Introduction and Overview

For all our enthusiasm over checks and balances among three coequal branches, modern government is essentially executive government. Presidents govern; Congress, not so much. Most law comes from agencies, not legislatures. Courts check executive government only intermittently; instead, they have gone into the business of rights proliferation.

Executive government is on the rise across the globe; but how and why did it happen in the United States, under a Constitution that to some minds at least was written to forestall that sort of government? Is executive government merely a functional adaptation to the demands of a modern society (as some prominent scholars would have it) or something more sinister (as others insist)? Is the existing body of constitutional doctrine and administrative law sensibly tailored to modern-day institutional realities? In what respects should those realities prompt us to re-think our legal doctrines?

Part I of the seminar explores the grand constitutional and institutional questions, and it introduces students to some of the rich, controversial literature on the subject. In the more lawyerly Part II, the seminar explores highly salient—and fiendishly difficult—legal questions that have arisen over the scope of executive power in a wide range of areas, from immigration law to financial regulation. For the most part we will focus on domestic policy, as opposed to the President’s power to conduct war and foreign affairs—not because those powers don’t matter (they obviously do) but because they pose a somewhat separate, highly involved set of question. We’ll likewise bracket questions concerning presidential appointment and removal, which are adequately covered in more standard courses.

Prerequisites/Expectations

Much of the seminar is an exercise in advanced constitutional and administrative law. I will simply assume that you know what Youngstown said; what’s wrong with Morrison v. Olson; how Chevron operates, etc. Thus, Constitutional Law I (Constitutional Structure) and Administrative Law are prerequisites. Exceptions only by personal application to the instructor.

The seminar will require extensive reading, as well as a great deal of independent study and research—all for a measly two credits. My tolerance for complaints on that score is zero. Do not take this course for an easy or automatic B+.

Requirements/Grading

The principal requirement is a term paper, 25 – 35 pages, on a topic to be proposed to and approved by the instructor within the first three weeks of class (i.e., September 5). If you can’t think of ideas: I have lots of suggestions.
My experience with seminar papers hasn’t been entirely positive. To ensure the timely completion of well-researched, tolerably coherent papers, we will follow a rigorous process. A draft of the paper is due on November 14. In the final two sessions students will present their draft papers in class (a useful skill to practice); another student will comment on the draft (ditto). The revised, final version of the paper will be due at the end of exam period (December 17, midnight). No extensions.

I’ll provide further details in the first session. For now, mark the due dates in your calendar.

Final paper: 65% of grade
Oral presentation: 10%
Comments on classmate’s paper: 10%
Overall class participation: 15%

Office Hours, Etc

Tues, 4:30-5:30 (Hazel 409); or by appointment. I do not tweet, text, twerk, or engage in any other modern form of communication. However, I am available at mgreve@gmu.edu, pretty much at all hours.

Syllabus

The syllabus is subject to periodic changes, depending on our progress, students’ interests, real-world events (the Administration is the gift that keeps on giving for purposes of this seminar), and my sheer whim. The operative version at all times is the one on TWEN. Please check the syllabus frequently.

All readings except The Federalist are available on TWEN, either via Syllabus links or in pdf or word format; or on Library Reserve. Not listed on the Syllabus: the landmark cases from ConLaw I and AdLaw that you’ll have to remember to follow the discussion. As we go along you’ll want to refresh your memory by re-reading your class notes or outlines—or maybe even the cases.

“Recommended” readings are just that—recommended. Read them if you can find the time (and/or if you’re really interested in this or that topic). Do read, and think about, the assigned materials.

Part I: Our Constitution and Our Institutions

Session 1 (Aug. 22): Foundations

What exactly is executive power, and what does the Constitution tell us about it? Is Prof. Hamburger right: the Constitution erects a bulwark against executive prerogative(s)? Or is there something about executive power that cannot be fully tamed and contained under law (as Professor Mansfield argues)?

Does the Constitution permit something called administrative law (and powers)? What exactly is that?

Readings:

The Federalist, Nos. 69, 70, 71, 73
Harvey C. Mansfield, Taming the Prince (pp. )

Recommended:


**Session 2 (Aug. 29): The Rise, and Rise, of Executive Power**

Profs. Posner & Vermeule insist that (1) Carl Schmitt had it basically right about executive power and (2) there’s nothing to worry about: it can’t happen here. Is either of these propositions right? Is Professor Eastman just a “tyrannophobe,” or does he have a point?

Readings:


**Session 3 (Sept. 5): The Vanishing Congress**

Two related sets of issues here. One: the Founders’ idea that Congress might suck all power into its “impetuous vortex” has proven demonstrably false. Why? Is Professor Rao’s account compelling?

Two: “Congress must go first, and its will must prevail”: that’s the rock-bottom proposition of the (post-) New Deal Constitution. It’s embodied in *Erie Railroad*, in the APA, in *Chevron*, and in various avoidance canons. Has that premise become a fiction? If so, is it still a useful fiction, for legal purposes? If not, what follows? Do Greve & Parrish provide any kind of answer? Does Mr. DeMuth?

Readings:


Christopher C. DeMuth, *Can the Administrative State Be Tamed?*, 7 J. Legal Analysis 121 (2016). https://oup.silverchair-cdn.com/oup/backfile/Content_public/Journal/jla/8/1/10.1093_jla_law003_3/law003.pdf?Expires=1501338890&Signature=AVThKyBbc~Vx~JpsBmRQ82h2ucGIDPE9xpJHsYrECjJAiLUoAS8hXUMnYYvW4ss-HRoJhXPShFbQJfO1OmG~nffLMZbOobomhPU~zTPAfg1nPn3CGBNGQdtxmitjyaXCl09sHe2fNbKQJ-JigfSLy~QauSVWWWS5pshmo2tOBrlpAHPbBY2s8jjiQlig2GEooljCQnYzKH3jWlgyXS0agWAibZXdezQ6G6AiR-gnKpdGlgn~ToVPH982t9y83jHXLyY8JbRHLg3VfMKB0OdDljZB3VJW2wrwXY866CXLouYjPcdsK4MdvYEY8SxnyU9PpQVL3BvOhMRRE3gd6w_&Key-Pair-Id=APKAIUCZBIA4LVPAVVW3Q
**Session 4 (Sept. 12): What’s Afta NAFTA?**

President Trump has avowed his intent to “renegotiate” (or even abrogate) NAFTA. Can he do that, unilaterally? Or would that require the consent of Congress? What exactly, if anything, does the Constitution tell us about this? Does it matter that NAFTA isn’t a treaty, technically speaking?

Questions regarding executive treaty abrogation have also arisen forcefully in Britain, where the high courts have adjudicated the question of whether Prime Minister Theresa May, or may not, implement the voters’ Brexit referendum without the consent of parliament (answer, no; and she has since obtained that authority). In what ways is the British experience institutionally similar to the NAFTA debate? How does it differ?

The session really belongs in Part II. I have placed it here because one of the prominent lawyers on the Brexit cases, Mr. Alastair Sutton, happens to be in town and has kindly agreed to discuss the matter. Read the briefs and opinions very carefully.

Readings:

*The Federalist, No 75*

Materials on Brexit Cases


Recommended:

U.S. treaty practice and law are a bit confusing so you may want to take a look at Michael D. Ramsey, *The Treaty and Its Rivals: Making International Agreements in U.S. Law and Practice*


**Session 5 (Sept. 19): Presidentialism**

First of two related sessions on the executive—this one, on the President’s role within the executive branch and vis-à-vis Congress and other political actors. Richard Neustadt’s famous account holds that the President is both enormously powerful and strikingly powerless: he has to cajole and persuade to get anything done. Is this still a good description of the office? Read the first three assignments with that question in mind.

The remaining readings address the President’s role atop the administrative state and under/within administrative law, a subject that will occupy us repeatedly in this course. What does the “net neutrality” saga tell you in that regard? Does it matter to you that the FCC is an “independent” agency?

Readings:

Richard Neustadt, *Presidential Power and the Modern Presidents*

Materials on FCC’s “Net Neutrality” Rules

Recommended:


Peter L. Strauss, Overseer or ‘The Decider’? The President in Administrative Law, 75 GEO. WASH. L. REV. 696

Session 6 (Sept. 26): Executive Federalism

Even federalism and federal-state relations have come to be dominated by the executive branch of government. We’ll survey the scenery and then noodle over two issues that have prompted a bit of commotion of late: the President’s power to “commandeer” state or local governments; and the states’ standing to sue the executive. On the former, try to recall what you know about commandeering and clear statement federalism rules. On the latter: Professor Bulman-Pozen celebrates states as a safeguard against presidential unilateralism. Should they get preferential standing?

Readings:

Jessica Bulman-Pozen, Executive Federalism Comes to America, 102 Va. L. Rev. 953 (2016)

Michael S. Greve, Our Polarized, Presidential Federalism

Materials on federal detainers and “sanctuary jurisdictions”

Briefs, opinions on state standing (immigration cases)

Session 7 (Oct.3): The Executive and the Court(s)

Professor Vermeule argues that “the law” (he means the courts) have “abnegated” in their attempts to police the Executive, and he believes that this is all to the good and that it happened for compelling reasons. True? Is the Conde-Greve riff a coherent response, or just kvetching?

We’ll revisit some old chestnuts: Crowell v. Benson, and Schechter Poultry (the delegation piece). What legal/institutional arrangement do these cases reflect? Think carefully: you’ll need this stuff for this and the next session.

Readings:

Adrian Vermeule, Law’s Abnegation (Introduction & Ch. 1) (pp. 1-55)
James Conde & Michael S. Greve, *Yakus and the Administrative State*

Recommended:

Caleb Nelson, *Adjudication in the Political Branches*,

**Session 8 (Oct. 10): The Executive and the Administrative State**

“The administrative state,” like Congress, is a they, not an it; and in recent years it has generated increasingly variegated and funky forms and practices. Does that make you want to be more of a “formalist” or a “functionalist”? What's really at stake in the Amtrak case? In the controversy over the PTO and PTAB (*Oil States Energy Services* is a very important pending case)?

Readings:


http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3852&context=dlj

Recommended:

Daniel Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*,  

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**Part II: Executive Power in Action**

**Session 8 (Oct. 17): Enforcement, Rulemaking, and Discretion**

We’ll look at some examples of perfectly lawful but “unorthodox” and, to many minds, somewhat unnerving executive enforcement patterns: regulation by threat; regulation by “guidance” and press release; regulation through settlements and conduct remedies. Does the existing legal framework, principally under the APA, provide a meaningful check on these practices? If you had to re-think or revamp some doctrine, which would it be—hard look review, or maybe *Chevron* or *Seminole Rock*? The legal effects test, and final agency action? *Chenery II*?

Readings:

James W. Coleman, *Policymaking by Proposal*  

Clean Power Plan (briefs)

*U.S. v. Texas* (briefs on rulemaking)
Session 9 (Oct. 24): Non-Enforcement

No one seriously thinks the President’s “faithful execution of the laws” entails a duty to enforce the law, come what may—right? So what’s the limit to the executive’s discretion to not enforce the laws? Also, is there a constitutional limit to Congress’s power to authorize “big” executive waivers? We’ll look at the problem in light of two examples: immigration, and the Affordable Care Act.

Readings:

- Texas v. United States (briefs, opinions)

Recommended:

- Philip Hamburger, Is Administrative Law Unlawful? (Chapter 5)

Session 10 (Oct. 31): Money

The Constitution’s “fiscal” clauses are very poorly understood—but they’re hugely important, and slightly perplexing. On the one hand, Congress may abuse its power of the purse to invade the President’s turf. On the other hand, there a danger that the President may trample on the powers of Congress (for example by “impounding” funds). Does Prof. Price’s response to the conundrum persuade you?

May Congress delegate its power to tax (and then spend the proceeds) to the Executive? Is this different (institutionally, or constitutionally) from delegating regulatory powers?

Daniel Hemel, *The President’s Power to Tax*

**Session 11 (Nov. 7): Is Clint Eastwood Constitutional?**

For much of the 19th century (federal) law was often enforced by private actors, working on commission or for a fistful of dollars. We later abandoned law enforcement for profit; but over the past two decades we’ve re-introduced it on quite a grand scale. What explains that turn of events? Is the current practice of for-profit enforcement worrisome? How does it differ from the bounty-hunting of old?

Readings:


Recommended:

Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (2013) (much more than you’ll want to digest but very, very good)

**Session 12 (Nov. 14): Crisis Response**

Recall Profs. Posner’s & Vermeule’s “Schmittian State”: in a crisis the Executive will do what it takes, regardless of law. That may well be true of foreign affairs and especially military engagements; but does it fairly describe the response to the 2008 financial crisis?

What does the *aftermath* of the crisis tell us about law and executive power?

Readings:


Recommended:


**Sessions 13 &14 (Nov. 21 &28): Paper Presentations & Discussion**