

National Security Law Outline

Professor Robert Knowles, University of Baltimore, Spring 2024

Rory Rightmyer

[National Security Law](#)

[Summary of Course](#)

[What Laws Are Relevant in National Security Law?](#)

[Executive Authority](#)

[Youngstown Framework](#)

[General](#)

[Analysis](#)

[Case Examples](#)

[Youngstown Framework Cases](#)

[Nondelegation Doctrine](#)

[General](#)

[Major Questions Doctrine](#)

[Analysis](#)

[Cases](#)

[Presidential Authority](#)

[General](#)

[Presidential Power from Constitutional Clauses](#)

[Commander-in-Chief Clause \(Art. II, §2, cl. 1\)](#)

[Vesting Clause \(Art. II, §1, cl. 1\)](#)

[Take Care Clause \(Art. II, ...\)?](#)

[Presidential Emergency Powers](#)

[Presidential Customary Authorities](#)

[Aggregate Authority](#)

[Congressional National Security Powers](#)

[Congressional Authorization to Use Force](#)

[Congressional Limits on the President's Use of Force](#)

[National Security Searches](#)

[4th Amendment Analysis](#)

[Border Searches](#)

[Cases](#)

[Laws of War](#)

[Analytical Frameworks](#)

[Executive Authority / Youngstown Framework](#)

[Jus ad Bellum](#)

[Congressional Authorization to Use Force](#)

[Executive Authorization to Use Force](#)
[International Jus ad Bellum](#)
[Jus in Bello](#)
[Targeted Killing](#)
[Covert Action](#)
[Legal Authority for Covert Action](#)
[Domestic Use of the Military](#)
[FISA](#)
[Border Searches](#)
[4th Amendment Analysis](#)
[Routine vs. Non-Routine](#)
[Border vs. Extended Border Search](#)

National Security Law

Summary of Course

NatSec law is survey of laws governing the use of force and related activities by the US gov including the authority to:

- Wage war
- Engage in armed attacks against enemies of the United States
- Detain, interrogate, try, and punish individuals outside the traditional law enforcement context
- Conduct surveillance and searches for non-law enforcement purposes
- Target and kill individuals outside the law enforcement context
- Use the US military for domestic policy purposes
- Engage in secret operations against foreign nations and their agents

An assessment of the rights individuals may possess that protect them from the above, whether from US law or international law

What Laws Are Relevant in National Security Law?

Con law and sep of powers

- Scope of presidential powers
- Relationship between and separation of congressional and presidential powers ← heart of natsec law
- Authority of courts to assess the legality of statutes and exec branch activities
- Rights that protect individuals

U.S. statutory, exec branch, admin and treaty law

- Any of the above that authorize or restrain the president's use of force and engagement in surveillance, foreign policy, and other natsec activities

International Law - Law of War

- *Jus ad bellum* - international norms regulating the use of force by one nation or armed group against another
- *Jus in bello* - international norms regulating the conduct of parties engaged in armed conflict

Executive Authority

Youngstown Framework

General

Generally, J. Jackson's concurrence in [Youngstown Sheet & Tube Co. v. Sawyer](#) (The Steel Seizure Case), 343 U.S. 579 (1952) provides a framework for executive authority according to Congress's approval.

This framework divides questions of Presidential authority into three categories.

Lowest Ebb	Independent Power - "Twilight Zone"	Maximum Power
When the president acts contrary to the will of congress. This grouping has the lowest level of judicial deference, and essentially requires the court to invalidate the incapacitating act of Congress.	When the president acts either without congressional authorization, they can rely only upon their own independent powers. This grouping has highly facts-based judicial deference, based on the "imperatives of events and contemporary imponderables" of the situation.	When the president acts pursuant to an express or implied authorization of Congress. In these circumstances, if the president cannot act, it is because the federal government itself lacks the power to act. This grouping has the highest judicial deference.

Potential sources of presidential authority in the Twilight Zone:

- **Constitutional Commander-In-Chief power**
 - Outward (Foreign) vs. Inward (Domestic)
- **Inherent Emergency Power**
 - What is an emergency
 - Who decides when there is an emergency
 - "Sovereign is he who decides on the exception."— Carl Schmitt
 - Nature, length, extent of the emergency
- **Customary Authority**
 - "...the way [the framework has consistently operated fairly establishes that it has operated according to its true nature. ...a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by presidents who have also sworn to uphold the Constitution...may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II..."
 - *Youngstown* - Frankfurter Concurrence at 610-611
 - Customary authority depends on factors:
 - Consistency
 - Frequency
 - Duration
 - Density (number of times an act is repeated over the course of its duration)
 - Continuity
 - Normalcy (non attribution to presidential or congressional personality aberrations or unique historical circumstances)
 - Congressional notice of the practice
 - Meaningful congressional acquiescence
 - Absence of objection
 - Institutional opportunity to object
 - Utility of objection
 - Non Interference with protected freedoms
- **Aggregate Authority from "Mass of Legislation"**
 - Congress authorizes A, B, and D, but not C.
- **Constitutional Take-Care clause power**
- **Constitutional Vesting clause power**

Analysis

Analyzing authorization of presidential power:

1. Congressional Authorization in Statute
 - a. "Field" Preemption
 - b. Nondelegation Analysis
2. President has Authority from Another Source
 - a. Commander in Chief Power
 - b. Inherent Emergency Power

- i. Nature, length, extent of the emergency
 - c. Customary Authority
 - i. "Systematic, unbroken executive practice long pursued and not questioned by Congress"
 - ii. Customary authority depends on factors:
 - Consistency
 - Frequency
 - Duration
 - Density (number of times an act is repeated over the course of its duration)
 - Continuity
 - Normalcy (non attribution to presidential or congressional personality aberrations or unique historical circumstances)
 - Congressional notice of the practice
 - Meaningful congressional acquiescence
 - Absence of objection
 - Institutional opportunity to object
 - Utility of objection
 - Non Interference with protected freedoms
 - d. Aggregate Authority from "Mass of Legislation"
 - i. Congress authorizes A, B, and D, but not C. Argument is that C is necessary in order to execute A, B, or D.
3. "Lowest Ebb" analysis - Zivotofsky II
- a. If the President's power is exclusive and congress passes an act infringing on it, then the act of congress is unconstitutional.
 - b. Otherwise, the act is unconstitutional only if it both:
 - i. Infringes unduly on the President's Functions;
 - ii. Is not justified by an overriding need to promote objectives within Congress's constitutional authority.

Case Examples

Youngstown Framework Cases		
Congressional authority was given for the recapture of the vessel, if this had authorized the executive to engage in this activity, this case would fall under this category.		Bas v. Tingy Recapture of a ship from the French 1800 Upheld Presidential Action
Little v. Barreme Blockade of French shipping 1801 Overruled Presidential Action	Although Congress authorized some power, their specificity precludes the President from interpreting that power however they would like. (Occupied the Field) Therefore, this is a category 3 case.	
1. Prior statutes authorized the President to call up troops during invasion or insurrection, also, Congress retroactively approved of the action. 2. President could act under the Commander-in-Chief clause as defensive war power and would have the power regardless of Congress' approval.		The Prize Cases Civil War Blockades 1863 Upheld Presidential Action
Congress passed a law authorizing the president to take this action.		Curtiss-Wright War in Chaco Arms Exports 1936 Upheld Presidential Action
Youngstown The Steel Seizure Case 1952 Overruled Presidential Action	Taft-Hartley Act did not expressly grant the President the authority to seize this property. The matter was debated but not adopted. Jackson felt that Congress had contemplated but ultimately rejected the decision to grant the President this authority; he put Youngstown in the third grouping.	
Congress authorized the creation of the organization and a clearance program, but didn't explicitly authorize the revocation procedure used.	Greene v. McElroy 1959 Security Clearance Case Upheld Presidential Action	

Neither the Hostage Act nor the IEEPA grant this power explicitly. Congress acquiesced to this presidential power, but did not explicitly authorize or prohibit it.	Dames & Moore 1981 Iranian Hostage Crisis Upheld Presidential Action	Often, exercises of presidential power do not fall neatly into one of the three pigeonholes, but rather lie on a spectrum between congressional approval and prohibition.
Zivotofsky II 2015 Israeli Passport Case Upheld Presidential Action	Congress passed a law explicitly contradicting the executive.	

Nondelegation Doctrine

General

Generally, Congress cannot delegate its power to make laws to the president.

However, this doctrine is generally not used to strike down acts of Congress because:

- Very little evident support for this doctrine among the Framers.
- Actual delegation by early Congresses
- The Necessary and Proper Clause
- The Constitution may be interpreted to grant some lawmaking power to the President - e.g., the Treaty Clause.
- It could make much of the modern administrative state unconstitutional.

See *United States v. Gundy* (2019)

- Nondelegation Doctrine is valid.
- Especially when Congress delegates the authority to “prescribe the rules by which the duties and rights of citizens are determined.”
 - In issues of foreign affairs the duties and rights of citizens are generally not in question, so nondelegation does not apply.

Major Questions Doctrine

If the issue in the case is really important and the statute doesn’t address it, then Congress has retained the authority to decide that major question themselves, and not delegated it to an executive agency.

Analysis

Principles Controlling Delegation of Authority:

1. Delegation of that specific power must be allowed
2. Delegating statute contains standards for how the delegated power can be exercised
 - a. If not, the statute is unconstitutional.
3. The executive must follow those standards
 - a. If not, the executive action is unlawful.
4. There is no other constitutional violation in the delegation or exercise thereof.
 - a. See *Greene v. McElroy* (Security Clearance Hearing)

Cases

Field v. Clark, 143 U.S. 649, 692 (1892)

Nondelegation Doctrine

Congress delegated to president the power to impose tariffs when president felt necessary.

The Brig Aurora, 11 U.S. 382, 384 (1813)

Power “delegated” to president to end an embargo on European trade subsequent to certain findings of fact.

J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409-410 (1928)

Congress may delegate powers so long as the statute has an “intelligible principle” to guide the delegate’s discretion.

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)

In both these cases, (and only in these cases), the court struck down a delegation of power to the president.

Gundy v. United States, 139 S. Ct. 2116, 2129 (2019)

Standards for delegation of powers are “not demanding”.

However, J. Alito and J. Gorsuch suggested here that the scope of delegation authority may need to be re-addressed.

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-475 (2001)

Court has almost never second-guessed congress's delegation of powers.

Presidential Authority

General

Generally, the President has certain powers and authorities granted by the Constitution. These include the powers granted by Constitutional clauses, (commander-in-chief clause, vesting clause, and take care clause), as well as emergency powers, customary authorities, and aggregate authority from “mass of legislation.”

The President's authority is most clearly seen in international relations.

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

The Chaco War between Bolivia and Paraguay (1930s)

Decision by J. George Sutherland – authorizes presidential authority in the field of international relations.

“Very delicate, 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... but must be exercised in subordination to the applicable provisions of the Constitution...”

Principles and justifications derived from *Curtiss-Wright*

- a. Speak with one voice: Avoid embarrassments from conflicting pronouncements in FA requires discretion and freedom for Pres.
- b. Knowledge and expertise: Pres. knows conditions in foreign countries.
- c. Secrecy: refers to J Marshall and Washington on need for secrecy and discretion in negotiating treaties (but limited to that context)
- d. Flexibility: difficulty of predicting events in “vast external realm” – anarchy world requires Pres not to be bound by too strict guidelines.

Presidential Power from Constitutional Clauses

Commander-in-Chief Clause (Art. II, §2, cl. 1)

Outward (foreign)

1. Customary War Powers
2. Core Command Authority Inherent in the Title

Inward (domestic)

1. Defensive War Power
 - a. *The Prize Cases*
 - i. “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 specific legislative authority...”
 - ii. *But cf.* “Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after you have given him so much as you propose.” - Lincoln, 1846
 - b. Proportionality is not a limit on the defensive war power.

Vesting Clause (Art. II, §1, cl. 1)

“The executive power shall be vested in a president of the United States of America.” Art. II, §1, cl. 1.

Cf. “All legislative Powers herein granted shall be vested in a Congress of the United States...” Art. I, §1.

Take Care Clause (Art. II, ...)?

Presidential Emergency Powers

Emergency Powers

[*In Re Neagle*](#)

The President's Emergency Powers

- Stand-by Emergency Legislation
- 120 different standby statutes
- National Emergencies Act (1976)
 - Imposes procedural requirements on the president's invocation of these stand-by emergency authorities. The president must...
 - Declare a new national emergency
 - Indicate the stat. Authority they intend to exercise, and
 - Notify Congress

What is an emergency?

Sudden, unforeseen, and of unknown duration.

Dangerous and threatening to life and wellbeing

Requiring immediate action

The entity with emergency powers decides that an emergency exists

May require that the government depart from ordinary rules and procedures.

"Sovereign is he who decides on the exception." -Carl Schmitt

>>But Schmitt was also a nazi so take that for what it is.

Presidential Customary Authorities

Aggregate Authority

Congressional National Security Powers

Congressional Authorization to Use Force

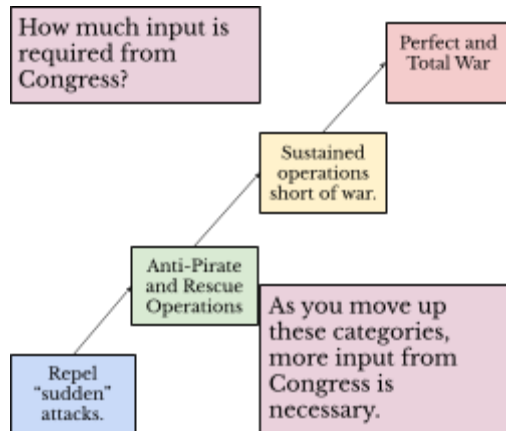
Congress can authorize the use of force in several ways:

1. A formal declaration that a state of war exists between the U.S. and another nation state.
2. A statute broadly authorizing the use of military force against a particular nation or armed group or a category thereof.
3. A statute authorizing a specific use of force in a specific context.
4. Acquiescence in a systematic, unbroken, executive practice long long pursued and not questioned by Congress.
5. A statute retroactively approving a previous or ongoing use of force by the President - e.g. The Prize Cases

Congress can authorize the use of force without a formal declaration of war.

Authorization of hostilities against a hostile nation are permitted and often precede formal declarations of war.

Such authorized hostilities necessarily precede formal declarations of war because at the time of these authorizations the interests of the parties is not all out war, but rather is to protect their interests without prompting a full scale escalation of war.



Congressional Limits on the President's Use of Force

The War Powers Resolution (1973)

Attempts to define and limit the President's war powers.

- "The constitutional powers of the President as commander-in-chief to introduce US armed forces into hostilities ... are exercised only pursuant to:
 - A declaration of war
 - Specific statutory authorization, or
 - A national emergency created by attack upon the US, its territories or possessions, or its armed forces.

Trigger for the WPR's requirements:

- If the president:
 - 1) introduces armed forces into hostilities or "imminent involvement in hostilities clearly indicated by the circumstances" Or
 - 2) introduces armed forces into territory or waters of a foreign nation while equipped for combat, excluding training, supply, etc. Or
 - 3) substantially enlarges US forces equipped for combat in a foreign nation

Reporting Requirements:

- The President must...
 - Tell Speaker and Senate Pres w/in 48 hours
 - Circumstances requiring introduction of US forces
 - constitutional and legislative authority and
 - Estimated scope and duration of hostilities
 - Provide info that congress requests and report periodically on state of hostilities, but at least each six months.
 - 60 day clock: Within 60 calendar days of submitting a report, Pres must terminate hostilities unless Congress authorizes extension or President certifies another 30 day time period necessary to protect US forces.
 - The Concurrent Resolution: Pres must remove forces if Congress directs (Constitutional?)

Interpretative Limits on Other Authority:

- (a) Authority to introduce US Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
 - (i) From any provision of law... 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 states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or
 - (ii) 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 chapter. . . .
 - (iii) For purposes of this chapter, the term "introduction of United States Armed Forces" includes the assignment of members 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.

National Security Searches

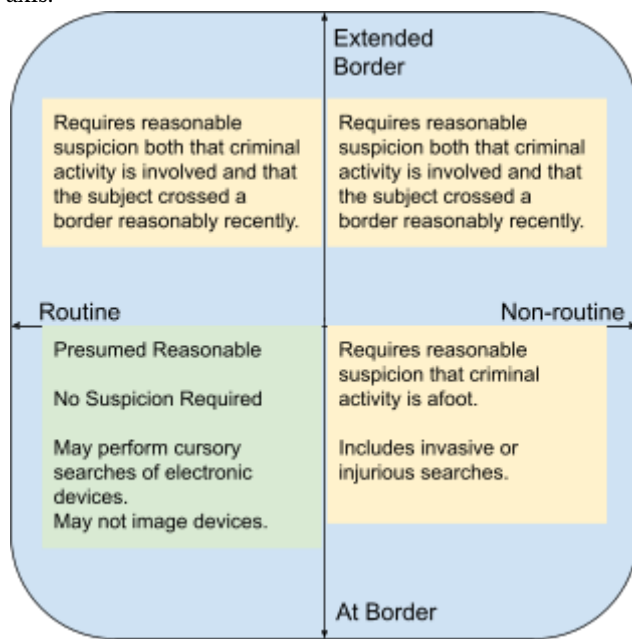
4th Amendment Analysis

1. Is this activity a search?
2. Is there an exception allowing this search?
3. Is the search reasonable?

Border Searches

Routine border searches are generally considered to be reasonable because there is a greatly minimized expectation of privacy and the interest of the government in controlling the entry of persons and things into the country is far stronger than that minimized expectation.

Border searches are characterized on two axes. The first is the routine / nonroutine axis. The second is the location axis.



A non-routine search is one that includes a component of injury (including injury to dignity) or deprivation or damage to property.

The privacy deprivation that results from extensive imaging and extended analysis in a forensic scan renders those searches non-routine.

A search occurs “at the border” if it occurs actually at the border or at a functional equivalent. Functional equivalents include both airports and other ports of entry, and at an established station near the border at the confluence of two or more roads that go to that border.

A “reasonable suspicion” is a particularized and objective basis for suspecting, under the totality of the circumstances, that the particular person stopped is engaging or may engage in criminal activity.

Cases

United States v. Saboonchi, 990 F. Supp. 2d 536 (MD 2014)

Defines reasonableness of a search and explains that imaging of devices is a non-routine search. Court upholds the use of this data as evidence, however, because the border agent had more than a reasonable suspicion to justify the search.

Routine searches at the border are presumed to be reasonable. *United States v. Ramsey*, 431 U.S. 606, 616 (1977). The government has the highest powers at the border. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

The question of what is routine ranges from the reasonable removal, disassembly, and reassembly of a vehicle's fuel tank (*Flores-Montano*, at 155), to the unreasonable requirement that a person submit to a body cavity or x-ray search. (*United States v. Montoya de Hernandez*, 473 U.S. at 534-35).

Whether a search is routine or non-routine is a fact-specific inquiry. A non-exhaustive factors from *United States v. Braks*, 842 F.2d 509 (1st Cir. 1988):

- i.) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe
- ii.) whether physical contact between Customs officials and the suspect occurs during the search;
- iii.) Whether force is used to effect the search
- iv.) Whether the type of search exposes the suspect to pain or danger;
- v.) the overall manner in which the search is conducted; and
- vi.) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search

Laws of War

Analytical Frameworks

Executive Authority / Youngstown Framework

- I. Introduce Youngstown
 - A. Case Overview
 - B. Describe three levels
 1. Maximum Power
 2. Independent Power "Twilight Zone"
 3. Lowest Ebb
- II. Enabling / Disabling Statute Analysis
 - A. "Field" Preemption
 - B. Nondelegation Analysis
- III. Twilight Zone Analysis
 - A. Constitutional Commander-in-Chief Power
 - B. Inherent Emergency Power
 - C. Customary Authority
 - D. Aggregate Authority from Mass of Legislation
 - E. Take-Care Clause
 - F. Vesting Clause
- IV. "Lowest Ebb" Analysis
 - A. Congress's acts infringing on exclusively presidential powers are unconstitutional.
 - B. If the infringed power is not exclusive, then it is unconstitutional if it infringes unduly on the President's Functions and is not justified by an overriding need to promote objectives within Congress's constitutional authority.

Jus ad Bellum

Congressional Authorization to Use Force

Congress authorizes the Use of Force

1. A formal declaration that a state of war exists between the US and another nation state (World Wars)
2. A statute broadly authorizing military force against a particular nation or armed group. (2001 / 2002 AUMF)
3. A statute authorizing a specific use of force in a specific context.
4. Acquiescence in a systematic, unbroken, executive practice long pursued and not questioned by Congress.
5. A statute retroactively approving a previous or ongoing use of force by the president. *The Prize Cases*

Executive Authorization to Use Force

- I. Authorizations to Use Military Force (AUMFs)
- II. The War Powers Resolution

International Jus ad Bellum

Generally, international law prohibits the use of force (UN Charter Art. 2(4)), but allows for two exceptions:

1. With the support of the UN Security Council
2. The inherent right of self defense. (UN Charter Art. 51)
 - a. Preemptive Self-defense requires an immediate overwhelming force. *Caroline Doctrine*
 - b. Only the state which has suffered an attack may declare that an armed attack has occurred (and that a response in self-defense or defense of others is authorized.)

Art. 2(4): Mandates peace by outlawing the use of force and threats to use force

Art. 7: establishes the intl court of justice (ICJ)

Arts 39, 41, 42: empowers the Sec Council to ascertain violations of 2(4) and intervene with measures including the use of force

Art. 43: Requires member states to make agreements to provide military assistance to the S.C. when needed.

Jus in Bello

Main principles of LOAC

1. Humanity
2. Proportionality
3. Necessity
4. Distinction

First, threshold question. What kind of conflict is it?

Targeted Killing

Intl Armed Conflict - both belligerents are nation states.

Non-Intl Armed Conflict - one or both belligerents are not nation states.

DPH'ing = Directly participating in hostilities

Most common civilian associated w/ armed group, potentially directly participating in hostilities, question is whether they're doing that at the time of the targeting

Proportionality analysis

Covert Action

Legal Authority for Covert Action

- I. National Security Act of 1947
- II. Hughes-Ryan Act
- III. EO 12333
- IV. Intelligence Oversight Act of 1980

Domestic Use of the Military

FISA

- I. 4th Amendment Analysis
- II. Foreign vs. Domestic
- III. Probable Cause Requirements
- IV. FISC Review

Border Searches

4th Amendment Analysis

Routine vs. Non-Routine

Border vs. Extended Border Search