



APPENDIX FIVE

FEDERAL COURTS AND THE WAR POWERS



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I. INTRODUCTION

The debate over war powers features prominently in today's legal and political landscape. It especially permeates discussions of the war in Iraq and the War on Terror. Despite its prominence in legal circles, “black letter” law is rare in the world of war powers. In fact, the case law interpreting how the Constitution allocates war powers is far less developed than many other areas of constitutional law.

One reason so little case law exists on war powers is that few such cases are ever filed in the first place. When such cases are brought, domestic and international conflict runs high. Courts — especially in the past several decades — have shown a reluctance to intervene in war powers cases involving inter-branch disputes.

Nevertheless, the Supreme Court's jurisprudence over 200 plus years includes some instances of the Court's resolving questions concerning Presidential and Legislative war powers. On these occasions, the Court has treated war power cases as one among many “separation of powers” disputes that it is empowered to decide.¹ While these Supreme Court cases are instructive and illuminating, they leave many key questions unanswered. This is because the law they announce is often limited in scope and closely tied to the particular facts of the individual case.² In addition, when the Court has made sweeping statements about the respective branches' powers, it has often done so in *dicta*, language that — while persuasive — is not binding.³ Even the clearest statements, no matter their weight, often seem to be contradicted by language in prior and subsequent cases, statements made by the Constitution's Framers or other key historical figures, or instances of historical practice over the past 200 years.⁴ Finally, the Supreme Court has rarely spoken with one strong voice in this area. When it has acted, it has often handed down fractured opinions or called its prior jurisprudence into doubt.⁵

The end result is that courts have played a limited — though at times a crucial — role in the war powers debates. At various times, the Supreme Court has intervened to protect individual liberty and property interests from exercises of executive war power, especially when the President is not acting in concert with Congress.⁶ This, in effect, encourages the President to persuade Congress, or forego the desired action.⁷ At other times, the Court has refused to involve itself in disputes involving war powers or foreign affairs.⁸

Put most simply, the law in this area is open to many interpretations. Few, if any, Supreme Court cases squarely decide the “pure” war powers questions, such as: How may war be initiated or terminated? In what ways may the courts or Congress prescribe or proscribe how the President, as Commander-in-Chief, may conduct war? Did the President improperly initiate a particular war, and if so, what could Congress do to terminate it?

We summarize here the most influential war powers opinions issued by the Supreme Court, focusing on those that have been cited most frequently in subsequent decisions and in the academic literature.⁹

II. CASE OVERVIEW

War powers cases speak to a variety of issues. Many involve fundamental questions of separation of powers. Other cases involve conflicts between executive action and individual liberty and property rights. However, there is one kind of case the courts have consistently declined to rule on. These cases ask whether the President can start a war on his own initiative, or whether Congress has an obligation to act first. Courts have repeatedly stated that this question is beyond the realm of judicial power since it involves sensitive questions of policy and foreign affairs rightfully decided by popularly-elected officials.

A. EARLY PRACTICE

Many modern-day scholars and courts have interpreted the Supreme Court's early opinions as offering insights into how the Framers meant the Constitution to allocate war powers among the three branches. There is great disagreement, however, about how broadly or narrowly these cases should be read, and at times about what these cases actually hold or mean.

The French Quasi War

In the late 18th century, the U.S. declared its neutrality in the war between Britain and France. In response, the French began to seize American ships trading with their British enemies, igniting the Quasi-War, so named because it was limited to the high seas and never officially declared. This was in part because “[t]here was a great fear of engendering a conflict that could be disastrous for such a young nation. Congress instead passed a series of statutes that both triggered the President’s constitutional war powers and calibrated just what sort of force could be exercised on behalf of the United States.”¹⁰

Three famous cases grew out of the Quasi-War with France. In *Bas v. Tingy*,¹¹ the Supreme Court was asked to decide which of two statutes governed the amount of salvage to be paid as reward for the recapture of an American ship. The Court engaged in statutory interpretation, asking whether France was an “enemy” so as to trigger one of the statutes as opposed to the other. The Court answered that France was indeed an enemy since there was clearly a state of war, even though it was only a “limited” or “partial” war. In stating that Congress may authorize a full-scale or a limited war, the Supreme Court strongly implied that Congress could circumscribe the President’s war powers. As Justice Chase wrote, “congress may wage a limited war; limited in place, in objects, and in time.”¹² Indeed, explained Justice Chase, it had limited the war to the sea, and even then only to “certain persons in certain cases.”¹³ It had not given the President the authority “to commit hostilities on land” or “to capture unarmed French vessels.”¹⁴ Justice Washington echoed this sentiment, calling it an “imperfect war” — but a war nonetheless — “because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than the extent of their commission.”¹⁵

A year later, in *Talbot v. Seeman*,¹⁶ the Supreme Court found yet another capture lawful and meritorious, entitling the American captain to salvage. In so doing, it once again became “necessary to examine the relative situation of the United States and France at the date of the recapture.”¹⁷ As Chief Justice

Marshall stated: “The whole powers of war being by the Constitution of the United States vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry.”¹⁸

In 1804, the Supreme Court decided *Little v. Barreme*,¹⁹ a case arising out of a Quasi-War statute in which Congress had prohibited American vessels from sailing to France. Captain Little, under orders of the Secretary of the Navy, captured a ship sailing *from* France to the United States. In a unanimous opinion, Chief Justice Marshall held that the capture was illegal since the President’s order was contrary to the law passed by Congress. Whatever the President’s inherent power in the absence of a statute,²⁰ Congress — by authorizing the seizure of ships sailing in one direction — had implicitly restricted the President’s authority to capture ships sailing in the opposite direction.

The War of 1812 & the Dorr Rebellion

The War of 1812 was the first full-fledged, official war in which the United States engaged. In *Brown v. U.S.*,²¹ the Supreme Court held that the President could not confiscate British property without statutory authorization by Congress. Chief Justice Marshall agreed that the laws of war generally permitted a sovereign to confiscate enemy property in its own territory during war, but found that this sovereign power resided in the legislature.²² Justice Story’s dissent is also illuminating, for while he found the seizure a legitimate exercise of the President’s war power, such power was not inherent in his office. Rather, it was triggered by Congress’ declaration of war, for with Congress “rests the sovereignty of the nation as to the right of making war, and declaring its limits and effects.”²³

In subsequent cases the Supreme Court considered the extent of the President’s power to call forth the militia to suppress insurrection and repel outside invaders. In *Martin v. Mott*,²⁴ a draftee objected to his conscription during the War of 1812, and in *Luther v. Borden*,²⁵ the petitioner contested his arrest by the militia called in response to the 1842 Dorr rebellion against the Rhode Island charter government. In both cases, the Court held that Congress — in enacting the Militia Act of 1795 and the Insurrection Act of 1807 — had granted the President broad power to call forth the militia and armed forces when he thought necessary. At the same time, it made clear that “if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy.”²⁶

The Mexican-American War

The Supreme Court elaborated on the President’s substantive war powers in *Fleming v. Page*,²⁷ a case arising out of the U.S. war with Mexico. The issue presented was whether the taxes imposed upon goods transported to the U.S. from Tampico, Mexico were properly levied against “foreign” goods, even while the U.S. occupied the country. The Supreme Court held that the President — as Commander-in-Chief and pursuant to Congress’ declaration of war — could “direct the movements of the naval and military forces” and “invade a hostile country and subject it to the sovereignty and authority of the United States.”²⁸ However, he could not “enlarge the limits of the United States” since this “can be done only by the treaty-making power or the legislative authority.”²⁹

The Civil War

In *The Prize Cases*,³⁰ the Supreme Court upheld President Lincoln’s blockade of southern ports during the Civil War on the basis of the Militia and Insurrection Acts. The Court stated that the President “has no power to initiate or declare a war either against a foreign nation or a domestic State.”³¹ But, in this case, Congress had authorized the President to call out “the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.”³² It also distinguished the need for a quick *response* to insurrection from initiating or making war:

*If a war be made by 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 none the less a war.*³³

At the same time, the Supreme Court showed itself willing to step in to protect individual liberties against wartime incursions. In *Ex parte Milligan*,³⁴ the military arrested and tried a citizen of the Union who had joined a secret society conspiring to liberate Confederate prisoners and seize Army munitions. The Supreme Court unanimously held that neither the President nor Congress had the authority to strip a citizen — who had not joined the enemy and who was living in a peaceful state away from the battlefield — of the right to a trial by jury when the civil courts were still open.³⁵ The Court stated:

*The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.*³⁶

The Supreme Court did not, however, declare military commissions *per se* impermissible.³⁷ Indeed, since the time of George Washington, the United States has used military commissions to try enemy soldiers apprehended in wartime for violations of the common laws of war and other offenses.³⁸

B. SUPREME COURT JURISPRUDENCE IN THE TWENTIETH CENTURY

The case of *United States v. Curtiss-Wright Corp*³⁹ — issued in 1936 — is famous for its language on expansive presidential powers in the area of foreign affairs. Interestingly, the nation was not at war. Rather, the issue in question related to the lawfulness of a congressional delegation of power to the President, particularly the power to prohibit sales of arms to a country if the President determined that it would contribute to peace in the region. The Supreme Court sought to make clear that in upholding the legislative delegation of power it relied not only on the authority of the legislative branch, but also on the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress.”⁴⁰ The Court reasoned that the nation needed to speak with one voice in foreign affairs, and highlighted the President’s access to secret information and his unique diplomatic ties. However, the Court’s sweeping language is considered by many to be largely *dicta*.⁴¹ As Justice Robert Jackson later emphasized, in *Curtiss-Wright* “[i]t was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.”⁴²

World War II

The Supreme Court revisited the issue of military commissions during World War II. When eight Nazi saboteurs were apprehended by the FBI after entering New York and Florida in civilian clothing with plans to attack targets, President Roosevelt issued a proclamation creating a military commission to try the detainees for offenses of the laws of war (based in common law) and the Articles of War enacted by Congress (the precursor to the present-day Uniform Code of Military Justice).⁴³ In the midst of their military trial, the defendants challenged the tribunal's authority by seeking writs of *habeas corpus* in U.S. civil courts.⁴⁴

In *Ex parte Quirin*,⁴⁵ the Supreme Court denied the detainees' petitions and upheld the military commissions. The President, said the Court, had acted pursuant to both congressional authority and his constitutional powers as Commander-in-Chief.⁴⁶ Significantly, the Court distinguished between "lawful combatants" (*i.e.*, uniformed soldiers who could be captured and detained as "prisoners of war") and "unlawful combatants" (*i.e.*, enemies who entered the U.S. disguised in civilian clothing and bent on hostile acts). The latter category of persons, in addition to being subject to capture, could also be tried by military commissions for violations of the laws of war.⁴⁷

World War II also gave rise to a variety of cases involving the rights of Japanese-Americans. In the wake of Pearl Harbor, the military issued a curfew order ostensibly to prevent sabotage and espionage by sympathetic persons of Japanese ancestry. In *Hirabayashi v. United States*,⁴⁸ the Supreme Court unanimously upheld the curfew despite its sweeping and race-based character. The Court said the order was a reasonable exercise of emergency war powers, supported both by an Executive Order of President Roosevelt and by congressional legislation.⁴⁹ The Court stated that:

[t]he war power of the national government is 'the power to wage war successfully.' ...It extends to every matter and activity so related to war as substantially to affect its conduct and progress. Since the Constitution commits to the Executive and to Congress the exercise of the war power ... it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it ... it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.⁵⁰

Soon after, Japanese-Americans were evacuated from their homes on the west coast and sent to internment "camps." This exclusion order was based on the same executive order and legislation as the prior curfew order. In *Korematsu v. United States*,⁵¹ the Supreme Court held that such measures were not "beyond the war power of Congress and the Executive."⁵² It concluded that Japanese-Americans were not excluded because of animosity to their race, but rather because of war with the Japanese empire and the "finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal."⁵³

Korematsu illustrated the wide scope of powers that Congress and the President share when they act jointly in times of war. In fact, some scholars assert that the Supreme Court exercised a variant of the political question doctrine — even as it purported not to do so — in its decisions relating to the treatment of Japanese-Americans during World War II.⁵⁴ To some, these cases "speak volumes about the unwillingness of the judiciary to exercise constitutional independence in times of emergency."⁵⁵

Korematsu has been widely criticized in recent years. In 1984, a district court in California overturned *Korematsu*'s conviction, a largely symbolic gesture since his sentence had already been served.⁵⁶ The Court based its decision on the fact that “the government knowingly withheld information from the courts when they were considering the critical question of military necessity.”⁵⁷ A few years later, Congress itself apologized for the evacuation, calling it a “fundamental injustice.”⁵⁸

The Korean War

In the celebrated *Steel Seizure* case, the Supreme Court stepped in to safeguard individual property rights against executive incursion. The Court ruled that President Truman had exceeded his constitutional authority as Commander-in-Chief when he ordered the Secretary of Commerce to take control of most of the nation's steel mills to avert a threatened strike that he believed would disrupt U.S. military efforts during the Korean War.⁵⁹ The Court concluded that the U.S. steel mills did not constitute the “theater of war,” and stated that the Commander-in-Chief did not have “the ultimate power ... to take possession of private property in order to keep labor disputes from stopping production.”⁶⁰ The Court further concluded that Truman's actions contradicted the existing statutory framework — as embodied in the Taft-Hartley Act — which outlined procedures to handle emergency labor disputes.⁶¹

The case is perhaps most famous for Justice Jackson's concurring opinion, which has become a touchstone for war powers and separation of powers disputes ever since. Jackson described three categories of presidential power. When the President acts in accordance with congressional authorization, Jackson wrote, his power “is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁶² In contrast, when the President acts in contravention of the express or implied intent of Congress, the President's power is “at its lowest ebb.”⁶³ Finally, Jackson described a “zone of twilight” in which Congress is silent with respect to presidential power:

*[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.*⁶⁴

Jackson's concurrence signals a tolerance for greater presidential authority in wartime than some proponents of congressional authority may wish to concede. At the same time, it makes clear that Congress may be instrumental in both expanding and restricting executive war powers.

The Political Question Doctrine & Recent Abstention by the Federal Courts

Courts have generally refused to intervene in those cases that present the most stark war powers question: whether the President has the power to initiate war or whether Congress has an obligation to act first. Cases of this sort were first brought in the Vietnam War era and similar suits have been filed ever since. In the typical case, a Member of Congress or an individual called to the battlefield petitions a court for an injunction or declaratory judgment holding that the executive is unconstitutionally waging war without Congressional authorization. During the Vietnam War, litigants brought cases before more than 20 courts.⁶⁵ Actions were also brought in response to conflicts in El Salvador,⁶⁶ Nicaragua,⁶⁷

Grenada,⁶⁸ the Persian Gulf,⁶⁹ Iraq,⁷⁰ and Yugoslavia.⁷¹ Yet, courts have routinely refused to reach the merits of such claims.⁷² As a result, the judiciary has shed minimal light on the fundamental war powers questions that these cases pose.

Courts sometimes decline to hear such questions on procedural grounds, concluding that plaintiffs lack standing,⁷³ a case or controversy is not “ripe” for judicial consideration,⁷⁴ or the suit is barred by sovereign immunity.⁷⁵

In a variety of other decisions, courts have invoked the “political question” doctrine. According to this doctrine, a court should decline to rule if the Constitution has committed decision-making on a particular subject to a coordinate branch of government or if there is a lack of “judicially discoverable and manageable standards” by which to make a legal decision.⁷⁶ In this light, some courts have held that the President’s authority over foreign affairs — including the power to abrogate treaties and commit troops to battle — are political questions.⁷⁷ As one court stated, “It is crystal clear that *if there is one political question in the fabric of government of the Republic, it is whether or not to maintain a war* and, if so, whether to maintain it as an imperfect or declared war. Into this seamless web of national and international politics, the courts should not intrude.”⁷⁸ Of course, here as elsewhere, there is no shortage of controversy. Some accuse the courts of confusing “political questions” with “political cases,” shying away from many more cases than it should.⁷⁹ Whatever its precise definition, courts have invoked the political question doctrine to avoid ruling on the substance of war powers questions.

Finally, in some cases, courts have avoided reaching the toughest questions by ruling that Congress did, in fact, properly authorize the conflict in advance (*e.g.*, in passing the Tonkin Gulf Resolution) or ratified it after the fact (*e.g.*, through military appropriations or extensions of the draft).⁸⁰ These decisions appear to reflect the judicial conclusion that legislators had “ample means to redirect or end any executive use of force with which they disagreed,”⁸¹ that is, Congress could enact legislation to end wars which it did not support.

Some, like John Hart Ely, have asserted that the War Powers Resolution of 1973 (“WPR”) can be read *implicitly* as providing Members of Congress the right to file suit. However, the language of the measure contains no express provision for such action.⁸² In several cases, plaintiffs have sued pursuant to the WPR in an effort to halt what they consider to be illegal wars.⁸³ Ultimately, these efforts have failed, as courts have routinely dismissed WPR claims under the political question doctrine or by finding a lack of standing.⁸⁴

However, some courts have hinted that if the legislative and executive branches were at an “institutional impasse” courts may and perhaps should decide the scope of the respective branches’ war powers.⁸⁵ As Justice Powell wrote in a concurring opinion in *Goldwater v. Carter*, “[t]he specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty ‘to say what the law is.’”⁸⁶ To this day, no court has ever found such an impasse. Rather, courts have instead invoked the political question doctrine, as well as threshold doctrines of ripeness and standing, to dispense with war powers cases without commenting on whether a war was being waged lawfully.⁸⁷

C. RECENT CASES: SEPARATION OF POWERS AND INDIVIDUAL RIGHTS IN THE WAR ON TERROR

The Supreme Court's recent opinions in the War on Terror cases speak to the relative powers of the President and Congress, as well as to the role of the courts in safeguarding individual rights in times of war.

The 2004 case of *Rasul v. Bush* involved a challenge to a Presidential order denying alien detainees the privilege “to seek any remedy or maintain any proceeding, directly or indirectly ... in any court of the United States.”⁸⁸ The Supreme Court held that U.S. federal courts had jurisdiction to rule on *habeas* petitions filed by foreign nationals captured abroad and detained at the U.S. naval base in Guantanamo Bay, Cuba.⁸⁹ The Supreme Court relied on the fact that, while technically located outside the United States, the Guantanamo base was under the exclusive control of the U.S. military. This endowed the detainees with a statutory right to bring *habeas* petitions in federal court.⁹⁰ In holding that Congress had granted federal courts this jurisdiction, the Supreme Court implicitly rejected the President's argument that federal statutes could not be construed to infringe upon his power to detain enemy combatants. As Justice Stevens wrote, the federal courts “have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”⁹¹

The *Rasul* court distinguished the 1950 case of *Johnson v. Eisentrager*,⁹² which seemed to deny the “privilege of litigation” to aliens captured and tried outside the United States.⁹³ In distinguishing *Eisentrager*, the Court highlighted that the *Rasul* petitioners (citizens of Australia and Kuwait) were not nationals of countries at war with the U.S., had denied that they were plotting to attack the U.S., were never given access to any tribunal, and were detained at Guantanamo where the U.S. “exercises exclusive jurisdiction and control.”⁹⁴

However, the *Rasul* court grounded its ruling in statutory interpretation, not the constitution itself. As a result, in 2005, Congress overruled *Rasul* when it passed the Detainee Treatment Act (“DTA”) and stripped federal courts of their jurisdiction to hear *habeas* petitions from individuals detained at Guantanamo Bay.⁹⁵

In *Hamdi v. Rumsfeld*,⁹⁶ the Supreme Court considered the *habeas* petition of a U.S. citizen who was captured in Afghanistan for supporting the Taliban and detained in the United States pursuant to his declaration as an “enemy combatant” by the Government. In *Hamdi*, the Supreme Court held that the President was empowered by statute to capture and detain enemy combatants, including American citizens.⁹⁷ In so holding, the Court avoided the far more controversial question of whether the Executive is endowed with this power independent of the legislative grant.⁹⁸

While the detention was deemed lawful, the Court also stated that due process demands that “a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”⁹⁹ It sought to balance “the most elemental of liberty interests” — freedom from physical detention — with the “weighty and sensitive governmental interests” at stake in times of war.¹⁰⁰ The Court did not state precisely what constituted a “meaningful opportunity” to challenge one's classification as an enemy combatant, but suggested that at a minimum it included notice of the factual basis for one's detention and access to counsel. At

the same time, it suggested that — in order to alleviate the burden on the Executive in wartime — something less than full criminal procedures would be permissible, such as allowing hearsay evidence. The Court ordered that the petitioner be granted such a hearing, and hinted that an “appropriately authorized and properly constituted military tribunal” would suffice.¹⁰¹ In concluding, the Supreme Court affirmed the role of the courts in protecting individual rights in times of war:

*[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case ... serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.*¹⁰²

Most recently, in 2006, Salim Ahmed Hamdan, the alleged driver and bodyguard for Osama bin Laden, challenged the legitimacy of the military commission that would try him.¹⁰³ The Supreme Court concluded that the structure and procedures of the military commissions enacted by the President violated domestic and international law.¹⁰⁴ The Court concluded by remarking that, however dangerous an individual Hamdan may be, “in undertaking to try [him] and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”¹⁰⁵

Once again, Congress sought to overrule *Hamdan* by enacting the Military Commissions Act (“MCA”), which removed the jurisdiction of federal courts over *habeas* petitions from Guantanamo detainees “in all cases, without exception.”¹⁰⁶ This raised the question: if individuals captured abroad and held in Guantanamo no longer have any statutory rights to *habeas* relief, do they have any constitutional rights? In *Boumediene v. Bush*,¹⁰⁷ the Supreme Court held that the Suspension Clause has full effect in Guantanamo, entitling foreign detainees to a “meaningful opportunity” to challenge the lawfulness of their detentions.¹⁰⁸ Moreover, the DTA’s review procedures, said the Court, were an inadequate substitute for *habeas*, since they created too great a risk of error.¹⁰⁹ In so holding, the Court emphasized that “the privilege of *habeas corpus* was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights”¹¹⁰ and that care was taken “to specify the limited grounds for its suspension.”¹¹¹ Furthermore, since the writ is itself “an indispensable mechanism for monitoring the separation of powers,” its scope “must not be subject to manipulation by those whose power it is designed to restrain.”¹¹²

Finally, the War on Terror has also raised questions about the scope of the President’s authority to conduct domestic surveillance. In late 2005, it came to light that the National Security Agency, with the support of the President and as part of the War on Terror, was collecting intelligence from certain electronic and telephone communications without first obtaining a warrant or a court order.¹¹³ In 2006, a district court in Michigan ruled the program unconstitutional under the Fourth Amendment.¹¹⁴ However, in 2007, the Sixth Circuit dismissed the case for lack of standing.¹¹⁵ The Supreme Court subsequently declined to hear the case.¹¹⁶

CONCLUDING THOUGHTS

In general, the Court has afforded wide discretion to the President and Congress when they act in concert. However, when the President acts *contrary* to Congress, his authority is significantly diminished and his actions are often declared unconstitutional. In a few cases, the Court has also stepped in to protect individual liberty and property rights. Such cases not only safeguard individual rights, but also reassert the role of the courts in war powers cases. However, on what are perhaps the most fundamental war powers questions — such as whether the President may initiate war without congressional authorization — the courts have not ruled definitively.

FOOTNOTES

- 1 See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure), 343 U.S. 579 (1952).
- 2 See, e.g., *United States v. Hamdan*, 126 S. Ct. 2749, 2774 (2006) (declining to answer broader constitutional questions posed in case); *Id.* at 2795 n.61 (refusing to answer international law question).
- 3 See, e.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936) (recognizing broad presidential powers in area of foreign affairs); *Youngstown*, 343 U.S. at 636 n.2 (Jackson, J., concurring) (observing that much of *Curtiss-Wright* “is dictum”); *American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981) (rejecting dicta in *Curtiss-Wright*).
- 4 Perhaps the most striking examples of this are competing uses of statements made by Founding Father, Congressman, and Chief Justice of the U.S. Supreme Court John Marshall. Advocates of congressional and judicial power highlight his statements in *Talbot v. Seeman*, 5 U.S. 1, 28 (1801), and *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 177 (1804), as advocating broad war powers for Congress. See, e.g., Louis Fisher, *Presidential War Power* 25-26 (2d ed. 2004). Advocates of presidential power have seized upon statements Marshall made as a Congressman to support claims for more robust presidential war powers. See, e.g., *Curtiss-Wright*, 299 U.S. at 320; *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting).
- 5 See, e.g., *Hamdi*, 542 U.S. 507 (producing no majority opinion, one concurrence, and two dissents); *Id.* at 522-23 (O’Connor, J., plurality opinion) (limiting *Ex parte Milligan*, 4 Wall. 2, 125, (1866), to its precise facts and observing that *Ex parte Quirin*, 317 U.S. 1, 63 (1942), rejected aspects of *Milligan*); *Id.* at 568-72 (Scalia, J., dissenting) (arguing *Quirin* was not the “Court’s finest hour,” accusing the plurality of revising *Milligan*, and misinterpreting *Quirin*); *Hamdan*, 126 S. Ct. at 2776 n.27 (a plurality recognizing that the Court’s “Civil War precedents must ... be considered with caution” because they involved both war powers and criminal regulations under martial law).
- 6 See, e.g., *Barreme*, 6 U.S. at 179 (allowing American captain to be sued for damages for seizing Danish ship, even though the seizure had been ordered by President Adams as part of the French Quasi-War, because the seizure exceeded the scope of Congress’s authorization for the “quasi-war”); *Youngstown*, 343 U.S. at 586-87 (invalidating President Truman’s seizure of the nation’s steel mills during the Korean War; rejecting broadest claims of executive war powers in the face of legislation to the contrary); *Rasul v. Bush*, 542 U.S. 466, 483-85 (2004) (holding that U.S. courts have jurisdiction to hear *habeas corpus* claims filed by alien detainees, even though they were captured abroad and held outside the U.S.).
- 7 See, e.g., *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (four justices rejecting arguments that “today’s decision would ‘solely hamper the President’s ability to confront and defeat a deadly enemy,’” and reasoning, “Where, as here, no emergency prevents consultation [between the President and] Congress, judicial insistence on that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine — through democratic means — how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.”).
- 8 See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1973) (refusing to hear case brought by several Senators challenging President Carter’s decision to abrogate the defense treaty with Taiwan).
- 9 Entire volumes have been devoted to the role of the courts in war powers debates. For the sake of space, we neither catalogue these sources nor detail the considerable authority from state or lower federal courts in the area. For more comprehensive summaries of how the courts have interpreted war powers, see John Hart Ely, *War and Responsibility* 46-67 (1993); Louis Fisher, *supra* note 4, at 29-31, 49-50, 121-144, 171-172, 205-208, 272-273 (2d ed. 2004); W. Taylor Reveley, *War Powers of the President And Congress* 5, 8, 11, 207-212, 216-217, 242, 262; Am. Jur. *War* § 36 (2006); Stephen Dycus, Arthur L. Berney, William C. Banks, & Peter Raven-hansen, *National Security Law* (2006); Louis Fisher & Nada Mourtada-sabbah, *Is War Power a Political Question?* (2001).
- 10 David Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 Harv. L. Rev. 941, 965 (2008).
- 11 4 U.S. (4 Dall.) 37 (1800).
- 12 *Id.* at 43.
- 13 *Id.*
- 14 *Id.*
- 15 *Id.* at 40.
- 16 5 U.S. (1 Cranch) 1 (1801).
- 17 *Id.* at 28.
- 18 *Id.*
- 19 6 U.S. (2 Cranch) 170 (1804).
- 20 We use “inherent” to refer to those powers instilled in the Presidency which may nonetheless be subject to limitation by Congress. In contrast, “preclusive” or “exclusive” powers are those wielded by the President which may not be impinged upon by the other branches. See Barron & Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 694 n.6 (2008).
- 21 12 U.S. (8 Cranch) 110 (1814).
- 22 See *id.* at 129.
- 23 *Brown*, 12 U.S. at 145 (Story, J., dissenting)
- 24 *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).
- 25 *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).
- 26 *Luther*, 48 U.S. at 45; see also *Martin*, 25 U.S. at 32 (stating that “the watchfulness of the representatives of the nation” is one of the checks and balances that must “guard against usurpation or wanton tyranny”).
- 27 50 U.S. 603 (1850).
- 28 *Id.* at 615.
- 29 *Id.*
- 30 67 U.S. 635 (1863).
- 31 *Id.* at 668.
- 32 *Id.*

- 33 *Id.*
 34 71 U.S. (4 Wall.) 2 (1866).
 35 See *Id.* at 121-122.
 36 *Id.*
 37 See John Yoo, *War by Other Means* 145 (2006).
 38 See generally Louis Fisher, *Military Tribunals & Presidential Power: American Revolution to the War on Terrorism* (2005).
 39 299 U.S. 304 (1936).
 40 *Id.* at 320. Advocates of Congressional supremacy point out that Marshall’s “sole organ” quote, which was cited by the Court in *Curtiss-Wright*, comes from a speech about Presidential power in the absence of statutory authority, and that later Supreme Court opinions authored by Marshall, including *Little v. Barreme*, support an expansive view of Congress’ power to limit executive action. See Barron & Lederman, *supra* note 10, at 970 n.88.
 41 See *Youngstown*, 343 U.S. at 636 n.2 (1952) (Jackson, J., concurring) (observing that much of *Curtiss-Wright* “is dictum”); *American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981) (rejecting dicta in *Curtiss-Wright*).
 42 *Youngstown*, 343 U.S. at 635-636 n.2 (Jackson, J., concurring).
 43 See William H. Rehnquist, *All The Laws but One: Civil Liberties in Wartime* 136-137 (1998).
 44 See generally Fisher, *supra* note 38, at 106-113.
 45 317 U.S. 1 (1942).
 46 See *Id.* at 28-29.
 47 See *Id.* at 30-32. See also YOO, *supra* note 37, at 146-147; Fisher, *supra* note 38, at 117-118.
 48 320 U.S. 81 (1943).
 49 See *Id.* at 92 (The Executive Order and the statute that ratified and confirmed it “were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution. We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President’s action has the support of the Act of Congress, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure.”).
 50 *Id.* at 93.
 51 323 U.S. 214 (1944).
 52 *Id.* at 217.
 53 *Id.* at 219. The Court did not simply accept these military findings, but rather noted that they were confirmed by congressional hearings. See *Id.* (“That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.”).
 54 See Fisher & Mourada-Sabbah, *supra* note 9, at 38 (citation omitted).
 55 Fisher, *supra* note 38, at 140.
 56 *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).
 57 *Id.* at 1417. The Court went on to say that, “[w]hether a fuller, more accurate record would have prompted a different decision cannot be determined. Nor need it be determined. Where relevant evidence has been withheld, it is ample justification for the government’s concurrence that the conviction should be set aside.” *Id.* at 1419.
 58 See Pub. L. No. 100-338, 102 Stat 903 (1988).
 59 See *Youngstown*, 343 U.S. at 587.
 60 *Id.*
 61 See *Id.* at 586.
 62 *Id.* at 635-637.
 63 *Id.*
 64 *Id.*
 65 REVELEY, *supra* note 9, at 212 (citing, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1312 n.3 (2d Cir. 1973)).
 66 *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982) (denying declaratory judgment to Members of Congress under the War Powers Resolution and other statutes on the basis of the political question doctrine because the court lacked the “factfinding” and investigative expertise that was the province of Congress, not the courts).
 67 *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 597-598 (D.D.C. 1983) (denying relief to Members of Congress and others under the War Powers Resolution and other statutes pursuant to the political question doctrine).
 68 *Conyers v. Reagan*, 578 F. Supp. 324, 326 (D.D.C. 1984) (holding that a lawsuit challenging the constitutionality of the American invasion was a political question and that the doctrine of “equitable/remedial discretion” permitted the court to decline cases where plaintiff Members of Congress had “in-house” remedies available to them in the legislative branch).
 69 *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987) (citing political question and equitable discretion doctrines in dismissing suit filed by Members of Congress).
 70 *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990) (dismissing the case on ripeness grounds); *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003).
 71 *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (plaintiff Members of Congress lacked standing because their votes were not “nullified” and no constitutional impasse existed between the political branches).
 72 See, e.g., REVELEY, *supra* note 9, at 11 (1981); LOUIS Fisher, *supra* note 4, at 272 (2004); Ely, *supra* note 9, at 55-56 (1993). Some argue that this “hands off” judicial stance contradicts earlier lines of cases. See, e.g., Ely, *supra* note 9, at 54-67 & nn.46-63 (collecting cases); John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 Colum. L. Rev. 1379, 1409 n.88 (1988) (collecting cases). They call upon the courts to resolve these cases or for Congress to pass legislation requiring courts to hear them. See, e.g., ELY, *supra* note 9, at 54-67, 124-25, 135 (language of proposed legislation).
 73 See Fisher & Mourada-Sabbah, *supra* note 9, at 48, 57 (citing *Campen v. Nixon*, 56 F.R.D. 404 (N.D. Cal. 1972) (denying stand-

- ing to plaintiffs who asserted that the Vietnam War was illegal absent a declaration of war by Congress); *Pietsch v. President of the United States*, 434 F.2d 861, 863 (2d Cir. 1970) (holding that a plaintiff did not have standing as a federal taxpayer to challenge the draft)).
- 74 See, e.g., *Dellums*, 752 F. Supp. at 1152.
- 75 See *Fisher & Mourtada-Sabbah*, *supra* note 9, at 46-48 (citing *Luftig v. McNamara*, 252 F. Supp. 819 (1966); *Velvel v. Johnson*, 287 F. Supp. 846 (D.D.C. 1968)).
- 76 *Baker v. Carr*, 369 U.S. 186, 217 (1962).
- 77 See REVELEY, *supra* note 9; see also *Fisher & Mourtada-Sabbah*, *supra* note 9 at 47-57 (citing *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (“we are bound not to enter the realm of foreign policy”); *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972) (dismissing case on various bases, including the fact that it involved a nonjusticiable political question); *Sarnoff v. Connally*, 457 F.2d 809 (9th Cir. 1972) (dismissing case as political question); *Head v. Nixon*, 342 F. Supp. 521 (E.D. La. 1972), *aff’d*, 468 F.2d 951 (5th Cir. 1972); *Harrington v. Schlesinger*, 373 F. Supp. 1138 (E.D.N.C. 1974), *aff’d*, 528 F.2d 455 (4th Cir. 1975) (“it is the function of the Congress to determine whether the Executive has executed the laws at variance with the intent of Congress.”)).
- 78 *Fisher & Mourtada-Sabbah*, *supra* note 9, at 49 (citing *Davi v. Laird*, 318 F. Supp. 478, 484 (W.D. Va. 1970) (denying relief to plaintiff taxpayers who sought declaratory judgment and other relief holding that the Vietnam War was unconstitutional)); see also *DaCosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973) (declining to review a challenge to military operations in North Vietnam because issues regarding “tactical and strategic military decisions ordered by the President in his capacity as Commander-in-Chief” constituted a political question).
- 79 *Baker*, 369 U.S. at 211, 217 (“There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’”); see also *Goldwater v. Carter*, 444 U.S. 996, 1006-1007 (1979) (Brennan, J., dissenting); ELY, *supra* note 9, at 54-55; *The Constitution Project, Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* 19-21 (2005); *Id.* at 42 (Recommendation 9: “To preserve the system of checks and balances of which war powers are a part, the federal courts should, in appropriate cases, decide whether authority exists for the use of force abroad.”).
- 80 See REVELEY, *supra* note 9, at 212; *Fisher & Mourtada-Sabbah*, *supra* note 9, at 51-53 (2001); *Orlando v. Laird*, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970).
- 81 REVELEY, *supra* note 9, at 212.
- 82 See ELY, *supra* note 9, at 60-63.
- 83 See, e.g., *Crockett*, 558 F. Supp. at 896; *Sanchez-Espinoza*, 568 F. Supp. at 600; *Campbell*, 52 F. Supp. 2d at 44; *Lowry*, 676 F. Supp. at 337.
- 84 See *supra* note 83 (collecting cases).
- 85 See *Fisher & Mourtada-Sabbah*, *supra* note 9, at 67; *Crockett*, 558 F. Supp. at 898 (stating that judicial intervention may be appropriate in the case of a “constitutional impasse” between the two branches); *Lowry*, 676 F. Supp. at 339 (“a true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review.”); *Dellums*, 752 F. Supp. at 1150 (courts “should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse”).
- 86 *Goldwater v. Carter*, 444 U.S. at 1001.
- 87 In perhaps “the most acute exception to the general rule of judicial nonintervention,” a federal district judge in New York enjoined the Nixon administration from conducting military activities in Cambodia. REVELEY, *supra* note 9, at 213; *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). The district court had concluded that “there [was] no existing Congressional authority to order military forces into combat in Cambodia or to release bombs over Cambodia, and that military activities in Cambodia by American armed forces are unauthorized and unlawful.” *Holtzman*, 484 F.2d at 1308. Less than two weeks later, the Second Circuit reversed the district court on the basis that the dispute was a political question. *Id.*
- 88 *Rasul v. Bush*, 542 U.S. 466 (2004); Military Order of November 13, 2001 at www.fas.org/irp/offdocs/eo/mo-111301.htm.
- 89 See *Rasul*, 542 U.S. 466.
- 90 See *Id.* at 483-484.
- 91 *Id.* at 485.
- 92 *Johnson v. Eisenstrager*, 339 U.S. 763 (1950).
- 93 *Id.* at 777.
- 94 *Rasul*, 542 U.S. at 476.
- 95 See YOO, *supra* note 37, at 156; Pub. L. No. 109-148, 119 Stat. 2739.
- 96 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- 97 *Id.* at 509.
- 98 *Id.* at 516-517 (“The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF.”).
- 99 *Id.* at 509.
- 100 *Id.* at 531 (highlighting that the government should be able to conduct war without being distracted by litigation or having to divulge sensitive defense secrets).
- 101 *Id.* at 538.
- 102 *Id.* at 535-536.
- 103 See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
- 104 See *Id.* at 2760 (holding that the commissions violated the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949); see also Walter Dellinger, *A Supreme Court Conversation: Still “the Most Important Decision on Presidential Power Ever,”* Slate, June 30, 2006, at www.slate.com/id/2144476/.
- 105 *Hamdan*, 126 S. Ct. at 2798.
- 106 Pub. L. No. 109-366, 120 Stat. 2600 (2006).

- 107 See *Boumediene v. Bush*, No. 06-1195, 06-1196 (June 12, 2008).
- 108 In extending the geographical reach of the Constitution, the Court relied on the fact that the U.S. exercises “absolute” and “indefinite” control in Guantanamo. See *Id.* at *29.
- 109 *Id.* at *45; see *Id.* at *42 (“By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete.”).
- 110 *Id.* at *12.
- 111 *Id.* at *14; see also U.S. CONST. art. I, § 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.”)
- 112 *Id.* at *27.
- 113 Elizabeth Bazen & Jennifer Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, Cong. Res. Service, Jan. 5, 2006, at 1.
- 114 *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754 (S.D. Mich. 2006). While the appeal was pending, the Attorney General informed the Senate Committee on the Judiciary that the surveillance program at issue would “now be conducted subject to the approval of the Foreign Intelligence Surveillance Court,” a secret panel of federal judges which authorizes warrants for certain National Security Agency actions. Letter from Alberto Gonzales to Patrick Leahy and Arlen Specter (Jan. 17, 2007), available at <http://fas.org/irp//agency/doj/fisa/ag011707.pdf>.
- 115 See *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007).
- 116 See *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 128 S. Ct. 1334 (2008).