1. Assignment for today altered. Next week will be posted

2. Sum:

Finished the HC / post 9/11 developments thru Hamdi, Hamdan and MCA of 2006. Started "Cong. encroachments on the executive."

A. Chadha

Chadha and the question of legislative vetoes. Cong retains too much for itself. Legislative veto violates both Bicameralism and the requirements of the presentment clause. The language is clear and it embodies a carefully worked out allotment of powers—a structure and a precise formula for its working. So both clear language and an important structural separation of powers to be considered.

But the constitution also leaves a lot left unsaid. A lot of room left for statecraft and development.

The underlying problem in Chadha is how, given the size and functioning of our current government—given that, how can Cong control the vast administrative state. How can Pres. ad Cong control it. How can the people control it? Hire Jack Abramof to use it.

Strong and helpful White dissent 392 read.

Still used. Effective.

B. Clinton v. NY 396

Congress kept too much power in Chada. Here Cong give away too much. Line Item veto Act.

1. The Act [396 ½] gave the Pres the power to strike 3 types of budgetary, spending and tax issues according to three criteria. Pres is then to notify Cong of his action. His strikes can then be invalidated by action of Cong.

2. Unconstitutional. Const silent on the particular issue, but what is written speaks loudly enough to make for a express prohibition. The fmrers worked long and hard at the wordingg and debated it, and Geo. Washing sdai that an act had toe be taken as a whole and vetoed as a whole or not.

Cannot rewrite a stat after becomes law.
3. Distinguishes the the Pres valid power to suspend import duties exemptions. There Pres executing policy embodied in the statute as written and enacted.

4. Also distinguishes the Pres’s acknowledged discretion not to spend funds Cong has appropriated. In doing so he doses not rewrite the appropriations statutes and so does not create a different law.

5. Did not decide he lower ct’s alt holin that a line item veto disrupts the balance of powers: Not need the structural argument.

6. Scali’s dissent; 399 ½: read. Therefore history. Bottom of 399 Not read. Type of argument.

   A) Three p. 400:
      i) Practical Power to give effect to some but not all odf massive approproations bills. Otherwise thousands of single item bills that Pres has the power to veto.
      ii) strusrual probvisions: pragmatic rooms.
      iii) not a dispute between 2 branches.

B) 3 Separation of powers argument. IV p. 401 2/3 Read.
   Third argument non-delegation" 402 1/3

* * *

Cong Control over Executive Officers 402 bottom read

1. Appointment Art II S 2, cl 2 Read 402 bottom - 403 1st 6 lines

2. Officers (superior) / inferior officers. 403 6 linrs - end

Buckley v. Valeo 403 (1976) YELLOW SHEET 2 A
To Cong control of Officers. Can Cong limit the power of the Pres/ to dismiss execeptive officers at will.

Bowsher 404 (1986)

In a budget-cutting scheme, Congress passed the Gramm-Rudman-Hollings Act. It involved a method for reducing the deficit in stages to zero. Procedure p. 404 read. * Then:

1. Who is the Comptroller General, Head of GAO?
2. How appointed? 404 at ** (presumably to advice and consent of Senate)
3. How removed 404 at ***

5. Act required that the CG exercise executive duties. Those can only be done by members of the executive branch. Cong cannot exercise or delegate anything more than legislative related power. Cannot remove executive officers. That is for the Pres to do.

6. Had long been considered officer of legislative branch 405. But had invested with executive duties 406 top 1.


8. White dissent with description of what is executive and what is not. 406 ff.

Removal: 408ff

Inferior officers are subject to will of Pres., but are there some positions whose functions allow Cong. to limit the Prs’s power to remove?


Humphrey’s followed in Wiener (1958) with respect to War Claims Commission. Intrinsically judicial. Cong could limit ground for dismissal by Pres., not just by Pres. will.

What about Independent Counsel?

Morrison (1988) 410

GO TO YELLOW P 4A
1. Process in

2. 3 weeks after injury

3. Add q. in.

4. Post artifices on each surface

5. Sutures of fascia to

6. Lead in to DU you / create without tension

Lead in 1 DU you / 2 DU you / 3 DU you

Sutures of fascia to 1 DU you / 2 DU you / 3 DU you

Post rupture fascia

Do not rupture fascia

7. Avoid bleeding

8. Avoid infection

9. Avoid tension

10. Avoid retraction

11. Avoid infection

12. Avoid tension

13. Avoid bleeding

14. Avoid infection

15. Avoid tension

16. Avoid retraction

17. Avoid infection

18. Avoid tension
1. We've already seen arguments in support of extensive presidential power based on the Pres's responsibilities as commander in chief but also on his "inherent" executive power. See Youngstown and the Guantanamo cases.

And lately, arguments about inherent executive power have arisen in Pres. Bush's use of signing statements – when he signs a bill into law and registers his interpretation of the statute's meaning. And Presidential claims to confidentiality, too, have long prompted arguments about inherent executive power. In order to carry out the responsibilities of the office, the Pres must have access to confidential information and advice about the military, foreign affairs and domestic security.

One of the protections for such confidentiality would be a right of the Pres to have immunity to judicial actions like subpoenas – the privilege to be exempt from judicial interference. And you will recognize this as a separation of powers question.

Arguments about the relation of the judicial and executive branches started for us with CJ John Marshall's opinion in Marbury v. Madison. Marshall said very deferentially that the Ct. may not intrude upon the Presidents offices or the Cabinet room or conversations between the Pres and his advisors.

BUT Marshall also drew a distinction. The courts may not intrude upon the president's work in political matters, but they may do so where law is at stake. Political/legal distinction. There is no jurisdiction over the political where the Pres is answerable to the electorate, but there is jurisdiction over the legal: JM: "It is emphatically the province and duty of the judicial department to say what the law is." A statement which Cooper v. Aaron ratcheted up to a claim that the Ct. is the supreme interpreter of the constitution.

Modern arguments about immunity became particularly acute during the Nixon administration, and then the Clinton administration and now in the Bush administration.

The precipitating occasion in the Nixon administration was the Watergate affair. And one of the key events in ending Nixon's presidency was the Court's action U.S. v. Nixon.

1. Factual background

A seemingly petty break-in took place at the Demo Nat'l Headquarters in the Watergate Hotel in D.C. in June, 1972, in the midst of a Pres. campaign. As you know, the investigation grew into a national crisis. Eventually Pres. Nixon was forced to appoint a Special Prosecutor who initiated a high profile investigation. The House of Representatives initiated the impeachment process and undertook a parallel investigation of its own a parallel investigation.

Grand jury. (Secretly taped phone calls and office conversation) Indictment March 1, 1973
Subpoena April 18. subpoenaed tapes and documents. The subject of this case.
Pres. Moved Quah may 1; denied May 20
S. Ct. Grannted cert on May 31, 1974; Before edecision by CT
Argued July 8, decided July 24
Would Nixon comply? Doubt, but he did. August 5 Complied.
Damaging tapes. Aug 8; announced resignation next day.
Impeachment process underway. p 411 Criticism for activist CT.
Will return to p. 436.

2. The S. Ct's opinion in the July 24th case.

A. Pres. argues FIRST absolute privilege
1. Separation of powers. [For Pres. to interpret the Const with respect to its own limits and the other branches are to respect this interpretation.]

2. Need for confidentiality

B. Ct response
1. Marbury
2. Too broad. 421 bottom- 422 stop last line 1st word. Then continue BUT and read on to 422.

C. Pres argues SECOND: If not absolute, then relative, and outweighs the subpoena

D. Ct response
1. Where left off 422 at para g. 1st 7 lines. "Presumptive" Bus the argument?
   Last 5 lines of Para C.
2. Goes on to weigh pres. Calomm to confidentiality vs. needs of criminal justice system
Since no military or diplomatic secrets and only avgeneralized confidentiality vs. 
adminisitartion of justice. Limits to criminal cases. Emphasizes criminal. See fn2, p422 
And remember in camera 
Guidance to D Cts. 423. 

Sum: Pres is not absolutely immune from subpoenas BUT is a presumptive 422 3/4

* * *

AND Absolute immunity from civil damanges in some circumstances:


Why immunity here? ☑


1. Facts: Paula Jones seeks damages for Clinton's acts before he was Pres. Clinton 
argues for delaying such suits until the Pres's term ends.

2. Pres argument 429.
   A) Not above law. Only postponement.
   B) Separation of powers 429 middle. Impoerince of the job limits fed judiary nauthoiry.

3. Ct counter argument/ Agree descriotion of innoortance of theoffice 429 last full 
acts.

4. Aftermath 434 top

5. Indict a Pres? N4 p.434 bottom

6. Impeachment. Always a remedy and maybe the only appropriate one.

Impeachment 436 Go Thru