This is a seminar in American Foreign Policy and National Security Law. The focus will national security, though significant attention will also be paid to foreign relations and international law. As the title makes evident, we will address the subject from the perspective of American courts and policy: what decisions or conclusions do the law, policy, and the national interest require under the circumstances presented in the cases at hand? At the same time, foreign policy and national security law also raise broader legal and policy questions about America’s relations with other countries and about America’s role in the international realm. Accordingly, our inquiries will be focused on both domestic and international perspectives, which relate to the two major divisions in the law: the domestic legal context, which includes American constitutional, statutory, and treaty law relating to foreign policy and security; and American obligations regarding other countries in the form of treaties, agreements, and international law. We will spend the first part of the course on the domestic legal/constitutional context, and the second part on the international legal and political context. As we will see, these two domains are distinct, but also overlapping in several respects.

The course is about the law, but it is also a political science course. This means that we will consider the relevant cases from legal, strategic, and political perspectives. To what extent are important cases in foreign policy law and national security law based on purely legal considerations? To what extent are they based on political power or conceptions of the national interest and the interests of national sovereignty? What does the law (constitutional, statutory, treaty, international) have to say about a particular dispute? If the law is unclear (as is often the case), what criteria should courts and decision makers rely upon in making a decision? Is national interest (strategic, economic, political, normative, etc.) the primary criterion, or something else? What is the national interest in such cases? Who should determine what it is? What if the President and the Congress disagree about a war power or the meaning of a treaty? What if the President and a court disagree about the law? To what extent should Courts consider the national and security interests of the United States when they decide legal disputes regarding foreign policy and national security? Ultimately, what should the relationship be between law and strategy?

These and related questions permeate our subject, and are often difficult to resolve. That means that there is often more than one reasonable position in a case. Accordingly, I will strive to foster open-minded discussion in the class, and to encourage tolerance of all relevant viewpoints. As the Supreme Court declared in a famous free speech case (New York Times v. Sullivan, 1964), there is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Let us make this a motto for our class.
In class, I will introduce each week’s subject in lecture, and then open the class up to guided discussion and debate. Class discussions will take three different forms at different times: 1) open-ended discussion about the material; 2) discussion centering on questions I will pose the previous week; 3) discussion based on “simulations” presented at the back of the book. The simulations will involve more stylized discussion based on the parameters laid out in the book, subject to our own modification and discretion.

Books: We will use three books. The casebook is expensive, so I have an extra copy that I can put on reserve or give to the class to be shared among students who wish to share.

- **Power and Constraint: the Accountable Presidency after 9/11**, by Jack Goldsmith
- **The Limits of International Law**, by Jack Goldsmith and Eric Posner
- I will also send you short articles via the Class List as the semester goes on
- Students are also encouraged to check out pieces written on the national blog of Benjamin Wittes, Robert Chesney, and Jack Goldsmith entitled “Lawfare: Hard National Security Choices”: [http://www.lawfareblog.com](http://www.lawfareblog.com)

Class Requirements and Grades:

Student grades will be based on three factors: 1) a midterm exam; 2) a term paper due the day after the last class session; 3) the quality and participation in class discussions and the simulation exercises (that is, good class participation can help the grade, not hurt it). The exam will consist of some basic identification questions and essay questions based on what we have studied. The paper should be a research paper or analytical piece focusing on an issue or question of direct relevance to the class. I will discuss the paper in class, and each student should speak with me about what they to do. The midterm will count for 40% of the grade and the paper 60%. Class participation can help the grade if it is good, but will not harm the grade you receive.

Reading Assignments: Most of these assignments are intended to be for one class session, but it is possible that some will spill over into the next week, especially when we do the “Simulation” exercises. Accordingly, I do not have specific dates for each subject. We will play it by ear regarding the dates of the assignments.

- **I: Introduction**
  - Goldsmith, *Power and Constraint*; Introduction to Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (provided by instructor);
  - Downs, “Civil Liberties and Human Rights” (provided by instructor)
  - Questions for Class Discussion/Debate to consider (Roles might be assigned): 1) How should the government deal with terrorism: as a “criminal law issue” or as a “war”? 2) Was the Bush administration justified in establishing military tribunals for enemy combatants, or should such captives be tried in regular criminal courts? 3)
Was the Bush administration justified in considering torture as a method of dealing with terrorism? 4) Should the major decisions regarding national security and terrorism be made by the Executive branch? Or should terrorism policy be the joint product of the Congress, the Presidency, and the Courts?

- FGMS, National Security Law, Chapter 1, pp. 1-72.
- Class Discussion/Debate will focus on: United States. v. Curtiss-Wright Corp./Youngstown Sheet and Tube Co. v. Sawyer; INS v. Chadha;
- Questions to consider: 1) the FGMS authors ask, “Do you think the foreign relations powers of the United States emanate solely from the U.S. Constitution or from other sources?” How would you answer this question? 2) Are there presidential decisions regarding the use of military force that the Constitution delegates to the President exclusively? If so, what decisions would or should this delegation cover? 3) Which view of the President’s power do you find most persuasive, that of Curtiss-Wright, or Youngstown? 4) How applicable is the Chadha case to foreign affairs and national security cases? Should legislative vetoes be given more leeway in this domain or not? Are there similarities between the delegation of power to the President in foreign affair and the “political question” doctrine? (I will discuss this doctrine in class. If interested, see pp. 846-896. FGMS)

- FGMS, Ch. 1, pp. 72-97;
- Class Discussion/Debate will focus on: Ex Parte Merryman/ Korematsu v. United States/Hamdi v. Rumsfeld/Hamdan v. Rumsfeld.
- Questions to consider: 1) Are there “emergency powers” that the President possesses? If so, where do they come from? What are their limits? 2) Are there circumstances that might justify the governmental action in Korematsu? What would those be? 3) Was the President really authorized by Congress to establish the military tribunals in the Hamdi and Hamdan cases? 4) If Congress had not authorized the tribunals, does the President possess power independent of Congress to do so? 5) See the different approaches to constitutional interpretation discussed by Glennon in FMGS (pp. 12-21). Which theory or theories is/are most useful for adjudicating and addressing such issues of foreign policy and national security?

IV: The War Power: I
- FMGS, Ch. 4, pp. 491-557
- Class Discussion/Debate will focus on: The Prize Cases/Dellums v. Bush.
- Questions to consider: 1) What is war, and what powers accrue to the state regarding war? Do those powers come from the Constitution or from other sources outside the
Constitution? What might these other sources be? 2) To what extent may the President engage in war and the exercise of war powers independent of Congressional action? When is Congressional support required, and what forms can it take? 4) Do the courts have a role in limiting or adjudicating the war powers? 5) Was President Bush’s engagement in military action in Iraq justified under the Constitution? 6) Was President Obama’s engagement in military action in Libya justified under the Constitution?

**V: The War Power: II**
- FMGS, Ch. 4, pp. 558-648
- Questions to consider: 1) Is the War Powers Resolution constitutional, in part or in total? Why or why not? 2) Independent of its constitutionality, is the War Powers Resolution good or bad policy? 3) Can the authorization to go to war be “implied” by statute, treaty, or Congressional silence or funding? 4) The vast majority of the deployments of military force in American history have not been accompanied or authorized by a formal declaration of war. Should this long-established practice be taken into consideration in interpreting the war powers of the Constitution?

**VI: Simulations for the War Power:**
- Simulations for Chapter 4 on pp. 1389-1390 in FGMS

**VII: Investigating and Prosecuting Threats to National Security: I**
- FGMS, Ch. 8, pp. 1054-1120
- Questions to consider: 1) What were the major problems cited by the 9/11 Commission Report? 2) To what extent did legislative and policy changes after 9/11 address these problems? To what extent did they create new problems? 3) What accommodations to the special needs of national security (before and after 9/11) have the law and the courts made? Should accommodations be made, or should constitutional standards (e.g., Fourth, Fifth, Sixth, and Fourteenth Amendments) be the same for investigating national security threats as for regular domestic law enforcement? 4) If accommodations should be made, are the ones we have made adequate and justified?
VIII: Investigating Threats to National Security: II
- FGMS, Ch. 8, pp. 1121-1193
- Class Discussion/Debate will focus on: United States v. Verdugo-Urquidez/ In re Terrorist Bombings of U.S. Embassies in East Africa
- Simulation for Chapter 8, pp. 1396-1397 in FGMS
- Questions to consider: 1) Should the same constitutional standards apply to U.S. searches, seizures, and investigations abroad than at home? 2) Can a defendant receive a fair trial if classified information relevant to his or her case is not fully available to him or her due to national security concerns? What appropriate remedies are there for such cases? 3) In such cases, should the law treat the rights of American citizens living abroad differently from the rights of non-citizens abroad?

IX: National Security and the Control of Information
- FGMS, Ch. 9, pp. 1194-1283
- Simulation for Chapter 9, p. 1398 in FGMS
- Questions to consider: 1) Are democratic theory and constitutionalism compatible with making exceptions or qualifications to constitutional rights in the name of national security? 2) Are there requirements, attributes, or needs of state that transcend the particular nature of the state, be it democratic or non-democratic? 3) Is the “State Secrets Privilege” consistent with the Constitution and basic democratic theory? 4) Does the “public’s right to know” include knowing all the details regarding foreign policy and the implementation and practice of national security policy and law? Where should we draw the line?

- FGMS, Ch. 2, pp. 98-125.
- Goldsmith and Posner, The Limits of International Law (read over the course of the next three weeks)
- Class Discussion/Debate will focus on: The Paquette Habana/Sandra Day O’Connor, “Federalism of Free Nations”
- Questions to consider: 1) On what basis does the “law of nations” (later called “international law”) pose obligations to the United States as a sovereign power? 2) The FGMS authors distinguish “Monism” from “Dualism.” Which model best describes the United States? Which model do you think is most appropriate for American policy and law to follow? 3) To what extent should the obligations or
claims of international law trump or qualify the rights of national sovereignty? To what extent should the obligations or claims of sovereignty trump international law? 4) Posner and Goldsmith argue that countries follow the dictates of international law only when it is either in their interest, or not against their interest, to do so. Is this empirically true? Is it normatively right? 5) Is it right and/or useful for the Supreme Court to incorporate the legal standards and principles of other countries into their interpretations of the U.S. Constitution? If so, when and with what limits?

- FGMS, Ch. 2, pp. 232-272
- Class Discussion/Debate will focus on: *U.S. v. Yunis*/*U.S. v. Bin Laden/Ex Parte Qurin/ Hamdi v. Rumsfeld/*”Notes on Detainees in the ‘War on Terrorism’”
- Questions to consider: 1) Is the Alien Tort Statute a good law, or does it compromise the sovereign integrity of the United States? 2) In *Sosa v. Alvarez-Machain*, Justice Souter limited the reach of the ATS to the types of crimes Blackstone held were primary offenses against the law of nations, while Justice Scalia claims that Souter and the Court’s majority opened the door to too much litigation in this area. Who is right as an empirical matter? Who has the best constitutional argument? 3) Are the *Quirin* and *Hamdi* decisions consistent with international norms and the appropriate rights of sovereign states? 4) In *United States v. Yunis* (p. 253), the Court says, “Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.” Do you agree or disagree with this statement?

- Simulation for Chapter 2, p. 1385-1387 in FGMS

■ XII: Treaties and Other International Agreements
- FGMS, Ch. 3, pp. 273-357
- Class Discussion/Debate will focus on the torture agreements in this chapter
- Questions to consider: 1) What status do treaties have in the U.S. constitutional scheme? May a treaty “trump” the Constitution itself? That is, are there constitutional limits on what a treaty may require? What if a treaty calls for the suppression of free speech that the First Amendment protects? How does a treaty’s status compare to: the Constitution/a federal statute/a federal executive agreement/a state law; etc. 2) In making a treaty, what values and interests do American lawmakers and policymakers take into consideration? What should they take into consideration? 3) In the complex process that led to the United States’ adoption of the Convention Against Torture, did the United States take appropriate factors and concerns into consideration ad act in an appropriate fashion? Were the “conditions” that the United States stipulated for approval appropriate from the standpoint of American interests and values?
Simulation for Chapter 3, pp. 1387-1389 in FGMS

A Smattering of Recommended Readings for Your Interest

The casebook is also a bibliographic source, so you can find many readings relating to our subjects in it. Here is a list of a few prominent books that you might find useful and interesting regarding such subjects as foreign relations and national security law, policy and history; diplomacy; theories of international politics; and the use of force. There are thousands of such sources, so I have picked some that are good starters. These works cover a range of viewpoints, including radical, liberal, conservative, neoconservative, and non-ideological. They also represent writers who are committed to legal approaches and those who are more skeptical of legalistic approaches to foreign relations policy and national security.

- 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States
- David A. Baldwin, ed., Neorealism and Neoliberalism: The Contemporary Debate
- Duncan S. Bell, ed., Tragedy, Power, and Justice: Realism and Global Political Theory
- Peter Berkowitz, ed., Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases
- Philip Bobbitt, The Shield of Achilles: War, Peace, and the Course of History; Terror and Consent: The Wars for the Twenty-First Century
- David Cole and James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security
- Cecil B. Crabb Jr. and Pat M. Holt, Invitation to Struggle: Congress, the President, and Foreign Policy
- Donald Alexander Downs and Ilia Murtazashvili, Arms and the University: Military Presence and the Civic Education on Non-Military Students, Chapters 1 and 12
- John Hart Ely, War and Responsibility
- George P. Fletcher and Jens David Ohlin, Defending Humanity: When Force Is Justified and When
- Michael J. Glennon, Constitutional Diplomacy
- Louis Henkin, Foreign Affairs and the United States Constitution
- George F. Kennan, *American Diplomacy; Memoirs, 1925-1950; Memoirs, 1950-63*
- Richard Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders*
- Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution*
- Walter A. McDougall, *Promised Land, Crusader State: The American Encounter with the World Since 1776*
- Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace; The Purpose of American Politics; Scientific Man vs Power Politics*
- Richard M. Pious, *The War on Terrorism and the Rule of Law*
- Eric A. Posner, *The Perils of Global Legalism*
- *Restatement (Third) of the Foreign Relations Law of the United States*
- Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*
- Phillip R. Trimble, *Foreign Relations Law*
- Kenneth Waltz, *Man, the State, and War* (Columbia University Press, 1959), and *Theory of International Politics*
- Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*
- Paul D. Williams, *Security Studies: An Introduction*
- John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11; War by Other Means: An Insider’s Account of the War on Terror*


