

“Powers of (and Restraints) on the Executive”

Ruth Bader Ginsburg American Inn of Court
CLE Materials
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I. Hiring and Firing Powers

1. U.S. Constitution, Art. II, § 2: Gives the President, “by an with the advice and consent of the Senate,” the power to “appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers” whose appointments are not otherwise provided for in the Constitution.
 - a. But Congress may “vest the appointment of [] inferior officers ... in the President alone, in the courts [], or in the heads of departments.”
 - b. Further, the President has “power to fill up all vacancies that may happen during the recess of the Senate.”
 - c. The Constitution is, however, silent on the President’s ability to *fire* officers.
2. *Myers v. United States*, 262 U.S. 52 (1926)
 - a. SCOTUS held the “power of removal is incident to the power of appointment.”
 - b. Emphasized this power was inherent in President’s role because it is President’s job “to take care that the laws be faithfully executed” (a.k.a. the “Take Care Clause”).
 - c. This power is held within the executive branch because “[t]he advice of the Senate does not make the appointment,” but rather “[t]he President appoints.”
3. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)
 - a. SCOTUS refined the “exclusive power of removal” and limited the President’s removal power to “purely executive officers,” i.e., those who directly serve the President.
 - b. This paved the way for Congress to create administrative agencies that could be insulated—to an extent—from presidential control.
 - c. But any restrictions on the President’s removal power cannot restrict the “Take Care Clause.”
4. *Bowsher v. Synar*, 478 U.S. 714 (1986)
 - a. Congress cannot create administrative agencies that perform “purely executive functions” and still retain full authority over the removal of its members.
 - b. The President must enjoy broad discretion to fire such executive agency appointees.

- c. However, Congress *does* retain the right to create some legislative restrictions upon hiring and firing of agency officials that the President must follow.
5. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)
- a. If Congress department agency heads the power to appoint inferior officers, then “the department head, rather than the President, . . . enjoys the power of removal.”
 - b. In situations where only one level of protected tenure separates the President from an officer exercising executive power, the President can remove officers for “good cause.”

II. IMMIGRATION POWERS

1. U.S. Constitution, Art. I, § 8, cl. 4: The constitution grants Congress plenary power over naturalization.
2. *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (better known as the “Chinese Exclusion Case”)
 - a. As an incident of national sovereignty, Congress has plenary and unqualified power to regulate immigration as a matter of national public interest.
 - b. As a matter of constitutional authority, statutes Congress may exclude non-citizens based on race or political beliefs.
 - c. Limits on *presidential* immigration power relate more to issues like administrative procedure and compliance with statutes set by Congress.
3. Illegal Immigration Reform and Immigrant Responsibility Act (1996), Division C of Pub. L. 104–208, 110 Stat. 3009-546
 - a. Immigrants unlawfully present in the U.S. for 180 days, but less than 365 days, must remain outside the U.S. for three years unless they obtain a pardon. If they are in the U.S. for 365 days or more, they must stay outside the U.S. for ten years unless they obtain a waiver. If they return to the U.S. without the pardon, they may not apply for a waiver for a period of ten years.
 - b. One provision in the Act, 8 U.S.C. § 1252(a)(2)(B), stripped courts of jurisdiction to review any “decision . . . of the Attorney General . . . the authority for which is specified” to be in the discretion of the Attorney General.

III. WAR POWERS

1. War Powers Resolution (also known as the War Powers Act), 50 U.S.C. §§ 1541–1548
 - a. The President’s powers are exercised only pursuant to a declaration of war, specific statutory authorization from Congress, or a national emergency created by an attack upon the United States. (50 U.S.C. § 1541)
 - b. The President is required to notify Congress within 48 hours of committing armed forces into existing or imminent hostilities, and armed forces cannot remain for more than 60 days without a Congressional authorization for use of military force or a declaration of war by the United States. (50 U.S.C. § 1543)
 - c. The President must remove armed forces that are engaged in hostilities “without a declaration of war or specific statutory authorization” at any time, if Congress so directs. (50 U.S.C. § 1544)
 - d. Use of War Powers Resolution: Presidents have submitted over 130 reports to Congress pursuant to the Resolution. Examples include:
 - i. 1975: President Ford submitted a report to Congress as a result of his order to the U.S. armed forces to retake the Mayaguez, a U.S. merchant vessel that had been seized by Cambodia.
 - ii. 1981: President Reagan deployed military advisors to El Salvador but submitted no report to Congress. Members of Congress filed a federal lawsuit in an attempt to force compliance with the Act, but the U.S. District Court hearing the suit declined to become involved in what it saw as a political question, namely whether U.S. forces were involved in hostilities.
 - iii. 1982-83: President Reagan sent a force of Marines to Lebanon to participate in peacekeeping efforts. While he did submit three reports to Congress under the Act, he did not cite Section 4(a)(1), and thus did not trigger the 60-day time limit. Congress, as part of a compromise with the President, passed a resolution authorizing U.S. troops to remain in Lebanon for 18 months. This resolution was signed by the President

and was the first time a President signed legislation invoking the War Powers Act.

- iv. 1990-91: President George H.W. Bush sent reports to Congress regarding the buildup of forces in Operation Desert Shield. President Bush took the position that he did not need “authority” from Congress to carry out the United Nations resolutions; however he did ask for Congressional “support” of U.S. operations in the Persian Gulf. Congress passed, and the President signed, Public Law 102-1 authorizing the President to use force against Iraq if the President reported that diplomatic efforts had failed. President Bush did so report, and initiated Operation Desert Storm.
- v. 1993-99: President Clinton utilized U.S. armed forces in operations such as air strikes and peacekeeping forces in Bosnia, Kosovo, and the former Yugoslavia. These operations were pursuant to UN Security Council resolutions and were conducted with other member states of NATO. Members of the House filed suit against the President, charging that he had violated the War Powers Act, especially since 60 days had elapsed since the start of military operations in Kosovo. Clinton noted that he considered the War Powers Act constitutionally defective. The court ultimate held that the Members lacked legal standing to bring the suit. See Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).
- vi. 2001: After the terrorist attacks on the World Trade Center and the Pentagon, Congress passed Public Law 107-40, authorizing President George W. Bush to “use all necessary and appropriate force against those nations, organizations, or persons he determined had planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” For the first time, “organizations and persons” are specified in a Congressional authorization to use force pursuant to the War Powers Act, rather than just nations.

- vii. 2002: Congress authorized President George W. Bush to use force against Iraq, pursuant to the War Powers Act, in Public Law 107-243.

IV. PARDON POWER

1. U.S. Constitution, Art. II, § 2, Cl. 1: The President shall be the Commander in Chief of the armed forces . . . and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
 - a. The pardon power serves several purposes. One purpose is to temper justice with mercy in appropriate cases, and to do justice if new or mitigating evidence comes to bear on a person who may have been wrongfully convicted.
 - b. Another purpose of the pardon power focuses not on obtaining justice for the person pardoned, but rather on the public-policy purposes of the government.
 - c. Pardons have also been used for the broader public-policy purpose of ensuring peace and tranquility in the case of uprisings and to bring peace after internal conflicts.
 - d. *(source: The Heritage Foundation, <http://www.heritage.org/constitution/#!/articles/2/essays/89/pardon-power>)*
2. Schick v. Reed, 419 U.S. 256 (1974)
 - a. Pardon power includes the power to impose a conditional commutation (e.g., can pardon a death sentence on the condition that the prisoner not be paroled).
 - b. “[T]he conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not, in themselves, offend the Constitution, but which are not specifically provided for by statute.”
3. Ex parte Garland, 71 U.S. 333 (1866) and United States v. Klein, 80 U.S. 128 (1871)
 - a. Pardon power is unlimited except in cases of impeachment. It extends to every offense and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. The power is not subject to legislative control.

4. Notable Pardons:

- a. "No Taxes For the Rich" – 2001 Pardon of Marc Rich by Bill Clinton for tax evasion
- b. "They Made Me Do It" – 2001 Pardon of Patty Hearst by Bill Clinton for bank robbery
- c. "Peace, Man" – 1977 Pardon of Vietnam Draft Dodgers by Jimmy Carter for avoiding serving in the Vietnam War
- d. "Bring Me Your Poor (the Rich are on Their Own)" – 1865 blanket pardon of Confederate citizens by Andrew Johnson but not extended to leaders or wealthy
- e. "Freedom is Good, but Whisky is Better" – 1794 Pardon of Whisky Rebels by Virginia Governor Henry Lee on behalf of George Washington for rebellion against spirits tax
- f. "Oh Brother, My Brother" – 2001 Pardon of Roger Clinton by Bill Clinton for drug crimes
- g. "Throat Tickle" – 1981 Pardon of "Deep Throat" Mark Felt for breaking and entering into protestor's homes and office
- h. "Another Nixon Pal" – 1989 Pardon of George Steinbrenner by Ronald Reagan for conspiring to make illegal contributions to Nixon's reelection campaign
- i. "Yet Another Nixon Pal" – 1971 Pardon of Teamster's head Jimmy Hoffa by Richard Nixon for jury tampering and fraud
- j. "It's Just Water Under the Gate" – 1974 Pardon of Richard Nixon by Gerald Ford for Watergate

5. (source: TIME magazine article from January 21, 2016, et al.)