

**BOWDOIN COLLEGE**  
**PRESIDENTIAL POWER AND THE LAW**  
**GOVERNMENT 3035**  
**FALL 2017**

**Professor Andrew Rudalevige**

Hubbard Hall 205 (798-4273; [arudalev@bowdoin.edu](mailto:arudalev@bowdoin.edu); @rudalev)  
*Office Hours: Monday, 10:00-noon; Thursday, 1:00-2:00; or by appointment*

This advanced seminar grapples with current and historical questions of presidential power. Article II of the U.S. Constitution is brief, and vague; the “executive power” is nowhere defined. How do presidents gain traction against the legislative and judicial (and even the executive) branches, and when can other political actors rein them in? How do power, and law, interact? Case studies include a variety of claims made over time by presidents about their unilateral administrative abilities, as well as in the contemporary war on terror (with regard to detention, interrogation, surveillance, due process, and the like) – and the reaction they have provoked from other branches of government such as the Supreme Court.

The topics covered in this course are historical, but also playing out in real time. Thus, beyond the syllabus readings, students are also expected to keep up to date with current political events. This is especially important as regards ongoing events in Washington and the world that affect the issue-areas we will be focusing on during the course.

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The following assigned books are available for purchase from on-line booksellers (you are urged to shop around) and on reserve at the H-L Library. Other required readings will be made available on-line via the class Blackboard site.

- Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard, 2013)  
[ISBN 978-0-674-72584-3]
  - Harold Bruff, *Untrodden Ground: How Presidents Interpret the Constitution* (Chicago, 2015)  
[ISBN 978-0-226-41826-1]
  - Phillip Cooper, *By Order of the President*, 2<sup>nd</sup> ed. (Kansas, 2014)  
[ISBN 978-0-7006-2012-8]
  - Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 6<sup>th</sup> ed. (Kansas, 2014)  
[ISBN 978-0-7006-1998-6]
  - Charlie Savage, *Power Wars*, paperback rev. ed. (Back Bay Books, 2017)  
[ISBN 978-0-316-28659-6]
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## COURSE REQUIREMENTS

1. *Attendance and participation* (15%). This is an advanced seminar and depends on your active involvement – and, of course, your preparation for each class. The reading load reflects the high expectations I have of upper-level Bowdoin students.

If you cannot be present for a given class session please notify me well in advance. More than one unexcused absence will have a negative effect on your grade.

2. *Short response papers and/or questions for outside speakers* (20%). Discussion topics will be distributed in advance of (normally) one class session per week, along with a question to which students should respond, using the readings, in the form of a brief (≤1.5 page) essay. For sessions involving outside speakers, this will normally include developing questions, based on the readings, for those speakers.

There will be twelve topics, but you need to write on only eight. You may “pass” on two weeks during the semester, at your discretion; and in two other weeks, you will write case briefs instead (see #3, below.) If you choose to write more than eight response papers, however, only the top eight grades will count.

Papers are due at the start of class (in hand, or via email) unless otherwise stated in the discussion topic email. Late papers or other assignments will not receive full credit: extensions will be granted only in advance and in exigent circumstances.

3. *Case briefs* (20%). A wide array of federal court cases are on the syllabus, and we will argue a number of them informally in class. Each student will sign up to write (and argue in class) two “briefs” during the semester, one on the side of the plaintiff and one on the side of the defendant.
4. *Research paper* (45%) of 20-25 pages on an approved topic relating to the course, to be due at **5:00 pm on Sunday, December 17** (*this date is set by the Registrar*). You may of course turn in your papers before this deadline – but not after it, except in the case of emergency *and* with my advance permission. Each member of the class will provide a brief review of their topic during our final class session.

There are many possible topics, obviously, and you should start thinking about areas of interest early in the semester. You may want to expand upon one of the topics we can of necessity only touch on lightly during class. But you are welcome to select different issues too. I will hold individual meetings with you the week after spring break to discuss paper topics and how you might continue (not begin!) your research for the paper.

While you do not need to conduct primary research for this paper, you do need to construct a clear hypothesis, think of appropriate ways to test that hypothesis, identify and utilize relevant qualitative or quantitative data for conducting that test, and draw conclusions about the validity of your hypothesis.

*Other things to keep in mind:*

An accumulating body of research shows that the use of electronic devices during class, even for notetaking, lessens your participation, undermines your retention of key information, and is distracting to others. This is especially true in small seminars that require maximum interaction and attention. Therefore, except in cases where medical accommodations make them necessary (see below), *please do not use laptops or other devices during class sessions.*

Students requiring accommodations to respond to disabilities need to be in contact with the Office of the Dean of Student Affairs to ensure these are addressed. Please also let me know of any special needs or accommodations at the beginning of the semester or as soon as you become aware of them.

If you are taking this course on a Credit/D/Fail basis, a 'credit' grade requires completion of all work for the course (participation, papers, etc.).

In this course unless otherwise specified please use Chicago Manual of Style-format footnotes. A useful quick reference guide may be found at:

[http://www.chicagomanualofstyle.org/tools\\_citationguide/citation-guide-1.html](http://www.chicagomanualofstyle.org/tools_citationguide/citation-guide-1.html)

Finally, it goes without saying – and yet, I will say it! – that *in all written work, you must abide by the most stringent rules of citation. Plagiarism is grounds not only for a failing grade on a given assignment, but for the course – and, potentially, for dismissal from the College.* Please refer to the Bowdoin Honor Code to remind yourself how the College defines plagiarism ("strictly," is the short answer). And become familiar with the College library website's references to proper citation.

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## **SCHEDULE OF READINGS**

*Subject to change, with notice*

(\*) indicates readings available on-line via Blackboard

*Note: because of the American Political Science Association annual meetings, there will be no class meeting on August 31. Our first class will be Tuesday, September 5.*

### ***September 5: Introductions and Overview***

(\*) The Constitution of the United States

Bruff, Ch. 1

(\*) Charlie Savage, "Presidential Candidates, Silent on Presidential Power," *New York Times* (January 24, 2016), p. SR3.

## **I. The Basics of Presidential Power**

### ***September 7. Constitutionalism and Prerogative***

(\*) John Locke, §92-94, §150-68, from the *Second Treatise on Government*

(\*) *Federalist Papers*, #69-70, 72-73

Fisher, Ch. 1

Cooper, Ch. 1

## ***September 12, 14, 19. Law and Emergencies***

### **Sept. 12:**

- (\*) Clinton Rossiter, *Constitutional Dictatorship*, excerpt
- Review Bruff, Ch. 5 (Lincoln)
- (\*) *The Prize Cases*
- (\*) Daniel Tichenor, "Historical Set Points and the Development of U.S. Presidential Emergency Power," *Perspectives on Politics* 11 (September 2013): 769-88.
- Ackerman, Ch. 1

### **Sept. 14:**

- review Bruff, Ch. 2, 9, 14 (Washington; Truman; G.W. Bush)
- (\*) *Pacificus-Helvidius* debate (1793-94)
- (\*) *Youngstown Sheet & Tube v. Sawyer* (1952), including dissents
- (\*) Bruff, *Bad Advice*, Ch. 6
- (\*) Richard Epstein, "The Imperfect Reconciliation of Liberty and Security" in Reuter and Yoo, eds., *Confronting Terror*

### **Sept. 19:**

- Ackerman, Ch. 3- 4
- (\*) Robert Bauer, "Thoughts on the Proper Role of the White House Counsel," *Lawfare* (February 21, 2017)
- Savage, Ch. 1-3

[Note: Bruff, *Bad Advice*, Ch. 1 & 4, is not required but relevant for those particularly interested.]

## **II. The Constitution, Applied and Extended**

### ***September 21. Appointments and Removal Power***

- Fisher, Ch. 2-3
- (\*) *Myers v. U.S.* (1926)
- (\*) *Humphreys Executor v. U.S.* (1935)
- (\*) *Morrison v. Olson* (1988)
- (\*) *NLRB v. Noel Canning* (2014)

### ***September 26. Vetoes and Pardons***

- Fisher, Ch. 5
- Cooper, pp. 192-95, 202-04, and Ch. 8
- (\*) Charlie Savage, "Can Trump Pardon Himself?," *New York Times* (July 21, 2017)

*Note: there will be no class meeting on September 28.*

### **October 3, 5, 12. Administrative Unilateralism.**

#### Oct. 3:

Review Bruff, Ch. 12 (Reagan)

(\*) Terry Moe, "The Politicized Presidency," from Chubb and Peterson, eds., *The New Direction in American Politics*

Cooper, Ch. 2-4

(\*) Joshua Kennedy, "Do This! Do That! – And Nothing Will Happen," *American Politics Research* 43 (January 2015): 59-82

#### Oct. 5:

(\*) Adam White, "The Administrative State and the Imperial Presidency: Then and Now," in Schmitt et al., eds., *The Imperial Presidency and the Constitution*

(\*) Andrew Rudalevige, "Old Laws, New Meanings," *Syracuse Law Review* (2016)

(\*) William West, "The Institutionalization of Regulatory Review," *Presidential Studies Quarterly* 35 (March 2005): 76-93.

(\*) *Motor Vehicles Manufacturers Association v. State Farm* (1983)

(\*) Executive Order 13771 (January 27, 2017)

#### Oct. 12:

Fisher, Ch. 7

Cooper, Ch. 5

(\*) Sue Eckert, "The Use of Financial Measures to Promote Security," *Journal of International Affairs* (2008)

### **III. Powers of War, and Peace**

#### **October 17, 19. Secrecy.**

#### Oct. 17 (Executive Privilege):

Review Bruff, Ch. 11 (Nixon)

Fisher, Ch. 6

(\*) *U.S. v. Nixon* (1974)

(\*) *In re Sealed Case (Espy)*, D.C. Circuit Court of Appeals (1997)

(\*) Attorney General Jeff Sessions, testimony before the Senate Intelligence Committee (2017)

#### Oct. 19 (State Secrets):

(\*) *U.S. v. Reynolds* (1953)

Savage, Ch. 8-9

#### **October 24. Foreign Affairs**

(\*) *Little v. Barreme* (1804)

(\*) *U.S. v. Curtiss-Wright* (1936)

Fisher, pp. 107-110 and Ch. 8

Cooper, Ch. 7

(\*) *Dames & Moore v. Regan* (1981)

(\*) *Zivotofsky v. Kerry* (2015)

## October 26, 31. War Powers

### Oct. 26:

Fisher, Ch. 9 (to p. 306)

(\*) *Federalist Papers* #4, 41, and review #69

(\*) John Yoo, "War and the Constitutional Text," *University of Chicago Law Review* 69 (2002)

(\*) *War Powers Resolution*, P.L. 93-148 (1973)

### Oct. 31:

Fisher, Ch. 9 (pp. 306-23)

Savage, Ch. 12

(\*) *Authorization for the Use of Military Force*, P.L. 107-40 (2001)

(\*) Michael Mukasey, testimony before the House Foreign Affairs Committee, July 25, 2017

(\*) Rita Siemion, "Trump Administration Says Its Broad Powers Under the 2001 AUMF Are Plenty," *JustSecurity* (August 2, 2017)

## III. Adaptations and Applications to World after 9/11

### November 2, 7, 9, 11. Detention, Trials, and "Enemy Combatants"

#### Nov. 2:

Review Bruff, Ch. 14

(\*) George W. Bush, Military Order of November 13, 2001

(\*) Alberto Gonzales, Memo for the President, January 25, 2002

(\*) State Department comments on Gonzales draft memo

(\*) George W. Bush to the Vice President, et al., "Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002

(\*) Mohamedou Ould Slahi, *Guantanamo Diary*, excerpt

#### Nov. 7:

(\*) *Rasul v. Bush* (2004)

(\*) *Hamdi v. Rumsfeld* (2004)

(\*) materials from *Padilla v. Bush* (2006) and *al-Marri v. Hanft* (4<sup>th</sup> Circuit, 2007)

#### Nov. 9:

(\*) *Hamdan v. Rumsfeld* (2006)

(\*) *Boumediene v. Bush* (2008)

(\*) Judge A. Raymond Randolph, "The Guantanamo Mess," in Reuter and Yoo, eds., *Confronting Terror*

#### Nov. 11:

Savage, Ch. 4, 7, 10 (and see <http://projects.nytimes.com/guantanamo>)

### ***November 16. Interrogation***

- (\*) Office of Legal Counsel, "Standards of Conduct for Interrogation," August 1, 2002 and related memoranda
- Jonathan Turley, "Nuremberg Revisited" and John Yoo, "Interrogation," in Reuter and Yoo, eds., *Confronting Terror*

### ***November 21. Targeted Killings and Due Process***

- Savage, Ch. 6
- (\*) Department of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen...*, DOJ White Paper (2010)
- (\*) "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States..." (May 22, 2013)

*No class November 23: Happy Thanksgiving!*

### ***November 28. Surveillance and Wiretapping***

- Savage, Ch. 5, 11
- (\*) *In re Sealed Case* (Foreign Intelligence Surveillance Court of Review, 2002)

## **IV. Concluding Thoughts**

### ***November 30, December 5. Accountability and Reform***

Nov. 30:

- (\*) *Federalist Papers*, #65
- (\*) Jared Cole and Todd Garvey, *Impeachment and Removal* (Congressional Research Service report R44260), October 29, 2015
- (\*) 25<sup>th</sup> amendment to the U.S. Constitution
- (\*) Douglas Kriner and Eric Schickler, *Investigating the President*, excerpt
- (\*) Eric Posner and Adrian Vermeule, *The Executive Unbound*, excerpt

Dec. 5:

- Ackerman, Ch. 5-6
- (\*) Terry Moe & Will Howell, *Relic*, excerpt
- (\*) G. Calvin Mackenzie, *The Imperiled Presidency*, excerpt

### ***December 7. The Future of Presidential Power*** [and brief student paper presentations]

- Ackerman, Ch. 7
- Bruff, Ch. 15
- (\*) Rudalevige, *The New Imperial Presidency*, Ch. 8
- (\*) JustSecurity symposium on *Power Wars: "Contrasting Views on Executive Authority"*  
<https://www.justsecurity.org/27891/contrasting-views-executive-authority/>

**FINAL PAPER DUE DECEMBER 17, 5 p.m.**