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The Courts in National Security Policy

By: Liam Kerr, *Gettysburg College*

Abstract

Presidential authority in the realm of national security policy has increased since George Washington's administration. The most noticeable expansion of America's position in global hegemon followed the allied victory in World War II. Accompanying the rapid increase in the Executive Branch's authority has been deference from the traditional constraints on the President's power, namely Congress and public opinion. This paper seeks to answer the question of whether the Judicial Branch, specifically the Supreme Court, has acted overall to constrain or enable the expansion of presidential war powers. This question will be examined through a qualitative analysis of existing academic literature and Supreme Court opinions.

Introduction

Since the end of World War II, the Executive Branch of the United States government has expanded its scope of power. The rise of American global hegemony was further solidified with the fall of the Soviet Union in 1991. Presidents since George Washington have taken executive actions, which challenged contemporary understandings of the proper role of the office. The Founding Fathers disagreed greatly about the "war powers" of the presidency, evidenced in the Constitution, the Federalist Papers, and other foundational writings of the American democratic philosophy. Writing to fellow founder of the Democratic-Republican Party, James Madison opined to Thomas Jefferson that "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."¹ On the opposite end of the spectrum was Federalist Alexander Hamilton, a staunch advocate for presidential power according to the English model. Hamilton surmised that the president held significant authority "In the conduct of war, in which the energy of the Executive is the bulwark

of the national security."² As the following paper will illustrate, the debate between American policymakers regarding the primacy of the Executive Branch has flourished from the founding of the nation to the war on terrorism.

Jordan, Taylor, Meese, & Nielson (2009) discussed whether there are effective checks on presidential powers and which actors in the policymaking process are most impactful on the distribution of national security authority. They concluded that, in addition to the tensions between the president and Congress, other influential actors include "public opinion, interest groups, the impact of past policies and programs, the responsiveness of the executive bureaucracy, and the views, interests, and expected reactions of other nations."³ Conspicuously excluded from the list is the Judicial Branch of the US government. This paper will seek to analyze the impact of the courts on US national security policymaking, focusing more specifically on the effect of Supreme Court (SCOTUS) decisions and jurisprudence on legal attitudes and interpretations. In particular, the research presented seeks to answer whether the Supreme Court has enabled or limited the operations of executive policy-making in national security-related issues. Given the national attention drawn to several landmark decisions, such as *Nixon v. U.S.* (discussed later), it is theorized that the following research will demonstrate that SCOTUS acted as a significant overall constraint on constantly expanding presidential powers.

The Arguments: Jurisprudence and Precedent

The aforementioned debate between America's greatest political philosophers during the time of the nation's founding laid the groundwork for centuries of legal argumentation. Constitutional legal experts have debated the question of presidential war powers from the beginning of our republic on issues such as George Washington's suppression of the Whiskey Rebellion, Thomas Jefferson's deployment of Marines to the

1 James Madison to Thomas Jefferson, April 2, 1798, in *The Writings of James Madison*, ed. Gaillard Hunt, http://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html.

2 Alexander Hamilton, *Federalist* No. 70, in *The Federalist*, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-70>

3 Amos A. Jordan, William J. Taylor, Michael J. Meese, and Suzanne C. Nielson, *American National Security*. 6th ed. Baltimore: Johns Hopkins University Press, 2009), 97.

Barbary Coast, James Polk's instigations with Mexico and Abraham Lincoln's suspension of Habeas Corpus rights. The legal arguments surrounding expansionary versus limited war powers parallel broader debates between strict and loose constitutional interpretation. James Baker, a notable public servant under several Republican administrations, struck at the importance of constitutional interpretation when he said, "As the president's national security lawyer, I was initially surprised how often my legal analysis started and often ended, with the text of the Constitution."⁴ National security decisions require legal analysis. The following discussion on legal precedent and interpretation will provide the proper backdrop for an analysis of SCOTUS' impact on national security policy.

There are several notable 19th-century examples of judicial review and subsequent constraint of presidential power by the courts. One such example is Chief Justice Taney's opinion in *Ex Parte Merryman*, where he condemns Lincoln's suspension of Habeas Corpus: a power expressly granted to the Legislative Branch.⁵ Most modern legal experts, however, tend to focus on a handful of 20th and 21st-century cases when determining executive powers in national security policy. Baker outlines the two cases which represent the two opposing ends of the spectrum of debate.

The first such case is that of *U.S. v. Curtiss-Wright Export Corp.* (1936) in which Justice Sutherland wrote the court's majority opinion. The issue at hand was whether Congress had the ability to delegate to the President power to restrict weapon exports to the parties of the Chaco War. In his opinion, Sutherland concluded that the President is 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" and therefore, he, "not Congress, has the better opportunity of knowing conditions which prevail in foreign countries and especially in time of war. He has his confidential sources of information...."⁶ Sutherland further added an unprecedented allotment of authority to the execu-

tive by stating "external sovereignty" exists above the confines of the Constitution, inherent to the Union and leaving the President, as the sole organ of international relations, with almost limitless power in national security.⁷

As influential as the *Curtiss-Wright* decision was in national security jurisprudence, another case stands as a more prominent precedent in constitutional law. *Youngstown Sheet & Tube Co. vs. Sawyer* (1952) saw a legal challenge to President Truman's decision to nationalize the steel industry in order to prevent a potential national security crisis resulting from a national steelworker strike. Although there were many significant concurring and dissenting opinions which are all referenced by lawyers today, it is Justice Black's majority opinion and Justice Frankfurter's concurring opinion which have proven most impactful. Black argued that, "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that [the President] has the ultimate power to take possession of private property."⁸ Because this was concerned with domestic powers, it is possible such an assertion is still consistent with Justice Sutherland's *Curtiss-Wright* opinion. Ironically, this case is more widely referenced to justify expanding presidential powers due to what Justice Frankfurter called the executive "gloss" of presidential authority. He states that presidential war powers are justified by "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution."⁹ *The Youngstown* case stands as the preeminent backdrop to cases pertaining to executive national security actions.

Youngstown and Curtiss-Wright demonstrate the vast differences in Supreme Court decisions. These cases, however, are not the only examples. Chris Edelson discusses the infamous *Korematsu v. United States*, in which Justice Stone led the court in answering "whether, acting in cooperation, Congress and the Executive have constitutional authority to

4 James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge: Cambridge University Press, 2014), 33.

5 Bruce A. Ragsdale, *Ex Parte Merryman, and Debates on Civil Liberties During the Civil War*. Federal Judicial Center. Federal Judicial Center History Office. 2007.

6 Baker, 39.

7 "United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)." Justia Law. Accessed April 17, 2018.

8 Baker, 41.

9 "Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)." Justia Law. Accessed April 17, 2018.

impose the curfew restrictions here complained of.”¹⁰ Mirroring language used in the *Curtiss-Wright* majority opinion and Justice Franklin’s concurring opinion in *Youngstown*, Justice Stone concluded that, “the two branches, acting together, possess the complete war power of the national government.”¹¹ Therefore, since Congress permitted President Roosevelt to force Japanese-Americans into internment camps during a time of emergency, the action was constitutionally acceptable. It should be pointed out, for reference later in this paper, that Justice Franklin noted in his *Youngstown* concurrence that “no such cooperation between Congress and the President existed and therefore the action was unconstitutional.”

The ageless debate between expansionary and limited presidential ascendancy in national security powers thrived within the walls of the Supreme Court since the founding of the nation. These three 20th century cases often provided the foundational context for further interpretation of the president’s delegated and implied war powers. The question then becomes, has the Supreme Court significantly limited or enabled the expansion of executive power which has taken place, especially since the end of WWII? Scholars disagree regarding this question, but this paper will organize historical examples corroborating both sides of the academic debate into a framework that explains why differences in historical jurisprudence exist.

The Case for Activism

Those who believe the presidency has been hindered in its pursuit of greater power by the Supreme Court follow the pattern of analyzing cases from the 20th and 21st centuries. Christenson and Kriner examine recent examples relating to the unprecedented levels of presidential imperium during the presidency of George W. Bush and his war on terrorism. Their take on the effectiveness of the courts’ reining in of presidents stems from the notion that, “For most of American history, the courts rationally shied away

from direct confrontations with the executive branch (Fisher 2005). Even some of the rare presidential defeats, such as the landmark ruling in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), may have paradoxically bolstered presidential power in the long term (Silverstein 1997; Bellia 2002).”¹² Despite this historical deference, Christenson and Kriner come to the conclusion that the Supreme Court has increasingly asserted its authority to decide when the executive branch has overstepped its supposed mandate in national security policy-making.

Three cases are cited by Christenson and Kriner as evidence of the trend of increasing judicial activism. In the 2004 case *Hamdi v. Rumsfeld*, the court ruled that “The administration could not hold American citizens as enemy combatants and deny them due process and habeas corpus rights.”¹³ Justice O’Connor wrote the majority opinion, asserting that a state of war does not grant “a blank check for the President when it comes to the rights of the Nation’s citizens.”¹⁴ Just two years later, the court ruled in *Hamdan v. Rumsfeld* that the military tribunals created by the President were unconstitutional. Justice Stevens continued by saying the defendant’s argument that “federal courts should respect the balance Congress struck when it created ‘an integrated system of military courts and review procedures’ is inapposite since the tribunal convened to try Hamdan is not part of that integrated system.”¹⁵ In this decision, the court echoes earlier notions that legislative assent to executive action lends greater levels of legitimacy to the executive branch’s national security policy. Finally, the Supreme Court ruled in *Boumediene v. Bush* (2008) that Guantanamo prisoners were entitled to vie for habeas corpus rights. Roger Douglas notes that although there existed an acknowledged “right to detain,” that right “did not necessarily mean a right to detain unfettered by judicial accountability.”¹⁶

Two notable cases arose during the administration of President Richard Nixon which Edelson

10 Chris. Edelson, *Emergency Presidential Power from the Drafting of the Constitution to the War on Terror*. Madison: University of Wisconsin Press, 2013.

11 Ibid., 85.

12 Dino P. Christenson and Douglas L. Kriner, “The Specter of Supreme Court Criticism: Public Opinion and Unilateral Action.” *Presidential Studies Quarterly* 47, no. 3 (2017): 471-494.

13 Ibid.

14 *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004)

15 *Hamdan v. Rumsfeld*, 548 U. S. 557 (2006)

16 Roger Douglas, *Law, Liberty, and the Pursuit of Terrorism* (Ann Arbor: University of Michigan Press, 2014), 174.

considers equally as prominent in case law. The first is *New York Times Co. v. United States* (1971), in which Justice Black declared that Nixon overstepped his authority by censoring publication of the leaked Pentagon Papers, which revealed government knowledge of the impossibility of winning the Vietnam War. Black opined, “In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.”¹⁷ Noticeably, President Nixon acted without the authorization of Congress and therefore lacked the clout enjoyed by President Roosevelt in *Curtiss-Wright*. Another case involving President Nixon was the more popularly acclaimed case of *United States v. Nixon* (1974) which related to the President’s claim of executive authority in releasing audio recordings of conversations had in the Oval Office. Although this case does not deal with national security issues, the President still claimed that executive privilege derived from concerns over national security information which would be dangerous to release. Justice Burger led the unanimous court in reaffirming that “it is the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege presented in this case [*Marbury v. Madison*]....”¹⁸

Edelson, Christenson, Kriner, and Douglas all share the belief that the Supreme Court has significantly constrained the presidency on many issues which are presented to them. While they recognize that the Supreme Court has at other times enhanced presidential authority, they argue that the general trend is an increase of judicial activism as the Executive Branch has grown in size and scope. This stance is followed by the opposite argument: that the Supreme Court has, on the whole, acted to enable the president’s enhancement of power through deference, save a few isolated examples to the contrary.

The Case for Deference

Conventional academic teaching emphasizes the role of the courts in having authority on the meaning

and proper application of the law in relation to the Constitution and existing case law. What if, however, the President and Congress actually share the responsibility of interpreting the law and the Constitution? Robert Blomquist and other advocates for presidential unilateralism argue that, as constitutional entities with delegated powers, the Executive and Legislative Branches possess the ability to define their roles under the Constitution. Focusing on this power, called ‘presipudence,’ Blomquist perceives the presidency as “the American national security sentinel based on a broad - but not unlimited - interpretation of presidential power.”¹⁹ A familiar argument to constitutional lawyers, such a theory is based heavily on a recurrent assessment of presidential power known as the “sole organ” doctrine, drawn from a speech by John Marshall in 1800.²⁰ The sole organ doctrine, which was cited as justification in the aforementioned *Curtiss-Wright* decision, has been used to substantiate the notion that the executive is empowered as the primary actor in foreign relations.

Blomquist relies on the sole organ doctrine in defining the concept of presipudence, a term he coined, which has been an assertion made by advocates of presidential power since Alexander Hamilton. It is ironic that the doctrine was conceived by the mastermind of judicial review, particularly since Blomquist uses the doctrine in subjecting presidential action in national security policy to simply “reasonably deferential judicial review.” As the frequent and natural foil to Federalist rhetoric, James Madison provided his input on Hamilton and Marshall’s pronouncement of executive authority when he said “Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded.”²¹ Madison’s school won in the infamous case *U.S. v. Nixon*, in which the court asserted its sole authority to interpret the law. Blomquist repeats the frequent concept that “privileging the president’s perspective on national security needs carefully balanced by

17 *New York Times Co. v. United States*, 403 U. S. 713 (1971) (*per curiam*)

18 *United States v. Nixon*, 418 U. S. 683 (1974)

19 Robert F. Blomquist, “The Theoretical Constitutional Shape (And Shaping) of American National Security Law.” *St. Louis University Public Law Review* 31, no. 1 (2011): 439-473.

20 Fisher, Louis. “The Law: Presidential Inherent Power: The “Sole Organ” Doctrine.” *Presidential Studies Quarterly* 37, no. 1 (March 2007): 139-52.

21 James Madison, *Letters of Helvidius*, nos. 1-4. 24 Aug. - 14 Sept. 1793, in *The Writings of James Madison*, ed. Gaillard Hunt.

Congress' perspective."²² Yet again, judicial review of presidential action seems to hinge on whether Congress has granted unilateral presidential dominion over an issue.

Several other scholars have spoken on this topic to reinforce the sentiment that courts have conceded significant authority to the presidency. Gregory McNeal wrote an extended review of an academic book entitled *In the Age of Deference*, by David Rudenstine. Emphasized in the review is an assessment of the classic dichotomy between liberty and security, most famously alluded to by Benjamin Franklin. "Rudenstine claims that 'the Courts deferential stance has substantially harmed the nation-and done so needlessly-by compromising individual liberty, the rule of law, and the democratic process'" (633).²³ The Supreme Court has often decided on issues concerning individual liberties and commonly found that national security concerns rightly supersede privileges guaranteed by the Bill of Rights. Perhaps the most famous example in illustrating this point is the notable case *Schenck v. U.S.* (1919), in which Justice Oliver Wendell Holmes, Jr. issued the unanimous majority opinion that freedom of speech is outweighed by national security concerns expressed under the Espionage Act. Now a colloquial phrase in case law, Justice Holmes inaugurated the "clear and present danger" test in determining whether speech could rightfully be limited. In this case, and in others relating to civil liberties guaranteed by the Constitution, the Supreme Court has a history of occasionally permitting executive national security actions which appear contradictory to the Bill of Rights.

Since the beginning of the War on Terrorism, following the September 11, 2001 attacks on the World Trade Center in New York and the Pentagon in Washington, D.C., national security has been a primary concern of most Americans. The administrations of Presidents George W. Bush, Barack Obama, and Donald J. Trump have used the prevalence of fear in citizen's minds to expand their powers in fighting the War on Terror. Congress authorized unilateral presidential

action in the 2001 Authorization for the Use of Military Force (AUMF) against perpetrators of the attacks and associated groups. The vague language enabled the president to use military force almost anywhere in the world, so long as there was a loose connection to terrorist organizations. In *Hamdi v. Rumsfeld*, the Supreme Court allowed President Bush to detain individuals related to the terrorist attacks, including American citizens. Congress' authorization contributed significant legitimacy to presidential actions since 2001.

Judicial deference to expanding presidential power is nothing new in the modern era, Douglas argues, as he found that "state secrets claims failed in only 4 out of 58 reported cases in the period 1977-2005."²⁴ In other words, the argument that state secrets are at risk, and therefore a matter beyond the courts' jurisdiction, has largely been successful in modern courtrooms. In 1971, SCOTUS ruled for the first time in the case *Bivens v. Six Unknown Named Agents* that those deprived of constitutional liberties are subject to remedy by the government and such victims have standing to sue before the court. Since the *Bivens* doctrine was conceived, the Court has only weakened its effectiveness through the creation of what Zbrokek calls the "national security exemption."²⁵ In federal court cases which never reached the Supreme Court, known as *Aulaqi I* and *Aulaqi II*, judges ruled that the family of American citizen Anwar al-Awlaki, who was killed by drone strikes ordered by President Obama, lacked standing to sue and dismissed the case. Plaintiffs argued that al-Awlaki was deprived of life and liberty without constitutional due process and that his estate was subject to remedy according to the *Bivens* doctrine. This is the most recent, yet most extreme, example of the national security exemption. Zbrokek claims that, "By foreclosing *Bivens* actions to victims of government action, the courts have potentially deprived American citizens of constitutional protections and crafted an expansive exemption for national security-related suits."²⁶ The national security exemption is significant not only in conversations of affording remedies to victims of government action, viewed

22 Blomquist.

23 Gregory S. McNeal, "Deference, Power, and Emerging Security Threats." *Texas Law Review* 95, no. 3 (2017): 631-650. *Academic Search Premier*, EBSCOhost (accessed March 19, 2018).

24 Douglas, 112.

25 Alexander Steven Zbrokek, "Square Pegs and Round Holes: Moving Beyond *Bivens* in National Security Cases." *Columbia Journal of Law & Social Problems* 47, no. 4 (2014): 485-524.

26 Ibid.

by John Marshall to be essential to the enforcement of constitutional guarantees, but also in simply deciding when or whether government action supersedes civil liberties.

Preventing an ‘Imperial Presidency’

Responding to weighty evidence suggesting noteworthy judicial acquiescence of authority to presidential sovereignty in external relations, a growing number of American scholars, politicians, and ideological groups have offered actions to rein in presidential power. One such method in preventing the further rise of the “imperial presidency,” a term popularized by presidential historian Arthur Schlesinger, is a reliance on Congress to mandate statutory limits on executive power. The analysis of the extent to which Congress has deferred and enabled the rise of an imperial presidency is a matter for individual analysis. As this paper has demonstrated, however, Congress has an important role in legitimizing presidential power when it comes to judicial interpretation. Likewise, a potential method for reform, identified by Gregory McNeal, is for Congress to “create processes and procedures that bind courts and the Executive. Congress can force structure around doctrine and can even force a conversation about what deference doctrines are constitutionally mandated.”²⁷ Considering the Legislative Branch has blissfully delegated its power to the Executive Branch in the past, it seems unlikely for any such congressional reform to be implemented.

Focusing on the development of the national security exemption in relation to civil liberties and constitutional guarantees, Alexander Zbrokek offers his prescribed proper judicial reform relating to the *Bivens* doctrine (described as inherently inadequate). Therefore, he advocates for the creation of an “Article I court with jurisdiction over post-deprivation constitutional claims in national security cases.”²⁸ Would such a court be sufficient in increasing judicial assertiveness overall, or would the statutory scope be so narrow as to inadequately address the larger issue? While the court would “close the rights/remedies gap generated by the national security exception to the *Bivens* doctrine and compel the Government to account for its actions,” it is unlikely that the growth in the authority of the Executive Branch would be sig-

nificantly impacted.

Seeking institutional checks and balances to the growing system of presidential unilateralism on national security matters will likely prove ineffective. As is evidenced by the founding documents and writings of even the staunchest advocates of executive power, checks and balances are central to a functioning American government. In other words, it was expected that the power of the presidency was properly balanced by shared powers between the other two branches of the federal government as well as the states. It appears that, over time, institutional checks are meaningless if the values of the American people change. As has perhaps happened already, “assertions of presidential authority made in *extremis* may become embedded in U.S. practice and law without a corresponding application of checks and balances.” This “may in time diminish both the principles of law that define American life as well as the physical security at which they are directed.”²⁹ Therefore, James Baker prescribes a “sustained commitment to the rule of law in practice and perception” as the proper response to dynamic and multifaceted threats to American national security. Only through an increased understanding of founding legal principles and constitutional law can existing institutional checks and balances begin significantly limiting presidential power in external relations.

Conclusion

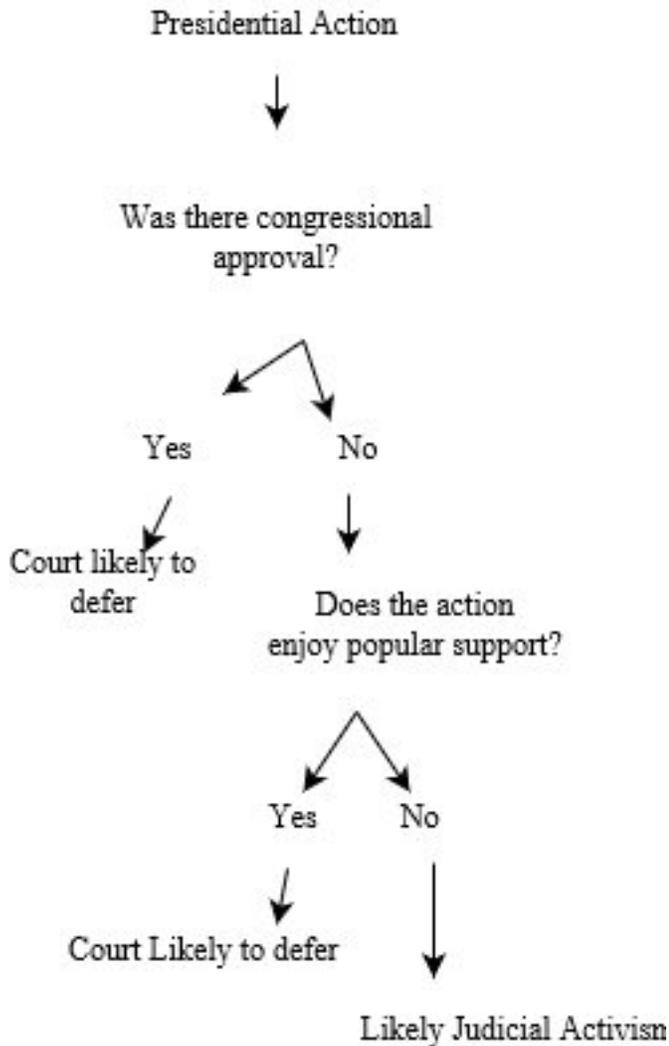
The goal of this paper was to examine existing scholarly literature and debate surrounding the question of executive authority in national security policymaking, and to subsequently determine whether the Supreme Court has historically enabled or limited presidential power. The hypothesis proposed the existence of considerable evidence would indicate that the Supreme Court has limited the president through judicial review. After careful review of case law and opinions from national security legal experts, it appears that the original hypothesis is null. Through lack of action in the face of executive power-grabs (due to SCOTUS’s nature as a reactionary force), the courts have enabled an expanding definition of presidential war powers. While courts have occasionally limited

27 McNeal, 637

28 Zbrokek.

29 Baker, *In the Common Defense*, 307.

powers of the president, these limits occur in very specific circumstances and tend to reinforce Blomquist's idea of "reasonably deferential judicial review."



Supreme Court actions can be organized into the following framework to explain the historical variation in levels of deference. First mentioned during the conversation surrounding *Korematsu*, but recurrent throughout this paper, is the idea that Congress lending legitimacy to presidential action cannot be underscored. Christenson, however, discusses the influence of public opinion on presidential action. He further demonstrates how a Supreme Court case surrounding the action influences public opinion, the outcome of the case, and the future actions of the president.

Therefore, the above flowchart helps to explain what considerations matter most in the outcome of national security cases before the Court. It should be noted that these outcomes are only likely according to this research and could change given the personal opinions or ideologies of the particular individuals on the Supreme Court. A good example to illustrate this flowchart is the aforementioned *Ex Parte Merryman* case in which a federal district court ruled against President Lincoln's suspension of Habeas Corpus. Lincoln did not have approval from Congress to exercise their constitutional responsibility and uproar arose from the American people who were already inclined to call the President a tyrant. Such conditions being met, the court, chaired by Chief Justice Roger Taney, ruled against Lincoln. Lincoln, however, simply ignored the decision and carried on.

The ascendancy of the president in national security policy is the greatest change in American government. Shifting perception of the proper role of the presidency paired with the changing threats facing the United States has led to the primacy of the Executive Branch. Traditionally, public opinion, Congress, and the Courts are most readily equipped to check wrongful assertions of executive power. Resulting from a greater degree of deferral from the public and Congress, however, has been a general trend towards judicial deference. Although the Supreme Court has decided against presidential powers in individual examples, the legal precedents set by *Youngstown* and *Curtiss-Wright* have worked what Blomquist calls 'presiprudence' into accepted legal doctrine. Going forward, the Supreme Court is likely to continue in this tradition, given an increased and ill-defined threat from non-state actors, terrorist organizations, significant power tensions, and nuclear weapons.

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