

Presidential Powers Under the Constitution and the Courts

Foreign Affairs, War Powers and the War on Terrorism

Foreign Affairs and War Powers

- Supreme Court and lower federal courts generally very deferential to the Executive in these areas
- See Executive authority in these areas as much broader than in domestic affairs
- Conflicts between President and Congress in these areas are sometimes seen as “non-justiciable” under “political question” doctrine
- Not the kind of “case or controversy” that defines the Court’s constitutional jurisdiction



Foreign Affairs and War Powers Enumerated in Article II

“The executive power shall be vested in a President of the United States...The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militias of the several states, when called into the actual Service of the United States...He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

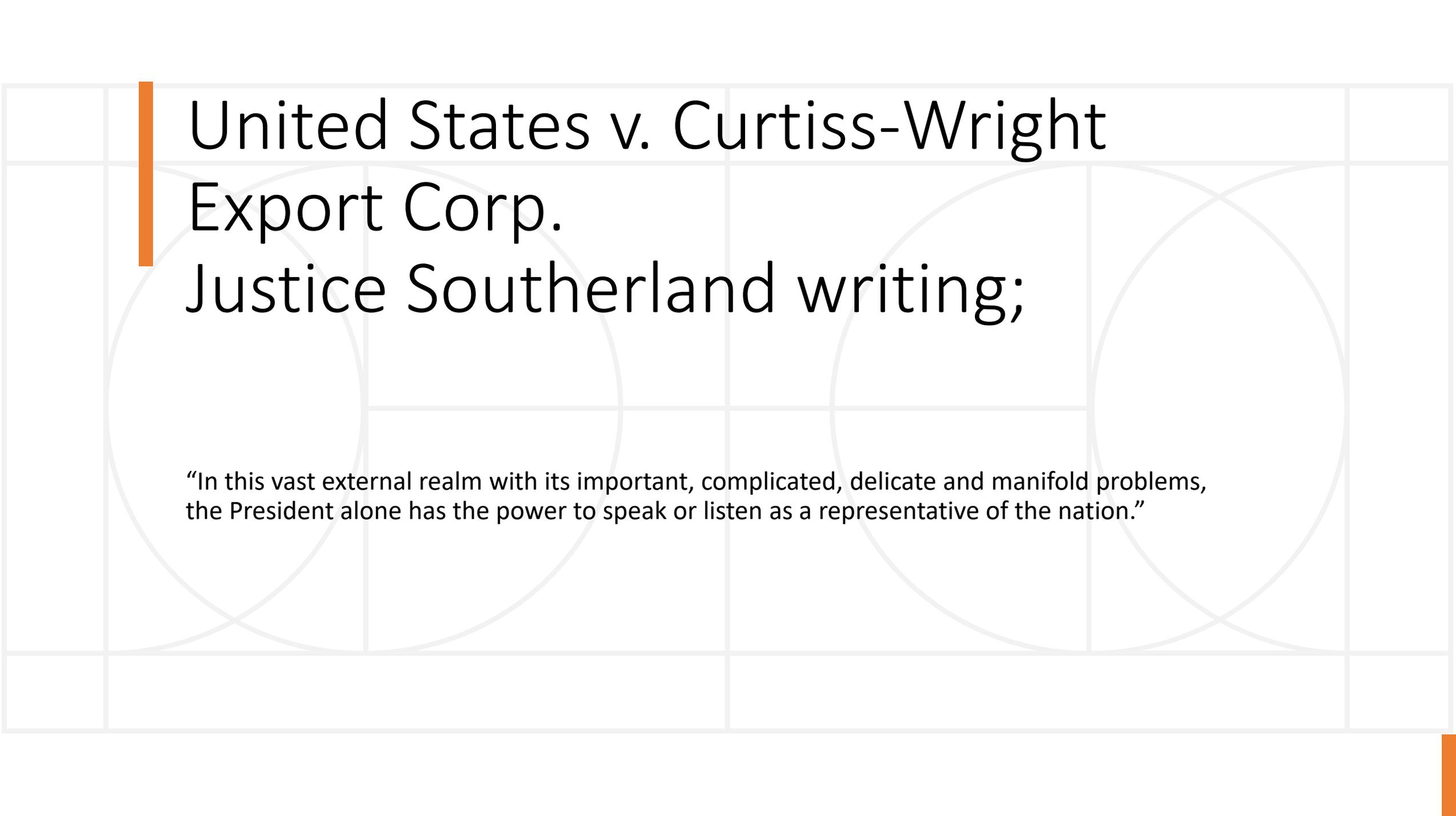


Foreign Affairs and War Powers Enumerated in Article II (cont.)

and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ambassadors, other public Minister and Consuls,...and all other officers of the United States, whose Appointments are not otherwise herein provided for...he shall receive Ambassadors and other public Ministers...and shall Commission all the Officers of the United States.”

United States v. Curtiss-Wright Export Corp. (1936)

- Congress passed joint resolution empowering President to prohibit selling arms to Bolivia or Paraguay
- Curtiss-Wright indicted for conspiracy to sell arms to Bolivia
- Challenged the joint resolution as an unconstitutional delegation of legislative power to Executive
- Supreme Court upheld delegation to President of power to stop munitions shipments
- Executive powers in foreign affairs are inherently in the national government by virtue of it being sovereign



United States v. Curtiss-Wright
Export Corp.
Justice Southerland writing;

“In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”

United States v. Curtiss-Wright Export Corp.

- Still cited as authoritative precedent on question of broad, inherent presidential powers in this area
- Opinion not without critics
- If Southerland is correct about broad, inherent foreign policy powers why was it necessary to enumerate powers in this area in Article II?
- Also argument for broad, inherent powers in this area contradicts general intention of Founders for a government of limited, enumerated powers
- Constitution's authors most concerned about a too powerful executive



Two Major Areas

- Treaty making and War powers
 - Under treaty making powers two prominent issues
 - Do presidential powers differ in relation to treaties and executive agreements?
 - Can president withdraw from treaties without the consent of the Senate?
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Treaties and Executive Agreements

- Treaties become law when ratified by 2/3 of the U.S. Senate
 - Executive agreements become effective when signed by the President and representative of foreign government
 - Executive agreements mentioned nowhere in U.S. Constitution but are recognized as constitutional
 - Supreme Court has ruled three times in decisions defining presidential powers in executive agreements
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United States v. Pink (1942)

- Twice upheld Roosevelt's agreement with Soviet Foreign Minister Litvinov leading to U.S. recognition of Soviet Union
- Justice Douglas wrote;

“A treaty is the ‘Law of the Land’ under the Supremacy Clause [of Article VI] of the Constitution. Such international compacts and agreements as the Litvinov Agreement have a similar dignity.”

United States v. Belmont (1937)

- New York state court refused to enforce the Litvinov Agreement
- U.S. Supreme Court overruled the state court
- The Court wrote that “in respect of what was done here, the Executive had the authority to speak as the sole organ” of the nation

Dames & Moore v. Regan (1981)

- President Carter had negotiated agreement with Iran freeing hostages in exchange for unfreezing Iranian assets in the U.S. and ending all lawsuits against Iran in U.S. courts.
- Federal statutes authorized Carter to negotiate the agreement.
- Dames & Moore was an insurance company with legal claim against Iran
- It challenged the agreement Carter had made in the Supreme Court

Dames & Moore v. Regan (cont.)

- Government defended its actions in part on inherent executive powers under Article II
- Court found that too broad a claim of executive power
- But Court rejected the challenge and supported the agreement emphasizing the federal statutes supporting Carter's authority.

Dames & Moore v. Regan (cont.)

Rehnquist wrote;

“Because the President’s actions in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is ‘supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who would attack it.’”

Dames & Moore v. Regan (cont.)

- Rehnquist also quoted Justice Frankfurter's concurring opinion in *Youngstown Sheet and Tube Inc. V. Sawyer*;
 "[A] systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned...may be treated as a gloss on 'Executive Power' vested in the President by section 1 of Article II."

Treaties

- Article II

The President “shall have Power, by and with Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”

- Article VI

The “Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land.”

Treaties (cont.)

- *Geofroy v. Riggs* (1890)

“[T]he treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations...[and] it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.”

Treaties (cont.)

Treaties cannot violate the U.S. Constitution.

- *Reid v. Covert* (1957) – American civilian dependents of military personnel abroad must be given a trial that meets the dictates of the Constitution
- Justice Black writing;

“[N]o agreement with a foreign nation can confer power on the Congress, or any other branch of the government, which is free from the restraints of the Constitution.”



Withdrawing From Treaties

- Does a President need Senate approval to rescind a treaty?
 - President Carter rescinded the U.S. treaty with Taiwan as part of the agreement to recognize the People's Republic of China.
 - Senator Goldwater sued, arguing that the Senate must approve a treaty rescission just as it must approve treaty ratification.
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Withdrawing From Treaties (cont.)

- *Goldwater v. Carter* (1979)
- Supreme Court dismissed the case
- Chief Justice Rehnquist writing

“[T]he basic question presented...in this case is ‘political’ and therefore nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations.” It “was a dispute between co-equal branches of our government, each of which has resources available to protect and assert its interests.”

The Prize Cases (1863)

“If a war be made by an invasion of a foreign nation, the president is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is nonetheless a war, although the declaration of it be unilateral.”

The War Powers Resolution (1973)

- President as Commander in Chief may introduce U.S. forces into hostilities or situations where hostilities seem imminent only pursuant to
 - (1) Declaration of war
 - (2) Specific statutory authorization, or
 - (3) A national emergency created by an attack on the United States, its territories or possessions, or its armed forces.

The War Powers Resolution (cont.)

- It requires the President
 - (4) To consult with Congress where possible before introducing troops into hostilities, and
 - (5) To report to Congress within 48 hours after troops are introduced into hostilities or imminently hostile situations.

The War Powers Resolution (cont.)

- It requires the President
 - “To withdraw troop after 60 days unless Congress has declared war or authorized a 60-day extension or is unable to meet as a result of armed attack on the United States.”
- The President can extend this for 30 days if he certifies to Congress in writing that
 - “unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”



Federalist Papers Number 69 (Hamilton)

“The President is to be Commander in Chief of the army and navy of the United States...it would amount to nothing more than supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all of which by the Constitution under consideration would appertain to the Legislature.”



War on Terrorism

- Who are the combatants?
 - Where is the theater of war?
 - Whose laws apply?
 - What authority does the President have?
 - How will we know when it is over?
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Authorization for the Use of Military Force (AUMF)

- Gave the President authority

“to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations or persons.”

- Section 2(b) states it is supposed to constitute specific statutory authorization as defined by the War Powers Resolution
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AUMF

- How long is the authorization valid?
- Does it have to be renewed?
- What does “all necessary and appropriate force” mean?
- Who qualifies as “nations, organizations or persons”?
- Does Congress have to explicitly revoke the authorization by concurrent resolution?



Habeas Corpus

- Article I, sec. 9, cl.2
“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”
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Habeas Corpus (cont.)

- “You have the body”
 - Person being held can challenge legality of his/her detention
 - Person holding the prisoner is ordered to come before the court to justify legality of prisoner’s detention
 - Only time Habeas Corpus has ever been suspended in the United States was by Abraham Lincoln during the Civil War.
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Hamdi v. Rumsfeld (2004)

- Hamdi was an American citizen apprehended in Afghanistan and brought to Guantanamo
 - Transferred to a military prison in South Carolina held as an enemy combatant
 - Does the federal government (i.e. the Executive) have the authority to hold an American citizen apprehended in a foreign country as an enemy combatant?
 - What, if any, legal process must be given to Hamdi?
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Hamdi v. Rumsfeld (cont.)

- Hamdi argued his detention violated the Non-Detention Act, a federal statute forbidding U.S. government from detaining any U.S. citizen except under the authority of an Act of Congress
 - Court ruled for the government 5-4
 - Court's opinion decided that Hamdi's detention was authorized under the AUMF, an Act of Congress sufficient to satisfy the Non-Detention Act.
 - Scalia and Stevens dissented that there was no authority to hold an American citizen as an enemy combatant without charges or trial unless Congress suspended Habeas Corpus.
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Hamdi v. Rumsfeld (cont.)

- Court ruled 8-1 that Hamdi must be given due process
 - Hamdi entitled to have habeas petition heard in federal court
 - Opinion did not specify all the process that must be given to Hamdi but it did say he must at least be given a meaningful factual hearing, including notice of charge, the right to respond and the right to be represented by an attorney.
 - Court sent the case back to the lower federal court for determination of what other process if any is due an American citizen captured abroad and held as an enemy combatant.
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Rumsfeld v. Padilla (2004)

- Padilla was an American citizen arrested at Chicago's O'Hare airport for allegedly planning to build and detonate a dirty bomb.
 - Padilla was taken to New York where an attorney filed a habeas petition in the Southern District of New York.
 - Padilla transferred to a military prison in South Carolina where he was held as an "enemy combatant"
 - The litigation over his imprisonment remained in New York
 - When the case reached the Second Circuit Court of Appeals it found that the President lacked the authority to order the military detention of American citizens captured on American soil.
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Rumsfeld v. Padilla (cont.)

- Appeals court held that the Non-Detention Act was an explicit Congressional prohibition against executive detentions without congressional authorization
 - Using Justice Jackson's three-part analysis the court said the President was left to "rely on his own constitutional powers minus any constitutional powers of Congress over the matter."
 - The court found the President's Article II powers were insufficient to authorize Padilla's detention
 - U.S. Supreme Court reversed the appeals court without reaching the merits of the case
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Rumsfeld v. Padilla (cont.)

- The Court determined that Padilla had not properly filed his habeas petition against Secretary Rumsfeld in the Southern District of New York
 - He should have filed it against the commander of the brig in the District of South Carolina where he was being held
 - Justice Stevens wrote a dissent for himself and three others expressly stating that he agreed with the appellate court that there was no legal authority to detain Padilla as an enemy combatant
 - This echoed Steven's and Scalia's dissent in Hamdi that an American citizen cannot be held without trial as an enemy combatant unless Congress suspends habeas corpus.
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Rasul v. Bush (2004)

- Title of multiple cases published dealing with several prisoners held at Guantanamo
 - In all of them the government argued that the courts had no jurisdiction to hear habeas petitions filed by anyone held at a prison on Cuba
 - Appellate court had found for the government based on World War II precedent titled *Johnson v. Eisentrager*
 - Supreme Court reversed appeals court holding that federal district court may hear the habeas petition of those being held in Guantanamo
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Congress and the Court

- In reaction to decision in Rasul Congress passes the Detainee Treatment Act providing that federal courts could not hear habeas petitions filed by detainees held as enemy combatants
- In Hamdan v. Rumsfeld the Supreme Court decides that the Detainee Treatment Act does not apply retroactively to prisoners held before it was enacted
- In response to Hamdan Congress pass the Military Commission Act of 2006 providing that non-citizens held as enemy combatants would not have access to federal courts via habeas petitions or otherwise
- In a 5 to 4 decision in Boumediene v. Bush Court holds that the preclusion of habeas corpus jurisdiction was unconstitutional. Did not meet the criteria of Article I, section 9 for suspending habeas

Boumediene v. Bush

“[T]he prisoners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled in the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be part of that framework, a part of the law.”

Ex Parte Milligan (1866)

- Lincoln suspended the writ of habeas corpus and Congress ratified the suspension of the writ by legislation in 1863
- Milligan was a resident of Indiana, a state not in rebellion, who had never served in the armed forces
- Detained in 1864 by the U.S. Army for allegedly participating in the rebellion and conspiring against the U.S.
- He was convicted and sentenced to death by a military commission
- After the war his case was heard by a civilian grand jury that failed to indict for any crime
- The government still intended to execute him
- The Supreme Court issued a writ of habeas corpus

Ex Parte Milligan (cont.)

- Supreme Court ruled that government should have indicted Milligan under federal criminal code and tried him in a civilian court
- Court rejected government's argument that military jurisdiction was justified by the "law and usage of war."
- No usage of war could sanction military trial for any offense for a citizen in civil life
- "Martial law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."

Ex Parte Quirin

- Eight Nazi saboteurs arrested after landing from two submarines in Florida and on Long Island.
- Roosevelt issues executive order saboteurs are to be tried by military tribunal
- Detainees filed a habeas petition in federal court and the Supreme Court heard it on an expedited basis
- One day after oral argument the Court issues a brief per curiam decision saying the President had constitutional authority to try the individuals before a military tribunal
- The saboteurs were tried and six of the eight were executed.

Ex Parte Quirin

- Three months later the Court issued a full opinion
- Upheld the President's use of military tribunals but rejects the government's argument that that the President's executive order barred the Court from having jurisdiction
- Nothing in the proclamation that precluded access to the courts
- “[B]y universal agreement and practice the laws of war draw a distinction between...lawful and unlawful combatants.”
- The former are treated as prisoners of war, the latter are offenders against the laws of war and subject to trial by military tribunals.
- Court will not define “with meticulous care” the boundaries of military tribunal jurisdiction