

## Exam Outline -- National Power and Federalism

★ Always state the constitutional source of power upfront!

### I. Judicial Power

#### A. Judicial Review

##### i. The *Marbury* Principle

The supreme court, not congress, has the authority and duty to declare a congressional statute unconstitutional (*Marbury*).

- ★ 1) **Quote (*Marbury*)** -- "It is emphatically the province and duty of the judicial department to say what the law is."
- 2) **Review of Executive Actions** -- The supreme court may review the acts of the Executive if the constitution or federal law imposes a duty on the executive branch to perform those acts.
  - a) Political Matters -- Actions by the executive that are **purely political** in nature cannot be judicially reviewed.
  - b) Discretionary Actions -- Actions that are discretionary under the constitution or federal law are not subject to judicial review.
- 3) **State Decisions** -- The supreme court has the power to review state judiciary decisions (*Martin*).

#### B. Refusal to Hear a Case

##### i. Advisory Opinions

- 1) **General Rule** -- The federal courts cannot render opinions which answer a legal question when no party is before the court who has suffered or faces specific injury. In other words, the federal courts must resolve a **case or controversy**.

##### ii. Standing

- 1) **Definition** -- Standing ensures that there is an **actual dispute** between two adverse parties that is capable of judicial resolution. Must show that plaintiff has established a **personal stake** in the outcome of an otherwise justiciable controversy.
  - a) The Test -- For there to be standing plaintiff must establish: 1) **injury-in-fact**, 2) **causation**, and 3) **redressability** (*Lujan*).
  - b) General Policy -- The Court has never been willing to hold that the **generalized interest** of a citizen in having his government behave **constitutionally** is a sufficient state to permit litigation. The plaintiff must show that his interest in the controversy is somehow **more direct** and **individualized** than that of the citizenry at large.
- 2) **Injury-in-Fact** -- Must have suffered/imminently suffer a **perceptible** (able to be perceived) and **recognized** harm. The invasion of any right recognized under the constitution, statutes, or common law is sufficient to establish injury-in-fact.
  - a) Tax Payers -- Alleging injury as a tax payer is too remote to establish injury-in-fact.
  - b) Actual or Imminent -- If the harm is too far in the future, or too speculative, the actual or imminent element will not be satisfied and there will be no standing.
    - i) *Example: Lujan* -- Federal agency action challenged b/c it (allegedly) had the effect of endangering certain species abroad. P argues that there was injury in fact b/ they have in the past and will in the future, travel to the habitats of the potentially affected species to observe and study the species. Court held no standing because **someday intentions** -- without any description of **concrete plans**, or even any specification of when someday will be -- do not support the finding of actual or imminent injury.
  - c) Harm Suffered by Many -- As long as the litigant alleges the requisite concrete harm, standing will not be denied merely because there is a large number of people suffering the harm.
    - i) *Members of a Minority Group (Allen)* -- Members of a minority group will not from that membership alone derive standing to litigate against governmental conduct which denigrates that minority group.
      - ▶ In *Allen* parents of black public school children sued the IRS, claiming that the latter was not effectively carrying out its obligation to ensure that discriminatory private schools do not receive tax-exempt status.
      - ▶ The parents interest in avoiding the "**stigmatizing injury**" generally caused by racial discrimination was **insufficient** to establish standing --> Only those who were **personally denied** equal treatment by the challenged discriminatory conduct had standing.
- 3) **Causation** -- Plaintiff's injury must be **fairly traceable** (*Allen*) to defendant's conduct. There must be a tangible causal link between plaintiff's injury and defendant's conduct.
  - a) Injury by Third Party -- It is more difficult to establish cause-in-fact for a claim that **government action or inaction** has caused some **third party** not before the court to injure him. See *Allen* (no cause-in-fact when plaintiff attacked the IRS's grant of tax-exempt status to discriminating 3rd party).

- b) Example: Lujan -- No cause. The nexus between environment and hurting livelihood is too attenuated.
- 4) **Redressability** -- Plaintiff must establish a relationship between the injury and the relief sought.
  - a) Analysis -- First discuss the **nature** of the injury and then discuss the way the injury will be **alleviated** by the requested relief.
  - b) Actual Redressability -- Plaintiff likely only has to establish that there is a relationship between the injury and the relief sought.
    - i) Example: Mass. v. EPA -- Mass tried to require the EPA to regulate US auto emissions to reduce global warming. The majority found that the redressability requirement was met, even though the harm feared by Mass (flooding of coastal lands) was nearly all yet-to-occur, and even though there was little concrete showing the if requested relief were granted, the threatened harm would be averted.

**Note:** *Mass v. EPA* could represent merely a weakening of the requirement because the plaintiff was a state as opposed to all plaintiffs.

### iii. Political Question

- 1) **General Rule** -- Even if the court has jurisdiction over a properly framed suit, it may decline to rule because it decides the case raises a non-justiciable **political question** that is dependent on the will of the other two political branches. Generally a separation of powers issue (Baker).
- 2) **Two Important Factors**
  - a) Commitment to Another Branch -- If the case presents an issue which has been committed by the constitution to another branch of the federal government, the court will likely invoke the political question doctrine.
  - b) Lack of Standards -- If the court finds that there are no manageable standards by which a court could resolve the issue, the political question doctrine will likely be invoked (Luther --Rhode Island case where the court had no criteria to determine what a "republican" form of government was).
- 3) **Less Important Considerations**
  - ◆ Issues requiring policy determinations beyond judicial discretion
  - ◆ Lack of respect due to coordinate branches
  - ◆ Adherence to political decisions already made
  - ◆ Embarrassment from multiple pronouncements by departments on one issue

## C. Statutory Interpretation

### i. Textual Arguments

- 1) **Definition** -- Giving weight to the actual text of the constitution. For almost all justices the text of the constitution is the starting point.
- 2) **Textualism** -- The view that judges must closely follow the text of the constitution without consulting any other source other than the words of the Constitution thereby seeking to limit the discretion of judges. The problem with this approach is the meaning of the text is not always very clear.

### ii. Structural Arguments

- 1) **Definition** -- Some interpretations can be used to infer certain powers from the structure of the constitution. Two important structural principles are the separation of powers and federalism.
  - a) Example -- New York v. US: The framework of the constitution bars congress from impairing the states sovereignty by forcing them to enact and administer a federal radioactive waste disposal program.

### iii. History/Tradition Arguments

- 1) **Definition** -- Arguments that take into account the nations history and tradition when interpreting the constitution. The Court may use history/tradition to: determine original intent, to extend the reach of a constitutional provision (e.g., substantive due process), or to decide whether certain conduct deserves constitutional protection.
  - a) Example -- Moore (Supporting the families due process right to live together): "the institution of family is deeply rooted in this nation's history and tradition"
- 2) **Originalism** -- In interpreting the constitution, the court first looks to the text and then, when unclear, to the original intent of the constitutional framers. The power of judicial review can only be invoked when it is absolutely clear from the text of the constitution or the framers intent that the specific practice or conduct in question is unconstitutional. The goal is to **curtail judicial discretion**.
  - a) Problems
    - ◆ Who were the framers?
    - ◆ What sources should be used to determine their intent?
    - ◆ Focusing on only the intent of the framers makes the constitution more static and thus incapable of dealing with contemporary issues.

### iv. Other Forms of Argumentation

- 1) **Core Purposes or Policy** -- Sound social policy can sometimes be used to argue for an interpretation.

- a) Example -- **Parrish** (upholding minimum wage law): "The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage..."
- 2) **Deference** -- Court will often give deference to the legislature. This is rooted in separation of power/ federalism.
- 3) **Precedent** -- Stare decisis may be used to interpret in accord with prior case law even if the justice would otherwise be inclined to construe the constitution differently.
  - a) Example -- **Casey**: Several justices used stare decisis in deciding not to overrule *Wade*.
- 4) **Formalist v Functionalism** -- Different views on whether the constitution should be a rigid framework or a dynamic set of guiding principles.

## D. Role of the Judiciary

### i. Expansive Exercise of Judicial Review

#### 1) Rationales

- a) Insulation from Politics -- Lifetime tenure, not elected. Therefore, not subject to political pressure.
- b) Well Suited to Interpret the Constitution -- The Court is supposed to use logic and reason in deciding issues rather than expediency.
- c) Least Dangerous Branch -- Some branch has to be the final arbitrator and the court has the least power to hurt the people (no money, no armies, only has its legitimacy per the people).

### ii. Narrow Exercise of Judicial Review

#### 1) Rationales

- a) Insulation -- The Courts insulation is a bad thing because the court is not accountable to the democratic process.
- b) Democracy -- Judicial review diminishes the power of democracy by preventing the people from directly controlling government.
- c) Counter Majoritarian -- Because judicial review is counter majoritarian and negatively impacts democracy, judicial review should only be used as a safeguard to protect individual rights against an unrestricted majority -- To protect against the tyranny of the majority.

## II. Federalism

### A. The Federalist System

- i. **Generally** -- The constitution creates a federalist system where the national government and the state governments co-exist. Therefore, there are often issues that concern the **balance of power** between the federal government and the state governments and the role that the constitution plays in that balance.

### B. The Limited Powers of the Federal Government

- i. **Enumerated Powers** -- The powers of the federal government are composed of **limited enumerated** powers (per **Art. I, §8**). The three branches of the federal government can only assert those **specifically granted** to them by the constitution.
  - 1) Big Question -- Any time the federal government does something you must ask: What is the enumerated power in the constitution that gives the fed the right to do whatever it did?
- ii. **No General Police Power** -- The states have a general police power (e.g., the ability to regulate solely to enhance the welfare, safety, morals, health of society). No such power exists in the Federal government. All federal legislation must be supported by a specific enumerated power (e.g., commerce clause, power to tax and spend, etc...).

### C. Rationales for Federalism

- i. **Efficiency** -- Allows local problems to be addressed locally, but national pooling of resources to help other areas or for general public goods.
- ii. **Promoting Individual Choice** -- People can choose to vest more power in fed or state govts, depending on which one works better. Also allows people to vote w/ feet and move to state where laws are different.
- iii. **Encouraging Experimentation** -- States can experiment to find the best solutions to novel problems. It is debatable how much useful experimentation will be carried out.
- iv. **Promoting Democracy** -- People can get involved in local government and be active citizens.
- v. **Preventing Tyranny** -- States can protect individual freedom despite some cases where they have not.

### D. Necessary and Proper Clause (Art. I, §8)

- i. **General Rule** -- If congress is seeking an **objective** that is within the enumerated powers, congress can use **any means** that is 1) **rationaly related** to the objective congress is trying to achieve, and 2) is not **specifically forbidden** by the constitution (**McCulloch**).

### III. Federal Commerce Power

#### A. Introduction

##### i. General Rule

Congress has the power to regulate **commerce among the states** (Art. I, §8).

#### B. New Deal Commerce Clause

##### i. General Rule

Basically any regulation on commerce was within the commerce clause. Btw '37 and '95 not one law was struck down under the commerce clause.

##### ii. Among the States

- a. **General Rule** -- Among the states is established by whether the activity exerts a **substantial economic effect** on interstate commerce (*Wickard* -- Farmer Filburn case).
  1. Aggregation Principle -- An individual contribution may be trivial but combined with everyone else a substantial effect can be established (*Wickard* -- Farmer Filburn's wheat grown for home use was still commerce that could be regulated by congress).
- b. **State Sovereignty** -- There is no sphere left to the states. Congress only needs to be regulating commerce (*Darby*).
  2. Tenth Amendment -- The tenth amendment is a **truism** (*Darby*).

#### C. Modern Commerce Clause

##### i. Three Categories of Activities (*Lopez*)

- a. **Channels** -- Congress can regulate in a way that is **reasonably related** to highways, waterways, and air traffic (*Darby*, *Heart of Atlanta*).
- b. **Instrumentalities** -- Congress may regulate the instrumentalities of interstate commerce. People, machines and other "things" used to carry out commerce.
- c. **Substantial Effect** -- Congress may regulate activities that have a substantial effect on interstate commerce (*Lopez*).
  1. Economic Activity -- Economic activities are considered to have a substantial effect on interstate commerce and are given deference (*Wickard*, *Raich* -- established that the use of medical pot was economic in the aggregate and had a substantial effect on commerce).
  2. Non-Economic Activity -- Non-economic activities are given **less deference** and as a consequence are generally held not to have a substantial effect (*Lopez*, *Morrison* -- gun possession near a school and gender motivated violence crime were non-economic and did not constitute a substantial effect).
    - a) Direct Effect -- There must be a direct and substantial relation to the government action (e.g., no aggregation) and an effect on interstate commerce to be within the commerce clause (e.g., if the law in *Lopez* had applied only to guns that had previously been in interstate commerce).
  3. Jurisdictional Hook -- If the act applies only to particular activities each of which has a **direct link** to interstate commerce, then the act will probably be constitutional (e.g., if the statute in *Lopez* applied only to guns that had previously moved interstate).
  4. Congressional Findings -- Congressional findings are useful but the court does not need to rely on them (*Morrison*). Congress cannot pile inference upon inference to find a connection with interstate commerce (*Lopez*).
  5. Activities Traditionally Left to the States -- If the activity being regulated was one that was traditionally left to the states (eg., state police power: crime, education family law...etc.), the court will look to the congressional action with more skepticism.

##### ii. Tenth Amendment and CC

- a. **Older More Liberal Approach** -- The 10th amendment is a **truism**.
- b. **Modern Trend** -- The 10th amendment has recently been used more frequently as a check on Federal power to advance federalist principles. See below.

#### D. Taxing and Spending Power

##### i. Scope of Taxing and Spending Power

- a. **Constitutional Grant** -- Congress' power to tax and spend is derived from **Article I, §8** of the Constitution.
- b. **Framers View** -- The framers did not agree on the scope of congress' power to tax and spend:
  1. Madison View -- Congress is limited to taxing and spending to carry out other powers **specifically granted** in Article I of the Constitution.
  2. Hamilton View -- Congress may tax and spend for any purpose that it believes serves the **general welfare**, so long as it does not violate another provision of the Constitution.
- c. **An Independent Power** -- The *Butler* court interpreted Art. I, §8 to provide that the power to tax and spend is a distinct constitutional power, fully effective without reference to other granted powers.

##### ii. The Power to Tax

- a. **Broad Power of Taxation** -- Congress is given the power to tax to provide for the **common defense** and the **general welfare**. As such congress has broad power to tax so long as it does not violate other provisions of the constitution (**Art. I, §8**).

- b. **Limitations** -- Calling a government action a tax is not enough. The action must also **raise revenue** and **not** have penalizing features (*Bailey*). Even though there is an apparent limitation, laws rarely get struck down because of the tax power.
- iii. **The Power to Spend**
  - a. **General Principle** -- Congress may spend in any way that it thinks would serve the general welfare (*Butler*).
  - b. **Limitations** -- Congress cannot use its spending power to engage in **coercive regulation**. However, congress can purchase compliance that it doesn't have the power to command.
  - c. **Modern Test (Dole)** -- In order to validly condition federal funds, congress must prove:
    - ◆ Must be in pursuit of the public welfare
    - ◆ Any conditions imposed must be unambiguous, so that the states make knowing choices
    - ◆ The conditions must be related to the federal interests in particular national programs
    - ◆ The conditions must not demand what the constitution forbids

## E. The Tenth Amendment

- i. **Definition** -- All powers not granted to the federal government are left to the states.
- ★ ii. **Federalist Approach (modern trend)** -- An independent congressional limitation preserves a sphere of state control.
  - a. **Modern Test** -- Congress cannot compel (commandeer) state regulatory or legislative action. Congress can attach strings to federal grants so long as expressly stated and related to purpose of a spending program (*New York v. US, Printz*). The modern narrowing of the commerce clause has led to a revival of 10th amendment limitations.
    - 1. *New York v. US* -- New York sought a declaration that the Low-Level Radioactive Waste Policy Amendments Act was unconstitutional. Court found the "take title" provision unconstitutional because it was "**commandeering**" the states by forcing them to legislate (commandeering state **legislative** officials).
    - 2. *Printz* -- Congress passes a fire arms regulation. Before it becomes fully effective the CLEO (Sheriff) of each state has to perform background checks for the Federal government. Court strikes down because it **commandeered** state **executive** officials.
  - iii. **More Liberal Approach** -- The 10th amendment is a **truism**; Something to remind us of the inherent structural limitations that the constitution places upon the federal government. This makes the 10th amendment a toothless provision (*Garcia* -- The Court cannot define traditional areas of state sovereignty).

## IV. Limits on State Power

### A. Dormant Commerce Clause

★ **Note:** Should also try to argue equal protection and due process when there is a DCC issue!!!

#### i. General

- a. **Constitutional Grant** -- The Congress has the power to regulate interstate commerce under **Art. I, §8**. The court has implied, however, that where Congress is silent, states are free to regulate as long as they do not place an **undue burden** on interstate commerce.

#### ii. Modern Approach

- a. **Undue Burden** -- Whether there is an undue burden depends first on if the law discriminates between in state and out-of-state citizens. There are three possible categories of discrimination: 1) facial discrimination, 2) discrimination in effect/Intent, or 3) no discrimination.
  - 1. **Facially Discriminatory** -- If the law on its face treats in-state citizens differently than out-of-state citizens then it is *per se* invalid regardless of the state interest (*City of Philly*).
    - i) *City of Philly* -- SC struck down NJ statute that prohibited the importation of garbage into the state. The majority concluded that the law was basically a **protectionist** measure. Since NJ had chosen a **discriminatory means** of furthering its objectives, it was a protectionist measure by imposing on out-of-state citizens the burden of conserving the State's remaining landfill space.
  - 2. **Discriminatory in Effect/Intent** -- The court is less suspicious but still could be invalidated particularly if there was **less restrictive means** available to accomplish the state objective.
    - i) *Less Restrictive Means* -- Generally, if a the state had another way to achieve its objective while placing a less substantial burden on interstate commerce, the law will be unconstitutional.
    - ii) *Economic Protectionism* -- Laws that engage in economic **protectionism** are treated with great skepticism by the court. See, *Healy*, (state law that taxed all milk and provided a subsidy to in state milk producers was protectionist and unconstitutional) ; and *Kassel*, (Struck down law banning 65' "doubles"--> part of the court used the balancing test while another part of the court evaluated under discriminatory intent/purpose)).
  - 3. **No Discrimination** -- State law is valid unless the burden on interstate commerce outweighs the benefit.
    - i) *Balancing Test* -- The balancing test involves weighing the **benefits** of the state law against the **burdens** that it imposes on interstate commerce. The balance is treated differently when the court finds **no discrimination** against out-of-staters. If a law passes the balancing test, it is subject to rational basis review.

- b. **Market Participant Exception** -- A state can discriminate when it is not regulating but acting as a participant in the marketplace through direct transactions.

## B. Preemption

### i. General

- a. **Constitutional Basis** -- The supremacy clause (Art. 5, Cl 2) provides that the Constitution, and the laws and treaties made pursuant to it, are the supreme law of the land. Thus, if there is a conflict between federal and state law, the federal law controls and the state law is invalidated.

### ii. Types of Preemption

- a. **Express** -- A Federal law may contain language expressly preempting state and local laws.
- b. **Field** -- The supreme court will find implied preemption if there is a clear congressional intent that federal law should exclusively occupy a field.
- c. **Conflict** -- If federal law and state law are mutually exclusive, so that a person could not simultaneously comply with both, the state law is deemed preempted.

## V. Separation of Powers

 **Look for** a branch of government doing things it normally doesn't do

### A. Introduction

#### i. Constitutional Framework: Article II

- a. **Executive Power** -- Article II provides: "The executive powers shall be vested in a President of the United States of America."
- b. **Major Tension** -- There has been a constant ongoing debate as to whether the language of Article II allows for **inherent** presidential powers or is limited to those solely **enumerated within**.
  - 1. **Art. I vs. Art. II** -- Article I refers to "legislative powers herein granted" but Article II refers to "executive powers." Some believe that this was done on purpose to show that the president is not limited to specific cases of power expressed in Article II.
  - 2. **Changed Conditions** -- Since the constitution was created, growth of the regulatory state has expanded the executive power. Should the original constitutional provisions on distribution of power be directly relevant or has the situation changed so much that they no longer matter?

#### ii. Four Approaches to Seizure Power (**Youngstown**)

- a. **No Inherent Presidential Power (Black)** -- The president has no inherent power and may act only if there is express constitutional or statutory authority.
  - 1. **Rationale** -- Inherent authority is inconsistent with a written constitution establishing a government of **limited powers**.
- b. **Interstitial Executive Power (Douglas)** -- The president may act without express statutory or constitutional authority so long as the president is not usurping the powers of another branch of government or keeping another branch from performing its duties.
  - 1. **Rationale** -- There is a need for the president to exercise powers not specifically enumerated in the constitution or not expressly granted by congress.
- c. **Legislative Accountability (Frankfurter/Jackson)** -- The president may take any action **not prohibited** by the constitution or a statute.
  - 1. **Jackson's Zones of Authority**
    - a) **Authorization of Congress** -- The president acts pursuant to an express or implied authorization of congress. His authority is at its maximum because it includes all the authority that he can possess plus all that congress can delegate.
      - 1) **Constitutionality** -- Presidential actions are **presumed valid**.
    - b) **Congress is Neutral (Twilight Zone)** -- The president acts in absence of either a congressional grant or denial of authority. In this zone the president acts only on his independent powers.
      - 1) **Constitutionality** -- Likely to "depend on the imperatives of events and contemporary imponderables."
    - c) **Congress in Opposition** -- The president takes measures incompatible with the expressed or implied will of congress. The president's power is at its "lowest ebb."
      - 1) **Constitutionality** -- Presidential power is only allowed if the congressional action is unconstitutional.
- d. **Broad Inherent Authority (Vinson)** -- The president has inherent authority, at least in some areas, and may act unless such conduct violates the Constitution. Implicit in this is that laws restricting the power of the president are unconstitutional.

#### iii. Which Approach?

The ultimate choice must be based on a decision about the appropriate **scope of the presidential power** and how to best check the president.

- a. **First Approach** -- Grants to the president only those powers found in the constitution.
- b. **Second Approach** -- Allows the courts to invalidate presidential actions that **interfere** with other branches of government.

- c. **Third Approach** -- Sees it as congress's responsibility to act to stop presidential infringements.
- d. **Fourth Approach** -- Grants the president broad authority so long as the constitution is not violated.

## B. Foreign Affairs

### i. Foreign Policy v. Domestic Affairs

- a. **Basic Question** -- Does the president inherently have greater powers in the area of foreign policy compared to domestic policy?
- b. **Justiciability** -- Challenges to the presidents conduct regarding foreign policy are often dismissed on Justiciability grounds, especially as political questions. Thus, when you see a foreign policy issue you should include Justiciability argument.
- c. **Broad Foreign Policy Power** -- The ability to conduct foreign policy on behalf of the nation is implicitly vested in the president (**Curtiss-Wright**).
  - 1. **Rationale** -- Power with regards to foreign policy is inherently in the national government by virtue of it being sovereign. Moreover, the President alone has the power to speak or listen as a repetitive of the nation.

### ii. Treaties and Executive Agreements

- a. **Constitutional Grant** -- Article II, §2 provides: The president "shall have the power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of Senators present concur."
  - 1. **Issues** -- 1) when may executive agreements be used instead of treaties? 2) what limits exist on the ability of the president to negotiate or rescind a treaty?
- b. **Treaty** -- An agreement between the US and a foreign country that is negotiated by the president and is effective when **ratified** by the Senate.
- c. **Executive Agreement** -- A power implicitly given to the president by the Constitution. An executive agreement is an agreement between the US and a foreign country that is effective when **signed** by the president and the head of another gov. **No** Senate ratification is required.
- d. **Dames & Moore** -- Executive agreement upheld. Applied narrowly, the holding establishes that executive agreements prevail over conflicting **state law** and are permissible when authorized by federal statutes.
  - 1. **Rationale** -- "Because the President's action in ... ordering the transfer of assets was taken pursuant to specific congressional authorization, it is supported by the strongest of presumptions." The action was **implicitly authorized** by a long history of congress **acquiescing** to similar presidential conduct.
  - 2. **Limited Scope** -- The holding does not give the president constitutional authority to settle or suspend all claims; It simply gives the president the authority where such a settlement or suspension is necessary incident to the resolution of a major foreign policy dispute **and** Congress has acquiesced in that type of presidential action.
- e. **Medellin** -- A international treaty is not binding domestic law unless Congress has enacted statutes implementing it or unless the treaty is self-executing.
  - 1. **Self-Executing** -- Becoming a party to the treaty automatically puts the treaty and all of its parts into action.
  - 2. **Rationale** -- Court used a combination of **Youngstown** (Black) and **Youngstown** (Jackson) in reaching its conclusion.

### iii. War on Terror

#### a. General

- 1. **Two Important Questions**
  - ◇ Should the court be involved (political question)?
  - ◇ If it should, how much power does the president have under the constitution?
- 2. **The Definition of War** -- Another tension in this area revolves around what the definition of war is. Drawing the line can be elusive. Further, if there is a non-traditional war, how does it end?

#### b. Hamdi

- 1. **Enemy Combatant** -- Can an American citizen apprehended in a foreign country be held as an enemy combatant?
  - a) **Yes** -- The detention was authorized under the Congressional authorization for use of military force passed after 9/11.
  - b) **Dissent** -- No authority to detain without charges or trial, unless congress expressly suspends the writ of habeas corpus.
- 2. **Process** -- What process, if any, should be afforded to an American citizen apprehended in a foreign country?
  - a) **Due Process** -- Due process required but the court did not explicitly say which procedures should be used.
- ★ 3. **Main Point** -- War is not a blank check to the president. The court can play a role in determining the proper balance between **security** and **liberty**.

**Note:** The court produced 8 different opinions for this case. So who really knows what the law is.

## C. Executive Authority

### i. Presidential Privilege

- a. **Definition** -- The presidential privilege is the president's ability to keep communications confidential to enhance candid advice and free exchange. This privilege is not absolute, but must yield to important countervailing interests (*Nixon*). In addition, the materials must be essential to the justice of the pending case.
- b. **Constitutional Grant** -- There is no explicit constitutional authorization for presidential privilege thus any power is vested in the president implicitly. The court in *Nixon* acknowledged the existence of power.
- c. **Civil v. Criminal Proceedings** -- There is an apparent distinction between civil (more privilege) and criminal (less privilege) situations (*Cheney*) because the need for information in a civil case is not as urgent or significant and thus does not have the same constitutional dimensions.

### ii. Non-Delegation Doctrine

- a. **General Limitation** -- The Congress cannot delegate its legislative authority to administrative agencies. To do so would violate the Constitution, which gives legislative authority only to Congress.
- b. **Non-Delegation in Practice** -- Laws are infrequently struck down under the doctrine. Congress often lacks the time and expertise to develop intricate rules and must enlist help from other branches. Moreover, virtually all laws require some degree of delegation.
  1. **Intelligible Principle Test** -- As long as Congress provides an intelligible principle to guide the branch that the power was delegated to, the delegation will be constitutional (*The Benzene Case*). Establishing an intelligible principle involves a difficult line drawing related to broad separation of powers principles.

## D. Legislative Authority

### i. Constitutional Grant

- a. **Article I, §7** -- Art. I, §7 gives the President the power to **veto** any bill passed by Congress.

### ii. The Line Item Veto

- a. *Clinton* -- The president can only carry out the laws made by Congress, he cannot make laws. Therefore, Congress cannot give the president the right to veto individual portions of a statute. This violates the constitutional requirements of **presentment** (Art. I, §7) and **bicameralism**.

### iii. The Legislative Veto

- a. *Chadha* -- Congress made a law where it could invalidate a decision made by the attorney general. The court took a **formalist** approach and struck down the law. The law authorized **legislative action** to be taken through a one-house legislative veto without satisfying either the bicameralism or presentment requirements of **Art. I**.
  1. **Legislative Action** -- Legislative action has the purpose and effect of altering the **legal rights, duties, and relations** of persons **outside the legislative branch**. In contrast, a resolution to recess wouldn't be a legislative action since it would only affect Congress.
  2. **Dissent** -- Legislative veto is simply not the functional equivalent of passing a law.
    - a) *Administrative Agencies' Lawmaking Function* -- Under the dissent, executive agencies engage in a sort of lawmaking function, and no one contends that every agency decision of a lawmaking nature need be confirmed by subsequent vote of both houses of Congress and by a presidential signature. --> "If Congress may delegate lawmaking powers to independent executive agencies, it is most difficult to understand Art. I as forbidding Congress from also reserving a check on legislative power for itself."

**Note:** Opinion was controversial and the dissents argued for a more structural/functional approach.

## E. Removal Power

### i. Constitutional Grant

- a. **Appointment** -- Art. 2, §2 provides that the president shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers...etc...appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointments of such inferior officers, as they think proper, in the president alone.
- b. **Removal** -- No constitutional provision addresses the removal power. Therefore, any power to remove is inferred from the Constitution.
- ★ c. **General Principle (Implied Removal Power)** -- The Constitution gives the president the responsibility to ensure that the laws are faithfully executed. As a practical matter, the most important way in which the president can exercise that responsibility is through choosing, supervising, and — if necessary — firing inferior government officials.

### ii. Appointment

- a. **Principal Officers** -- Art. 2, §2 requires that principal officers be appointed by the president with Senate confirmation.
- b. **Inferior Officers** -- Congress can vest the appointment of "inferior officers" in the 1) president, 2) the courts of law or 3) heads of department.

1. Establishing Inferior Officer -- Whether someone is an inferior officer may turn on whether he is 1) subject to removal or supervision by a superior, or 2) the nature of his duties (e.g., if they include policy making functions), 3) jurisdiction and tenure (Morrison (Special prosecutors are not inferior officers. Therefore Congress may delegate to the judiciary the job of appointing such prosecutors, who are named to investigate allegations of wrongdoing against members of the executive branch)).
- c. **Congressional Appointments** -- Congress cannot appoint officers of the executive branch. Would infringe on separation of powers b/c congress is not permitted to delegate executive power to itself.

### iii. Removal

- a. **General Principle** -- The president may remove executive officials unless removal is limited by statute (expressly or implicitly). Congressional limitations on the removal power are unconstitutional (Myers) but this principle is subject to some limitations below:
- b. **Quasi-Legislative and Quasi-Judicial Officers** -- When a federal appointee holds a **quasi-judicial** or **quasi-legislative** role, Congress may **limit** or **completely block** the President's right of removal. See Humphrey's Executor (Court upheld Federal Trade Commission Act, which limited (for cause) the President's right to remove federal trade commissioners, because it was necessary in order to preserve the appointees independence from the executive branch).
  1. Congress is Silent -- In this context the President may remove **only if** Congress has **explicitly conferred** the right of removal.
- c. **Purely Executive Officers**
  1. Rule Prior to Morrison -- Removal of a purely executive officer, appointed by the President, cannot be limited by Congress.
  2. Morrison Rule -- Congress may limit the President's right to remove even a purely executive officer, so long as the removal restrictions are not of such a nature that they **impede the President's ability to perform his constitutional duty**. See Morrison (SC upheld law that allowed Atty general to remove a special prosecutor (appointed to investigate high level cabinet officials) for good cause. Upheld b/c the executive still retained sufficient control over the special prosecutor).
  3. Free Enterprise Fund Standard -- The court struck down the part of a law that created a two-tier structure (SEC cannot remove board member without good cause, president cannot remove SEC member without good cause) where the president had no direct say in removal of an official.