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. The cases and materials focus on the distribution of power among the President, the Congress and the Judiciary and the limits of federal power over state action. The most fundamental issues are the scope of Presidential power and the proper role of the courts in dealing with legal questions affecting U.S. foreign relations, national security and civil liberties. This inquiry begins with the historical origins of the relevant texts and embraces contemporary controversies, particularly those emerging out of the U.S. response to the September 2001 attacks, including authorization of armed conflict and the detention and prosecution of suspected terrorists. In addition, we will consider the political question doctrine, treaties and executive agreements, the status of customary international law in U.S. courts, 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 law is helpful. Our text will be Bradley and Goldsmith, Foreign Relations Law (5th edition, Wolters Kluwer, 2014) and its current Supplement. Additional readings may be assigned from various primary materials, including recent judicial decisions.

PARTICIPATION: Grades are based on the final examination and class participation. Participation in class is required. We aim at thoughtful inter-active discussion rather than lectures. 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 me at the outset.

EXAM: The examination will be a three-hour, entirely open-book test, at 6 p.m. Dec. xx, 2015.

CONTACT: We will be using Courseware for communication, assignment and document distribution. A course page has been established; the password is “[REDACTED]”. Professor Feldman can be reached at [REDACTED] email > [REDACTED] <
SCHEDULE OF CLASSES

No. 1 Introduction and Background  (Sept. 1)

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 8)

Inherent Sovereignty, Constitutional Sovereignty, Delegated Powers
Readings: Ch. 1 pp. 27-43; Ch. 3 pp. 150-152 (nn 5-7); full text Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) -- on line and posted on courseware.

No. 3 Limitations on Judicial Intervention  (September 15)

Jurisdiction, Political Question Doctrine, Act of State
Readings: Ch. 2 pp. 47-53 thru n. 1, Baker v. Carr excerpt (courseware), Ch. 2 pp. 57-66 thru n1, 68-69 (n7); Ch. 9 pp.790-94 (Al-Aulaqi I); Ch. 2 pp. 71-80, 84-86 (nn10-11).

No. 4 Foreign Sovereign Immunity; Judicial Deference to Political Branches  (September 22)

Readings: Ch. 2 pp. 121-133; Ch. 6 pp. 423 (n 9), 448-460 (thru n5).

No. 5 Congressional and Executive Powers  (September 29)

Readings:
Congress - Ch.3 pp. 137-141, 145-49 (thru n2), 150 (n 5), 151-52 (n 7).
Executive - Ch.3 pp.157-158,175(n13), 176-182; Supp. pp 7-14 and 17-18 (Zivotofsky Kennedy, J. Part I, II A and B, III); 191-195 (nn 5-9).
Recommended: Ch. 3 pp. 160-68 (Youngstown); Supp. pp 19-35 (Zivotofsky opinions and notes).
No. 6 **Federal Common Law of Foreign Relations; Customary International Law in U.S. Courts** (October 6)

Readings: Ch. 2 pp. 75-76; Ch. 4 pp. 249-51, 254-58; Ch. 6 pp. 391-401 thru n 2, 403-05 (nn 5-9), 408-420 (ATS and Sosa), 489-91 (*Charming Betsy* doctrine); Supp. pp 74-76 nn 12a-12b (*Al Bahul*).


NO Class – October 13

No. 7 **Treaties** (October 20)

Self-Execution, Last in Time, Scope of Treaty power, RUDs


Recommended: Supp. pp 43-51 (*Bond* opinions); Ch. 5 pp. 323-31 (delegation to international courts and bodies)

No. 8 **Executive Agreements** (October 27)

Readings: Ch. 5 pp. 367-87 thru n 8; Ch. 4 pp. 234-41; Bush memorandum in *Medellin* posted on courseware; Supp. pp 54-59 nn 14-15.

No. 9 **War Powers** (November 10)

Readings: Ch. 8 pp. 585-92, 596 bottom-603 thru n7, 607-22 thru n 4, 628-32, 643-46 (nn 7-12); Supp. 64-65; Nixon veto message WPR on courseware.

Recommended: 1980 OLC opinion; Lawfare review of war powers authorities – both on courseware.

No. 10 **National Security and Individual Liberties I** (November 17)

Readings: Ch. 8 pp. 667-85, 686-88(nn 4-5); Ch. 9 pp. 693-702 thru n 3, 705-713 thru n 1.
No. 11  National Security and Individual Liberties II: (November 24)

Readings: Ch. 9 pp. 715 from n 5 -737 thru n 6, 741- 46 thru 1st para *(Boumediene)* 754-56 (Scalia dissent); Bush Military Order 11/13/2001 on courseware.

Recommended: 2012 NDAA excerpts on courseware; Supp. pp 70-73 n 8a (Sgt Bergdahl prisoner exchange).

No. 12  Federal Supremacy in Foreign Affairs – States’ Rights (November 3)

Readings: Const. Art I, section 10, Art. III, Art. V1, paragraph 2;

Ch. 4 pp. 203-221 thru n7, 225-234, 245-46 (nn10-11)

No. 13  Review  (December 1)

Exam  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*


Harold Koh, *The National Security Constitution*

Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*


