

## Separation of Powers: The Political Branches

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### Fall 2021

This course is an advanced seminar examining the separation of powers between the legislative and executive branches building on topics addressed in Constitutional Law I: Structure of Government. Beginning with a brief overview of broad separation of powers concepts foundational to the ratification of the Constitution, the course will cover contemporary practice and constitutional questions related to the balance of power among Congress, the White House, and executive branch agencies.

Specific topics will range from the locus of national security authority and the President's Commander-in-Chief role to emergency powers, the role of congressional appropriations in shaping executive branch practice, and congressional and inspector general oversight authority, to a study of overarching principles that govern the relationship of the White House with executive agencies and commissions. Course content will incorporate constitutional principles underlying the division of authority between the two political branches as well as insight from the instructors' high-level government service. Professor Engel most recently served as Assistant Attorney General in the Office of Legal Counsel ("OLC") and previously served as a deputy and counsel in the office. Professor Mascott has served in OLC and the Deputy Attorney General's office and previously held various legislative and communications roles in Senate leadership and House member offices.

Students are expected to complete a paper of approximately 20-25 pages in length, which will satisfy the upper-level writing requirement. Student grades will be based primarily on the final paper (55%) as well as submission of an initial thesis statement (10%). The quality of in-class participation will constitute the remaining 35% of the evaluation of student performance.

Constitutional Law I: Structure of Government is a prerequisite for the course. The collection of syllabus materials and in-class discussion consequently will assume familiarity with key foundational separation of powers cases covered in Con Law I. **Prior to the start of the semester, please reread articles I through VII of the U.S. Constitution as class discussion will assume significant familiarity with the document.**

### Reading Assignments

**Wednesday, August 25** (separated powers & the executive)

- U.S. Const. arts. I-VII
- Federalist Nos. 47, 48, 51
- Prakash, *IMPERIAL FROM THE BEGINNING* (2015), pp. 63-73
- McConnell, *THE PRESIDENT WHO WOULD NOT BE KING* (2020), pp. 1-44

**Wednesday, September 1** (executive power in practice)

- *Myers v. United States*, 272 U.S. 52, 106-35 (1926)
- *Humphrey's Executor v. United States*, 295 U.S. 602, 626-32 (1935)
- Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1170-88, 1220-43, 1269-72 (2019) (Intro, Parts I & III, Conclusion)
- Amar, AMERICA'S CONSTITUTION (2005), pp. 177-204 (Ch. 5, "Presidential Powers")

**Wednesday, September 8** (legislation, signing statements, & departmentalism)

- *Clinton v. City of New York*, 524 U.S. 417, 420-49 (1998) (majority opinion)
- Federalist Nos. 73, 78
- *Presidential Signing Statements*, 31 Op. O.L.C. 23, 26-31 (2007) (Part I)
- Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343-45 (1994) (Conclusion)
- William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1808-14 (2008) (Intro)
- Prakash, IMPERIAL FROM THE BEGINNING at 298-319 (ch. 13, "The President as 'Glorious' Protector of the Constitution")

**Wednesday, September 15** (appropriations, impoundment, & congressional control)

- *Bowsher v. Synar*, 478 U.S. 714, 717-36 (1986) (majority opinion)
- Chafetz, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017), pp. 45-77 (ch. 3, "The Power of the Purse")
- *The President's Veto Power*, 12 Op. O.L.C. 128, 165-70 (1988) (Parts III, V)
- *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Supplemental Op. O.L.C. 303 (Dec. 1, 1969) (Rehnquist)

**Wednesday, September 22** (emergency authority)

- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (all opinions but with a focus on Jackson, J., concurring)
- Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24-38 (1993)
- Prakash, IMPERIAL FROM THE BEGINNING at 206-20
- National Emergencies Act, 50 U.S.C. §§ 1621-1622

**Wednesday, September 29** (executive orders & proclamations)

- *Trump v. Hawaii*, 138 S.Ct. 2392 (2018)
- *Medellín v. Texas*, 552 U.S. 491, 523-532 (2008) (Part III)
- McConnell, THE PRESIDENT WHO WOULD NOT BE KING at 108-19
- Monaghan, *The Protective Power of the Presidency*, at 1-20, 38-56

**Wednesday, October 6** (federal prosecutorial authority; pardons and clemency)

- *Morrison v. Olson*, 487 U.S. 654 (1988) (majority & dissenting opinions)
- Bauer & Goldsmith, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY (2020), pp. 12-14, 137-99 (“Justice Department Independence” & “The Special Counsel”)
- Prakash, IMPERIAL FROM THE BEGINNING at 99-109 (pardon power)

**Wednesday, October 13** (congressional oversight, privilege, & impeachment)

- *Trump v. Mazars*, 140 S.Ct. 2019, 2126-36 (2020)
- *McGrain v. Daugherty*, 273 U.S. 135 (1927)
- *Congressional Oversight of the White House*, 45 Op. O.L.C. \_\_\_, 1-4, 9-52 (2021) (Introduction, Parts II-IV.A)
- *House Committees’ Authority to Investigate for Impeachment*, 44 Op. O.L.C. \_\_\_, 1-4, 10-39 (2020) (Introduction, Part II)

**Wednesday, October 20** (“federative” power; foreign affairs—Founding-era views)

- *United States v. Schooner Peggy*, 5 U.S. 103 (1801)
- Federalist Nos. 64, 75
- McConnell, THE PRESIDENT WHO WOULD NOT BE KING at 175-88 (foreign affairs)
- Prakash, THE LIVING PRESIDENCY (2020), pp. 185-214 (ch. 7: “From Chief Diplomat to Sole Master of Foreign Affairs”)
- John Locke, SECOND TREATISE OF GOVERNMENT (chs. XI-XII on the legislative, executive, and federative powers), pp. 43-47

**Wednesday, October 27** (foreign affairs & diplomacy in modern practice)

- *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)
- *Zivotofsky v. Kerry*, 576 U.S. 1 (2015)
- *Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty*, 45 Op. O.L.C. \_\_\_, 1-18 (2020) (Intro & Parts I-III)
- *Authority to Withdraw from NAFTA*, 42 Op. O.L.C. \_\_ (2018)

**Wednesday, November 3** (Founding-era view on military authority & declaration of war)

- *Little v. Barreme*, 6 U.S. 170 (1804)
- Federalist Nos. 23-28
- McConnell, THE PRESIDENT WHO WOULD NOT BE KING at 201-12 (“Commanding the Armed Forces”)
- Prakash, IMPERIAL FROM THE BEGINNING at 154-70
- Prakash, THE LIVING PRESIDENCY at 148-84 (ch. 6: “From First General to Declarer of Wars”)

**Wednesday, November 10** (Commander-in-Chief power, executive detention, and military tribunals in the 21st century)

- *Boumediene v. Bush*, 553 U.S. 723 (2008) (majority opinion)
- *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (majority opinion)
- *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. \_\_\_ (2018)
- *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20 (2011)

**Wednesday, November 17** (White House supervision: executive agencies v. commissions)

- *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 483-84, 492-508 (2010) (Intro & Part III)
- *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197-2207 & 2211-24 (2020) (Part III & Thomas concurrence)
- *Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies*, 44 Op. O.L.C. \_\_\_, 1-2, 7-31 (2019) (Intro, Parts II-IV)
- Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2319-46 (2001) (Part IV.A-B)
- Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 61-78 (1994) (Part II.D.4-F)

**Requirements**

Students must turn in their final paper to Professor Mascott at [jmascott@gmu.edu](mailto:jmascott@gmu.edu) by Tuesday, December 14, 2021 (before midnight). She will forward the papers to Professor Engel.

The paper may address any legal topic related to the materials studied for the seminar. The paper should treat the topic in an original way similar to a typical law review note or brief article. Students should acquire approval for their paper topic directly from Professor Mascott and should feel free to discuss the topic in advance with Professor Mascott in order to sharpen their thoughts. Topic statements are due to Professor Mascott before midnight on October 1.

Professor Mascott will hold office hours weekly on Mondays from 12:00-2:00 p.m. outdoors on the front plaza of the law school. She is also available via email ([jmascott@gmu.edu](mailto:jmascott@gmu.edu)) or the posting of questions on the course TWEN site.