

8318: Law and the Presidency

Spring, 2018

Monday, Tuesday, and Wednesday – 11:10 a.m.-Noon
Room 245

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Learning Goals

As you know from the official catalogue description, this course examines the law as it shapes the interactions of the President (and the executive branch more generally) with both Congress and the judiciary. My hope is that our work together will accomplish at least these five goals:

- Acquaint you with the foundational doctrines that constitute separation of powers law, including a set of “canonical” cases that are widely taken to be the key building blocks of that doctrine;
- Enable you to apply key doctrines to both current and ongoing controversies over presidential power;
- Familiarize you with the key government institutions that “practice” separation of powers law and how they interact;
- Acquaint you with the professional and ethical challenges facing executive branch lawyers – and the ways in which the challenges facing legal advisors to government do and do not resemble the challenges facing legal challenges to large non-governmental institutions with complex, often high-stakes outcomes; and
- Enable you to critique knowledgeably the legal positions put forward on separation of powers disputes whether by the courts, Congress, or the executive branch.

We will pursue these goals through a combination of lecture and in-class discussion, critical analysis of text, and sample problem solving.

Required and Optional Materials

- Our primary text for this class will be PETER M. SHANE HAROLD H. BRUFF, AND NEIL J. KINKOPF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* (4TH ED. 2018). Because the book may not be available in hard cover for the first couple of weeks of the course, please pick up the photocopied supplement from the copy center, which includes the

first few weeks' readings. (The publisher will also provide you electronic access to the book.) There will also be occasional photocopied supplementary readings.

- I have tried to pace the volume of reading evenly so as not to discourage in-depth analysis of the materials assigned. Please do not assume, unless I make an announcement to this effect, that our failure to cover an assignment completely in the session designated should delay your preparation of any subsequent assignment. Also, if, in covering those points that I think are important or especially difficult, I should neglect some point of interest to you, please feel free to raise your question in class or after.

Grading criteria

80 per cent of your course grade will depend on your performance on a final eight-hour take-home exam.

20 per cent of your grade will be based on class participation, to be calculated as follows: Each student begins with a base grade of 84 (2 points for each of 42 classes). Two points will be deducted for each unexcused absence, pursuant to the attendance policy below. One point will be deducted for any class in which you are not prepared to discuss the assigned material, except that, on a limited number of occasions, you may be excused from this penalty if you notify me ahead of class that you are not prepared. Three points will also be added to your score for each time you successfully complete one of the "case study" assignments explained below. I also reserve the discretion to add up to three points to a total score for any student whose participation shows consistent and insightful engagement with the material. (In sum, a student who attends and is prepared for every class, fulfills their two case study assignments, and shows consistent and insightful engagement with the material, would have a participation score of 93.)

I hasten to add that "insightful" does not mean "in agreement with the instructor." And you can not lose participation points for asking even those questions you think might be "too dumb/trivial" to ask in class. I guarantee that any question that occurs to you is on someone else's mind, too; you do everyone a favor by asking.

Course Policies

Electronics: Our class will operate with a "no laptop" – or, more accurately, "no computing device" – policy. That is, unless students are required to use an electronic note taking device as a disability accommodation, laptops, tablets, and all other electronic communication devices should be turned off while class is in session. For those interested in the rationale, I'm happy to recommend some short readings on the impact of computer use on classroom pedagogy.

I do use PowerPoint slides in class as a substitute for the blackboard. All slides, however, will be posted to the class's TWEN website, so there will be no need to copy down the content of the slides into your notes.

Attendance: Because we are a fairly compact group, it will be especially crucial to the "chemistry" of the class if everyone is present for every class. In cases of religious observance,

personal or family medical emergency, or other unforeseen obligations that cannot be rescheduled, your absence will, of course, be excused. Should any of these circumstances arise, please notify me by email in advance of your absence if practicable.

I ask, however, that you try to avoid scheduling placement interviews or clinic-related appearances that would conflict with our meeting times. If you anticipate problems on this score, we should talk. I reserve the right to sanction a failure to meet the expectation of regular attendance by exclusion from the course or the assignment of mandatory make-up written work. (I should add that, over many years of teaching, I've never yet had a student who had to be excluded from class as a result of excessive absence.)

Law and Politics: If our group resembles the prior offerings of this class, we will probably find that opinions on the issues we discuss will stretch across a pretty wide spectrum. It is my experience in this area that political opinions range widely from “champions of a very strong executive,” or “presidentialists,” to “champions of strong checks and balances, or “constitutional pluralists.” One interesting aspect of separation of powers law is that this division of opinion does not always map very neatly onto “Republican v. Democrat” or “liberal v. conservative” divides. In any event, the following may be a good form of self-discipline: When assessing a legal question, ask yourself whether your analysis would be changed if the sitting President were your most or least favorite President so far in your lifetime. If your candid self-diagnosis is, “Maybe,” then you may want to look harder at the law! In any event, I hope everyone will share their views freely. Having a variety of legal and political views in the class will help all of us (a) to form deeper insights into the relationship between our own political and legal views and (b) to learn to anticipate more thoughtfully how people who disagree with us politically may or may not wind up disagreeing with us legally.

“Case Studies”

You will also note that, throughout the schedule of readings, I have designated a set of “case studies,” although that’s perhaps a misnomer. These are problems or areas of current controversy that can really help us focus on the role of the President’s legal advisors. Part of everyone’s participation will be serving as “point person” for the discussion of two of these case studies. All that role entails is being able to lead off the class’s discussion by responding to some general questions I will give you in advance to guide your reading of the materials. Successful completion of this role will add 3 points to your class participation score for each of the two discussions.

SCHEDULE OF READINGS

(I have listed readings for only 40 classes in anticipation of using two class sessions for guest speakers)

1	<p>I. Introduction</p> <p>A. Overview of the executive branch and introduction to the complexities of constitutional interpretation</p>	Peruse pp. 1-32; read closely pp. 35-40 and Articles I-III of the U.S. Constitution
2	B. Judicial review of the executive	43-56
3	C. The interplay of statutes and Article II as sources of executive power	60-73
4	(Continued)	73-95
5	<p>II. The Political Branches' Core Powers</p> <p>A. The executive's "big gun": The veto power (and signing statements)</p> <p>CASE STUDY 1: Early Trump signing statements</p>	140-153 Supp. Vol 2, 1-8
6	B. Congress's "big gun": The power of the purse	178-188, 197-202
7	CASE STUDY 2: The Antideficiency Act and Government Shutdowns	Supp. Vol. 2, 9-25
8	<p>III. Mechanisms of Executive Accountability</p> <p>A. Impeachment</p> <p>CASE STUDY 3: Impeachment Issues and "the Russia Thing"</p>	225-249 249-254
9	CASE STUDY 4: Presidential Indictment While in Office?	Supp., Vol. 2, 26-120
10	B. The President's immunity from civil liability	279-300
11	<p>C. Executive privilege in judicial proceedings</p> <p>1. The presidential privacy privilege</p>	314-329
12	2. The state secrets privilege	329-354
13	D. Executive privilege before Congress	354-385
14	<p>CASE STUDY 5: "Fast and Furious" Documents</p> <p>CASE STUDY 6: Testimony of White House Aides</p>	Supp., Vol. 2, 121-155
15	<p>IV. Control of Administration by the Elected Branches</p> <p>A. Appointments</p> <p>1. Executive branch appointments</p>	443-469
16	<p>2. Judicial appointments</p> <p>CASE STUDY 7: The Nominations Process After Garland</p>	469-488 Supp., Vol. 2, 156-220
17	B. Removals	488-505
18	(Cont'd): <i>Morrison v. Olson</i> : An Unstable Synthesis?	518-541
19	(Cont'd): The "Layers of Protection" Problem	541-564

20	CASE STUDY 8: Litigating the Constitutionality of ALJ'S	Supp., Vol. 2, 221-253
21	C. White House Management of the Bureaucracy	564-571, 582- 599
22	D. Presidents and Law Enforcement 1. The problem of “non-execution” generally	611-634
23	2. Discretion in statutory enforcement CASE STUDY 9: Deferred Action Programs	635-664
24	V. National Security Powers A. Overview	709-735
25	CASE STUDY 10: Congressional Regulation Of Diplomacy	735-758
26	B. Treaty powers	758-784
27	C. Executive agreements	785-803
28	(Cont'd) CASE STUDY 11: The Iranian Nuclear Deal	803-823
29	D. Immigration and Foreign Policy CASE STUDY 12: The Travel Ban and Sanctuary Orders	906-925
30	VI. War Powers A. Overview	953-966, 1119- 1123
31	B. War Powers Resolution	992-1006, 1069- 1076
32	C. Presidential War-Making After Vietnam: Kosovo and Libya	1025-1047
33	D. Persian Gulf and Iraq Wars	1077-1110
34	E. Presidential Wartime Powers Off the Battlefield	1123-1157
35	VII. War Powers and “The Long War” A. The Treatment of Enemy Combatants	1159-1187
36	(Continued)	1204-1237
37	B. Targeted killing and the drone war	1274-1303
38	C. CASE STUDY 13: Updating the AUMF for Action Against ISIS/ISIL	1303-1318
39	D. Foreign Intelligence Surveillance Before 9/11	845-864
40	E. Foreign Intelligence Surveillance After 9/11	1318-1344