

**Government 4396 - Crises in Constitutionalism
(Spring 2014)**

Dr. Douglas C. Dow

Class Hours: MW 1:00-2:15PM (CV Seminar Room - GC 1.208B)

Office: GC2.206 Phone: (972) 883-4934

Office Hours: MWF 2:30-3:30PM and by appointment

E-Mail: dougdown@utdallas.edu

Course Description:

Most constitutional conflicts are resolved through normal streams of adjudication. These conflicts revolve around a specific clause of the Constitution, and are decided by the Supreme Court based upon established legal precedents. Constitutional crises arise when these markers of normal constitutionalism disappear: when the conflict centers on essential but unwritten aspects of the document, when the Supreme Court has been displaced as the final arbiter, and when issues appear for which there are no settled precedents or customs. What is a crisis, and how does a crisis differ from an emergency? Under what circumstances might the Constitution be itself the origin of the crisis? What have been the causes and conclusions of constitutional crises in American history? This class will delve into these vital questions, exploring the meanings of constitutional government, by inhabiting the peripheries of legality.

The bulk of our seminar will be spent examining six specific moments of constitutional crisis in American history. Our first historical moment will be the period of 1787-1800, with the framing and the eventual ratification of a new constitution, replacing the Articles of Confederation and creating a complex system of scattered sovereignty. The heart of the course involves a look at three different moments in the nineteenth century crisis over slavery and secession. We shall consider two moments of constitutional crisis of the past century. We shall examine the expansion of Congressional and executive power during the New Deal, a movement that allowed for the era of both federal regulation and civil rights protection, but only after the Court-Packing Crisis of 1937. We will conclude with the contemporary controversies around measures taken after 9/11 to fight the war on terrorism domestically. This moment, while unique in American history, must also be evaluated through the accumulated experiences of two centuries of constitutional maintenance and tradition. Interspersed through these historical moments will be readings addressing conceptual issues like constitutional abeyances, sovereignty, constitutional dictatorship, and the rule of law.

Course Requirements

Attendance and Participation: An important requirement for this honors seminar will be active participation in class discussion, debate and analysis. Regular attendance is required, and the professor will take attendance for each class. Please bring to class each day the texts under discussion – we will be referring to particular passages regularly. Each student is expected to have completed the day's readings before class. Be prepared to talk. Everyone will be expected

to demonstrate civility and a respect for the thoughts, opinions and beliefs of others. Notes or summaries will not be provided for missed classes. Cell phones and all other electronic noise-makers should be turned off (not on vibrate) during class. Because of the frequency by which many students using laptops to take notes also succumb to the temptations to surf the Web, check email, IM, or otherwise disengage themselves from class discussions, laptop use will not be permitted during class.

Exams: Each student will be responsible for completing five take home essay questions. There will be eight essay assignments offered, one after the end of each unit, and students may choose the five questions they want to answer. These essays will be 5 pages in length, and will cover both assigned readings, as well as lecture and discussion material. Each essay will be weighed equally, and taken together they will be worth 85% of the final grade. That means that each take home essay will be worth 17% of the final grade. Everyone must complete at least one of the first two essays. Students will be allowed to turn in a sixth essay, the grade for which can be used to substitute for the lowest of their five initial essay grades. All students will need to turn in an essay for at least one of the final two sections.

Quizzes: Most classes will begin with a brief quiz covering the readings that are required for that day. These quizzes will test recollection of the reading material and will aid as a starter for class discussion. The accumulation of quizzes, combined with attendance and participation, will account for 15% of the final grade.

Make-Ups: Extensions on the due dates for the take home exams will be given only in documented emergency situations and at the discretion of the professor.

Syllabus Changes: The professor reserves the right to amend this syllabus during the semester. Any changes will be announced in class, and students will be responsible for getting and following the new information.

Grading Scale: All exams will be graded on a 100-point scale. The following conversion chart will be used to translate numbers into letter grades:

A: 94-100	B-: 80-83	D+: 67-69
A-: 90-93	C+: 77-79	D: 64-66
B+: 87-89	C: 74-76	D-: 60-63
B: 84-86	C-: 70-73	F: below 60

Policy on Scholastic Dishonesty

Scholastic dishonesty will not be tolerated, and all student essays are expected to be the product of a student's own work. Students who violate University rules on scholastic dishonesty are subject to disciplinary penalties. Since such dishonesty harms the individual, all students, and the integrity of the University, policies on scholastic dishonesty will be strictly enforced. Any acts of plagiarism (representing the work of another as one's own, which includes cutting and pasting from the Internet) invite possible disciplinary action.

If students have any questions on what plagiarism means, they may consult a plagiarism

tutorial found at <http://uwp.aas.duke.edu/wstudio/resources/ppt/AvoidingPlagiarism.pdf>. To find out more about UTD policies regarding scholarly dishonesty and its consequences, please refer to the UTD Judicial Affairs website: <http://www.utdallas.edu/judicialaffairs/>. Students with any questions or concerns are also encouraged to contact the professor.

Reading Schedule:

Course Introduction – Monday, Jan. 13.

I. Constitutional Maintenance and Crisis in American Political Culture

Dates:

W. Jan. 15; W. Jan. 22; M. Jan. 27; W. Jan. 29

Themes:

- What is 'normal' constitutionalism?
- What counts as a constitutional crisis, and how are crises different from emergencies?
- Where in the Constitution are its "pressure points" embedded?
- What is a constitutional abeyance?
- What is sovereignty, and how is it distributed within the Constitution?
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Readings:

- The United States Constitution
- Sanford Levinson and Jack M. Balkin. "Constitutional Crises" from *University of Pennsylvania Law Review* (2009)
- Michael Foley. *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge, 1990), pp. 9-11, 59-82, 128-130
- Jack N. Rakove. "Making a Hash of Sovereignty" Part I in *Green Bag* (Fall 1998); Part II in *Green Bag* (Fall 1999).

First Essay Due: Wednesday, February 5

II. The Rise of the United States' Second Constitutional Regime

Dates:

M. Feb. 3; W. Feb. 5; M. 2/10

Themes

- What were the perceived problems of the Articles of Confederation?
- Can a constitutional regime legally end?
- How is a revolutionary political culture domesticated?
- What was the political and legal status of Ratification?
- Why did the Election of 1800 threaten the existence of this second constitutional regime?

Readings:

- The Articles of Confederation.
- Federalist Papers # 1, 40.
- Richard S. Kay. "The Illegality of the Constitution" from *4 Constitutional Commentary* (1987), pp. 57-80.
- Suzette Hemberger. "A Government Based on Representation" from *Studies in American Political Development* (Fall 1996).
- James E. Lewis Jr. "What is to Become of Our Government?: The Revolutionary Potential of the Election of 1800" from *The Revolution of 1800: Democracy, Race, and the New Republic* (University of Virginia Press, 2002), pp. 3-29.

Second Essay Due: Monday, February 17

III. Dred Scott, Fugitive Slave Crisis, and the Failure of Crisis Management

Dates:

W. Feb.12; M. Feb. 17; W. 2/19

Themes:

- What is the legal status of African Americans under the 1787 Constitution?
- What powers does Congress have to prohibit or regulate slavery in U.S. territories?
- What was the condition of inter-state comity with respect to slave laws in the 1850s?
- What are the limits of the Supreme Court in resolving fundamental political conflicts?

Readings:

- Paul Finkelman. (ed.) *Dred Scott v Sandford: A Brief History with Documents* (Bedford Books, 1997) pp. 1-52, 55-77, 108-126, 169-201.
- Mark A. Graber. "Voting for John Bell" in *Dred Scott and the Problem of Constitutional Evil* (Princeton University Press, 2006), pp. 237-254.
- Fugitive Slave Act of 1850.
- Massachusetts Personal Liberty Act of 1855.

Cases:

- *Scott v. Sandford* 60 U.S. 393 (1857) *

Third Essay Due: Wednesday, February 26

IV. A Constitution Divided: The Crisis of the Civil War

Dates:

M. Feb. 24; W. Feb. 26; M. March 3; W. March 5

Themes

- What is the history and theory behind the concept of a constitutional dictator?
- Was Lincoln a constitutional dictator?
- How can the Constitution recognize a civil war?
- What is the authority of military courts on civilian populations?

Readings:

- Livy. *History of Rome* 3.26-3.30
- Machiavelli. *Discourses on Livy*. Book I. chapter 33-34.
- John Locke. Chapter 14: "Of Prerogative." *Second Treatise of Government*
- Abraham Lincoln. "First Inaugural Address" (March 3, 1861)
- Herman Belz. "Lincoln and the Constitution: The Dictatorship Question Reconsidered" in *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* (Fordham University Press, 1998)

Cases:

- *Ex Parte Merryman* (1861)
- *The Prize Cases* 67 U.S. 635 (1863) *
- *Ex Parte Milligan* 71 U.S. 2 (1866) *
- *Cummings v Missouri* 71 U.S. 277 (1867)

Fourth Essay Due: Monday March 17

Spring Break: 3/10-3/15

V. States and Persons: Constitutional Status under Reconstruction

Dates:

M. March 17; W. March 19; M. March 24; W. March 26

Themes:

- What was the constitutional status of the former Confederate states after Appomattox?
- What were the Black Codes, and how did they cause a crisis in personal status under law?
- Why was Andrew Johnson impeached?

Readings:

- Thaddeus Stevens "Conquered Provinces Speech" April 4, 1863
- Thaddeus Stevens "Emancipation and Confiscation Speech" August 2, 1861
- Charles Sumner "Our Domestic Relations" Atlantic Monthly 1963.
- Samuel Shellabarger "Speech Before Congress" January 8, 1866
- Andrew Johnson's Veto of the Civil Rights Act (1866)
- Articles of Impeachment of Andrew Johnson (1867)
- Black Codes (1865-1868)

Cases:

- *Texas v. White* 74 U.S. 700 (1869) *
- *Slaughterhouse Cases* 83 U.S. 36(1873)
- *United States v. Reese* 92 U.S. 214 (1876)
- *United States v. Cruikshank* 92 U.S. 542 (1876)

Fifth Essay Due: Wednesday, April 2

VI. 1937: Public Opinion vs. the Supreme Court? FDR vs. Congress?

Dates:

M. March 31; W. April 2; M. April 7

Themes:

- What is the relationship between Supreme Court decisions and public opinion?
- What were the causes and impact of the “court-packing” plan?
- What has been the legacy of Footnote Four?

Readings:

- Leuchtenburg, William E. “When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis” 108 *Yale Law Journal* (1999), pp. 2077-2114
- Barry Friedman. “Acceptance” from *The Will of the People* (Farrar, Straus & Giroux, 2009), pp. 3-11, 195-236.
- Franklin D. Roosevelt. Fireside Chat on Reorganization of the Judiciary (March 9, 1937)

Cases:

- *Hammer v. Dagenhart* (1918) *
- *National Labor Relations Board v Jones & Laughlin Steel Corp.* (1937) *
- *United States v. Darby* 312 U.S. 100 (1941)
- *Wickard v. Filburn* 317 U.S. 111 (1942) *

Sixth Essay Due: Monday, April 14

VII. The Constitution Post 9/11: Setting the Context

Dates:

W. April 9; M. April 14; W. April 16; M. April 21

Themes:

- What have been the developments in the theory and practice of presidential power since

World War II?

- What is the unitary executive, and why is it so controversial?
- What is the concept of the state of exception, and how might it apply to the United States?

Cases:

- *Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952) *
- *United States v. Curtiss-Wright Export Co.* 299 U.S. 304 (1936) *

Readings:

- Giorgio Agamben. "A Brief History of the State of Exception" *State of Exception* (University of Chicago Press, 2005), pp. 11-22.
- Douglas C. Dow "A Conceptual History of the Unitary Executive" (2009)
- Louis Fisher. "Unchecked Presidential Wars" 148 *University of Pennsylvania Law Review* (May 2000), pp. 1637-1672.
- Authorization for Use of Military Force (September 18, 2001)
- Authorization for Use of Military Force Against Iraq (October 16, 2002)

Seventh Essay Due: Monday, April 28

VIII. The Constitution Post 9/11: Guantanamo and Military Commissions

Dates:

W. April 23; M. April 28; W. April 30

Themes:

- Has the detention camp at Guantanamo precipitated a constitutional crisis?
- What is the status of military tribunals in American history?
- How has the Supreme Court responded to the legal challenges against Guantanamo, and what is the appropriate role of the judiciary during the "war on terrorism"?
- How does the legal record of the Obama Administration compare with the Bush Administration?

Readings:

- Memorandum for Alberto R. Gonzales Re: Standards of Conduct for Interrogation (August 1, 2002)
- Amy Kaplan. "Where is Guantanamo?" *American Quarterly* (2005), pp. 831-858
- John Yoo. *War by Other Means: An Insiders Account of the War on Terror* (2006) selections
- David Cole. "Introduction" *The Torture Memos; Rationalizing the Unthinkable* (New Press, 2009), pp. 1-40.
- William E. Scheuerman. "Emergency Powers and the Rule of Law after 9/11." *Journal of Political Philosophy* 14:1 (2006), pp. 61-84

Cases:

- *Rasul v. Bush* 542 U.S. 466 (2004)

- *Hamdi v Rumsfeld* 542 U.S. 507 (2004)
- *Hamdan v Rumsfeld* 548 U.S. 557 (2006)
- *Boumediene v Bush* 553 U.S. 723 (2008) *

Eighth Essay Due: Wednesday, May 7