

American Government: Executive Powers, Law, and Crisis

GOV 312L 37990, Spring 2023

MWF 12–1pm

Parlin Hall 203

Kyle Shen

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Office hours: Monday 1–4pm (Zoom Only, Access on Canvas)

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Course Description:

What are the powers of the President in times of national crisis?

What *should* these powers be?

Understanding moments of crisis is essential to understanding American government and history. From the Civil War, Japanese Internment, the War on Terror, to Coronavirus, each of these moments engaged in stress-tests for American government's promise to maintain the rule of law and democratic government. When the president responds to crisis, what is the responsibility of the other two branches to facilitate or restrain the executive? Does a crisis justify any action, no matter the cost?

This course will be divided in three parts:

- 1) The first examines the history and concepts of Presidential powers to commandeer the machinery of government to respond to warfare and crisis
- 2) The second considers contemporary cases of crisis and uses of emergency power from the War on Terror and, more recently, Covid-19 Pandemic
- 3) The third examines emergency powers around the world and in international law to shed light on the American case

By the end of the course, students should be conversant on an array of arguments surrounding American executive powers and will be asked to apply them to a new set of topics.

Course readings draw on American constitutional law, American Political Development, and literature from human rights and comparative constitutional law. This course emphatically is NOT a class on legal doctrine or practice, but it will engage with cases and legal scholarship to explore the history and arguments for and against emergency powers.

Prerequisite:

GOV 310L. Students are expected to have basic working knowledge about American government and institutions.

I. Required Readings:

All readings posted on Canvas unless a URL is provided in syllabus

II. Assignments and Grading:

- 1) Participation: 15%
- 2) Reading Summaries: 10%
- 3) Short Paper 1: 15% (Due Feb 3)
- 4) Short Paper 2: 25% (Due March 10)
- 5) Final Paper: 35% (Due April 27)

A. Assignments:

i. Participation

- Participation is a major component of your grade
- Throughout the week I will expect you to participate during discussions, especially during weeks you turn in reading summaries
- On Fridays, class time will place an especially strong emphasis on classroom discussion and writing.
- We will hold an in-class debate exercise during the final week

ii. Reading Summaries:

- Sign up for two weeks in the semester here:
<https://forms.gle/rYfu6a9K7M7XeqvQA>
- Short paragraphs that summarize *each* reading assigned for the day
- Reading summaries will be due at the start of class
 - Reading summaries will not be accepted late. If you are sick and have a doctor's note or have some other excuse, contact me before class.
- You will be "on call" for the weeks that you sign up, meaning that you are expected to lead discussion for reading summaries that you completed

B. Grading Scale:

$93 \leq A$	$80 \leq B- < 83$	$67 \leq D+ < 70$
$90 \leq A- < 93$	$77 \leq C+ < 80$	$63 \leq D < 67$
$87 \leq B+ < 90$	$73 \leq C < 77$	$60 \leq D- < 63$
$83 \leq B < 87$	$70 \leq C- < 73$	$F < 60$

III. Policies and Procedures:

a. Office Hours over Zoom:

My scheduled office hours are immediately after class on Mondays from 1–4pm. Office hours will be held over Zoom, accessed through Canvas. Please schedule in advance via <https://calendly.com/gov350k2021/spring-312l-office-hours>

b. Late Assignment Policy:

With the exception of Reading Summaries, all late assignments will receive a late penalty of one-third of a letter grade (3.3%) will be deducted for each 24-hour period that passes after the due date. Turning in an assignment during the 24 hours after the due date turns an A paper becomes an A-, then a B+ the next day, then a B, etc.

****Reading Summaries will not be accepted late. Turn these in at the start of class during the weeks you sign up****

c. Grading Feedback and Email Policy:

If you have a question over how something was graded, you have two weeks from the day that the assignment was handed back to challenge the grade. Grade challenges must be made in person or in office hours.

Substantive discussion must take place in person. I will not answer substantive questions about the course or about grading through email. If you would like to discuss feedback, you may come to office hours.

If you email me after 8pm, I do not promise a response until the following morning.

d. Attendance Policy:

While I will not take attendance. However, participation in class discussion and delivery of reading summaries are a substantial part of your grade. Excess absences affect your final grade.

If you feel the slightest bit ill, please stay at home.

e. Lectures Online:

This class is using the Lectures Online recording system. This system records the audio and video material presented in class for you to review after class. Links for the recordings will appear in the Lectures Online tab on the Canvas page for this class. You will find this tab along the left side navigation in Canvas.

f. Academic Dishonesty:

This class has a no tolerance policy for academic dishonesty. Instances of academic dishonesty may be met with, among other measures, grade penalties, failure in the class for the semester, and reporting to the Dean of Students.

IV. University Resources for Students:

a. Services for Students with Disabilities

Please let me know if you experience any barriers to learning so I can work with you to ensure you have equal opportunity to participate fully in this course. If you are a student with a disability, or think you may have a disability, and need accommodations please contact Services for Students with Disabilities (SSD). Please refer to SSD's website for contact and more information: <http://diversity.utexas.edu/disability/>. If you are already registered with SSD, please deliver your Accommodation Letter to me as early as possible in the semester so we can discuss your approved accommodations and needs in this course.

b. Counseling and Mental Health Center

The Counseling and Mental Health Center serves UT's diverse campus community by providing high quality, innovative and culturally informed mental health programs and services that enhance and support students' well-being, academic and life goals. To learn more about your counseling and mental health options, call CMHC at (512) 471-3515.

If you are experiencing a mental health crisis, call the CMHC Crisis Line 24/7 at (512) 471-2255.

c. The Sanger Learning Center

All students are welcome to take advantage of Sanger Center's classes and workshops, private learning specialist appointments, peer academic coaching, and tutoring for more than 70 courses in 15 different subject areas. For more information, please visit <http://www.utexas.edu/ugs/slc> or call 512-471-3614 (JES A332).

d. Undergraduate Writing Center:

This class will involve a substantial amount of writing. The UWC offers resources and tips for improving skills for essay writing and proofreading. <http://uwc.utexas.edu/>

e. Behavioral Concerns and Safety

If you have concerns about the safety or behavior of fellow students, TAs or Professors, call BCAL (the Behavior Concerns Advice Line): 512-232-5050. Your call can be anonymous. If something doesn't feel right – it probably isn't. Trust your instincts and share your concerns.

f. Title IX Reporting

Title IX is a federal law that protects against sex and gender-based discrimination, sexual harassment, sexual assault, unprofessional or inappropriate conduct of a sexual nature, dating/domestic violence and stalking at federally funded educational institutions. When unprofessional or inappropriate conduct of a sexual nature occurs in our community, the university can:

1. Intervene to prevent harmful behavior from continuing or escalating.
2. Provide support and remedies to students and employees who have experienced harm or have become involved in a Title IX investigation.
3. Investigate and discipline violations of the university's relevant policies.

Beginning January 1, 2020, Texas Senate Bill 212 requires all employees of Texas universities, including faculty, report any information to the Title IX Office regarding sexual harassment, sexual assault, dating violence and stalking that is disclosed to them. Texas law requires that all

employees who witness or receive any information of this type (including, but not limited to, writing assignments, class discussions, or one-on-one conversations) must be reported. I am a Responsible Employee and must report any Title IX related incidents that are disclosed in writing, discussion, or one-on-one. Before talking with me, or with any faculty or staff member about a Title IX related incident, be sure to ask whether they are a responsible employee. If you would like to speak with someone who can provide support or remedies without making an official report to the university, you may make an appointment to speak with an advocate at https://deanofstudents.utexas.edu/emergency/advocate_appointment.php. For more information about reporting options and resources, visit <http://www.titleix.utexas.edu/>, contact the Title IX Office via email at titleix@austin.utexas.edu, or call 512-471-0419.

g. Q Drop Policy

If you want to drop a class after the 12th class day, you'll need to execute a Q drop before the Q-drop deadline, which typically occurs near the middle of the semester. Under Texas law, you are only allowed six Q drops while you are in college at any public Texas institution. For more information, see: <http://www.utexas.edu/ugs/csacc/academic/adddrop/qdrop>

h. Sharing of Course Materials is Prohibited

No materials used in this class, including, but not limited to, lecture hand-outs, videos, (quizzes, exams, papers, projects, homework assignments), in-class materials, review sheets, and additional problem sets, may be shared online or with anyone outside of the class unless you have my explicit, written permission. Unauthorized sharing of materials promotes cheating. It is a violation of the University's Student Honor Code and an act of academic dishonesty. I am well aware of the sites used for sharing materials, and any materials found online that are associated with you, or any suspected unauthorized sharing of materials, will be reported to Student Conduct and Academic Integrity in the Office of the Dean of Students. These reports can result in sanctions, including failure in the course.

i. Class Recording

Class recordings are reserved only for students in this class for educational purposes and are protected under FERPA. The recordings should not be shared outside the class in any form. Violation of this restriction by a student could lead to Student Misconduct proceedings.

j. University Food Bank and Professional Clothes Closet

[UT Outpost](#) is located near Kinsolving Dormitory at 2609 University Avenue. Here you can access a free food pantry and professional clothes. Use these services if you are experiencing food insecurity or you need clothes for a job interview. Click on the link for hours. UT Outpost also has satellite locations in RLP ground floor, WCP 2.112, SRH 3.364, and PCL 2.330.

k. University Legal Services

If you are facing legal issues, perhaps a dispute with your landlord, or if you just need a notary, the University offers free legal consultations and may be able to provide referrals to legal representation. You can schedule a meeting and find more resources here: <https://deanofstudents.utexas.edu/lss/>.

Course Schedule and Readings

Week 1 (January 9–January 13): **Responding to Crises: History and Today**

Session 1: Introduction

- US Constitution, Preamble

Session 2: Historical Responses to Crisis

- Oren Gross, “The Concept of Crisis,” *Conference: Civil and Economic Rights in Times of Crisis* (May 20, 2005).

Session 3: What is a Constitution?

- Carl Schmitt, *Political Theology* (1934), Introduction and Chapter 1 (excerpt)

****January 16: MLK Day, No Class****

Week 2: (January 18–January 20) **Responding to Crises: Does Law Matter?**

Session 4: Do Crises Follow Fundamental Principles?

- John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1990), Chapter 1: 21–28, 38–44
- George W. Bush, “Address to Congress and the Nation,” (Sept. 20, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html

Session 5: Should a Constitution Matter When Facing Crisis?

- David Stanaway, “Inside China’s fight over the future of zero-Covid,” *Reuters* (Dec. 2, 2022), <https://www.reuters.com/world/china/inside-chinas-fight-over-future-zero-covid-2022-12-02/>
- Ahilan Arulanantham, “How Much Liberty Must We Give Up?” *Just Security Blog* (April 6, 2020), <https://www.justsecurity.org/69538/how-much-liberty-should-we-give-up-the-constitution-and-coronavirus-lockdown-proposals/>

Week 3: (January 23–January 27) **What Does the Constitution Say? Lessons from the Founding**

Session 6: The Founders’ Debate

- Federalist Papers # 70, 78
- Anti-Federalist Paper # 70

Session 7: Commentaries on the Founding

- William Treanor, “The War Powers Outside the Courts,” In *The Constitution in Wartime*, Edited by Mark Tushnet (2005).

Session 8: What does the Constitution Say?

- Elizabeth Goitein, “Reforming Emergency Powers,” *Just Security Blog* (October 31,

2020), <https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/>

Week 4: (January 30–February 3)
The Civil War: Threat to the Life of the Nation?

Session 9: Secession and Emergency Power: Lincoln's Choice

- Edward S. Corwin, *The President: Office and Powers, 1787-1984* (1984), 152–180.

Session 10: The Laws of War and the Presidency

- Edward S. Corwin, *The President: Office and Powers, 1787-1984* (1984), 262–287.
- Ex Parte Milligan, 71 U.S. 2 (1866). Found in Sullivan, Kathleen M. and Gerald Gunther. 2010. *Constitutional Law: Seventeenth Edition*. 268-72.

Session 11: Establishing Law in Wartime: The Lieber Code

- Theodor Meron, “Francis Lieber’s Code and the Principles of Humanity,” *Columbia Journal of Transnational Law* 36(1) (1998): 269–282.

****Feb 3: Short Paper 1 Due****

Week 5: (February 6–February 10)
The Powers of the American Presidency

Session 12: The Supreme Court’s Limitations on Executive Power

- Mariah Zeisberg, “The Relational Conception of War Powers,” In *The Limits of Constitutional Democracy* (Edited by Jeffrey K Tulis and Stephen Macedo): 168–193.

Session 13: Responses to Crisis

- JJ Saylor, “Court over the President,” *Texas Law Review* 31(1) (1952): 38–45.
- *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure Case), 343 U.S. 579 (1952): Found in Sullivan, Kathleen M. and Gerald Gunther. 2010. *Constitutional Law: Seventeenth Edition*. 249–256.

Session 14: Limits on Presidential Powers? Authorization to Use Military Force

- Scott Roehm, “Bringing the AUMF Debate Back to its Constitutional Roots, and Recent History.” *Just Security Blog* (August 11, 2017), available at <https://www.justsecurity.org/44135/bringing-aumf-debate-constitutional-roots-history/>

Week 6: (February 13–February 17)
Presidents Unbound?

Session 15: Unleashing Executive Power

- Richard A Posner, *Not a Suicide Pact* (2006), Ch. 2.

Session 16: When does Emergency Justify Discrimination?

- *US v. Korematsu*, 323 U.S. 214 (1944): 214–224.
- Murphy and Jackson Dissents to *Korematsu*: Found in Sullivan, Kathleen M. and Gerald

Gunther. 2010. *Constitutional Law: Seventeenth Edition*. 520–521.

Session 17: Executive Power and Contemporary Presidencies

- Trump v. Hawai’I (2018) (abridged)

Week 7: (February 20–February 24)
Military Detention: Detainee’s Rights and Torture

Session 18: Militant Detention during the War on Terror

- Jonathan Hafetz, “Military Detention in the ‘War On Terrorism’: Normalizing the Exceptional After 9/11,” *Columbia Law Review Sidebar* 31 (2012), 31–46.
- Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and Hamdan v. Rumsfeld, 548 U.S. 557 (2006) in Sullivan, Kathleen M. and Gerald Gunther. 2010. *Constitutional Law: Seventeenth Edition*. 275-292.

Session 19: Reactions to Detention

- Steve Vladeck, “The Supreme Court Goes to War: *Hamdi*, *Padilla*, and *Rasul* at 10.” *Just Security* (June 27, 2014), <https://www.justsecurity.org/12260/supreme-court-war/>
- Boumediene v. Bush, 553 U.S. 723 (2008) in Sullivan, Kathleen M. and Gerald Gunther. 2010. *Constitutional Law: Seventeenth Edition*. 293–300.

Session 20: Conditions of Military Detention during the War on Terror

- Andrew Cohen, “The Torture Memos, 10 years Later,” *The Atlantic* (2012)
- Watch: Vice News, “Guantanamo Ex-Detainees Talk Through Their Past Torture,” <https://www.youtube.com/watch?v=F1EtE7r-hVM>

Week 8: (February 27–March 3)
Technological Advancements in Wartime: Drone Strikes and Cyberwarfare

Session 21: Legalizing Drone Warfare

- Harold Koh, “The Obama Administration and International Law: Keynote Speech at the Annual Meeting of the American Society of International Law.” <https://www.state.gov/documents/organization/179305.pdf> (March 25, 2010), 10–17
- Michael Walzer, “Just & Unjust Targeted Killing & Drone Warfare,” *Daedalus* 145(4) (2016): https://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00408, 12–24.

Session 22: Drone Warfare

- Council on Foreign Relations, *Targeted Killings* (2013), available at <https://www.cfr.org/background/targeted-killings>
- Matt Taibbi, “How to Survive America’s Kill List,” (2018), *RollingStone*.

Session 23: Cyberwarfare

- Kim Zetter, “An Unprecedented Look at Stuxnet, the World’s First Digital Weapon.”

(November 3, 2014), *Wired*.

Week 9: (March 6– March 10)

Surveillance

Session 24: FISA Courts and Surveillance

- David Kris, “How Fisa Court Really Works,” *Lawfare Blog* (Sept. 2, 2018)
- Lisa Graves, “Burdens of War: The Consequences of the U.S. Military Response to 9/11 The Costs to Civil Liberties and the Rule of Law in the U.S.,” Brown University, Watson Institute for International and Public Affairs (Dec. 27, 2010).

Session 25: Snowden

- Bryan Burrough, Sarah Ellison, and Suzanna Andrews, “The Snowden Saga: A Shadowland of Secrets and Light,” (2014), *Vanity Fair*.

Session 26: Whistleblowing: Shedding Light on Surveillance

- Edward Pozen, “Edward Snowden, National Security Whistleblowing, and Civil Disobedience,” In *Whistleblowing Nation* (Edited by Kaeten Mistry and Hannah Gurman) (2020).

****March 10: Short Paper 2 Due****

*****March 13–March 17: Spring Break*****

Week 10 (March 20–March 24):

Emergencies Beyond National Security

Session 27: Pandemics, Part 1

- John Fabian Witt, *American Contagions* (2021), Introduction
- Lawrence Gostin, “Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension,” *American Journal of Public Health* 95(4) (2005).

Session 28: Pandemics, Part 2

- John Fabian Witt, *American Contagions* (2021), Ch. 3
- John Fabian Witt, *American Contagions* (2021), Ch. 5

Session 29: Treating Climate as an Emergency

- Mark Nevitt, “Is Climate Change a National Emergency?,” *Just Security Blog* (February 25, 2021), <https://www.justsecurity.org/74914/is-climate-change-a-national-emergency/>

Week 11 (March 27–March 31)
Historical and Comparative Perspectives

Session 30: Changing Views of the Constitution in American History

- Aziz Rana, “Constitutionalism and the Foundations of the Security State,” *California Law Review* 103 (2015): 335–360.

Session 31: Collapse of Constitutional Democracy: The Weimar Republic

- John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1990), 139–178.

Session 32: Types of Constitutional Emergency

- John Ferejohn and Pasquale Pasquino. 2004. “The Law of Exception: A Typology of Emergency Powers.” *International Journal of Constitutional Law* 2: 210-239.

Week 12 (April 3–April 7)
The Laws of War

Session 33: Is a Just War Possible?

- Neha Crawford, “Just War Theory and the Counterterror War,” *Perspectives on Politics* 1(1) (2003): 5–21.

Session 34: International Law and War

- Sean Murphy, “Evolving Geneva Convention Paradigms in the War on Terrorism: Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants,” *George Washington Law Review* 75 (2007), 1113–1141.

Session 35: Do the Laws of War Apply to the War on Terror?

- Derek Jinks, “International Human Rights Law and the War on Terrorism,” *Denver Journal of International Law & Policy* 31(1) (2002): 58–68.

Week 13 (April 10–April 14)
Human Rights and Emergency

Session 36: What Are Human Rights?

- Lynn Hunt, 2007. “Introduction.” *Inventing Human Rights*, 15–34. (SUBJECT TO CHANGE)

Session 37: Human Rights in Emergency

- Steiner, Henry J., Philip Alston, and Ryan Goodman. 2007. *International Human Rights in Context 3d ed.*, 130–139.

Session 37: The Universal Declaration on Human Rights

- *Universal Declaration on Human Rights (December 19, 1948)*, Illustrated Edition (2015).

Week 14 (April 17–April 21)
Designing Emergency

Session 39: Debate Prep

Session 40: Debate Prep, Part II

Session 41: Debate

Week 15 (April 24, Final Day of Class)

Session 42: Debate Debrief & Final Thoughts

- William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998), Conclusion

****Final Paper Due Sunday, April 27, 11:59pm****