

American Government: Executive Powers, Crisis, and Foreign Affairs
GOV 312L 37850, Spring 2022

MWF 9:00 –10:00 am

Parlin Hall 201

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Office hours: Monday 10am-1pm (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 engages in actions to respond to crisis, what is the responsibility of the other two branches to facilitate or, indeed, restrain, the president's power? Does a crisis justify any action, no matter the cost?

This course will be divided in three parts. The first third examines the history and concepts of Presidential powers to commandeer the machinery of government to respond to warfare and crisis. The second considers contemporary cases of crisis and uses of emergency power from the War on Terror and, more recently, Coronavirus. The last third adopts a comparative lens, using perspectives from international human rights and from other countries 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 problem.

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 discourses on emergency and executive 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: 10%
- 2) Reading Summaries: 10%
- 3) Short Paper 1: 10% (Due Feb 11)
- 4) Short Paper 2: 15% (Due March 11)
- 5) Short Paper 3: 20% (Due April 15)
- 6) Final Paper: 35% (Due May 15)

A. Assignments:

- i. Participation
 - Participation will form a major component of your grade
 - Throughout the week I will expect you to participate during discussions
 - On Fridays, class time will place an especially strong emphasis on classroom discussion and writing.
- ii. Reading Summaries:
 - Sign up for two weeks in the semester here:
<https://forms.gle/q9KjWXXYx6oQiKYE9>
 - Short paragraphs that summarize *each* reading assigned for the day
 - Include 1–2 questions (total, not per reading) about the readings
 - These can include clarification questions
 - Or questions arising from disagreement or criticism with the reading
 - 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 will be expected to lead discussion for reading summaries that you completed
- iii. Short paper assignments will be brief (3–4 page) responses to a prompt.
 - 12 pt font
 - Double-spaced

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 10am–1pm. Office hours will be held over Zoom, accessed through Canvas. Please schedule in advance via <https://calendly.com/gov350k2021/spring-3121-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 the class of the corresponding assigned reading for which the summaries are intended.

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 constitute a substantial part of your grade. Excess absences will hamper your final grade.

Given the continued status of the pandemic, I expect there to be periodic absences due to illness or exposure. If you feel the slightest bit ill or under the weather for any reasons, or if you suspect you may have been exposed to Covid, please stay at home and schedule a covid test with Healthy Horns: (https://www.healthyhorns.utexas.edu/coronavirus_proactive_testing.html).

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.

To review a recording, simply click on the Lectures Online navigation tab and follow the instructions presented to you on the page. You can learn more about how to use the Lectures Online system at <http://sites.la.utexas.edu/lecturesonline/students/how-to-access-recordings/>.

You can find additional information about Lectures Online at:
<https://sites.la.utexas.edu/lecturesonline/>.

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/slcc> 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.

Course Schedule and Readings

Week 1 (Jan. 19 – Jan. 21): Responding to Crises: History and Today

Session 1: What is a crisis, and how do we respond to crises?

Session 2: Historical Responses to Crisis

- US Constitution, Preamble
- Gross, “The Concept of Crisis”
- Bush, State of the Union Excerpt, January 2002

Week 2: (Jan. 24 – Jan. 28) Responding to Crises: Does Law Matter?

Session 3: What is a Constitution?

- Finn, Chapter 1, 21–28, 38–44
- Schmitt, Political Theology, Introduction and Chapter 1

Session 4: Just War Theory

- Toner, “Just War and the Supreme Emergency Exemption”

Session 5: Does Law Matter Today?

- <https://www.justsecurity.org/69538/how-much-liberty-should-we-give-up-the-constitution-and-coronavirus-lockdown-proposals/>

Week 3: (Jan 31 – Feb 4) What Does the Constitution Say? Lessons from the Founding

Session 7: Commentaries on the Founding

- Franklin, Daniel P. 1991. *Extraordinary Measures: The Exercise of Prerogative Powers in the United States*. Ch 1
- *Treanor_War Power Outside Courts*

Session 8: The Founders’ Debate

- Federalist Papers 70, 78
- Anti-Federalist Papers 67, 70, 74

Session 9: What does the Constitution Say?

- US Constitution: Article I, Section 8 and Section 9
- Goiten, “Reforming Emergency Powers,” <https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/>

Week 4: (Feb 7 – Feb 11)

The Civil War: Threat to the Life of the Nation?

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

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

Session 10: The Laws of War and the Presidency

- Corwin, Edward S. 1984. *The President: Office and Powers, 1787-1984*, 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

- Meron, Francis Lieber's Code and the Principles of Humanity

Week 5: (Feb 14 – Feb 18)

The Powers of the American Presidency

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

- Zeisberg, Mariah. "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

- Saylor, "Court over the President," (1952)
- 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: The Authorization on Use of Military Force

- NY Times, "When Presidents go to War"
- Roehm, Scott. 2017. "Bringing the AUMF Debate Back to its Constitutional Roots, and Recent History." *Just Security Blog*. Available at <https://www.justsecurity.org/44135/bringing-aumf-debate-constitutional-roots-history/>

****Feb 11: Short Paper 1 Due****

Week 6: (Feb 21 – Feb 25)

Presidents Unbound?

Session 13: Unleashing Executive Power

- Posner, Richard A. 2006. *Not a Suicide Pact*. Ch. 2.
- Issacharoff, Samuel and Richard H. Pildes. 2005. "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime," 161-197.

Session 14: When does Emergency Justify Discrimination?

- US v. Korematsu, 323 U.S. 214 (1944): 214-224.

- Murphy and Jackson Dissents: Found in Sullivan, Kathleen M. and Gerald Gunther. 2010. *Constitutional Law: Seventeenth Edition*. 520–521.
- Watch: “Japanese Internment during WWII,”
<https://www.youtube.com/watch?v=6mr97qyKA2s>

Session 15: Executive Power and Contemporary Presidencies

- Trump v. Hawai’I (2018) (pp 1-14)

Week 7: (Feb 28 – March 4)
Military Detention: Detainee’s Rights and Torture

Session 16: Militant Detention during the War on Terror

- Jonathan Hafetz, Military Detention in the "War On Terrorism": Normalizing the Exceptional After 9/11
- 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 17: Reactions to Detention

- Vladeck, Steve. 2014. “The Supreme Court Goes to War: *Hamdi, Padilla, and Rasul* at 10.” *Just Security*. <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 18:

- Cohen, Andrew. 2012. “The Torture Memos, 10 years Later.” *The Atlantic*.
- Ian Fishback, Statement for Senate Judiciary Hearing
<https://www.humanrightsfirst.org/sites/default/files/Fishback-SFTR-January-6-2017.pdf>
- Interview with John Yoo <https://www.press.uchicago.edu/Misc/Chicago/960315in.html>.
- Watch: Vice News, “Guantanamo Ex-Detainees Talk Through Their Past Torture,”
<https://www.youtube.com/watch?v=F1EtE7r-hVM>

Week 8: (March 7 – March 11)
Drone Strikes and Cyberwarfare

Session 19: Legalizing Drone Warfare

- Koh, Harold. March 25, 2010. “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>, 10-17
- Walzer, M. 2016. “Just & Unjust Targeted Killing & Drone Warfare.” *Daedalus* 145(4): 12-24. https://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00408

Session 20: Drone Warfare

- Council on Foreign Relations. 2013. *Targeted Killings*. Available at <https://www.cfr.org/backgrounder/targeted-killings>

- Taibbi, Matt. 2018. “How to Survive America’s Kill List.” *RollingStone*.

Session 21: Cyberwarfare

- Leetaru, Kalev. 2017. “What Tallinn Manual 2.0 Teaches about the New Cyber Order.” *Forbes*.
- Zetter, 2014. “An Unprecedented Look at Stuxnet, the World’s First Digital Weapon.” *Wired*.

Week 9: (March 21 – March 25)
Surveillance

Session 22: FISA Courts and Surveillance

- Kris, “How Fisa Court Really Works,” *Lawfare Blog* (Sept. 2, 2018)
- 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 23: Whistleblowing: Shedding Light on Surveillance

- Burrough, Bryan, Sarah Ellison, and Suzanna Andrews. 2014. “The Snowden Saga: A Shadowland of Secrets and Light.” *Vanity Fair*.
- CBC News, “Journalist Glenn Greenwald give the inside story of Edward Snowden,” Available at <https://www.youtube.com/watch?v=BhdENw-vhDQ>

Session 24:

- Pozen, “Edward Snowden, National Security Whistleblowing, and Civil Disobedience”

****March 11: Short Paper 2 Due****

*****March 14 – March 18: Spring Break*****

Week 10: March 28 – April 1
Domestic Emergencies

Session 25: Pandemics

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

Session 26:

- Witt, *American Contagions*, Ch. 3
- Witt, *American Contagions*, Ch. 5

Session 27:

- NFIB v. OSHA (2022), 1–4, 10–16, 26–30 (Start at Part IV)

- <https://www.justsecurity.org/69141/pandemics-and-human-rights/>
- <https://www.justsecurity.org/74914/is-climate-change-a-national-emergency/>

Week 11: April 4 – April 8

Constitutional Law and Emergency (A Comparative Perspective)

Session 34: Changing Views of the Constitution in American History

- Rana, “Constitutionalism and the Foundations of the Security State” 335-360
- Graber, “Counter Stories Maintaining and Expanding Civil Liberties in Wartime”

Session 35: Emergency in Other Countries

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

Session 36: Collapse of Constitutional Democracy: The Weimar Republic

- Finn, Part II, Ch. 4, 139-178

Week 12: April 11 – April 15

International Law and Emergencies: Laws of War

Session 34: International Humanitarian Law

- Murphy, *Evolving Geneva Convention Paradigms in the War on Terrorism: Applying the Core Rules to the Release of Persons Deemed Unprivileged Combatants*, 75 GEO. Wash. L. REV. 1105 (2007), 1113-1141.

Session 35: Fixing Emergencies afterward? Prosecuting Crimes of War

- Gary Bass, Stay the Hand of Vengeance, Intro

Session 36:

- Roberts, “The Laws of War in the War on Terror,” International Law Studies 79

April 15: Short Paper 3 Due

Week 13: April 18 – April 22

International Law and Emergencies: Human Rights

Session 37: What are Human Rights?

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

Session 38: Human Rights and Emergencies

- Steiner, Henry J., Philip Alston, and Ryan Goodman. 2007. *International Human Rights in Context* 3d ed., 375–412.

Session 39: Human Rights and Emergency Case Studies

- Nesiah, “The Princely Impostor: Stories of Law and Pathology in the exercise of

emergency powers”

Week 14: April 25- 29
International Law and Emergencies: Case Studies

Session 40: International Law and Privacy

- European Court of Human Rights, Jurisprudence on Privacy and Surveillance

Session 41: International Law and Torture

- Steiner, Henry J., Philip Alston, and Ryan Goodman. 2007. *International Human Rights in Context* 3d ed., 224–251

Session 42: Emergency Powers in Action: Responses to Covid around the World

- Neo, “Singapore’s Legislative Approach to the Covie-19 Public Health ‘Emergency’”
- Freedomhouse, “Democracy under lockdown”
- Simons, “We need to think about post-lockdown rights,” *The Monthly* (Oct. 2021).

Week 15: (May 1 – 6)
Final Reflections

Session 43: Debate Prep

Session 44: Debate

Session 45: Reflections

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

Final Paper Due Sunday, May 15, 5pm