This seminar examines the core legal issues arising in the making and execution of U.S. foreign policy under a Constitution based on the separation of powers, federalism and civil liberties. It focuses on some of the most challenging issues that have divided the American polity from the inception of the Republic to the present day: the allocation of foreign affairs power between the Executive and the Congress; the proper role of the courts in deciding legal issues relating to national security, particularly where civil liberties are at issue; pre-emption of state law by statute, treaty, and executive agreements; and the application of customary international law as part of the domestic law of the United States. The cases and materials include both historical debates and contemporary controversies, including the scope of Presidential power to protect the nation in times of acute danger. We will also consider the political question doctrine, the treaty power, executive agreements, and the federal ‘common law’ of foreign relations.

The course will be conducted at a fairly advanced level, focused on legal rather than policy issues, with an eye to the interests of students participating in the graduate programs in national security, human rights, and international legal studies. There are no prerequisites, but familiarity with basic U.S. constitutional principles is very helpful. Our text will be Bradley and Goldsmith, Foreign Relations Law (5th edition, Wolters Kluwer, 2014) and its current Supplements. Additional readings will be assigned.

PARTICIPATION: Grades are based on the final examination and class participation. Attendance and participation in class discussion are required. We expect every class member to be prepared for each session, and our presentations will assume your familiarity with the assigned material. If you are not prepared for a given class, please see us at the outset.

EXAM: The examination will be a three-hour, open-book test to be typed on-line; no hand-written exam papers.
SCHEDULE OF CLASSES

No. 1  Introduction and Background  (August 30)

The Constitution: Historical, Conceptual and Textual Foundations
Readings: Overview (pp. xxv-xxvii); Ch. 1 pp. 3-27.

No. 2  Scope and Origin of the Foreign Affairs Power  (September 6)

Inherent Sovereignty, Constitutional Sovereignty, Delegated Powers
Readings: Ch. 1 pp. 27-43 (Curtiss-Wright); Ch. 3 pp. 150 (n 5), 160-172 thru n 4 (Youngstown), 190 (n 3).

No. 3  Judicial Responsibility and Restraints  (September 13)

Jurisdiction, Political Question Doctrine, Comity
Readings: Ch. 2 pp. 47-53 thru n 1, n 5a re standing (July 2016 Supp. on CANVAS); Baker v. Carr excerpt (CANVAS), Ch. 2 pp. 57-66 thru n 1, 68-69 (n 7); Ch. 9 pp. 790-794 (Al-Aulaqi I); Ch. 2 pp. 110-115 thru n 1.

No. 4  Congressional and Executive Powers  (September 20)

Inherent Powers and Conflicts Between the Congress and the Executive
Readings: Ch. 3 pp. 137-141, 145-149 (thru n 2), 151-152 (n 7), 157-158, 176-182 (Dames & Moore), 191-192 (n 5); Supp. pp 8-20 (Zivotofsky) (can skim historical examples on pp 15-17).

Recommended: Supp. 21-37 (Zivotofsky dissents and notes)

No. 5  War Powers  (September 27)

Readings: Ch. 8 pp. 585-592, 596-603 thru n 7, 607-622 thru n 4, 629-632, 643-646 (nn 7-12); Nixon veto message WPR and excerpt 1980 OLC Opinion (on CANVAS); n 12b re ISIL (July 2016 Supp. on CANVAS)
No. 6  **War and Liberty**  (October 4)

Readings: Ch. 8 pp. 667-681, 685 (n 1), 686-688 (nn 4 - 5); Ch. 9 pp. 693-702 thru n 3, 705-713 thru n 1 (*Hamdi*).

No Class – October 11

No. 7  **War on Terror**  (October 18)


No. 8  **Treaties**  (October 25)

Self-Execution, Last in Time, Federalism, RUDs


Recommended: Supp. pp. 46-54 (*Bond* opinions); Ch. 5 pp. 323-331 (delegation to international courts and bodies)

No. 9  **Executive Agreements**  (November 1)

Scope of Presidential Authority

Readings: Ch. 5 pp. 367-387 thru n 8; Ch. 4 pp. 234-241(*Garamendi*); Bush memorandum in *Medellin* (on CANVAS); nn 14-16 re Iran and Climate Change (July 2016 Supp. on CANVAS).

No. 10  **Federal Common Law of Foreign Relations**  (November 8)

Customary International Law in US Courts

Readings: Ch. 2 pp. 72-79; Ch. 4 pp. 249-251, 254-258; Ch. 6 pp. 391-401 thru n 2, 408-420 (ATS and *Sosa*), 491-494 (*Serra v. Lapin re Charming Betsy* doctrine)
No. 11  **Foreign Sovereign and Foreign Official Immunity**  (November 15)

Deference to the Executive Branch

Readings: FSIA Appendix C: Sections 1604, 1605, 1695A, 1609, 1610; pp. 448-455 (maj. opinion in Nelson); 458-560 (nn 1-3) pp. 464-465 (n 16); excerpt from Altmann on CANVAS; pp. 470-482 (Samantar cases); p 484 n 5; p 487 n 12; excerpt from USG Suggestion of Immunity in a head of state case on CANVAS

No. 12  **Federal Supremacy in Foreign Affairs**  (November 22)

States’ Rights

Readings: Const. Art I, section 10, Art. III, Art. V1, paragraph 2; Ch. 4 pp. 203-221 thru n 7, 225-234, 245-246 (nn 10-11)

No. 13  **Extra-territorial application of U.S. law**  (November 29)

Readings: Ch. 2 pp. 89-104 thru n 2 (Morrison); Ch. 6 pp. 432-439 (Kiobel)

**Review for Exam**  (November 29)

Exam: December date TBD
Recommended Readings and Sources

Schroeder and Bradley, Presidential Power Stories (Foundation 2009)
ALI, Restatement (Third), Foreign Relations Law of the United States (1986)
Thomas Franck, M. Glennon, S. Murphy, E. Swaine, Foreign Relations and National Security Law
Louis Henkin, Foreign Affairs and the Constitution
Louis Fisher, Presidential War Power
John N. Moore and R.F. Turner, National Security Law
Harold Koh, The National Security Constitution
Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration

Lederman & David Barron, The Commander-in-Chief at the Lowest Ebb --


