

# Foreign Affairs and the Constitution

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## Introduction

Questions of foreign policy and national security engage some of the most fundamental areas of constitutional law. What is the proper distribution of power among the executive, legislative, and judicial branches of government? Do the full panoply of constitutional protections apply in cases involving foreign policy or national security? What is the role of international law in the United States? How should courts address these sensitive issues?

From its birth in 1789 to the tragedy of September 11, 2001, the American republic has engaged in a series of struggles between competing interests and institutions. The struggle between personal liberty and national security is perhaps the most fundamental conflict. Indeed, a cursory review of American history reveals the delicate balance between these competing interests. It is a tentative relationship that has been forged through the centuries. It is not a fixed relationship, however, but waxes and wanes in synchronous movement with current events.

The struggle between national sovereignty and international obligations represents another conflict of competing interests. According to the Constitution, treaties are the law of the land. The Supreme Court has also recognized that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” And yet, the application of international law in the United States, whether through treaties or customary international law, remains frenetic and uncertain.

In addition to these struggles of competing interests, the American republic has also experienced a struggle between competing institutions. The Constitution has partitioned power among the executive, legislative, and judicial branches of government. This separation of powers is designed to promote democratic governance and reduce the threat of unilateral action by any branch. In the words of James Madison, “[a]mbition must be made to counteract ambition.” As demonstrated by the adoption of the War Powers Resolution, the Iran-Contra affair, the Authorization for the Use of Force after September 11th, and the debates over countless deployments of U.S. military personnel abroad, the institutional struggle between the executive and legislative branches endures; it is vibrant and ongoing.

The judiciary plays an essential role in moderating the struggle between these competing interests and institutions. From examining the separation of powers, the principle of federalism, or

the justiciability of foreign affairs, questions involving foreign policy and national security merit careful consideration by the judiciary.

According to Alexander Hamilton, the purpose of the federal union is to provide for “the common defense of the members; the preservation of the public peace, as well as against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.” The goal of this course is to review the manner in which these fundamental issues have been addressed by the respective branches of government.

### **Course Requirements**

Students have the option of taking a final exam or writing a research paper. The research paper may be submitted as a scholarly writing paper or as a non-scholarly writing paper. This option must be indicated at the beginning of the semester. Scholarly writing papers have different requirements than non-scholarly writing papers. All students writing papers must submit a brief summary, bibliography, and outline of their proposed work. Rough drafts are also required. The paper is due on the last day of final exams. The final exam or research paper will count for 80% of the course grade.

Class participation is an integral component of this course. Class participation includes the following: (1) attendance; (2) punctuality; (3) preparation; and (4) professionalism. Students are expected to attend class regularly, to be punctual, and to be fully prepared to discuss the readings. Accordingly, class participation will count for 20% of the course grade.

### **Course Materials**

CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW (2d ed. 2006).

## Course Readings

### **I. An Overview of International Law and Institutions**

*Sources of International Law*

-Textbook, pp. xxv-xxvi

*International Institutions*

-Textbook, pp. xxvi-xxvii

### **II. Foreign Affairs and the Separation of Powers**

*Constitutional Background*

-Textbook, pp. 1-7

*Nature of the Foreign Affairs Power*

-Textbook, pp. 29-33; 161-169; 177-182

### **III. The Principle of Federalism**

*Preemption of State Action*

-Textbook, pp. 320-328; 331-335

*The Limits of Federalism*

-Textbook, pp. 409-416

### **IV. Justiciability of Foreign Affairs**

*Standing, Ripeness, and Mootness*

-Textbook, pp. 39-47

*Political Question Doctrine*

-Textbook, pp. 47-54

*Act of State Doctrine*

-Textbook, pp. 90-100; 105-108

## **V. Constitutional Protection Abroad**

*The Extraterritorial Reach of the Constitution*

-Textbook, pp. 593-606; 664-672

*The Aftermath of September 11, 2001*

-Textbook, pp. 304-311

-Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006)

## **VI. Constitutional Protection at Home**

*War and Individual Liberties*

-Textbook, pp. 255-274

*The Aftermath of September 11, 2001*

-Textbook, pp. 284-297

## **VII. The War Power**

*Declaring War*

-Textbook: pp. 197-199; 222-225; 236-248; 280-284

## **VIII. Entering International Agreements**

*Executive Agreements*

-Textbook, pp. 467-472; 478-484

*Conditioning Consent*

-Textbook, pp. 424-431

*Treaty Termination and Reinterpretation*

-Textbook, pp. 451-459

## **IX. International Law in the United States**

*Customary International Law*

-Textbook, pp. 485-494

*Treaty Law*

-Textbook, pp. 371-377; 380-385; 442-446; 568-575

-Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006)  
*Using International and Foreign Sources in Constitutional Interpretation*  
Textbook, pp. 580-586

**X. Human Rights Litigation in U.S. Courts**

*Alien Tort Statute*

-Textbook, pp. 502-515; 535-545

*Foreign Sovereign Immunities Act*

-Textbook, pp. 60-70; 75-83