UNIVERSITY OF MICHIGAN POLITICAL SCIENCE

War and the Constitution
Winter 2013

Wednesday 4-6pm
2436 Mason Hall

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Office hours: Tues., 11:45-1pm, or by appointment

Description: This course examines the nature of constitutionalism with a special focus on war and foreign affairs. This is not a class on national security law, but rather a class about how constitutional purposes and constraints condition the war-making power in the US political system. We are scrutinizing the normativity that the Constitution brings to war hostilities, as well as how the imperatives of international politics condition how actors interpret constitutional meaning.

The domain of war and foreign affairs is an evocative window into the meaning of constitutional constraint. Constitutions are themselves political responses to the security problems associated with anarchy at the international level and hierarchy at the domestic level. The Supreme Court is traditionally deferential to the branches in its security jurisprudence, either labeling problems “political questions,” or incorporating highly deferential doctrines and standards into its review of legislatures and executives. Security is perhaps the only area of constitutional politics where officials and observers feel comfortable asking officials to ignore constitutional constraints for the sake of the whole. And finally, a characteristic of hostilities in modern times is an aggressive use of law by combatants on both sides as a way to extract gains in battle (“lawfare.”) For these reasons, war, security, and foreign affairs are often thought to exist in uneasy alliance with both normativity and with the law. An important question of the class is about whether war and security are structured by dynamics that are central to constitutional functioning more broadly, or whether war and security represent exceptional policy areas that should be theorized in special ways.

What is the relationship between war and constitutional constraint? What is the relationship between constitutional purposes and legal and political constraint? Who should decide constitutional questions of war, and how should they go about deciding? What is the allocation of war and security powers under the US Constitution, and what are the security responsibilities of each branch? The effort is to link these particular questions about war to broader questions about the nature and meaning of constitutional authority itself.

The reading for this class is intensive. The bulk of your grade is based on a long paper, due at the end of the semester. Please look over the syllabus carefully and make a
decision about whether to proceed in this class on the basis of a careful assessment of whether you will be able to fulfill the course requirements.

Requirements:

Participation. 25%. The bulk of this grade is based on two oral presentations guiding our discussion. Each student will sign up for two different class sessions where she or he should develop a point of view with reference to the readings. The remainder of this part of the grade is based on attendance, preparedness for class, and quality of engagement over the semester.

Short Paper. 25%. Each student will prepare one 5-page paper, due April 3. This paper can be extended or developed further into the final paper, or the final paper may engage a completely different topic.

Final Paper. 50%. Each student will prepare one final 20 page research paper, due April 24. We will take time in class to discuss strategies and expectations surrounding research papers. You are encouraged to come to office hours over the semester to discuss paper ideas.

Penalties. Papers are reduced by one letter grade per day late (A to B, etc.). Please contact me as soon as you know your paper will be late.

Accommodations for Students with Disabilities:

If you need an accommodation for a disability, please let me know. Some aspects of this course, the assignments, the in-class activities, and the way the course is usually taught can be modified to facilitate your participation and progress. As soon as you make me aware of your needs, we can work with the Office of Services for Students with Disabilities (SSD) to help us determine appropriate academic accommodations. SSD (734-763-3000; http://www.umich.edu/sswd) typically recommends accommodations through a Verified Individualized Services and Accommodations (VISA) form. Any information you provide is private and confidential and will be treated as such.

Policy on Academic Integrity:

I expect all students to uphold the standards outlined in the College’s statement, LSA Community Standards of Academic Integrity. For this class, any violation of academic integrity — i.e., submitting someone else’s work, submitting work you completed in another class (double-submission), or failing to credit sources – results in an F for the class as a whole. I also report any suspected incidences of academic dishonesty to the Assistant Dean for Undergraduate Education. Academic integrity is an interesting and occasionally complex topic, and I encourage you to ask me any questions on this topic that arise for you.
Books to Procure:
Carl Schmitt, *The Concept of the Political* (also available online through MLibrary)
Michael Walzer, *Just and Unjust Wars*
John Fabian Witt, *Lincoln’s Code*
The Federalist Papers

All other readings are available on the class CTools website.

Reading Schedule:

   US Constitution

   *Constitutions as a Security Response*

   Montesquieu, *The Spirit of the Laws*. Book IX; X; Book XX sections 1, 9, 12
   Hobbes, *Leviathan*. Chapter XIII; Chapter XIV; Chapter XVII; Chapter XVIII
   Locke, *The Second Treatise of Civil Government*. Chapter III (“Of the State of War”)
   Federalist No. 2, 3, 4, 9, 10, 11.
   Kenneth Waltz, *Theory of International Politics* (1979), chapter 5 & 6
   John Ikenberry, “Constitutional Politics in International Relations,” from *Liberal Order and Imperial Ambition*

   Michael Walzer, *Just and Unjust Wars* (chs. 1, 2, 4, 16, 17, 19)
   David Rivkin Jr., “Presidential Power to Make and Remake International Law” 99

   *Models of constitutional reasoning*

   Larry Alexander and Frederick Schauer, “On Extrajudicial Constitutional Interpretation,”
   Jon Elster, *Ulysses Unbound* ch. 2
   Sotirios Barber, *Welfare & The Constitution* ch. 5 & 6
   Louis Michael Seidman, *Our Unsettled Constitution*, ch. 3 & 4
5. February 6. Inherent versus Delegated Powers
Federalist Papers 23
*Legal Tender Cases*, 79 U.S. 12 Wall. 457 (1870) (focus on dissents)
*Chae Chan Ping v. United States* 130 U.S. 581 (1889) (excerpt)
Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug 1, 2002)

**Which Branch Has Authority to Wage War?**

Locke’s *Second Treatise of Civil Government* Book II Chapters XII, XIII
James Madison, Debates from 1787 Constitutional Convention (excerpts)
George Washington’s Neutrality Proclamation (April 22, 1793)
Pacificus-Helvidius Debates:
- Pacificus Number I (June 29, 1793); Pacificus Number VII (July 27, 1793);
- Helvidius Number I (August 24, 1793); Helvidius Number II (August 31, 1793);
- Helvidius Number III (September 7, 1793)
Donald R. Wolfensberger, “Congress and Policymaking in an Age of Terrorism,” from *Congress Reconsidered* (Lawrence Dodd, Bruce Oppenheimer, eds.)

7. February 20. Contemporary Debates
Louis Fisher, *Congressional Abdication on War & Spending*, ch. 1, 2
Curtis Bradley and Trevor Morrison, “Historical Gloss and the Separation of Powers”

8. February 27. The Civil War, Mexican War, World War II
James Polk, “War Message to Congress,” (May 11, 1846)
Abraham Lincoln on the War with Mexico (January 12, 1848)
Abraham Lincoln to William Herndon (15 February 1848)
The Prize Cases
Little v. Barreme
TBD

March 6. WINTER BREAK
Globalism

US Constitution Article I Section 8; Article IV
*Downes v. Bidwell*
Christina Duffy Burnett, *Foreign in a Domestic Sense* selections TBD
Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (selections)

John Ikenberry, *Liberal Order & Imperial Ambition*, ch. 6, 7

11. March 27. The Cold War, Vietnam, and the War Powers Resolution
(* this looks like more reading than it is—many pieces are short selections*)
Use Gaddis, *We Now Know*, on the cold war-- section on international economic cooperation especially useful – deterrence – nuclear weapons
President Johnson’s Message to Congress (August 5, 1964)
*Tonkin Gulf Resolution (H.J. RES 1145)* (August 7, 1964)
George C. Herring, “The Executive, Congress, and the Vietnam War, 1965-1975” from *Congress and United States Foreign Policy: Controlling the Use of Force in the Nuclear Age*
President Richard Nixon, “Cambodian Incursion Address,” April 30, 1970
Henry Kissinger, *Ending the Vietnam War* (excerpt)
War Powers Resolution of 1973
Nixon’s Veto of the War Powers Resolution
Law

John Fabian Witt, *Lincoln’s Code* (selections)

*Korematsu v. United States* (1944)
*Youngstown Steel Seizure* (1952)
John Locke, “Of Prerogative,” *Second Treatise of Government*
David Dyzenhaus, “Emergency, Liberalism, and the State” *Perspectives on Politics*

14. April 17. Class Selects Topic:
Some ideas: Torture, Free speech, Habeas corpus, State secrets, Drones

Weds, April 24—Final Papers due