the Presentment Clause, legislation that passes both Houses of Congress must either be entirely approved (i.e. signed) or rejected (i.e. vetoed) by the President. The Court held that by canceling only selected portions of the bills at issue, under authority granted him by the Act, the President in effect "amended" the laws before him. Such discretion, the Court concluded, violated the "finely wrought" legislative procedures of Article I as envisioned by the Framers.

Decisions

Decision: 6 votes for City of New York, 3 vote(s) against
Legal provision: Article 1, Section 7, Paragraph 2: Separation of Powers

Hamdi v. Rumsfeld

http://www.oyez.org/cases/2000-2009/2003/2003_03_6696/

Advocates
Paul D. Clement (argued the cause for Respondents)
Frank W. Dunham, Jr. (argued the cause for Petitioners)
Case Basics
Docket No.: 03-6696
Petitioner: Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi
Respondent: Donald H. Rumsfeld, Secretary of Defense, et al.
Decided By: Rehnquist Court (1994-2005)
Opinion: 542 U.S. 507 (2004)
Granted: Friday, January 9, 2004
Argued: Wednesday, April 28, 2004
Decided: Monday, June 28, 2004
Issues: Due Process, Hearing or Notice

Facts of the Case:
In the fall of 2001, Yaser Hamdi, an American citizen, was arrested by the United States military in Afghanistan. He was accused of fighting for the Taliban against the U.S., declared an "enemy combatant," and transfered to a military prison in Virginia. Frank Dunham, Jr., a defense attorney in Virginia, filed a petition for a writ of certiorari in federal district court there, first on his own and then for Hamdi's father, in an attempt to have Hamdi's detention declared unconstitutional. He argued that the government had violated Hamdi's Fifth Amendment right to Due Process by holding him indefinitely and not giving him access to an attorney or a trial. The government countered that the Executive Branch had the right, during wartime, to declare people who fight against the United States "enemy combatants" and thus restrict their access to the court system. The district court ruled for Hamdi, telling the government to release him. On appeal, a Fourth Circuit Court of Appeals panel reversed, finding that the separation of powers required federal courts to practice restraint during wartime because "the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not." The panel therefore found that it should defer to the Executive Branch's "enemy combatant" determination.

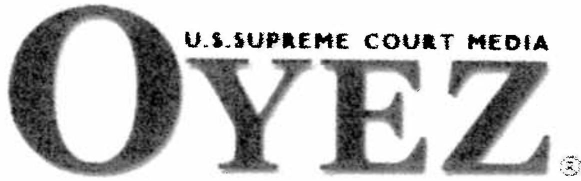
Question:
Did the government violate Hamdi's Fifth Amendment right to Due Process by holding him indefinitely, without access to an attorney, based solely on an Executive Branch declaration that he was an "enemy combatant" who fought against the United States? Does the separation of powers doctrine require federal courts to defer to Executive Branch determinations that an American citizen is an "enemy combatant"?

Conclusion:

Yes and no. In an opinion backed by a four-justice plurality and partly joined by two additional justices, Justice Sandra Day O'Connor wrote that although Congress authorized Hamdi's detention, Fifth Amendment due process guarantees give a citizen held in the United States as an enemy combatant the right to contest that detention before a neutral decisionmaker. The plurality rejected the government's argument that the separation-of-powers prevents the judiciary from hearing Hamdi's challenge. Justice David H. Souter, joined by Justice Ruth Bader Ginsburg, concurred with the plurality that Hamdi had the right to challenge in court his status as an enemy combatant. Souter and Ginsburg, however, disagreed with the plurality's view that Congress authorized Hamdi's detention. Justice Antonin Scalia issued a dissent joined by Justice John Paul Stevens. Justice Clarence Thomas dissented separately.

Decisions
Decision: 8 votes for Hamdi, 1 vote(s) against
Legal provision: Due Process
Judgment of the Court by Justice Sandra Day O'Connor

-Find Conclusions
for Hamdan +
Boumediene



Hamdan v. Rumsfeld

http://www.oyez.org/cases/2000-2009/2005/2005_05_184/

Advocates
Paul D. Clement (argued the cause for Respondents)
Neal K. Katyal (argued the cause for Petitioner)
Case Basics
Docket No.: 05-184
Petitioner: Salim Ahmed Hamdan
Respondent: Donald H. Rumsfeld, Secretary of Defense, et al.
Decided By: Roberts Court (2006-)
Opinion: 548 U.S. ___ (2006)
Granted: Monday, November 7, 2005
Argued: Tuesday, March 28, 2006
Decided: Thursday, June 29, 2006
Issues: Criminal Procedure, Habeas Corpus

Facts of the Case:
Salim Ahmed Hamdan, Osama bin Laden's former chauffeur, was captured by Afghani forces and imprisoned by the U.S. military in Guantanamo Bay. He filed a petition for a writ of habeas corpus in federal district court to challenge his detention. Before the district court ruled on the petition, he received a hearing from a military tribunal, which designated him an enemy combatant.
A few months later, the district court granted Hamdan's habeas petition, ruling that he must first be given a hearing to determine whether he was a prisoner of war under the Geneva Convention before he could be tried by a military commission. The Circuit Court of Appeals for the District of Columbia reversed the decision, however, finding that the Geneva Convention could not be enforced in federal court and that the establishment of military tribunals had been authorized by Congress and was therefore not unconstitutional.

Question:
May the rights protected by the Geneva Convention be enforced in federal court through habeas corpus petitions? Was the military commission established to try Hamdan and others for alleged war crimes in the War on Terror authorized by the Congress or the inherent powers of the President?

Conclusion:
Yes and no. The Supreme Court, in a 5-to-3 decision authored by Justice John Paul Stevens, held that neither an act of Congress nor the inherent powers of the Executive

for a more amenable historical example, pointing out that while it was nominally a sovereign country in the eighteenth century, English habeas corpus review did apply there since Ireland was under de facto English control and shared the English legal system.

The majority opinion rejected the government's argument comparing the habeas corpus restriction under the MCA to those affected by the Antiterrorism and Effective Death Penalty Act of 1996, which were ruled constitutional after a suspension clause challenge. The Court explained the restrictions of AEDPA on habeas review were not a complete suspension on habeas corpus, but simply procedural limitations, such as limiting the number of successive habeas petitions a prisoner can file, or mandating a one-year time limit for the filing of federal habeas review that begins when the prisoner's judgment and sentence become final. The main distinction between the MCA and AEDPA, the Court went on to explain, was that AEDPA applies in practice to those prisoners serving a sentence after having been tried in open court and whose sentences have been upheld on direct appeal, whereas the MCA suspends the application of the writ to those detainees whose guilt has not yet been legally determined.

The Court also concluded that the detainees are not required to exhaust review procedures in the court of appeals before pursuing habeas corpus actions in the district court. The majority distinguished between de jure and de facto sovereignty, finding that the United States had in effect de facto sovereignty over Guantanamo. Distinguishing Guantanamo base from historical precedents, this conclusion allowed the court to conclude that Constitutional protections of habeas corpus run to that to U.S. Military base at Guantanamo Bay, Cuba.
In the majority ruling Justice Kennedy called the Combatant Status Review Tribunals "inadequate".[4][5][6][7] He explained, "to hold that the political branches may switch the constitution on or off at will would lead to a regime in which they, not this court, 'say what the law is'."[8] The decision struck down section 7 of the MCA, but left intact the Detainee Treatment Act. In a concurring opinion, Justice Souter stressed the fact that the prisoners involved have been imprisoned for as many as six years. Chief Justice Roberts and Justice Scalia each wrote opinions for the four dissenters.[9]

Justice Souter's concurrence
Justice Souter's concurrence was joined by Justices Ginsburg and Breyer. According to Justice Souter, "subsequent legislation eliminated the statutory habeas jurisdiction" over the claims brought by Guantanamo Bay detainees, "so that now there must be constitutionally based jurisdiction or none at all." [10] Citing the Supreme Court's decision in Rasul v. Bush, he added that the ""[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus."[11] Justice Souter pointed to the lengthy imprisonments, some of which have exceeded six years, as "a factor insufficiently appreciated by the dissents." [12] He thus denied the charge of the dissenters that the Court's majority "is precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time."[13]

Justice Scalia's dissent
Justice Scalia's dissent was joined by Chief Justice Roberts and Justices Alito and Thomas. Justice Scalia argued that "the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows." [14] The commission of terrorist acts by former prisoners at Guantanamo Bay after their release "illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection."

[15] A consequence of the Court's majority decision will be that "how to handle enemy prisoners in this war will ultimately lie with the branch [the judiciary] that knows least about the national security concerns that the subject entails." [16] A conflict between the Military Commissions Act and the Suspension Clause "arises only if the Suspension Clause preserves the privilege of the writ for aliens held by the United States military as enemy combatants at the base in Guantanamo Bay, located within the sovereign territory of Cuba." [17]

Justice Scalia added that the Court's majority "admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States." [18] Justice Scalia pointed out that Johnson v. Eisentrager (where the Supreme Court decided that U.S. courts had no jurisdiction over German war criminals held in a U.S.-administered German prison) "thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."[19]

According to Justice Scalia, the Court's majority's "analysis produces a crazy result: Whereas those convicted and sentenced to death for war crimes are without judicial remedy, all enemy combatants detained during a war, at least insofar as they are confined in an area away from the battlefield over which the United States exercises 'absolute and indefinite' control, may seek a writ of habeas corpus in federal court." Justice Scalia added that the Constitution allows suspension of the writ of habeas corpus only in cases of rebellion or invasion, both domestic disturbances; he asked "[i]f the extraterritorial scope of habeas turned on flexible, 'functional' considerations, as the [Court's majority] holds, why would the Constitution limit its suspension almost entirely to instances of domestic crisis?" [20]

Chief Justice Roberts' dissent

Chief Justice Roberts' dissent took a far more tempered approach than that of Justice Scalia, focusing on whether the process afforded the Guantanamo detainees in the Detainee Treatment Act were an adequate substitute for the Habeas protections the Constitution guaranteed. By arguing in the affirmative, he implied that the issue of whether the detainees had any Suspension Clause rights was moot (since, if they did, he found that those rights were not violated anyway). This line of reasoning was arguably more in line with the plain reading of Johnson v. Eisentrager (which denied German prisoners of war Habeas rights primarily due to both practical logistical concerns and the determination that they had been afforded an adequate substitute: traditional military war crimes trials, which complied with the Geneva Conventions) than that of Justice Scalia, and also avoided the more controversial and complicated issue of whether the detainees were entitled to file Habeas petitions in the first place. However, the claim of the Chief Justice that the Court has struck down generous procedural protections afforded 'enemy combatants' and replaced them with a set of "shapeless" procedures to be defined by federal courts, has been described as disingenuous by some commentators.[21]

Amicus briefs

The Supreme Court received over two dozen briefs of amicus curiae on the case, including some written strictly on the history and application of Habeas Corpus in England, Scotland, Hanover, Ireland, Canada, British-controlled territories, India, and the United States. Twenty-two amicus briefs were filed in support of the petitioners, Boumediene and Al Odah, and four were filed in support of the respondents, the Bush Administration.

Reception of the ruling

Conservative commentators have criticized the ruling, asserting that it "wantonly overruled the will of the people and Congress to suspend the habeas corpus rights of this dangerous and irredeemable class of criminal defendants".[30]
Liberal legal theorist Ronald Dworkin disagreed with the conservative criticism and praised the Court's decision, advocating that it was "a great victory".[31]

Aftermath
On November 20, 2008, five Guantánamo detainees, including Boumediene, were ordered freed by Judge Richard J. Leon of Federal District Court in Washington.[32] The Court ordered the continued detention of a sixth, Belkacem Bensayah. The Court ruled: "To allow enemy combatancy to rest on so thin a reed would be inconsistent with this court's obligation; the court must and will grant their petitions and order their release. This is a unique case. Few if any others will be factually like it. Nobody should be lulled into a false sense that all of the ... cases will look like this one."[32][33][34][35]

Release to France
On May 15, 2009, Boumediene was transferred to France, where he has relatives.[36][37] His wife and children moved from Bosnia to Algeria, following his arrest, but would join him in France.