

Separation of Powers: The Political Branches

Professor [Jenn Mascott](mailto:jmascott@gmu.edu), 703-993-8168/jmascott@gmu.edu &
Professor [Steve Engel](mailto:steven.engel@dechert.com), 202-261-3369/steven.engel@dechert.com; *Partner, Dechert LLP*

Fall 2022

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, 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, double-spaced, 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 24 (separated powers & the executive)

- U.S. Const. arts. I-VII
- Federalist Nos. 47, 48, 51
- Prakash, *IMPERIAL FROM THE BEGINNING* (2015), pp. 63-73

- ****Suggested****: McConnell, *THE PRESIDENT WHO WOULD NOT BE KING* (2020), pp. 1-44

Wednesday, August 31 (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)
- Amar, *AMERICA'S CONSTITUTION* (2005), pp. 177-204 (Ch. 5, "Presidential Powers")
- ****Suggested****: 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)

Wednesday, September 7 (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)
- Prakash, *IMPERIAL FROM THE BEGINNING* at 298-319 (ch. 13, "The President as 'Glorious' Protector of the Constitution")
- ****Suggested****:
 - 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)

Wednesday, September 14 (appropriations, impoundment, & congressional control)

- *Bowsher v. Synar*, 478 U.S. 714, 717-36 (1986) (majority opinion)
- *The President's Veto Power*, 12 Op. O.L.C. 128, 165-70 (1988) (Parts III, V)
- ****Suggested****:
 - Chafetz, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017), pp. 45-77 (ch. 3, "The Power of the Purse")
 - *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 21 (emergency authority)

- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (all opinions but with a focus on Jackson, J., concurring)
- Prakash, *IMPERIAL FROM THE BEGINNING* at 206-20
- National Emergencies Act, 50 U.S.C. §§ 1621-1622

- ****Suggested****: Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24-38 (1993)

Wednesday, September 28 (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
- ****Suggested****: Monaghan, *The Protective Power of the Presidency*, at 1-20, 38-56

Wednesday, October 5 (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”)
- ****Suggested****: Prakash, IMPERIAL FROM THE BEGINNING at 99-109 (pardon power)

Wednesday, October 12 (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)
- ****Suggested****: *House Committees’ Authority to Investigate for Impeachment*, 44 Op. O.L.C. ___, 1-4, 10-39 (2020) (Introduction, Part II)

Wednesday, October 19 (“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)
- John Locke, SECOND TREATISE OF GOVERNMENT (chs. XI-XII on the legislative, executive, and federative powers), pp. 43-47
- ****Suggested****: Prakash, THE LIVING PRESIDENCY (2020), pp. 185-214 (ch. 7: “From Chief Diplomat to Sole Master of Foreign Affairs”)

Wednesday, October 26 (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)
- ****Suggested****: *Authority to Withdraw from NAFTA*, 42 Op. O.L.C. __ (2018)

Wednesday, November 2 (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)
- ****Suggested****: *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20 (2011)

Wednesday, November 9 (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
- ****Suggested****: Prakash, *THE LIVING PRESIDENCY* at 148-84 (ch. 6: “From First General to Declarer of Wars”)

Wednesday, November 16 (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)
- Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2319-46 (2001) (Part IV.A-B)
- ****Suggested****:
 - *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)
 - 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 by Wednesday, December 14, 2022 (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 Wednesday, October 5.

Professor Mascott will hold office hours weekly on Tuesdays from 1:00-3:00 p.m. She is also available via email (jmascott@gmu.edu) or the posting of questions on the course TWEN site.