

BOWDOIN COLLEGE
PRESIDENTIAL POWER AND THE LAW
GOVERNMENT 3035
SPRING 2020

Professor Andrew Rudalevige

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Office Hours: Monday, 10:15-11:45; Thursday, 3:00-4:30; 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 the other branches of government.

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.

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.

- Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 6th ed., revised. (University of 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
- Harold Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University of Kansas, 2009), ISBN 978-0700616435

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* (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. {continues overleaf}

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 approximately 20-25 pages on an approved topic relating to the course, to be due at **5:00 pm on Wednesday, May 13** (*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) or where they are specifically authorized for in-class work (as for reference, given the number of trees we might save by not printing the entirety of court cases), 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. Note that this differs somewhat from the Chicago style for bibliographic entries. A useful quick reference guide may be found at: 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.

SCHEDULE OF READINGS - Subject to change, with notice

(*) indicates readings available on-line via Blackboard

January 22: Introductions and Overview

(*) The Constitution of the United States

I. The Basics of Presidential Power

January 27. Constitutionalism and Prerogative

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

(*) *Federalist Papers*, #47, 51, 69-70, 72-73

Fisher, Ch. 1

Bruff, Ch. 5

(*) William Barr, address to the Federalist Society (November 15, 2019)

January 29. All the President’s Lawyers

Bruff, Ch. 1-4

(*) Robert Bauer, “Thoughts on the Proper Role of the White House Counsel,” *Lawfare* (February 21, 2017)

Savage, Ch. 1-3

February 3, 10. Law and Emergencies [note: there is no class on February 5.]

(*) Clinton Rossiter, *Constitutional Dictatorship*, excerpt

(*) *The Prize Cases* (1863)

(*) *Ex Parte Milligan* (1866)

(*) Daniel Tichenor, “Historical Set Points and the Development of U.S. Presidential Emergency Power,” *Perspectives on Politics* 11 (September 2013): 769-88.

(*) *Pacificus-Helvidius* debate (1793-94)

(*) Chris Edelson, Emergency Presidential Power, Ch. 6-7

(*) *Korematsu v. United States* (1944)

(*) *Youngstown Sheet & Tube v. Sawyer* (1952)

(*) Bruff, Ch. 6

(*) Richard Epstein, “The Imperfect Reconciliation of Liberty and Security” in Reuter and Yoo, eds., *Confronting Terror*

II. The Constitution, Applied and Extended

February 12, 17. Appointments and Removal Power

Fisher, Ch. 2-3

(*) *Myers v. U.S.* (1926)

(*) *Humphreys Executor v. U.S.* (1935)

(*) "Justices to Weigh Constitutionality of CFPB Structure," *ScotusBlog* (October 18, 2019)

(*) *Morrison v. Olson* (1988)

(*) *NLRB v. Noel Canning* (2014)

February 19. Vetoes and Pardons

Fisher, Ch. 5

(*) Phillip J. Cooper, *By Order of the President*, pp. 192-95, 202-04, and Ch. 8

(*) Charlie Savage, "Can Trump Pardon Himself?," *New York Times* (July 21, 2017)

February 24, 26. Secrecy: Executive Privilege and Its Cousins

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)

(*) *Trump v. Mazars*, D.C. Circuit Court of Appeals (2019)

(*) Office of Legal Counsel, "House Committees' Authority to Investigate for Impeachment," Slip Opinion (January 19, 2020)

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

Savage, Ch. 8-9

March 2, 4. Foreign Affairs.

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

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

Fisher, pp. 107-110

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

Fisher, Ch. 8

(*) Michael Gordon, "Trump Moves Closer to Ending Another Treaty," *Wall Street Journal* (October 27, 2019)

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

(*) Curtis Bradley and Jack Goldsmith, "Presidential Control Over International Law," *Harvard Law Review* (2018)

March 9-18: Have a great spring break!

March 23, 25. War Powers

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)

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)

(*) Office of Legal Counsel, "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," Slip Opinion (May 31, 2018)

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

March 30, April 1, 6. Detention, Trials, and "Enemy Combatants"

Review *Ex Parte Milligan*

(*) Edelson, Emergency Presidential Power, Ch. 5 (*Quirin*)

Bruff, Ch. 9-10

(*) 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

Bruff, Ch. 8

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

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

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

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

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

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

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

April 8. Interrogation

Bruff, Ch. 11-12

(*) 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*

April 13. Targeted Killings

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)

(*) Scott Anderson, "Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?," *Lawfare* (January 3, 2020)

April 15. Surveillance and Wiretapping

Bruff, Ch. 7

Savage, Ch. 5, 11

(*) *In re Sealed Case* (Foreign Intelligence Surveillance Court of Review, 2002)

April 20, 22, 27. Inter- (and Intra-) branch Relations

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

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

Fisher, Ch. 4, 7

(*) material on National Emergencies Act and reapportionment of funds, TBA

(*) *Trump v Hawaii* (2018)

(*) Jeffrey A. Weinberg, "The view from the Oval Office: Understanding the Legislative Presidency," *Journal of Legislative Studies* (December 2018)

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

(*) Joshua Kennedy, "Do This! Do That! – And Nothing Will Happen," *American Politics Research* (January 2015)

(*) Executive Order 12866 (September 30, 1993)

(*) Rachel Potter, *Bending the Rules*, Ch. 2

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

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

(*) *Chevron v. NRDC* (1984)

(*) *King v. Burwell* (2015)

April 29, May 4. Oversight & Accountability

(*) Douglas Kriner and Eric Schickler, *Investigating the President*, excerpt

(*) Eric Posner and Adrian Vermeule, *The Executive Unbound*, excerpt

(*) *Federalist Papers*, #65; review 25th amendment to the U.S. Constitution

(*) Jared Cole and Todd Garvey, *Impeachment and Removal* (Congressional Research Service report R44260), October 29, 2015

(*) "Mueller Report," excerpts

(*) Office of Legal Counsel, "A Sitting President's Amenability to Indictment and Criminal Prosecution," Slip Opinion (October 16, 2000)

(*) Adam Schiff, et al., "Trial Memorandum" and Presidential Response, January 2020

IV. Concluding Thoughts

May 6. Reforms and Presidential Power?

Bruff, Ch. 13

(*) Bruce Ackerman, *Decline of the American Republic*, Ch. 5-6

(*) G. Calvin Mackenzie, *The Imperiled Presidency*, excerpt

(*) Terry Moe & Will Howell, *Relic*, excerpt