

MODULE 6

Foreign Affairs, War, and Immigration

Curtiss-Wright · treaties and executive agreements · recognition · the war power · Hamdi · Trump v. Hawaii

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Foreign policy power: Curtiss-Wright

Are foreign affairs and domestic affairs measured with the same stick?

EXCLUSIVELY FEDERAL

- Passed straight from the Crown to the United States.
- But see *Alden v. Maine*: the States kept their sovereign immunity.

THE PRESIDENT

- The single voice of the nation.
- “The sole organ of the nation in its external relations.”

DIFFERENT MEASURING STICKS

- Foreign affairs: more deference to the President.
- Domestic affairs: *Youngstown*.

The holding upheld a delegation. The rest is dictum — the most quoted dictum in the field.

Dames & Moore v. Reagan: the hostage deal

To end the Iran hostage crisis, the President settled Americans' claims against Iran.

THE DEAL

- Free the hostages.
- Unfreeze Iran's assets.
- Move Americans' claims to an international tribunal.

THE COURT

- Upheld — in eight days.
- An executive agreement, not a treaty.
- Rehnquist uses Jackson, not Curtiss-Wright.

CONGRESS IMPLICITLY AGREED

1. Presidents had done it before, and Congress went along.
2. Congress had set up procedures for future claims.

Silence became consent: long practice, known to Congress and left alone.

International agreements

Two ways to bind the nation abroad — and one thing that is often confused with them.

TREATIES

- In the Constitution.
- The President negotiates and signs.
- Two-thirds of the Senate consents.

EXECUTIVE AGREEMENTS

- Not in the Constitution.
- In practice, the President acts alone.
- Anything a treaty can do, they can do.

NOT EXECUTIVE ORDERS

- Any order the President issues.
- Usually written, published and numbered.

My board: the Court has upheld every executive agreement it has reviewed ... so far.

Treaties at home: Holland and Medellín

What a treaty lets Congress do, and what it does not let the President do.

MISSOURI v. HOLLAND, 1920

- Congress could not protect migratory birds on its own.
- A treaty, plus a statute implementing it, could.
- The Tenth Amendment does not answer the question.

MEDELLÍN v. TEXAS, 2008

- A treaty that does not execute itself is not law at home.
- Congress has to implement it.
- The President cannot do it by memorandum.

Both cases run through Congress.

Recognition: Zivotofsky v. Kerry

A statute said “Israel” could go on the passport of an American born in Jerusalem.

THE CONSTITUTION IS AMBIGUOUS

- Congress: immigration, naturalization, passports.
- The President: “receive Ambassadors.”

THE PRESIDENT WINS

- The recognition power is his alone.
- Congress cannot contradict it.

Youngstown category three — and the President's action was upheld anyway.

And Curtiss-Wright's “sole organ” is demoted to dictum.

The war power

Congress declares war and pays for it. The President commands.

CONGRESS

- Raises armies and a navy — the draft.
- Pays for the war.
- Declares war, and ends it.

THE PRESIDENT

- Commander in Chief.
- Directs the forces Congress provides.

DECLARED WARS

- The last was World War II. Since then: authorizations — or nothing.

My board: what is a war? On terror, on drugs, on poverty ...

Acting first: the WPR and the Prize Cases

Can the President use force before Congress says yes?

THE WAR POWERS RESOLUTION, 1973

- The President may act first.
- Report to Congress within 48 hours.
- Out within 60 days unless Congress authorizes.

THE PRIZE CASES, 1863

- Lincoln blockades the South.
- No authorization from Congress.
- The Court says OK.

The fight is over one word in the Resolution: “hostilities.”

The war on terror: the AUMF

One week after September 11, 2001, Congress authorized force.

SEPTEMBER 18, 2001

- “All necessary and appropriate force.”
- Against those “he determines” planned or aided the attacks.
- To prevent future attacks.

WHAT IT DOES

- The President defines the enemy.
- Everything that follows runs through a statute.
- A second AUMF, in 2002: Iraq.

Youngstown category one — as long as the statute reaches it.

Hamdi v. Rumsfeld, 2004: may he be held?

An American citizen, captured in Afghanistan and declared an “enemy combatant” by the Executive.

DETENTION: ON WHAT AUTHORITY?

- Article II alone? Not answered.
- The AUMF? Yes — 5 votes.
- Held for the duration of the conflict.

SOUTER AND GINSBURG

- No: a citizen may be held only under an Act of Congress.
- The AUMF does not say so clearly enough.

The whole case rests on a statute Congress could amend tomorrow.

Hamdi: what process is due?

The plurality borrows the test for cutting off disability benefits.

THE PLURALITY: “AD HOC” DUE PROCESS

- Notice of the factual basis.
- A fair chance to rebut it.
- A neutral decisionmaker.
- Counsel — on remand, “unquestionably.”

THE DISSENTS

- Thomas: the war power needs no process.
- Scalia and Stevens: charge him with treason, or suspend habeas — then a full trial.

“A state of war is not a blank check for the President.”

After Hamdi: al-Awlaki, Boumediene, Hamdan

A citizen killed abroad; aliens at Guantánamo; the President's own tribunals.

ANWAR AL-AWLAKI

- A US citizen.
- Killed by a drone strike in Yemen, 2011.
- No court reached the merits.

BOUMEDIENE, 2008

- Habeas corpus reaches Guantánamo.
- For aliens as well as citizens.
- Congress's substitute was not enough.

HAMDAN, 2006

- The President's own military tribunals.
- They violated the UCMJ and the Geneva Conventions.
- Not assigned.

The President acts, the Court asks for Congress, Congress acts, the Court tests it.

Military commissions: Milligan and Quirin

When can the government try someone outside the ordinary courts?

MILLIGAN, 1866

- A civilian, tried by a military commission.
- The civil courts were open.
- No jurisdiction: the Constitution applies “equally in war and in peace.”

QUIRIN, 1942

- German saboteurs out of uniform — one claimed citizenship.
- Tried by a military commission.
- Upheld: unlawful belligerents.

The line is not citizenship. It is whether you fought for the enemy — and whether the courts are open.

Immigration: Trump v. Hawaii, 2018

A proclamation restricting entry from seven countries, most of them majority-Muslim.

THE STATUTE: § 1182(f)

- The President may suspend the entry of any class of aliens.
- It “exudes deference to the President in every clause.”

THE CONSTITUTION

- Establishment Clause claim: rational basis.
- Upheld, 5–4.
- Korematsu “was gravely wrong the day it was decided.”

Deference at its strongest: a statute, foreign nationals, and national security.

The current case: Newsom v. Trump

The President federalized California's National Guard over the Governor's objection.

THE STATUTE

- § 12406(3): when the President cannot execute the laws with the regular forces.

REVIEWABLE?

- Yes: the power is statutory, so no political question.

HOW HARD A LOOK?

- Barely: a “colorable basis” is enough.
- A stay order — the fight is still running.

The Commander in Chief, turned inward.

Questions for discussion: the brig

Your client is an American citizen captured abroad.

THE FACTS

- Captured abroad with a group “associated” with al Qaeda.
- The group did not exist in 2001.
- Held without charge in a brig in South Carolina.
- To be tried by a military commission.

QUESTIONS FOR DISCUSSION

1. Does the 2001 AUMF reach this group?
2. Which Jackson category is this?
3. What process does Hamdi require?
4. May a military commission try him?
5. What do you file first, and where?

Module 6 on one slide

One line per case.

THE LINE, ONE CASE AT A TIME

- Curtiss-Wright: a delegation upheld; “sole organ” is dictum.
- Dames & Moore: long practice plus congressional silence can count as consent.
- Holland and Medellín: treaties become law at home through Congress.
- Zivotofsky: recognition is the President's alone.
- The war power: Congress declares and pays; the President commands.
- Hamdi: detention under the AUMF — with notice, a hearing, a neutral decisionmaker.
- Milligan and Quirin: military trials for enemy fighters, not civilians.
- Trump v. Hawaii: a statute and national security — deference at its strongest.

Next — Module 6A: what can be done to the President.

Next: Module 6A — Immunity from Suit and Impeachment. Readings on the course website.