

NATIONAL SECURITY

CONCEPTUALIZATION OF “NATIONAL SECURITY”

- **THREE SHIFT EVENTS**
 - **(1) Profound Economic Crisis**
 - The Great Depression -> New Deal, dividing “Social Security” & “National Security”.
 - Belief that economic forces controlled by more than mere American activity
 - **(2) Rise of Totalitarian Regimes**
 - Perception of foreign threats from Germany, Russia, etc. Emphasis on (1) *unreasonable*, (2) *powerful* (3) *states with different foreign policy methodologies and goals*. Perception of totalitarian regimes as ever-present and ever-dangerous.
 - Development of skepticism of unwieldy, public, slow-acting legislative process.
 - **(3) Technological Changes**
 - Airpower, better navy, etc developed a focus on easy strikes, making America less insular.
 - **Shift Changes:** More centralization, secrecy, increased view of a perpetual threat, *perpetual militaries and spies*, etc.
 - **Developed:** Joint Chiefs of Staff as major part of Executive, Perpetual Military, CIA, NSA, Secrecy.
 - **Post-’45 “National Security Constitution”** emerges.
- **May Periods**
 - **(1) Safe Borders and Union** – Boundaries, Civil War, largely insular from Europe.
 - **(2) Hemispheric Independence** – Focus on the Monroe Doctrine, WW1/2, Social Order. Defense of South Am.
 - **(3) Free World** – Cold War, etc. Focus on defense of Democracy, etc.
 - **(4) “Stability”** – Relative stability. BUT 9/11?

“Security” in the Constitution

- **Generally:** No blanket emergency power, built on silences and mixed power.
- **Preamble:** Domestic Tranquility; “Common Defense”
- **Art 1 Sec 1:** All powers vested in Congress
 - **Itemization** seems to imply lack of Leg. to expand own power.
- **Art 1 Sec 5** – Secret journals clause, implies power to keep things secret.
- **Art 1 Sec 8** – Common Defense in taxing and appropriation – critique of monarchy, power in Leg, *possibly* prevents blank check
 - **[10]** – Defend law of nations, thus international law. *Can this mean international treaties are binding law without domesticization?*
 - **[11]** – War, marque & reprisal. Implies power of small wars (M&R).
 - **[12, 13]** – Armies LESS THAN 2 years, Navy unlimited. Latter implies international defense, more investment.
 - **[14]** – Gov’t regulation of army. Not deployment, but stuff like UCMJ.
 - **[15, 16]** – Calling forth and using militias. Leaves training, etc to states.
- **Art 1 Sec 9[2]** – Writ of habeas suspension. Not *explicitly* limited to Congress
 - **[7]** – No \$ from treasury without appropriation by law. No secret budget?
- **Art 1 Sec 10[3]** – States may not go to war unless actually attacked. Implies lesser emergency power.
- **Art 2 Sec 1** – No “herein granted”, may infer that Leg may delegate power or expand power
 - **Enumeration of powers** may be exemplary and not limiting
- **Art 2 Sec 2** – Tactics v. Strategy – Declaration v. Commander in Chief. Treatymaking in the Executive.
- **Art 2 Sec 3** – State of the union, information for mandatory disclosure, ambassador power to recognize foreign countries
- **Art 3 Sec 2** – All cases, no subject matter limit, able to hear issues relating to emergencies
- **Art 3 Sec 3** – Treason – concern with treason trials, requirement of witnesses
- **Art 4 Sec 4** – Guarantee states against invasion
- **Amendments 2, 3, 4** – Bear arms, quartering, S&S, **6** – Jury trial even in military
- **QUESTIONS:** Who ultimately recognizes foreign governments? Who declares neutrality? Executive agreements? Control of information to whom?
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EXECUTIVE POWER

THE FOUNDING

- Focus on a **limited** executive largely subservient to the legislature
 - **Locke:** Two powers in the Executive, the *Executive* (to execute laws) and the *Federative* (declarations of war, etc, as derived from the people). Federative power can be abused, only way to stop is to appeal to heaven (i.e. rebel)
 - **“Prerogative”** – Monarchical federative/executive power to act for the people (burning building example) where the people would need such.
 - **Federalist Papers 8 & 69:** Executive in the US is limited by a number of different facets, cannot even declare war properly
 - **Arguments:** Anarchy is more likely to produce state-by-state standing armies, so union important. Limiting the likelihood for external attack limits need for standing armies, creating less need for perpetual militarization and fascism.

THE EARLY REPUBLIC

- **General:** Enumerated text limits powers, strong judiciary, space for Lockean prerogative power.
 - (1) **International Humanitarian Law** has a **dark history** hinging on the definition of civilization
 - (2) **Definition of Native Americans** may influence def. Of Al Qaeda, etc.
 - (3) **Dual Framework mirrors domestic framework** – Racism, etc.
- **Declarations of War**
 - **Methods:** (1) Explicit allowance, (2) General appropriation bill, (3) Congressional Acquiescence
 - **Formal (*perfect*) declarations of war** empowered by Constitution
 - **Create unlimited power, activate “standby” statutes.**
 - **Informal (*imperfect*) declarations of war** allowed by congressional statute. *Bas v. Tingy*
 - **But not unlimited. Limited by the allowance of the statute.**
 - **Question of the *directness* of the statute.**
 - **Congress > Exec.** *Little v. Barreme.*
 - **AUMF** – 2001 authorization to President to use force against Terrorists.
 - **Liability for Actions**
 - **Old: Personal Liability.**
 - **Ratification** available to indemnify for lost \$ after individual officer is sued for actions.
 - **Factors for personal liability:** (1) High Rank (2) Involvement in decisionmaking
 - **New: Chain of Command.** Immunity.
 - **“Slow trickle war” power.** Can slowly roll out war powers.
 - **Politicization of war powers?** Could possibly allow Leg. to abuse.
 - **Perceived to be aggressive.** Heavy hesitation on use
 - **Exec Powers**
 - **Mitchell** – Limited Exec power, no takings without serious necessity. No delegation, emergency *ex post*.
 - **Martin** – Exec discretionary power, wider power. More about *emergency* and *delegation*.
- **Property Rights & the Frontier Wars**
 - **Congress maintains control over property annexation.** Emphasis on people determining power.
 - **US claim to territory via discovery,** avoiding perception of aggressive war against cogent nation. Maintains perception of peace, consistent with constant frontier wars (Indians considered to not be active nation), perception that international laws of war followed.
 - **OLD LAWS OF WAR**
 - (1) **Sword:** Allows murder during war, etc
 - (2) **Shield:** No aggression, no killing kids, etc.
- **Ex:** Where 1798 act allowed capture of ships from French and 1799 said “the enemy”, the latter was to be interpreted that, despite the absence of a declaration of war, an *imperfect war* existed between the US and France. *Bas v. Tingy*. Where Congress authorized the ability for the President to allow seizure of ships going to French ports, seizure of one going *from* was outside of his subordinates’ power and thus a trespass. *Little v. Barreme*. “Domestic” defined as somewhere with legislative approval (in this case, via sending a treasury department) and “Foreign” everywhere else, so tariffs properly applied. *Fleming v. Page*. Where President exercises discretionary power in time given by Legislature, a man called to service by the militia could not attack his authority even though war had not been formally declared -> EXIGENCY POWER. *Martin v. Mott*. Emergency must be shown before taking can be justified – no general taking power. *Mitchell v. Harmony*. Indian sale of land ineffective, land seized by crown and eventually in hands of America was in American control subject to ownership rights of Indians that could not be transferred. *Johnson v. McIntosh*.

THE CIVIL WAR

- **Milligan**
 - **MAJORITY:** Absolutism, constitution same in war and peace
 - **MINORITY:** If Cong + President work together, perhaps more powers, no reason to limit.
 - **CONTRA Prize Cases:** *Prize Cases* allow wide power, *Milligan* cuts back.
- **The Civil War**
 - **Presidential powers expanded greatly.** Created “constitutional dictatorship” of sorts.
 - **Calling of troops without formal war making.** Subverts Congress, calls troops. *But allowed to call militia.*
 - **Enaction of Lieber Code** – Enforcement of international war powers, etc.
 - **Lieber Code 24** – Distinction between civilized and barbarous countries, implies above Native Americans.

- **Judiciary has only enumerated powers**, and thus may only exercise appellate jurisdiction over courts martial **at the discretion of Congress.** *Ex parte Vallandigham.*
 - **“Advocacy against War”** speech standard implied by Lincoln
 - **Ex: Advances money of own accord for warmaking** via Secretary of Treasury to 3 private people, **Suspends Habeas Corpus eight times**, but shot down in *Ex parte Merryman* as outside his power, but Lincoln disregards, **Limits Post Office (in violation of article 3 sec 3)** use for “treasonous correspondence”, **Blockades seceding states**
 - Discusses frankly in address, openly invoking emergency powers.
 - **Later utilizes powers to go beyond even what Congress could do.** Including Emancipation Proclamation, limited conscription, etc.
 - **The “Lincoln 11-Week Dictatorship”**
 - **Lincoln Concessions**
 - **Legal:** Militia, Habeas, Blockade
 - **Concedes Illegal:** Enlargement of military, etc.
 - **Justifications for Habeas suspension:** (1) Commander-in-Chief clause + threat, (2) Take Care clause + Oath, (3) Silence, (4) Courts not up to the challenge of the Civil War, (5) Power of Degree
 - **Congress ratifies, but carefully limits power.**
 - **Prize Cases**
 - Wide view of Presidential power, allowing Lincoln to unilaterally create blockade.
 - (1) Country was at war, (2) Congress could not have declared war [enemy not foreign,] and (3) Decision made solely by president in the context of an emergency
 - **Dissent** points to *Martin v. Mott*, considers acts beyond scope
- **Martial Law**
 - **Requires some active threat.** Cannot be via threatened invasion, lest unlimited power develop. *Vallandigham*
 - **Existence of courts that can receive petitions of habeas corpus relevant.**
 - **Military tribunals** considered outside the scope of normal Judiciary process
- **Habeas**
 - **REQUIRES:** (1) Actual Ongoing Military Operations and (2) Courts NOT functioning. *Merryman.*
 - **Split.** May indicate allowance without factors.
- **Ex:** The Judiciary had no power to issue a writ of cert on a military court martial without congressional approval. *Ex parte Vallandigham.* President not empowered to suspend habeas corpus, nor may his officers do so, as the power to do so resides within Congress. *Ex parte Merryman.* Martial law in Indiana inappropriate, and thus no suspension of habeas. *Ex Parte Milligan.* Lincoln properly created blockade in American ports and defined Confederacy as enemy. *The Prize Cases.*

LABOR STRIFE AND RIGHTS DURING THE WORLD WARS

- **Post-Civil War Approaches to Constitution:** (1) Absolutism and (2) Relativism [War/peace dichotomy]
- **Peacetime “War Constitution”**
 - **Presidential right to execute “law” of own making.**
 - **Power to protect judges** given. *In re Neagle.* Dissent argues this is too far beyond scope.
 - **But not necessary finding.** Could have found via statute. Implies wide berth for President.
 - **President has power to protect and involve self**
 - **Implies wartime powers used in peacetime against internal strife.**
 - *In re Debs* – Right to sue for injunction, *or even use Federal Troops.*
 - **Strikebusting** becomes major concern, INTERNAL STRIFE BEGETS “WAR” CONSTITUTION.
 - **Posse Comitatus** – “Power/authority of the County”
 - **Posse Comitatus act** allows involvement, but with HEAVY LIMITATIONS -> Presumption against use of fed troops
- **FIRST AMENDMENT**
 - *Shaffer v. US* – Allows espionage act conviction, bases it on tendency to obstruct recruiting or enlistment.
 - **WWI - Schenck/Debs (1919)** – Whether the words & circumstances are of such a nature as to “create a **clear and present danger** that they will bring about the substantive evils that Cong. has a right to prevent” – “Proximity and degree” – (1) Intent (2) Tendency (3) Act.
 - **1st Am. Limitations**
 - (1) **Espionage Act** – Still good law – Insubordination, etc
 - (2) **Sedition Act** – Much broader.
 - **No right to shout “fire” in theater.**
 - **Wartime element.** Feeling that wartime may justify result.
 - **Learned Hand in Masses counsels against**, advocates “Explicit Advocation” standard (stricter)
 - + : (Evil – Improbability) > Invasion of Free Speech
 - **Holmes in Abrams against:** Must be present danger of immediate evil or intent to bring about.
 - **“Marketplace of Ideas” concept.** Infers people will naturally seek truth. True? \$\$\$
 - **Specific Intent argument.** Intent to cause harm, where majority is more general intent.
 - *Frohwerk*–Kindling a fire analogy, focus on wartime.
 - **State Sedition Laws (~1920s)**
 - **Gitlow:** Statutes are unconstitutional only where they are arbitrary or unreasonable attempts at exercising authority vested in the State. Spark kindling fire idea. **Idea that legislature decides what is C&P danger.**

- **“Stark Raving Mad” test** – Ultimate almost unquestioning deference to legislature, even in peace
 - **Allows legislature to define *prima facie* speech-action C&P danger.**
 - *Whitney* – Membership as a form of advocacy can be prohibited. Low point.
 - **MODERN RULE – Brandenberg**: (1) Express advocacy of lawbreaking, (2) Imminent violence advocated, (3) violence likely.
- **Detention of Combatants/Law of War**
 - **Division between citizens during peacetime and violators of the law of war**
 - **Military jurisdiction for “belligerent” people -> LAW OF WAR with “enemy combatants”.** *Quirin*.
 - “Enemy Combatant” theory dead per Geneva Convention Common Article III.
 - **Definitions**
 - **“Lawful Combatant”** – Combatant engaged in normal warfare, such as shooting other soldiers. Cannot be prosecuted for such actions.
 - **“Unlawful Combatant”** – Combatant violating laws of war via espionage, etc.
 - **Cf “Enemy Combatant”** – Lawful or unlawful.
 - **Article V Tribunal** – Required on field to determine violation of the Law of War. If found, military commission allowed.
 - **Article 15** considered broad mandate allowing military tribunals to prosecute spies
 - **DISTINGUISH *Milligan***: (1) Not belligerents in *Milligan* (citizens not fighting against country), (2) Art 15/LoW -> different than *Quirin*.
 - **Article III Sec. 2 and Fifth/Sixth Amendments** held not to apply.
 - **Citizens that associate themselves with enemy** are subject to tribunals
 - **Requires state of war?** Requires act of war?
 - **Detentions of Citizens**
 - ***Korematsu*** – Espionage needs > liberties, *Korematsu*’s detention proper.
 - **Viewpoints**
 - **(1) BLACK. Majority.** Deference to government. Strict scrutiny with deference.
 - **(2) FRANKFURTER.** Imminent lawless action-esque major necessity requirement.
 - **(3) JACKSON.** No constitutional issue, stay away.
 - Establishes strict scrutiny subordinated to war/military necessity.
 - **Premised on falsified info.**
 - **Contra *Mitchell* Test:** Rational Relation to Imminent Danger. Dissent advocates.
 - ***Hirabayashi*** – Curfew of minority proper during war, esp where *Hirabayashi* violated it.
 - ***Ex Parte Endo*** – Proven loyal citizens cannot be detained.
 - **“Military Tribunal”** – Broadly defined, generally focuses on all various forms of tribunals
 - **“Military Commission”** – Courts for soldiers (i.e. courts-martial), etc.
 - **Ex:** Executive has the power to, while executing the laws, to protect judges via appointing a marshal to protect him. *In re Neagle*. Where a strike occurred that threatened mail and interstate commerce, judiciary could issue injunction. *In re Debs*. Exec could rightfully capture enemy saboteurs and try them in military court, no habeas (and by implication, normal courts) not available. What happened to *Milligan*??? *Ex parte Quirin*.

PRESIDENTIALISM AND NATIONAL SECURITY POWERS (COLD WAR FORWARD)

- **Shift to Powerful Executive**
 - **1) GENESIS OF NATIONAL SECURITY AS A PRE-POLITICAL ISSUE.**
 - **Pendleton Herring** – Pushes for “positive statism” by greater executive powers in the face of threat. Eventually helps pen the National Security Act.
 - **General feeling that fascism new, dangerous, necessitates independent exec.**
 - **2) LINKAGE BETWEEN DOMESTIC AND INTERNATIONAL ISSUES.**
- **FORMS OF PRESIDENTIAL POWER**
 - **(1) INTRA-BRANCH**
 - **(2) PRESIDENTIAL COMMUNICATIONS**
 - **(3) ONGOING CRIMINAL INVESTIGATIONS**
 - **(4) STATE SECRETS**
 - **Overcoming**
 - **(1) + (2)** can be overcome with a specific adequate need or misconduct
 - **(A)** Is the information likely to be material and useful for the case at hand?
 - **(2)** Is the info actually accessible by deliberation, etc?
 - **(3) + (4) Virtually impenetrable.** Appropriate?
- ***US v. Curtiss-Wright*** – Foreign affairs power vested in US via England, President has “plenary” powers in foreign affairs not dependent on Congressional delegation. WIDE INTERPRETATION OF POWER.
 - **Generally allows sweeping Exec power in foreign and national security affairs without Congressional delegation.**
 - **Dicta?** The emphasis on presidential powers may be unnecessary to holding, thus dicta.
 - **Southerland** rests holding on (1) idea of transfer of sovereignty from the crown to the president, (2) Marshall’s “sole organ” language, and (3) Washington refusing to give info about a treaty to the House.
 - **Distinction between Foreign and Domestic.** Is this the lynchpin of presidential powers?
- ***Youngstown* (Steel Seizure Case)**

- **Non-delegation doctrine**- No delegation of powers to other branch without “**intelligible principle**” to guide.
 - **DEAD.** Died post-45.
- **Presidential Power**
 - **Presidential Directives** – Include Executive Orders, National Security Decision Directives (NSDDs), etc.
 - **“Power through Practice”** – Pres may gain power via repeat use, a form of “common law”?
 - **Aggregate Authority** – Way to argue Pres gains power through aggregate of Constitutional powers
 - **No legal vacuum.** People begin to realize that perpetual emergency means some limits should be placed.
- **Black (Majority)** – President has no power to act without Constitutional mandate or Congressional delegation.
 - **“Theater of War”** is the only location exercisable. Definition?
 - Based on citizenship? Geography? Etc.
 - **Limited view of Constitutional powers, emergency powers.**
 - **Questionable re: delegation.** Seems to be allowed despite idea.
- **Jackson (Dissent)**
 - **(1) President acts with express or implied auth or Cong.** – Highest power, delegation, etc.
 - **Virtually unbeatable.** No finding of unconstitutionality.
 - **Legality:** (1) Whether Cong may delegate to exec, (2) Whether delegation contains standards for the exercise of the delegated power, (3) whether the exec follows the standards, and (4) whether the exercise otherwise violates the constitution
 - **(2) Pres. Acts in absence of either cong. grant or denial, relying on independent powers with “zone of twilight”**
 - **“Congressional Acquiescence”** the idea, in a sense.
 - **Repeat use of power becomes “common law” practice.**
 - **Factors:** Consistency, frequency, duration, “density”, continuity, normalcy, congressional notice, meaningful congressional acquiescence.
 - **(3) President acts in defiance to Congress** – Lowest amount of power, present in *Youngstown*
 - **Lowest form of power.**
 - **Presidential Signing Statements**
 - **(1) Executive Interpretation of Terms** – Useful, show how an exec views a certain statute or how it intends to apply it.
 - **(2) Political.** Increased use to limit or complain about terms.
 - *Clinton v. City of NY* – No line-item veto.
 - **No standing(?)**
- **General Outlay**
 - **Take Care Clause** – General reading against wide interpretation, but Frankfurter may allow some exec power
 - **Emergency** – Split on whether emergencies dictate inherent emergency power, general feeling of wide interp.
- ***Dames & Moore v. Reagan*** – International Emergency Economic Powers Act approved Reagan’s nullification of attachments against Iranian property in order to manage foreign relations. Acquiescence of Congress the major factor, where there was a foreign necessity, etc.
 - **Emerg from 1970s push to less power.**
 - **Emphasizes SECRECY**

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CONGRESS

CONGRESSIONAL DELEGATION AND JUDICIAL DEFERENCE

- **Mechanisms: (1) DELEGATION and (2) APPROPRIATION**
 - Congress provides the legal framework for executive warfare.
 - Appropriations given higher scrutiny given less scrutiny by Congress. *Intrusion upon tactical?*
 - *Lichter v. US* - REINACTMENT BY ACQUIESCENCE. “A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes”.
 - “Necessary and proper” becomes the hinge upon which Congress can delegate power
 - “Power to wage war successfully” – that is, a wide reaching power to delegate.
 - May imply wholesale ability to delegate entire war power.
 - The *Curtiss-Wright* of war powers.
 - *Greene v. McElroy* – CLEAR STATEMENT RULE. National Security program (and National Security Act) allowed for some secrets, but did not enable DoD to create security clearance program with no due process.
 - Clear Statement Requirement – Req. some clear statement of authority for appropriations, empowerment to exec.
 - Kent Modification: Must be explicit where some constitutional right is being violated.
 - Endo Rule: Appropriation must “plainly show a purpose to bestow the precise authority which is claimed”
 - **Emphasis on conflicts with the Constitution.** Deprival of due process basically involved, with worry re: no specific authority
 - **Appropriation as “Back Door Law”** – Congress may push towards certain results (and Pres may nullify certain law) by purse strings or impoundment (intentional non-use of funds)
 - **Appropriations as Limitation** – Some appropriations may come with strings attached, limits, etc.
 - *Lichter vs. Greene* – Issue of difference in war powers? Delegation is not wholesale giving of power?
- **Statutory Emergency Powers**
 - “Emergency” - No definition. Considered political question, courts tend to not touch.
- **Limits on Congress’ War Powers**
 - (a) **Nondelegation** – Must delegate with “intelligible principles” – no blanket delegation. PROBABLY DEAD.
 - (b) **Lovett Principle** – May not violate any other portion of the constitution with appropriations.
 - Prevents both substantive and structural trespass of Constitution.
 - SUBSTANTIVE TRESPASS – Due process, etc.
 - STRUCTURAL TRESPASS
 - (A) – Congress overextending power
 - (B) – Congress treading into Exec power
 - i.e. Congress may not intrude upon President’s status as CiC.
 - **Difficult to invoke.** Courts regularly dodge with rule avoiding constructions violating Constitution.
 - **May limit *Lichter*.** May imply that there are indeed limits on delegation
 - **May also imply mandatory appropriations,** depending on interpretation.
 - (c) *Chadha* – Congress must act “in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and a presentment to the President”
 - Prevents structural trespass?
 - Resurgence of textualism. Emphasis on text of constitution, etc.
 - **No one-house veto powers, no avoidance of a house, etc.**
 - May conflict with *Curtiss-Wright*, *Dames & Moore*, etc – worries re fundamentally political process.
 - IRONIES
 - (1) Leg veto defense is functional, but usually functionalism *harms* legislature/protects exec.
 - (2) Some consider textualism limiting of the executive branch as well.

WAR POWERS RESOLUTION

- **Generally:** Requires (1) Declaration of war [by Congress], (2) Specific Statutory Authorization, or (3) Nat’l Emergency for use of hostilities. Reporting requirement for any action in absence of declaration of war, with rescission required in 60 (+30 if cong unavailable or upon request) days after reporting if no response or if denial of continuation. Regular reporting requirement. Anti *Orlando v. Laird* provision limiting interpretation.
- **History:** Emerged from legislative textualism, narrative of exec run amok in Vietnam, push to “inefficient” procedural system
 - **Push against *Orlando v. Laird*** – “Mutual participation” justified Vietnam war.
- **Consultation Requirement** -- Required to consult with congress prior to action, but parameters undefined. Unclear if requires assent.
- “Hostilities” also trigger clock. Meaning likelihood of confrontation may also trigger clock. POLITICAL QUESTION per *Crockett*.
 - *Kouhi* – “Time of war” determined.
- Requires concurrent res (not presented to Pres), so thus may be violation of *Chadha*.
- **Libya** – Obama sends out letter to meet procedural reqs, but ignores time requirement, etc. Prez does go after approval, but approval is rejected.
- **Issues**
 - (1) Congress has been *very* wary to actually enforce, and *Crockett v. Reagan* requires both execution of 60 day period
 - (2) Rise of short-term military strikes means 90 days sufficient
 - (3) Rise of covert operations

JUDICIARY

POLITICAL QUESTION DOCTRINE

- **Approaches**
 - (1) **Textual.** Where only Congress and the Prez authorized to make decision, judicial intervention disallowed.
 - *But* Court regularly determines issues in this realm.
 - (2) **Prudential.** Courts lack expertise in fact-finding, etc.
 - *But* discoverability possible, courts regularly determine outright war.
- **General impulse:** Courts handle independent rights, not procedural relations in the government. *Rights v. Structure*.

STANDING TO SUE

- **Northeastern/Valley Forge Factors:**
 - (1) **Injury in fact**, defined as (a) a concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,
 - (2) **A causal relationship between the injury and the challenged conduct** -- “fairly can be traced to the challenged action of the defendant” and has not resulted “from the independent action of some third party not before the court”
 - (3) **a likelihood that the injury will be redressed by a favorable decision** -- “prospect of obtaining relief from the injury as a result of the favorable ruling” is “not too speculative”
- (A) **CITIZEN STANDING – SPLIT.** Generally requires some *particularized grievance*. Probably requires more than general public.
 - *ACLU v. NSA* - Injury from warrantless surveillance too speculative
 - –VS- *Amnesty Int’l v. USA* – Reasonable fear of warrantless surveillance enough.
- (B) **TAXPAYER STANDING** – Dead-ish.
 - *Faust* – Requires *appropriate nexus of Taxpayer and law*.
- (C) **CONGRESSIONAL STANDING**
 - *Raines* – Standing for congressmen *only* when congressional vote completely nullified.
 - **“Completely nullified”** – *no* remaining legislative remedies. Factual determination. *Campbell*

RIPENESS

- **Generally:** (1) All of Congress must have been heard on issue, (2) Exec must commit self to action.
 - **NON-ABSOLUTE BAR.** Means it tends to be harsher than other doctrines.
 - *Dellums v. Bush* – No ripeness, but may indicate political questions not a bar for certain war issues.
 - Generally preserves political debate, etc.

STATE SECRETS

- **Totten Bar**
 - “where the **very subject matter of the action** is **“a matter of state secret”** an action may be “dismissed on the pleadings without ever reaching the question of evidence” because it is “so obvious that the action should never prevail over the privilege” *Reynolds*
 - “Public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential” *Totten*
 - May be back-seated if *Reynolds* can be met.
- **Reynolds Privilege**
 - State secrets doctrine includes a “privilege against revealing military [or state] secrets, a privilege of which is well established in the law of evidence” *Reynolds*
 - **Must be asserted by government:** “there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer” *Reynolds*
 - **May declare prospectively.** *Jeppesen Dataplan*
 - **Independently reviewed by court.** Re: whether info is privileged. *Al-Haramain*.
 - **Less fatal, but may be so.** If evidence clearly kills case, *Totten* bar-esque result.

INTERNATIONAL LAW

DOMESTIC EFFECT OF INTERNATIONAL LAW

- “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...” *Art. VI.*
- **Theories: (1)** Int’l Law > Domestic Law. **(2)** Int’l Law = Norms for foreign action. **(3) [dominant]** International supplements domestic law.
- **Three Categories of International Law**
 - **(1) Treaties Made under the Authority of the US**
 - **Equal to law. Subject to *lex posterior***, thus superseded by subsequent statute.
 - Treaty “depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations... [but] with all this the judicial courts have nothing to do and can give no redress” *Head Money Cases*.
 - **(1) TREATIES**
 - **Requires:** Executive creation, senatorial approval by supermajority (usually pushed forward by Senate Foreign Relations Comm.). Some monopoly over negotiations by exec.
 - **Negotiating Record** probably the biggest record of interpretive source.
 - “While courts interpret treaties for themselves, the meaning given them by departments of government particularly charged with their negotiation and enforcement is given great weight.” *Kolovrat v. Oregon*.
 - **(A) SELF EXECUTING v. (B) NON-SELF-EXECUTING**
 - Debate regarding policies. Congress tends to prefer latter to control lawmaking, but subject matter may modify.
 - **Questions exist regarding senatorial approval.** Not clear if senate interpretation is binding or not, probably not.
 - **President can *probably* unilaterally terminate.**
 - **(2) EXECUTIVE AND OTHER AGREEMENTS**
 - ***Kay-Zablocki*** requires submission of Exec agreements to Congress.
 - But **toothless**. “Pacts”, secret agreements, etc usually not
 - **Types**
 - **(1) Congressional-Executive Agreements**
 - **(A) In-Advance Authorized Agreement or (B) After-the-fact Negotiation Ratification (imp.)**
 - Congressional approval and allowance. Routinely sustained
 - **Only require simple majority.** Treaties require supermajority of senate, thus meaning it may be easier to get one of these passed.
 - **State Department Considerations for Congressionally Authorized Procedures:** Degree of commitment or risk involved, intent to override state laws, need for subsequent legislation, past practice for similar agreements, congressional preference, degree of formality desired, proposed duration, need for prompt conclusion, general international practice.
 - **(2) Executive Agreements Pursuant to Treaty**
 - *Implied* approval by congress, usually, given Treaty approval.
 - **(3) Sole Executive Agreements**
 - **Types**
 - **(1) Strong.** Status-of-forces agreements, etc.
 - **(2) Weak.** Increasingly treaty-like agreements. *More domestic legal effect.*
 - Controversial. Usually confined to limited matters and thus sometimes approved.
 - **Possibly destroy the treaty clause.** Thus, some limitation is necessary.
 - ***Dames & Moore* justifications:** (1) Congressional Acquiescence and (2) *Implied* and *Foreign Executive Powers*
 - **Ackerman** thinks *some* control is necessary here.
 - **(2) Laws of Nations/Customary International Law**
 - **Lesser effect.** Possibly allowable when very serious. Vaguely nonbinding without some action or *jus cogens* exception. *Reid*
 - **Lex posterior applies to treaties, applying theory 3 to US Law.** *Whitney*.
 - **ICJ can be essentially ignored.** *Comm/Nicaragua v. Reagan*.
 - **OBSTACLES**
 - **(1) *Charming Betsey*.** Presumptive harmony between international and domestic law, so no presumption of abrogation.
 - **(2) *Head Money Cases*.** Treaties are statutes, so *lex posterior* applies. *Whitney* also supports.
 - **(3) Standing.** Treaty must be self-executing, meaning that domestic law may be applied to enact various international rules.
 - “*Self-executing*” – Clear intent of treaty to give broad domestic effect.
 - “*Non-self-executing*” – Requires Congressional legislation to give effect, if any.
 - “[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be made to the customs and usages of nations.” *The Paquette Habana*.
 - ***Jus Cogens*** – Preemptory norm. **Generally limited to rules against murder, rape, torture, etc.**
 - **Implies very little normative transfer to American law.**
 - **Modern trend** of less emphasis on law of nations
 - **Perception that Democratic societies need not obey all International laws.** Paternalistic?

- Courts have *some* power to enforce claims based on these laws.
 - “The determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts”. *Sosa*.
- (3) Constitution and Statutes of the US
 - **Supersede all.** General implication that this controls, pending it was enacted after a treaty.
- **Statutory Incorporation of International Law**
 - **Numerous statutes incorporate international law.** Usually tail-end of non-executing treaty, etc.
- **Ex:** Constitution supreme over treaty, thus petitioners could not be prosecuted per treaty in violation of 5th and 6th Amendments. *Reid v. Covert*. Treaty properly enacted, 10th amendment not violated given Constitutional limits. *Missouri v. Holland*. Courts could not properly enforce a ICJ judgment where only treaty agreed to follow where subsequent statute invalidated – *lex posterior* applied. *Comm. Of US Citizens Living in Nicaragua v. Reagan*. Congress may properly incorporate international law even without strong definition. *A-Bihani v. Obama*. Though courts should do so in limited cases, federal courts can and should entertain claims on international law that happen abroad involving treaties of the US. *Sosa v. Alvarez-Machain*.

NATIONAL SECURITY ACT, INTELLIGENCE, & COVERT OPS

- **Trend:** Development of a perpetual intelligence community alongside the definition of “National Security”
- **STRUCTURE**
 - **Dual Roles:** (1) Collection, analysis, and dissemination of info re threats to national security, and (2) Conducting covert ops
 - **Legal Authority**
 - **National Security Act of 1947** – Charter for the **defense and intelligence communities**.
 - **50 USC 403-1** – Creates **Director of National Intelligence** responsible for ensuring info gets to president, head of departments, etc. Acts as gatekeeper for national intelligence. Ensures compliance with law, etc.
 - **50 USC 403-4** – Creates **CIA and Director of the CIA**. Gives overall direction for collection and evaluation of intelligence, correlation of intelligence and dissemination, and organization of process of collection.
 - **50 USC 403-4(a)** – “**Fifth Function**” – implicitly allows covert ops (“perform such other functions and duties related to intelligence affecting the national security as the President ... may direct”)
 - **Church Committee** – Strongly pushed back against covert ops, esp. illegal ones.
 - **Executive Order 11,905** – Created the **Operations Advisory Group (OAG) [now the Special Coordination Committee (SCC)]** as well as an Intelligence Oversight Board (IOB) to sop Church Comm. Involvement.
 - **101(?)** – Creates **National Security Council** to “advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security”. President, VP, Sec of State, Defense, Energy, and perhaps others. Generally assesses objectives, commitments, etc.
 - **CIA act of '49** – Created CIA with Fifth function (see 50 USC 403, above)
 - **Post-9/11 – Director of National Intelligence** created to stand over community and emphasize communication post-9/11 Comm. Report.
- **COVERT OPS – THE “5th FUNCTION”**
 - **Empowerment/Interpretation**
 - **Broad:** Implies wide discretionary power given by Congress, no need for clear statement given nature of covert ops
 - **Independently empowered by plenary power or customary constitutional law?**
 - **Plausible deniability furthered.** Less legal structure = more flexibility and deniability.
 - **Empowered by Letters of Marque and Reprisal?** Unlikely, given outside and commercial nature of historical use of clause.
 - **Narrow:** Merely a savings clause for intelligence gathering processes.
 - **Types:** (1) Paramilitary Operations, (2) Political actions, and (3) In-between
 - **Blur between intelligence and covert ops.** Much blurs in terms of categories.
 - **Control of Covert Actions**
 - **18 USC 960 - Neutrality Act** – “Whoever, within the United states, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for or takes part in any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the US is at peace, shall be fined under this title or imprisoned not more than three years, or both.
 - **Rogovin Memorandum** – Established various justifications for Exec covert actions – namely, (1) *post-hoc* ratification, (2) delegation, and (3) implied Presidential powers.
 - **National Security Act** – Implicitly gives “**fifth function**” powers to CIA, thus in a sense ratifying past Pres. Behavior.
 - **Issues:** (1) Really debated issue? (2) Ambiguous and thus too open ended or otherwise secretive?
 - **Illegal Covert Actions**
 - **Executive Order 12,333** – Expressly disclaimed any authority “in this Order” to violate Constitution or Laws qua CIA.
 - **US v. Lopez-Lima** – Implicitly allows if conducted *before* 1981 (pre-12,333).
- **CONGRESSIONAL OVERSIGHT**
 - (1) **Budget Oversight**
 - **Overall funding amt known/published, specific information withheld.**
 - **Generally:** General funding amount published despite CIA act due to series of FOIA requests in the 90s. Specific funds and info withheld. President can withhold info for nat'l security purposes.

- **Cf Art 1 Sec. 9 Cl. 7** – “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”
 - **Split on standing.**
 - Disallowed in *US v. Richardson*. SCOTUS finds no specialized harm to grant taxpayer or citizen standing. Cong'l standing would probably fail, as no invalidation of vote(?)
 - Found in *Richardson v. US* (3d Cir. predecessor case). Emphasis on civic republicanism.
 - **Congress has plenary power to exact reporting and accounting reqs.** *Richardson*. Thus, may be no citizen standing/power.
 - **Defunding** probably possible, though Ollie North in Iran/Contra just found extra cash elsewhere.
 - **Complete/specific defunding may infringe on Executive control of tactics.**
 - **Implicit power of covert ops?** If found, right to funding.
 - **Allowed by Secret Journal Clause?**
 - **50 USC 403j(b)** – Sums made available to the CIA “may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds”.
 - **Also allowed to transfer under similar provision.** 50 USC 403f(a)(1).
- **(2) Reforms**
 - **General wariness to challenge covert ops directly.** Usually focus on making them *more* like normal military functions.
 - **War Powers Resolution**- Likely useless, as it involves the “US Armed Forces” only. Paramilitaries unrelated.
 - **Hughes-Ryan Amendment of 1974 – Requires notice to specified people, including “gang of 8”, after events.** No funds may be appropriated by CIA for ops in foreign countries “other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the US” and reports scope of op to Congress.
 - **Intelligence Oversight Act of 1980 – Requires prior reporting.** Cong req that heads of agencies “keep [the Cong. intelligence committees] fully and currently informed of all intelligence activities” for which the US is responsible, “including significant anticipated intelligence activity”
 - **“Timely”** subject to debate.
 - **Church Comm. Attempts**
 - Wanted Cong'l oversight, prior notice, consistency with “American Constitutional principles”, annual DETAILED info about expenditures
 - **“Intelligence Charter”** – Proffered document requiring “Consistency” with American public foreign policies, excruciating list of banned dirty tricks included.
 - **Ford/Carter Executive Orders**
 - Require at least one senior cabinet official approve *before* events (and review from time to time)
 - Create review boards with various names (OAT, SCC, etc) to connect intelligence community
 - **Reagan’s Exec Order 12,333** – Requires senior cabinet official and the president approve action.
 - **No dirty tricks rule.** Basically disallows violations of the Constitution and other applicable law.
 - **Basically means:** No violation of constitution or statutes, don’t act domestically, don’t involve self in foreign diplomacy, *BUT this really is only enforced by senior intelligence officers.*
 - **Iran/Contra Scandal** – “Scandal” only in the sense that issue came to light. Pushes for some sort of control over what was perceived as a wayward executive.
 - **Intelligence Authorization Act, Fiscal Year 1991** – Requires Pres ensure that cong intelligence comms are kept fully and currently informed of intelligence activities, including significant anticipated intelligence activities. Explicitly does not require presidential approval. Requires identifiable foreign policy objectives for covert actions, where the determination of such is in writing. Usually requires reporting of covert actions, with limited exceptions.
 - **Requires written findings by president**, specifying details, disallowing *ex post facto* factors.
 - **Bush I signed with complaining prez. Statement**, inferring limited power.
 - **Legal rationale requirement** usually found in OLC finding, etc.
 - **QUESTIONED BY SIGNING STATEMENT.** Excises “unconstitutional” provisos of Int. Auth. Act, specifically those he perceived to require prior approval.
- **(3) OVERALL MODERN TANGENT**
 - **Concession:** Covert ops necessary, just a question of how much may be done without Congressional knowledge or approval.
 - **Free covert ops vs. public war? Middle ground?** Is a middle ground even possible consistent with the realities of covert ops?

TERRORISM

MATERIAL SUPPORT

- **Holder v. Humanitarian Law Project**
 - **Money considered fungible** – offsets other assets, etc, so “support” can be defined as even giving money
 - **Political branches can define material support widely.** Can prohibit support period, etc.
 - But contra Jimmy Carter and other parties getting away with support. Perhaps a distinction of popularity?

DEFINING TERRORISM

- **Definitions vary.** Generally hinge on a methodology – the use of violence against persons or property to further political or social objectives.
 - **Old Vague Concept:** Methodology of use of violence against military and civilians equally for political or other reasons.
 - **Classification vs Methodology.** Former increasingly used by Gov’t for political reasons, esp. Re ATEDPA.

- **FOREIGN Terrorist Org.** – Generally enables *more warfare power*, FISA, etc.
 - **Definition controlled by State Department.** Not up to review generally, judicial review limited to *membership only*, and info about classification hard to come by. *PMOI v. State Dep't.*
- **DOMESTIC Terrorist Org.** – Generally enables *lesser power*, use of criminal law, Title III, etc.
- **PATRIOT Act** – Substantially uses Anti-Terrorism and Effective Death Penalty act definition (below) to define *domestic terrorism*.
- **UN Comprehensive Convention on Int'l Terrorism Draft** – “The targeting and deliberate killing of civilians and non-combatants cannot be justified or legitimized by any cause or grievance”
- **No consensus on appropriateness, so NOT DISAPPROVED BY LAW OF NATIONS.** *Yousef.*
- **Highly relevant.** Defines parameters of Anti-Terrorism and Effective Death Penalty Act of 1996, prohibitions on financial institutions, etc.
- **“Global war on terror”** shifts government to a new focus on warfare, intelligence, enemies.
- **Anti-Terrorism and Effective Death Penalty Act of 1996-** Defines and punishes “foreign terrorist organization[s]”
 - **Generally:** Going after civilians and armies equally with some political motive.
 - Definition
 - **8 USC 1189(a)(1)** – The Secretary is authorized to designate an organization as a **foreign** terrorist organization in accordance with this subsection if the Secretary finds that— (A) the organization is a **foreign organization**; (B) the organization **engages in terrorist activity** (as defined in section 1182 (a)(3)(B) of this title or terrorism (as defined in section 2656f (d)(2) of title 22), **or retains the capability and intent to engage in terrorist activity or terrorism**); and (C) the terrorist activity or terrorism of the organization **threatens the security of United States nationals or the national security of the United States.**
 - **8 USC 1182(a)(3)(B) - “Terrorist activity” defined** As used in this chapter, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: **(I)** The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle). **(II)** The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. **(III)** A violent attack upon an internationally protected person (as defined in section 1116 (b)(4) of title 18) or upon the liberty of such a person. **(IV)** An assassination. **(V)** [biological warfare]
 - **Designation requires notice.** *NCOR.*
 - Record could also be particularly declassified minus national security info. *NCOR*
 - **Includes** unlawful acts involving hijacking/sabotage of conveyances, seizing or detaining and threatening to kill/injure/further detain a person to compel a third person to do or not do something, a violent attack upon an internationally protected person, assassinations, biological attacks, etc.
 - Punishments
 - **18 USC 2339B(a)(1)** – Prohibits any persons in US jurs to “**knowingly provid[e] material support or resources**” to the org.
 - **18 USC 2339B(A)(2)** – Blocks any funds the org has with any financial institution.
 - **8 USC 1182(a)(3)(B)(i)** – Bars certain members of the org from the US.
- **Ex:** Terrorism does not violate LoN and grant universal jurisdiction. *US v. Yousef.* Definition of “Terrorist organization” by Secretary of State not a violation of due process. *People’s Mojahedin Org. Of Iran v. Department of State.*

SURVEILLANCE

FOURTH AMENDMENT

- **Framework**
 - **US Const. Am. 4** – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
 - **“Search”** – Must involve some sort of penetration beyond merely looking at something like the public. *Katz*
 - “People, not places” – *Katz*
 - **Places** - Harlan’s formulation involves a **“reasonable expectation of privacy”** re:people in certain contexts.
 - **Yes:** Beeper tech where car could be monitored by sight. *Knotts.*
 - **No:** Thermal imaging use.
 - **Warrantless searches** are per se unreasonable, “subject only to a few specifically established and well-delineated exceptions”. *Katz*
 - **Exceptions:** Searches incident to arrest, *Robinson*, automobile searches, *Michigan v. Long*, “Hot pursuit” or other exigent circumstance searches, *Michigan v. Tyler*, “Stop and frisk” searches, *Terry v. Ohio*
 - **“Special Needs Exception” 1 - Exceptions for things other than criminal investigation:** use of pen register devices, *Smith v. Maryland*, contents of banking records, *US v. Miller*, searches to prevent railroad accidents that cause “great human loss”, *Skinner v. Railway Labor Execs Ass’n*, Searches to help prevent the spread of disease or contamination during a public health crisis, *Camara v. Municipal Ct.*,
 - **“Special Needs Exception” 2 - Boarder control and public safety exceptions:** Searches of persons and things entering and leaving the US, *US v. Montoya de Hernandez*, searches of boats on navigable waters, *US v. Villamonte-Marquez*, searches of airplanes, *US v. Nigro.*
 - **“NATIONAL SECURITY” EXCEPTION?** Possibly implied.
 - **Improperly acquired statements** must be disclosed and fruit of the poisonous tree excised. *Alderman v. US.*
 - **National Security Exception?**

- **“Reasonableness” the key.** *Katz*
 - **Prior judicial approval required** for even national security issues, *maybe* with time as a factor. *Keith*.
 - **No absolute warrant requirement.** *US v. Truong Dinh Hung*.
 - **TRUONG “Primary Purpose” EXCEPTION** (*dead*)
 - (1) “Government should be relieved of seeking a warrant only when the object of the search or the surveillance is a **foreign power, its agent or collaborators**”
 - (2) Only “when the surveillance is conducted **‘primarily’ for foreign intelligence reasons**”
 - [3] Reasonableness. Questionable criterion.
- **Title III (of the Omnibus Crime Control and Safe Streets Act) – [Criminal statute]** Authorizes the use of electronic surveillance only pursuant to 18 USC 2516. Requires [1] court order with [2] detailed and particularized application requirements. Generally statutorily follows *Katz*.
 - **Fed. R. Crim. Proc. 41** – Reqs warrants for search and seizure of property, requiring “reasonable cause” for night searches.
 - **18 USC 2518** – Requires lots of info, including id of target, period of time sought for surveillance, explanation why other investigative methods have failed, etc.
 - ~~18 USC 2511(3)~~ – “Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the [US] against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government”
 - **REPEALED.** By FISA, among other things.
 - **Explicit natsec exception?**
 - **NORMAL CRIMINAL PROCEDURE.** Usually considered too limiting for natsec purposes, which explains desire to avoid.
- **Ex:** Government did not have a nat’l sec exception to the 4th amendment that trumped the need to get a warrant where time was pretty open. *Keith*. Government did not need a warrant where test was met. *US v. Truong Dinh Hung*.

FISA and the PATRIOT Act

- **Generally:** 1st and 4th Amendments stand against too many government intrusions.
- **Foreign Intelligence Surveillance Act of 1977** –
 - **Explicitly authorizes electronic surveillance for foreign intelligence purposes.** *US v. Duggan*.
 - **Court Application Process (FISC)**
 - **REQUIRES: (1) AGENT OF A FOREIGN POWER, (2) PROBABLE CAUSE, (3) SIGNIFICANT PURPOSE**
 - **50 USC 1801(b) - “Agent of a foreign power” means—**
 - (1) **any person other than a United States person, who— (A)** acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; **(B)** acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; **(C) [LONE WOLF]** engages in international terrorism or activities in preparation therefore; **(D)** engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or **(E)** engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor for or on behalf of a foreign power; or
 - (2) **any person who— (A)** knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; **(B)** pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; **(C)** knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; **(D)** knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or **(E)** knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).
 - **NOT OUT-OF-US NONCITIZENS.** Not subject to 4th, so FISA doesn’t apply.
 - **50 USC 1805(a)/1823(a) - Reqs “probable cause” that:**
 - (1) Target ... is a foreign power or agent of foreign power [and no US citizen can be found such on the basis of activities protected by the 1st Am.], **AND**
 - (2) Electronic surveillance must be used against foreign power or an agent of a foreign power, **OR**
 - Reqs proof that the locus of surveillance is being used or about to be used by foreign power or agent. **BUT** PATRIOT act allows roving wiretaps/warrants.
 - **Must** “specify...the nature and location of each of the facilities or places at which the electronic surveillance will be directed [if known]” (latter added by PATRIOT act)
 - (3) For **physical searches**, the property is owned, used, possessed by, or is in transit to or from an agent of a foreign power or a foreign power.
 - Reqs proof of ownership, use, or possession or in transit from foreign power
 - **“Probable Cause” different than with normal criminal law**

- “Upon the possibility of a probability – the probability to believe that the foreign target of the order *may* engage in spying, or the probability to believe that the Am. Target of the order *may* engage in criminal spying activities. *Charles Doyle*
- **FISC judgments unpublished, sealed, proceedings ex parte**, not known to targets of surveillance.
 - **4th Am.** Problem? Considered adequate in *US v. Duggan*.
 - **1st Am.** Limited by proviso disallowing consideration of 1st am protected situation. But real profiling?
- **50 USC 1804(a)(7)(B)** – Requires “the [significant] purpose” of surveillance to be for natsec (“significant” added by PATRIOT act).
 - **“Significant Purpose” = DUAL PURPOSES ALLOWED.** No longer primary purpose, destroying firewall and opening ability for LEO and CIA/FBI to work together. *In re Sealed*
 - **Not exclusively natsec req.** Can balance to some degree and still allow FISA warrant.
 - **50 USC 1804(a)(7)(C)** – Also requires proof that info “cannot reasonably be obtained by normal investigative techniques”
- **Emergency orderless surveillance allowed under limited circumstances**
 - **50 USC 1805(f)** – “Emergency situation” but within 72 hours judge must be informed.
 - Similar to 50 USC 1822(a), 824(e), (f).
 - **50 USC 1802** - One year where communications between or among foreign powers or focused on their property when there is “no substantial likelihood” that comm. By US person may be acquired.
- **50 USC 1801(f) - “Electronic surveillance” means**— (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511 (2)(i) of title 18; (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.
- **50 USC 1801(c) - “International Terrorism”** - [A]ctivities that— (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended— (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.
- **50 USC 1801(e) - “Foreign intelligence information” means**— (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against— (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to— (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States.
- **USE of FISA Info**
 - **Trung Dinh Hung** – Generally required “primary purpose” of info for FISA Surveillance to support criminal conviction without use of formal Title III process. Creates “*The wall*” between Title III/FISA people (i.e. attorneys general/natsec people) in order to prevent conflation.
 - **2002 Intelligence Sharing Procedures** – Eliminate “*the wall*”, info sharing between LEO and intelligence comm.
 - **General modern rule:** FISA Surveillance allowed with “significant purpose” of natsec, work between LEO and intelligence community.
 - **Preempts state secrets privilege.** *In re Telecomm. Records Litig.*
 - **INCIDENTAL INFORMATION** disputed. Some worries re: info gained in the *process* of work.
- **Ex:** No need for a wall between FISA and Title III users to prove significant purpose. *In re: Sealed Case Nos. 02-001, 02-002.*

PROGRAMMATIC SURVEILLANCE

- **Generally:** Data collection without court orders identifying specific targets.
- **The Terrorist Surveillance Program (TSP)**
 - Monitoring of thousands of people’s telephone and e-mail communications by NSA without warrants.
 - **Requires “reasonable grounds” to believe connections to Al Qaeda**, but really not heavily enforced.
 - **“Authorized” by the Authorization for Use of Military Force**, implying an emergency that dictated the authority to utilize implements of war, including block-grant surveillance
 - **Youngstown presidential-congressional agreement authorization?**
 - **No clear statement.**
 - **No judicial determination.** Usually slapped down as nonjusticiable or on state secret grounds.
 - **18 USC 2511(2)(e)** – Allows employees to conduct electronic surveillance in normal course of official duty.

- **1809(a)(1)** – Person is guilty of offense if he intentionally [1] engages in electronic surveillance under color of law except as authorized by statute or [2] discloses or uses information used under color of law by electronic surveillance where surveillance not approved by statute.
 - **FISA considered too slow**, so NSA avoided auth.
 - **Protect America Act (PAA)** – Authorized sweeping and suspicionless programmatic surveillance targeting individuals outside US.
 - **50 USC 1881a(c)(4) - No probable cause requirement.** Merely on certification of DSI.
 - Disallowed targeting people inside US or the like.
 - Sunset activated, superseded by PAA.
 - **FISA Amendments Act**– Maintained FISA.
 - **50 USC 1805b(a)** – Allows warrantless foreign intelligence surveillance on targets (including US persons) “reasonably believed” to be located outside of the US.
 - **General Requirements/Features:** Att’y general must certify necessity, immunity for telecom providers who follow, US persons cannot be internationally targeted, BUT if non-US & abroad, warrantless & suspicionless surveillance allowed IF certified by the attorney general/DNI. (pp.620).
 - **Allowed by *In re Directives*** ct where [1] surveillance is conducted to obtain foreign intelligence for natsec purposes and [2] is directed against foreign powers or agents of foreign powers reasonably believed to be outside the US.
 - **Even allows monitoring of US citizens if they have a link to some non US citizen outside the US.**
 - **Exec. Order 12333 - Emphasis on procedure.** Attorney general determines in each case probable cause of foreign agent, etc.
 - VIRTUALLY NO LIMIT ON SCOPE.
 - **18 USC 1881a(a)** - Allows “**Basket warrants**” for surveillance and data mining.
 - **Government uses “vacuum cleaner” approach.**
- **Ex:** Warrantless PAA-esque surveillance allowed pending reasonable belief. *In re Directives [Redacted] Pursuant to Section 105B of the FISA.*

IMMIGRATION AND NATIONAL SECURITY

GENERALLY

- **History**
 - **General shift** from open borders to immigration connected with national security
 - **Plenary Power Doctrine** – Judicial deference to Congress in matters of admission, deportation, etc. Emphasis on people determining the parameters of their own citizenry.
 - Encourages development of literacy tests, quota laws, “illegal immigrants”
 - Limited judicial review for deportations. Highest appealability to some administrative figure (ex: secretary of labor)
 - **1903** – Law prohibited entry of “any person who is opposed to all organized governments [...]”
 - Used to prohibit entry of anarchists such as John Turner.
 - Even in 1903, divide between *exclusion* and *deportation*, though some blurring present.
 - **1920** – Strong grip on importation and loyalty
 - **1917-1918** – Expansion of deportable citizens to political dissidents.
 - **1917 - Labor Deportations** – Rounding up of union members and deporting them to Mexico.
 - Focused on alleged terrorism of IWW (Industrial Workers of the World), but implication re: Chinese citizens
 - Somewhat approved of given alleged terrorism.
 - Attorney General later approves and orders internment of all German members.
 - Kidnapping case overturned on the basis of “necessary defense”.
 - **Postwar Political Deportations**
 - Emphasis on “parlor Reds” and other political evils
 - **“Deportation delirium”** – alleged delirium regarding fear of secret foreign terrorists attacking various political figures
 - **Palmer Raids** – Raids hunting down “radicals” seeking to undermine government.
 - Blanket arrest warrants/defective warrants used.
 - Some evidence of citizen-run deportations as well.
 - Lack of counsel usually present, but 1920 admin rule changes to only allow counsel/review by defendant after govt gets opportunity to present facts.
 - Decision of secretary of labor held final, no review.
 - **New Mexican “Illegal Aliens”**
 - *Wong Yang Sung*
 - (1) APA applies to deportation proceedings
 - (2) Const’l protections of due process applied to deportation proceedings, BUT
 - (3) Exactly what question of due process explicitly not determined.
 - **Harry Bridges**
 - 1934 – Deportation proceedings begin against Harry Bridges, native Australian, involved in a longshoreman strike.
 - Return of paranoia re: Communist forces.
 - Conflicts between Roosevelt admin and Congress

- No judicial deportation, but constant efforts to connect Bridges to communism and deport. -> SCOTUS defends on 1st Am rights.
 - SCOTUS defends again, but Bridges still thrown in jail for various alleged false statements
 - **Cold War Ideological Deportation**
 - 1948 – Numerous prosecutions of leaders of Communist Party under Alien Registration Act
 - **McClaran/Walter Act (L.N.A.)** (1952) – Comprehensive immigration statute authorizing, inter alia, the exclusion and retroactive deportation of Communists and other political dissidents *retroactively* (that is, for *past* involvement with the communist party), forbade naturalization by court if deportation pending.
 - Controversial and vetoed, but overridden by Cong.
 - **Utilized a strong NatSec justification.** High deference.
 - *Harisiades v. Shanghnessy* – Signature deportation case. Former membership in Comm. Party used against in naturalization case. SCOTUS rejects “vested right” argument, focuses and emphasizes power to deport.
 - **Justifications:** (1) Noncitizens have less rights, (2) No vested right to remain in US, but rather a privilege, (3) Deportation not a criminal punishment and thus not a retroactive punishment.
- **Racial Detention post-9/11**
 - **Heavy use of plenary power to detain/deport.** Using minor infractions to divide.
 - *Turkmen v. Ashcroft* – Government may properly detain and deport even with illegitimate motive re: race.
 - *Elmaghraby v. Ashcroft* – When citizens detained, gov’t may not detain and treat like in *Turkmen*
 - **Implies distinction between citizens and immigrants in terms of rights.** Contractarian?
 - Incommunicado period fine given eventual availability of counsel
 - **Detention presumptively reasonable** for six months, and after, violation IF (1) alien demonstrates no significant likelihood of removal in the reasonably foreseeable future and (2) government cannot rebut showing. *Wang v. Ashcroft*.
 - Non-individualized determinations do not violate due process.
 - Executive free to single out races, etc.
 - BUT some issue re:taping, etc.
 - *Ashcroft v. Iqbal* – No pleading proving that there was some disallowable racial motivation in the process of classifying “high interest” detainees.

“Right to Know”

- **Richmond Newspapers rule** – Right of press to attend criminal trials.
 - **AKA Press-Enterprise standard** – Public access to “governmental processes” granted when (1) “there is a tradition of accessibility” – that is, when “The place and process have historically been open to the press and general public”, (2) when “public access plays a significant positive role in the functioning of the particular process” and (3) when there is no showing that “closure is essential to preserve higher values and is narrowly tailored to serve that interest”.
 - **(1) EXPERIENCE PRONG.** Whether a tradition of accessibility is present in a particular place and process
 - **(2) LOGIC PRONG.** If public access plays a significant positive role in the functioning of that particular place and process
 - **SPLIT**
 - **Creppy Directive** – Chief Immigration Judge Mike Creppy issues directive issuing blanket closing of many deportation proceedings for national security purposes.
 - *North Jersey Media Group* – Creppy directive (closing a lot of deportation proceedings) held constitutional. No history of access to administrative access, and very low value considering countervailing national security interests.
 - *Detroit Free Press* – Blanket closure of deportation hearings in “special interest” cases unconstitutional. High history of access to court-like cases generally, and high value in keeping public processes open.
- **Related**
 - *US v. Moussaoui* – Interest of public strong over security interests for Gov’t.
 - *In re Motion for Release of Court Records* – No 1st Am. Right of access to court records concerning NSA warrantless electronic surveillance programs

International Humanitarian Law

- **Geneva Convention III** – Laws for “International Armed Conflicts”
 - **“International” Conflicts** presume, inter alia, roughly equal states on a specified battlefield with specified soldiers and specified beginnings and ends of war.
 - **Cf “Non-International Armed Conflict”** – Not as heavily covered, but still somewhat governed by Common Art 3
 - **Ex:** (1) Civil Wars, (2) Wars of Occupation, (3) Proxy Wars, (4) Colonial or Frontier Wars
 - **In fact more common than international conflicts.**
 - **Proposals made** to expand in 77 giving greater protection to rebels, etc, but US does not sign.
 - **Cf “New Category” with 9/11?** Implication that terrorist groups operate completely outside the usual structure?
 - **“Globalized Civil War”** – Alleged category. Contrary to normal civil war due to global nature (thus refuting typical border limits and allowing global detention) and, contrary to normal civil war, seems to permit use of extreme violence (no worry of everyone getting together again)
 - **Common Article 3-** Establishes baseline requirements for the treatment of *participating and nonparticipating countries alike*.
 - **DISTINCTIONS**
 - **(a) LEGAL COMBATTANTS.** Generally those fighting in war, civilians, etc.
 - **Presumption even applies to Al Qaeda** according to Red Cross discussions and the like. Allegedly encourages reciprocity, etc.
 - **(b) UNLAWFUL COMBATTANTS.** Those who by their acts violate the laws of war.

- **Hinge on actions, not status.** No blanket determination of unlawfulness, though it has been argued that participation in Al Qaeda is *de facto* unlawfulness.
- **NO MORE “ENEMY COMBATANT” THEORY.** Idea that the enemy combatant status per *Quirin* was somewhat prejudicial, allowed rights abuses.
- **Article V Tribunal** – Tribunal with requirements to determine the lawfulness or unlawfulness of a captured combatant.
 - **Burden of proof on detaining power.** Thus, the presumption is quite strong.
- **Highest class presumption.** If captured, captors presume person is the highest class possible UNLESS an Article V tribunal is held to determine acts violate laws of war, etc.

Habeas and Punishment on the Battlefield

- **Pre 9/11**
 - *Quirin* – Military commission OK for saboteurs, pretty much no habeas right
 - **“Enemy Combatant”** concept developed, but tossed out with the Geneva Convention Comm. Article III.
 - *Milligan* – Famous “if the courts are open” sort of case.
 - *Johnson v. Eisentrager* – Constitution grants no right of personal security or immunity for a military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the US.
 - **Essentially no 5th Am. Rights for aliens outside US.** But there are some rights *within* the US.
 - **Presumptions:** (1) Soldiers of other states (2) Abroad (3) on a specified battlefield (4) during war.
 - Dissent: Conflicts with *Quirin* – main holding seemingly reliant on punishment outside US bounds, but this is a dangerous precedent.
- **Post 9/11**
 - **Mil. Ord. (Nov. 08 ’01)** – Noncitizens get no access to federal courts (i.e. no habeas)
 - Creates detention climate, hinging on *Quirin*, to prep for things like Guantanamo.
 - *Rasul v. Bush* – **No jurisdiction** to handle wrongful imprisonment cases coming out of Guantanamo Bay. Not *Eisentrager* – Det in Guantanamo, no process.
 - **FACTORS:** (1) Does the US have exclusive jurisdiction and control? (2) Do Ds contest status? (3) Has there been access to counsel?
 - **Leads to Combatant Status Review Tribunal (CSRT)**, staffed by military officers, to evaluate situation. BUT presumption in favor of gov’t evidence, etc.
 - **FEATURES:** (1) Staffing by military officers, (2) presumption of guilt in favor of the government, (3) no access to lawyers, but “personal representative” with no right of confidentiality, (4) No confronting witnesses, and (5) no calling witnesses without governmental approval.
 - **Detainee Treatment Act (DTA) of 2005** – Explicitly(?) states that judges do not have jurisdiction to grant habeas to alien noncitizen Guantanamo prisoners EXCEPT DC Circuit review of *procedural* validity under tribunal’s own rules.
 - *Hamdan v. Rumsfeld (2006)* – Military commission pursuant to Detainee Treatment Act (DTA) lacks power to proceed, violating both the UCMJ and the Geneva Convention
 - **3 Key Conclusions**
 - (1) **Military Commissions must punish based on Laws of War or maybe UCMJ.**
 - (2) **Military must follow process of UCMJ.**
 - (3) **Non-Int’l Armed Conflicts governed by Common Article III.**
 - **“Prior Issue” Exception** – If petitioned to Article III court prior to DTA, allowed to continue. Effectively nullifies DMT without doing much with it, as all Guantanamo prisoners had appealed.
 - Neither the AUMF or DMT authorized review courts to convene military commissions over captured citizens like Hamdan
 - **Three situations for military commissions:** (1) In substitution for civilian courts when martial law declared, (2) Temporary military government in enemy territory when normal gov’t refuses to function, (3) “Incident to the conduct of war,” when there is a need to “seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the laws of war”
 - **Highly limited, field-of-war approach.**
 - **REQUIRES SOME OFFENSE AGAINST THE LAW OF WAR.** Otherwise, no exigency that meets the need of a military commission.
 - **DEVIATION REQUIRES NECESSITY.** “Necessity” not exactly defined by plurality.
 - Prosecution without seems to violate Geneva Convention/UCMJ.
 - **Departure from normal procedure must be met with necessity.** Article 36 of UCMJ, etc.
 - Vague process for detention insufficient.
 - **Presumption per Geneva convention of courts-martial or some similar process?**
 - **Military Commissions Act of 2006** – Attempts to fix in light of *Hamdan*, cutting off habeas explicitly for “an alien detained by the US who has been determined by the US to have been properly detained as an enemy combatant or is awaiting such determination”
 - **Limited review provided.** Some vestigial process present.
 - *Boumediene v. Bush* – MCA unconstitutional – constitutional issue after court dodges issue in *Hamdan*.
 - **HIGH WATER MARK.** Doesn’t change judicial deference, but seems to restrict Exec in some frames.
 - **Holds:**
 - (1) **Habeas available at Guantanamo.** “Functional” analysis of US power.
 - **Test:** US must possess habeas for areas it controls, etc unless impracticable.
 - **Detaining allowed**, just subject to courts -> *Milligan* approach.
 - (2) **DTA/MCA do not supplant writ of habeas.** Procedural infirmities.

- **Fails *Mathews*** (factors: (1) risk of erroneous deprivation of liberty interest versus (2) probative value, if any, of additional procedural safeguards).
 - **[3] [Implication] No differentiation between citizenship and aliens.** If some habeas available at Guantanamo for noncitizens, then the citizen-noncitizen distinction falls apart.
 - **[4] [Implication] No geographical limitations.** Global war equals no territorial limits.
- Guantanamo not formally part of US, but some control implied. *De jure* control not required in *Eisentrager*.
- Distinguishes *Eisentrager* on the basis of (a) enemy aliens (b) never been or resided in the US (c) captured outside and held in custody outside US (d) tried by military comm outside US (e) for offenses against laws of war outside the US (f) and in all times imprisoned outside US.
 - Also factors in (1) citizenship status (2) nature of sites of apprehension and (3) practical obstacles to obtaining the writ.
- **Finds no practical issues preventing habeas**, emphasizing a *Quirin*-like “if we’re open” situation.
- **Distinguishes detention by executive order**, where the majority emphasizes maximum worry.
 - **Also distinguishes based on process**, where no evidence review for CoA was worrisome.
- **Dissent** emphasizes *Hamdi* ruling emphasizing AUMF authorization, extends to habeas.
 - Disagrees re: nature of procedural remedy
 - Disagrees about *Eisentrager* “functional” test, emphasizing limitations on judiciary
- ***Al Maqaleh v. Gates*** – Post-*Boumediene*, no habeas provisions in Bagram. Maybe “black hole”’s justified closer to the battlefield?
- **Still a strong reluctance to overturn exec actions** by Congress/Judiciary.
- **National Defense Authorization Act (2011)** – Codifies military detention authorized by the AUMF
 - **1021/1022 Detention**
 - **Membership + Noncitizenship = Military detention**
 - **Support + Noncitizenship = ?**
 - **Membership + Citizenship = No requirement**, choice to detain.
 - **Support + Citizenship = No military detention.**
- **CURRENT PATHS UTILIZED** (*Discretionary* application)
 - **(1) Criminal Trial.** Generally the safest route power-wise.
 - **(2) Military Commissions.** Generally those that mimic or mirror criminal statutes per *Hamdan*
 - **(3) Detention.** Authorized per NDAA/AUMF, but some limitations on procedure per *Boumediene*.

Love on the Battlefield

- **Doesn’t exist, Otacon.** That chick is gonna get shot because every girl you touch in all four games gets killed. Even your sister.

Detention Post 9/11

- **Detention of Battlefield Captives**
 - **Military Order of November 13, 2001** – Enables detention of members of Al Qaeda etc, allowing for limited but not federal review of detainment.
 - ***Hamdi v. Rumsfeld*** – AUMF authorizes government to detain citizens fighting for enemy abroad.
 - **PLURALITY, SO MOSTLY NONBINDING.** Very disputed. Only exists via Thomas approval re: AUMF.
 - **Only holds** the US *does* have power to capture and detain citizens in Afghanistan. **Does not hold** far beyond that, proc. Holdings questionable.
 - Focuses on delegated powers in *Youngstown* system, but not absolute.
 - **Procedural requirements:** A citizen-detainee must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Govt’s factual assertions before a neutral decisionmaker. BUT some exigencies may allow executive more freedom.
 - ***Mathews balancing: Individual's factors:*** (1) The importance of the individual liberty or property interest at stake (private interest); (2) The extent to which the requested procedure may reduce the possibility of erroneous decision-making (government's interest) VS Governmental interest in avoiding the increases administrative and fiscal burdens which result from increased procedural requirements.
 - Dissent: Trason statute on books, should use.

Prof's Outline

- (1) Natsec Pre-History (Before WW2)
 - **Original vision:** Dominant role for Congress, Exec as mere first military officer
 - **Immediate slippage in Civil War.** Lincoln seizes power, begins to shift power.
 - **Slippage increases/continues** during Labor strikes, WWI, WW2.
- (2) Natsec Embedded in Statute
 - **Permanent role for military**
 - **Secrecy & Intelligence**
 - **NSA, CIA authorized.**
 - **Transformation between branches** – Judicial deference and Congress steps back decidedly
 - **Reform acts** pop up to change transformation, but little to no success
 - **International Law** begins to influence
- (3) Case Studies of the Post-9/11 World
 - **Surveillance**
 - **Detention**
 - **Immigration**
 - **Enemy Combatant Status**

Tropes

- (1) The Separation of Powers
 - **Key question:** Extent checks and balances promote, limit, or assist individual rights. Hurt? Help?
- (2) Rise of Executive Power
 - **Causes? Essential? Inevitable?**
 - **Relation to founding vision?** Refutes original concept?
- (3) Reform
 - **Historically meaningful?**
 - **Successful? Worth it?**
 - **Ways to do so?**
- (4) Change
 - **How have conditions changed?** New frame of warfare? Changes to international framework?
 - **Shift in regimes or predictable?**
 - **Is the Post-9/11 world really different?**

BOOK OUTLINE

GENERALLY

- *Youngstown* – 3 factors between congress and executive via Jackson
 - (1) **Express or Implied Delegation.** Congressional + Presidential powers
 - **“War Powers”** – Create emergency, expand presidential powers
 - **Emergency grants** implied, though they come from *both* delegation and inherent powers.
 - **Delegated Lawmaking** (pending limits) allowed
 - **First Move** possibly implicated where president occupies field.
 - (2) **Absence of Delegation** – Enables prez’s power alone plus maybe “zone of twilight”
 - (3) **Defiance/Incompatibility with Congress** – Prez power MINUS Congress’ powers.

PRESIDENTIAL POWERS

- *Martin v. Mott* – [Complaining re: punishment of avoiding service]
 - President has emergency powers to control militia. Decision solely in his power.
 - President has **power over militia**.
- *Mitchell v. Harmony* – [Forced to go to Mexico with militia]
 - Exec may **not seize property without immediate danger**. No right to takeover anything.
 - May seize with *immediate danger to prevent violence*. Very high bar.
- *Curtiss-Wright* – [Vio of delegated exec order extended to Bolivia]
 - Plenary powers of international relations -> **Extraconstitutional Power**
 - *Johnson v. McIntosh* – Some inherent power to land, etc beyond civilian right.
 - Less than absolute. Does not include power to declare war, etc.
- *Dames & Moore v. Regan* – [Termination of proceedings/attachments re: Iran]
 - Implicit approval + slight statutory authority = delegation (*Youngstown 1*)
 - Ex post facto authorization allowed.
 - **“Constitutional common law”** – Customary authority (*Haig v. Agee*)
- (i) Defense War Power
 - *Prize Cases* – [Blockade of confederate ports without war declaration]
 - **Unilateral defense actions** allowed in context of confederate war, focus on threat
 - Does not extend to **“war”**. *Dellums v. Bush* (Iraq).
- (ii) Prez-Only Powers
 - *Little v. Barreme* – [Dutch ship seizure]
 - **No actions in quasi-war beyond delegation**. Congress may still limit actions of Prez.
 - Extended to the identity of the enemy and thus probably covered “warmaking”-like. Distinguishable.
- (iii) Emergency Powers
 - *In re Neagle* – [Stop judicial assassination]
 - **Protecting and defending in exigent circumstances** allowed, for obvious reasons, without delegation
 - **“Presidential Laws”** inferred – ability of prez to fill in where Cong. Did not act.
 - *In re Debs* – [Requested injunction re: rail strike]
 - Exec may **use force to protect rail**. Emphasis on right of gov’t to establish commerce, etc.

CONGRESSIONAL POWERS

- (1) **Statutory Authorization for Military Force**
 - *Bas v. Tingy* – [Two statutes going from *express* to *implied* holding France was enemy – former said France, latter “enemy”]
 - **Imperfect wars may be declared**. “Public war”, so still fightable, despite not being perfect.
 - *Fleming v. Page* - [Question re: taxes of port established in area taken over by US military]
 - **Warfare not for conquest, Tampico not part of US**. Idea that US must officially control via Cong.
- (2) **Delegations and Appropriations for National Security**
 - *Lichter v. US* - [Reclamation of “excess profits”]
 - **Nondelegation Principle**. Must give intelligible principles to delegate Cong’l power.
 - **Congressional power implies power to delegate**, generally to effectuate purposes of power.
 - *Greene v. McElroy* - [Clearance revocation without DP]
 - **Explicit authority** required – exec cannot go beyond delegated power by, for example, creating extensive clearance sys
 - **Plain statement required** per *Ex Parte Endo*.
 - **Methods of Authorization/Limitation**
 - (i) **Specific/Explicit** – AUMF, etc.
 - (ii) **Defense Appropriations** – “Back door law” by providing funds for projects.
 - (iii) **Limits by Appropriations** – Taking away funds. Authorized to do so by *Spaulding v. Douglas Aircraft*.
 - *Dellums v. Bush* – [Challenge against war in Iraq]
 - **Prez cannot unilaterally declare “war”**. Cannot initiate emergency hostilities to degree of war.
- (3) **Statutory Emergency Powers**
 - 77 standing statutes generally in place pending “crisis”
 - **“Emergency”** – *Subjective* and determined by prez.
 - *US v. Yoshida Int’l* – Nonjusticiable political question. Later given more room, but still pretty absolute.
 - **Ex post approval may ratify otherwise disallowed actions**. *Reagan v. Wald*.

- (4) Substantive Limits
 - (a) **Nondelegation** – *Lichter/Curtiss-Wright* (requiring **Intelligible Principles**)
 - (b) **Lovett Principle** – No violation of constitution, *including intruding on Exec war power*. May imply Exec right to \$.
- (5) Procedural Limitations
 - (a) **INS v. Chadha** – Two chamber vote + presentiment required for legislation.

THE WPR

- See below.
- **Vetoed by Nixon, but overridden by Cong.** Thus, some arg that it is inapplicable remains.
- **Consultation requirement** given, but not clear as to consultation with *whom*.
- **“Hostilities” not clearly defined**, so trigger start not defined very well.
- **POSSIBLY IN VIOLATION OF INS v. CHADHA.** Does not allow presentiment, but virtually pointless.

JUDICIAL POWERS

- (a) **Standing**, *Northeastern* Factors.
 - **Northeastern/Valley Forge Factors:**
 - (1) **Injury in fact**, defined as (a) a concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,
 - (2) **A causal relationship between the injury and the challenged conduct** -- “fairly can be traced to the challenged action of the defendant” and has not resulted “from the independent action of some third party not before the court”
 - (3) **a likelihood that the injury will be redressed by a favorable decision** -- “prospect of obtaining relief from the injury as a result of the favorable ruling” is “not too speculative”
 - (i) **CITIZEN** – **Beyond normal taxpayer, must prove injury.** *ACLU v. NSA*
 - (ii) **COGNRESSMAN** – **Must prove vote nullification.** *Raines v. Byrd*.
 - + Cong'l action required. *Campbell v. Clinton*.
- (b) **Ripeness** – More than an impasse. *Dellums v. Bush*.
- (c) **State Secrets**
 - **Jeppesen Dataplan** – [Extraordinary rendition program]
 - (a) **Totten Bar** – Bar of claim if natsec
 - (b) **Reynolds Privilege** – Bar of specific evidence.

INTERNATIONAL LAW

- (a) **Domestic Effect**
 - (i) **Treaties generally governing federal law.**
 - **Making**
 - Require (1) intend agreement to be legally binding, (2) agreement deals with significant matters, (3) clearly describes obligations of parties, and (4) takes a form that is consistent with intent to be legally binding.
 - **President must ratify.**
 - **Senate gives “advice and consent”.** Some debate over ability to demand treaty stay the same as approved.
 - **Some judicial deference to government interp.** *Kolovrat v. Oregon*.
 - **Must be executed via law or must be self-executing.** Does not merely apply.
 - **Termination** powers unsettled. *Goldwater v. Carter*.
 - **Effect**
 -
 - (ii) **Executive and other Agreements**
 - **Making**
 - **Dames & Moore v. Regan** - [Termination of proceedings/attachments re: Iran]
 - **Prez. Has inherent power to make some international decisions.** Via exec agreement
 - (i) **Congressional-Exec Agreements** – Cong. Enacts or otherwise delegates auth to make agreement
 - (ii) **Agreements pursuant to treaty.** Questionable, but SCOTUS suggests approval of treaty = approval of enacting exec agreements.
 - (iii) **Sole Exec Agreements.** Very little justification/power.
- (b) **Effect**
 - **Missouri v. Holland** – In limited circumstances, treaties may be able to do what statutes cannot.
 - **Reid v. Covert** – Constitution > Treaties/Executive Agreements.
 - **Comm. US Citizens living in Nicaragua v. Reagan** – [IC] holds paramilitary actions with Contras violate treaty and customary international law, Ps sue to enjoin prez actions]
 - **Subsequent Statutes > Prior Inconsistent Treaties.** Cong. Can essentially statutorily override treaties, up to other countries to complain. -> *Lex Posterior* applies.
 - **General interp rule to avoid conflict/overruling.** *Murray v. The Schooner Charming Betsey*.
- (c) **Statutory Incorporation of Int'l Law**
 - (i) **SELF-EXECUTING** v. (ii) **NON-SELF EXECUTING.** Latter needs statutory incorp.
 - **Al-Bihani v. Obama** – Congress may pass statutes incorporating international law, including *deferring to* international law and generally allowing reference to it via statute.
- (d) **Domestic Effect & Jus Cogens**

- *Comm. Of US Citizens Living in Nicaragua v. Reagan* – [ICJ] holds paramilitary actions with Contras violate treaty and customary international law, Ps sue to enjoin prez actions]
 - **Customary International Law**– “general and consistent practice of states followed by them from a sense of legal obligation” [May include treaties, resting on consent of states]
 - **Very limited.** Construed somewhat narrowly.
 - **“Jus Cogens”**– “customary laws considered binding on all nations” – fundamental norms transcending consent
 - **May influence interp of const’l law.** Depends on view.
- *Sosa v. Alvarez-Machain* – [Claim re FTCA for abduction by govt for criminal trial in the US]
 - **Can sue in US courts for vio of law of nations**, *but* must prove norm of international character accepted by the civilized world and defined with specificity.
 - **High bar.** Like *Comm. Of US Citizens*, requires lots of proof of some international norm.
- *The Paquete Habana* – Controlling leg act may override customary int’l law – maybe also controlling executive act?

“TERRORISM” GENERALLY

- **SEE DEFINITION BELOW IN FISA.**
- *US v. Yousef*– Terrorism per se not violation of Law of Nations given variability of term.
- *PMOI v. Department of State* – [Challenge re: classification of org as terrorist org]
 - **Department of State controls terrorist definition by state.** Political question.
 - **Courts may only review membership issues.** Ex: may complain gov’t wrongly classifies as member of org, but not that org itself is OK.

INTELLIGENCE AND COVERT OPS

- **(1) Organization**
 - **(A) Authority**
 - **(i) Statutory**
 - **(a) DNI** – Director of National Intelligence, created by the National Security Act, ensures intelligence provided to prez and other members.
 - **(b) CIA** – Creates director of CIA and manages CIA, managing national sec intelligence.
 - **(c) National Security Counsel (NSC)** – Advises president re natsec.
 - **(ii) Presidential Auth**
 - **Executive Order 11,905** – Created Operations Advisory Group (OAG) with membership recommended by church comm to oversee “special activit[ies]”.
 - **Executive Order 12,333** – Requires “reasonable and lawful” means in intelligence, generally pushing for good intelligence nonetheless.
- **(2) Covert Actions**
 - **Covers both political action, paramilitary operations, and that in between.**
 - **History**
 - **(a) Neutrality Act** – Prevents others from interfering with foreign gov’t by punishing any action. Protects sovereignty.
 - **(b) Covert Actions – Origins and Practice** – Generally emerges early on and with some necessity.
 - **(c) Covert Actions during the Cold War** – Developed strong use of NSA with “Fifth function”.
 - **Executive Branch Implementation of the NSA**
 - **NSC-10/2** – Outlined mechanism designed by Prez to approve and manage secret ops and to make them responsible. Comprehensive definition of covert ops. CIA given primary responsibility.
 - *US v. Lopez-Lima* – [Agent to Cuba arrested on hijacking, claims authority]
 - **No requirement CIA act lawfully before 1981.** Hinges at least partially on implied authority before Exec Order 12,333.
 - **Congressional Oversight**
 - **General reluctance during Cold War – Vietnam.** Ignorance was politically useful.
 - **Budget Oversight**
 - **Initially limited.** Block grants, more avoidance
 - **Post-Watergate.** Push to get detailed receipts.
 - *US v. Richardson* – [citizen-taxpayer sues for CIA disclosure of detailed receipts per Art I Sec 9 Cl 7]
 - **Citizen-taxpayers have no standing on statement and accounts clause.** Generalized and common to public, so no standing. More deference to cong’l-exec-judicial balance outside judicial demands.
 - “Congress has plenary power to exact any reporting and accounting requirement it considers appropriate”
 - **Reforms**
 - **WPR** – Does nothing, only applies to armed forces.
 - **Intelligence Oversight Act** – pp 486-488. “Timely” notification, etc.
 - **Hughes-Ryan Amendment** – Disallows funds to be expended unless for intelligence UNLESS and until Prez finds each operation important to national security of US.
 - **But seems to authorize, to some degree, covert ops.** Ends “plausible deniability”.
 - **Question of threshold.** Not entirely clear what “important” means.
 - **Contra Affair**

- **Transfer of arms to Iran.** Allegedly authorized via plenary powers, arms control export act, maybe covert intelligence auth of NSA. Not clear.
- **Boland II** attempts to limit any support for Contras.
- **Continuing Reforms**
 - **Dispute over “timely” notification, etc post-Iran-Contra.**
 - **Intelligence Authorization Act, Fiscal Year 1991** – Requires prez keep Cong'l intelligence committees “fully and currently informed” of current and significant anticipated intelligence activity. Requires reporting illegal activity. Allows for some written procedure reqs to be determined, and outlines keeping things classified
 - **Sec. 413b** – Disallows covert actions unless “such an action is necessary to support identifiable foreign policy objectives of the US” – requires (1) writing unless emergency (2) no ex post facto ratification (3) specific findings with specifications of each department, (4) ids of third party contracts, (5) no vio of const. Disclosure of legal basis for action. Requires more notification if “significant undertaking”
 - **Defines covert action**
 - **Sec. 414** – Disallows funding “unless and until” Prez issues finding required.
 - **POSSIBLY A VIOLATION OF *INS v. CHADHA*.**
 - **Intelligence Auth. Act for 2010** – Allows prez to limit distro of info re: covert act to “Gang of Eight” for special security purposes, except “general description” of finding still needs to be given.
- **(3) 4th Am. And National Security**
 - **(1) Framework**
 - **U.S. Const. 4th Am.** - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
 - **Protects “people, not places”.** *Katz*, hinging on a “reasonable expectation of privacy”
 - **Exceptions:** Searches incident to arrest, *Robinson*, automobile searches, *Michigan v. Long*, “Hot pursuit” or other exigent circumstance searches, *Michigan v. Tyler*, “Stop and frisk” searches, *Terry v. Ohio*
 - **“Special Needs Exception” 1 - Exceptions for things other than criminal investigation:** use of pen register devices, *Smith v. Maryland*, contents of banking records, *US v. Miller*, searches to prevent railroad accidents that cause “great human loss”, *Skinner v. Railway Labor Execs Ass'n*, Searches to help prevent the spread of disease or contamination during a public health crisis, *Camara v. Municipal Ct.*,
 - **“Special Needs Exception” 2 - Border control and public safety exceptions:** Searches of persons and things entering and leaving the US, *US v. Montoya de Hernandez*, searches of boats on navigable waters, *US v. Villamonte-Marquez*, searches of airplanes, *US v. Nigro*.
 - **“NATIONAL SECURITY” EXCEPTION?** Possibly implied.
 - **(2) “National Security Exception”**
 - **Title III Electronic Surveillance** – Criminal law surveillance that authorizes limited surveillance pending detailed info re: the offense, the facilities and communication monitored, the identity of the target if known, the period of time, and an explanation as to why other methods have failed or why they are unlikely to succeed/dangerous.
 - ***Keith* – Prior judicial approval (warrant) required for natsec surveillance, maybe** with time as a factor.
 - **BALANCING.** Variance depending on “the governmental interest to be enforced and the nature of citizen rights deserving protection”
 - **Allows for imprecision and wideness,** but still emphasizes judicial control over process.
 - **Opens door for Cong'l rules.** Taken up by FISA, Patriot Act, etc.
 - ***US v. Truong Dinh Hung* – Warrantless searches/surveillance do not violate 4th Am.**
 - Kills *Keith*. Seems to emphasize necessity more than anything else.
 - Killed by *In re Sealed*. The divide implied here (moving towards natsec -> less crim prosecution needs) considered false.
 - **Limited to situations in which “the interests of the executive are paramount” – REQUIREMENTS:**
 - **(1)** Only when the object of the search or surveillance is a foreign power, its agent or collaborators
 - **(2)** Only when the surveillance is conducted “primarily” for foreign intelligence reasons.
 - **FISA -> PATRIOT ACT changed.** (“significant” purpose)

CONG'L AUTHORITY FOR FOREIGN SURVEILLANCE

- **(a) FISA**
 - **SEE BELOW.**
 - **Procedure on pp 594-595.**
 - **“Probable cause” different** – “Probability of a possibility” – probability to believe that the foreign target of the order may engage in spying, or the possibility to believe that the American target of an order may engage in criminal spying activities.
 - **Also must find probable cause re: locus of surveillance.** Must find locus is being used or about to be used by, or, for physical searches, owned used, or possessed by or in transit to or from, a foreign power or agent of a foreign power.
 - **“The Wall”** – Old system per *Keith* and the like preventing use of foreign surveillance info during criminal investigation and vice versa. Killed by Patriot Act, below.
 - **Patriot ACT** revises from “primary purpose” to “significant purpose”, shifting to allow both criminal and foreign intelligence involvement.
 - ***In re Sealed Case Nos. 02-001*** – Approve of new wording via PATRIOT Act, noting that new “significant purpose” wording allows for *both* foreign intelligence surveillance path or Title III path.

- **Patriot Act allowed** “consult[ation] with Federal law enforcement officers”, strongly implying a connection between the two groups.
- **Revives and fulfills *Keith* balancing.** Considers FISA procedures sufficient.

PROGRAMMATIC SURVEILLANCE

- **The Terrorist Surveillance Program (TSP)**
 - **Blanket** surveillance of telephone and e-mail communications – wide spread, little focus.
 - **Defenses** hinge on plenary power, AUMF(?), etc.
 - *Endo/Greene* requirements of Cong’l delegation probably not present (not clear enough) in AUMF context
 - **NO AUTH BY FISA.** Considered too full of delay.
 - **Use of federal officials.** Seemingly authorized by 18 USC 2511(2)(e) and (f).
 - **But** 1809(a)(1) of FISA criminalizes surveillance, etc without statutory auth.
 - **Preempts state secrets privilege.** *In re Telecommunications Records Litig.*
- **FISA Amendments Act/Protect America Act** – Authorized sweeping and significant programmatic surveillance (PAA re-passed)
 - **Text on pp 619.** Hinges on limitations on US citizens, etc.
 - ***In re Directives*** – Allows TSP, emphasizing on 4th Amendment exception.
 - **Holds:** “a foreign intelligence exception to the 4th Amendment warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the united states”
 - **Exec Order 12,333**, requiring only where there is probable cause of action against a foreign power or agent of foreign power.
 - **Totality of the circumstances** model. Focuses on reasonableness and *Keith* balancing to some degree.

DETENTION

- **Of “High Interest” / “Special Interest” Immigrants**
 - ***Ashcroft v. Iqbal*** – Failure to plead sufficient facts regarding detention. No real proof of discrimination.

HABEAS (AND SUSPENSION OF HABEAS)

- ***Ex Parte Merryman*** – [Challenge to Lincoln’s policy of suspending Habeas during riots near MD]
 - **Congress, not the Prez, has authority to suspend.**
 - Rendered moot, Lincoln later released everyone.
- ***Ex Parte Vallandigham*** – [Arrest and military trial of war dissident]
 - **Article III courts have no habeas power over military commissions.** Given no statement over SCOTUS authority, no authority.
- **(1) Before 9/11**
 - ***Johnson v. Eisentrager*** – No habeas right for German nationals captured abroad and tried abroad.
- **(2) After 9/11**
 - **Military Order Of Nov. 13, 2001** – Gives exclusive jurisdiction to military tribunals re: detained terrorists etc, does not allow habeas.
 - **(A) To Citizens in Guantanamo Bay**
 - ***Rasul v. Bush*** – Aliens outside sovereignty who deny terrorist status allowed to get habeas
 - **Focus:** Not nationals of countries at war, actively deny status, not been charged or given access to tribunal
 - **Leads to Combatant Status Review Tribunal (CSRT)** due to flood of habeas petitions. Still less than usual tribunal – rebuttable presumption in Govt’s favor, etc.
 - **Detainee Treatment Act (DTA) of 2005** – Again attempts to limit access to courts. Pushes detainees into CSRTs, only allows for limited appeals based on procedural indicia.
 - ***Hamdan v. Rumsfeld (2006)*** – DTA not specific enough to restrict habeas, Courts still have habeas jurisdiction.
 - **Military Commissions Act (MCA) of 2006** – Responds to *Hamdan*, explicitly cuts off access to courts for “alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”
 - ***Boumediene v. Bush (2008)*** – MCA unconstitutional.
 - **Guantanamo not part of US.** Thus, implicitly extends habeas jurisdiction beyond US bounds, distinguishing *Eisentrager*.
 - **Factors:** (1) citizenship and status of detainee, (2) nature of sites where apprehension and detention took place, and (3) the practical obstacles inherent in resolving prisoner’s entitlement to writ.
 - All of these in *Boumediene* advise allowing habeas.
 - **Still leaves suspension open pursuant to suspension clause.** Must explicitly suspend, etc.
 - **Outlines procedural issues re: substitute for habeas.** Hinges on procedural adequacy, where if met, prisoner must exhaust alternative remedies before filing writ.
 - **Deficiencies in CSRT:** No rebuttal of factual evidence (limited ability to introduce evidence), allowance of hearsay evidence (“relevant and helpful” standard), etc.
 - **Still emphasizes natsec justifications.** Seems to push deference to some national security interests.
 - ***Al Maqaleh v. Gates*** – Post-*Boumediene*, no habeas provisions in Bagram AFB. Maybe “black hole”’s justified closer to the battlefield?
 - **National Defense Authorization Act (2011)** – Codifies military detention authorized by the AUMF
 - **(B) CURRENT PATHS UTILIZED** (*Discretionary* application)
 - **(1) Criminal Trial.** Generally the safest route power-wise.
 - **(2) Military Commissions.** Generally those that mimic or mirror criminal statutes per *Hamdan*

- (3) **Detention.** Authorized per NDAA/AUMF, but some limitations on procedure per *Boumediene*.

MILITARY DETENTION BEFORE 9/11

- **Detention of Noncombattants (Before 9/11)**
 - *Hirabayashi* – Military curfew order (via Exec act from Cong'l auth) upheld as necessary to prevent espionage/sabotage.
 - *Korematsu* – Upheld restriction of Japanese person intentionally overstaying. Strict scrutiny re: race, but met.
 - **Relied on official fraud.** Deference to Gov't wartime necessity may be unfounded due to blatant lies by DeWitt.
 - *Ex Parte Endo* – Where loyalty test met, Gov't cannot detain relocation center.
- **Detention of Combatants (Before 9/11)**
 - *Ex Parte Milligan* – Arrest of alleged citizens and spies against Union had to be tried in Article III court, NOT military court, given that courts were open.
 - *Ex Parte Quirin* – Rush order approving military commission of German saboteurs. -> “War constitution” idea(?)
 - **Hinges on vio of Law of War.** Espionage a violation, so no right to Article III courts?
 - **Implies loss of citizenship.** Ignores one citizen and lumps all as the enemy.

MILITARY DETENTION AFTER 9/11

- **Military Detention of Battlefield Captives**
 - *Hamdi v. Rumsfeld* – AUMF authorizes imprisonment of enemy combatants (inc. US citizens) to prevent return to battlefield.
 - **Questionable application.** Plurality only, merely holds authorization of detention – proc issues questionable.
 - **Focuses on locus of capture.** *Milligan* about capture in US, here about capture on battlefield.
 - **Outlines procedural rules for detention.** Ability to present evidence, etc. *Matthews* balancing. Lots of deference to issues of calling soldiers in from the battlefield for adversarial proceeding.

MATERIAL SUPPORT

- *Scales* – Proof of knowing membership and specific intent to further group's unlawful goals sufficient.
- *Holder v. Humanitarian Law Project* – [Hum. L. Proj. Attempted to support Kurdistan Worker's Party to petition, etc]
 - **Material support crime statute constitutional.** No real issue with 1st Am, considered conduct.
 - **Congress can criminalize what may be to some degree innocent.** Providing help with petitioning to PKK banned period, no elbow room for innocence – offsetting costs of illegal acts by PKK?

Military Commissions

- *Ex Parte Milligan* – [Random arrest by military commander during Civil War after Cong'l auth to suspend some writ]
 - **No suspension and military tribunal of citizens where courts open.** Unless complete martial law, citizens may only be held (and not charged) under martial law.
- *Duncan v. Kahanamoku* – [Mil. Comm. Of Japanese citizen in Hawaii]
 - **No necessity to try Am. Citizen of Japanese descent in Hawaii = no power.** Necessity hinge.
- *Hamdan v. Rumsfeld* – [Trial of captured Yemeni national by military commission after detention at Guantanamo]
 - **DTA did not preclude review.** Part of the whole back-and-forth with habeas.
 - **Halfassed thrown-together commission insufficient procedurally.** Thus, Court has ability to review necessity of military tribunal.
 - **Hamdan's court procedurally infirm.** No challenge, no authority, etc.
 - **Three reasons for military commissions:** (1) substituted civilian courts when martial law declared, (2) try civilians “as part of a temporary military government” over occupied military territory where civilian gov't does not function, and (3) incident to the conduct of war.
 - **(3) “Incident to the conduct of war”** – i.e. violation of the laws of war, etc. *Quirin* as high water mark.
 - **Preconditions according to Winthrop treatise:** (1) only if offense committed within “field of command” of commander (i.e. theatre of war), (2) offense must have been made during period of war, (3) military commission may try only individuals of enemy's army who have been guilty of illegitimate warfare or other offenses against law of war, (4) only two kinds of offense justiciable: (a) vio of laws and usages of war and (B) breaches of military orders for which offenders are not legally triable by courts-martial

Right to Know

- **Creppy Directive** – Chief Immigration Judge Mike Creppy issues directive issuing blanket closing of many deportation proceedings for national security purposes.
- **North Jersey Media Group** – Creppy directive (closing a lot of deportation proceedings) held constitutional. No history of access to administrative access, and very low value considering countervailing national security interests.
- **Detroit Free Press** – Blanket closure of deportation hearings in “special interest” cases unconstitutional. High history of access to court-like cases generally, and high value in keeping public processes open.

WPR

SHORT TITLE - SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY SEC. 2.

(a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING SEC. 4.

(a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION SEC. 5.

(a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL SEC. 6.

(a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION SEC. 7.

(a) Any concurrent resolution introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION SEC. 8.

(a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of member of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution--

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provision of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

FISA Selections

50 USC 1801

As used in this subchapter:

- (a) **“Foreign power”** means—
- (1) a foreign government or any component thereof, whether or not recognized by the United States;
 - (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
 - (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
 - (4) a group engaged in international terrorism or activities in preparation therefor;
 - (5) a foreign-based political organization, not substantially composed of United States persons;
 - (6) an entity that is directed and controlled by a foreign government or governments; or
 - (7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.
- (b) **“Agent of a foreign power”** means—
- (1) any person other than a United States person, who—
 - (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;
 - (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;
 - (C) **[LONE WOLF]** engages in international terrorism or activities in preparation therefor;
 - (D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or
 - (E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor for or on behalf of a foreign power; or
 - (2) any person who—
 - (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;
 - (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;
 - (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;
 - (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or
 - (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).
- (c) **“International terrorism”** means activities that—
- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
 - (2) appear to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
 - (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.
- (e) **“Foreign intelligence information”** means—
- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
 - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
 - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
 - (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—
 - (A) the national defense or the security of the United States; or
 - (B) the conduct of the foreign affairs of the United States.
- (f) **“Electronic surveillance”** means—
- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
 - (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511 (2)(i) of title 18;
 - (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(h) **“Minimization procedures”**, with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802 (a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) **“United States person”** means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101 (a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

50 USC 1802

(a)

(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

(A) the electronic surveillance is solely directed at—

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801 (a)(1), (2), or (3) of this title; or

(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801 (a)(1), (2), or (3) of this title;

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 1801 (h) of this title; and

if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General’s certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 1808 (a) of this title.

(3) The Attorney General shall immediately transmit under seal to the court established under section 1803 (a) of this title a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

(A) an application for a court order with respect to the surveillance is made under sections 1801 (h)(4) and 1804 of this title; or

(B) the certification is necessary to determine the legality of the surveillance under section 1806 (f) of this title.

(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to—

(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

(b) Applications for a court order under this subchapter are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under section 1803 of this title, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 1805 of this title, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) of this section unless such surveillance may involve the acquisition of communications of any United States person.

50 USC 1821

(5) **“Physical search”** means any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, but does not include

(A) “electronic surveillance”, as defined in section 1801 (f) of this title, or

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(B) the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 1801 (f) of this title.