

NATIONAL SECURITY AND THE CONSTITUTION

Prof. David Barnum Winter 2020
990 West Fullerton/Rm. 2110 MW 1:00-2:30
dbarnum@depaul.edu Arts and Letters 201
Phone: 773-325-1972
Office Hours: MW 11:00-12:00 & 2:30-4:00 & by appt.

Introduction. The events of September 11, 2001, greatly intensified a long-standing debate, which continues to this day, about how best to reconcile the government's responsibility for protecting national security with the rights and principles embodied in the U.S. Constitution. This course will examine judicial decisions and other materials relevant to understanding the historical and contemporary nuances of that debate.

The course will begin by examining the impact of constitutional structure on the allocation of governmental responsibility to protect national security. We will discuss the respective powers of Congress, the President, and the courts in (1) the conduct of foreign affairs (in general) and (2) the decision to use military force (in particular).

The second part of the course will focus on the clash between national security and individual rights. Governments frequently cite the need to protect national security as their justification for abridging individual rights. Part II of the course will assess the role of the Constitution in protecting individual rights in four areas: (1) government attempts to curtail freedom of the press, (2) government use of electronic surveillance, (3) government abridgments of personal liberty, (4) government power to control immigration and travel.

The required readings for the course are two volumes of spiral bound material: (1) National Security and the Constitution: Volume I: National Security and Constitutional Structure, and (2) National Security and the Constitution: Volume II: National Security and Constitutional Rights.

Class Meetings and Briefs. The class will meet twice a week for lectures and discussions of the readings. Students are expected to do the readings in advance of class and be prepared to participate in the class discussions. On the days on which cases will be discussed, members of the class will be asked to "brief" each case, that is, to prepare a set of notes describing the facts of the case and identifying the questions decided by the Supreme Court (or other court) in its opinion. I will collect your briefs and look them over. Briefs will not be "graded," as such, but timely and consistent submission of briefs will be taken into account in calculating the class participation component of your grade.

Briefs must be submitted on the day on which the cases that they cover will be discussed in class. On rare occasions, belated submissions of briefs will be acceptable. Under ordinary circumstances, however, I will be collecting the briefs on the day of the discussion to which they relate and not at some future time.

Attendance. Each day we meet will consist of a discussion of a major portion of the course. I would not expect anyone to miss any class without a good reason. If you must miss class, please inform me before the fact or as soon as possible after the class you have missed.

Plagiarism. Plagiarism is a serious academic offense and is punishable by expulsion from the class and in some cases from the University itself. So do not even **think** of submitting any written work that is not entirely your own. When writing your term paper, be careful to put quotation marks around any passage taken from the cases and other materials and to accurately cite the source from which the passage has been taken.

Grading. Grading will be based on a take-home midterm exam (counting 20%), a term paper (counting 30%), a cumulative final exam (counting 40%), and class participation (including timely submission of briefs) (counting 10%).

Readings

Nb: Reading assignments include introductory text and follow-up notes as well as the cases themselves.

PART I:**NATIONAL SECURITY AND CONSTITUTIONAL STRUCTURE****I. THE CONSTITUTION AND FOREIGN AFFAIRS**

Mon. 1/6: Discussion of the American Judicial System

Wed. 1/8: Constitutional Allocation of Responsibility for the Conduct of Foreign Affairs and the Use of Military Force, Vol. I/1-21

Mon. 1/13: The Constitution and Foreign Affairs: Views of the Framers and Modern Views, Vol. I/22-38
The Governmental Process, Vol. I/38-46

II. THE CONSTITUTION, FOREIGN AFFAIRS, AND THE COURTS

Wed. 1/15: U.S. v. Curtiss-Wright Export Corp. (1936), Vol. I/47-54

Mon. 1/20: Martin Luther King Day

Wed. 1/22: Youngstown v. Sheet & Tube Co. v. Sawyer (1952), Vol. I/54-71

Mon. 1/27: Constitutional Politics and the Iran-Contra Affair, Vol. I/71-85

III. THE CONSTITUTION, THE WAR POWER, AND THE COURTS

Wed. 1/29: The Prize Cases (1862), Vol. I/86-94

Mon. 2/3: The War Power in Court: The First Iraq War, Vol. I/94-96
Ange v. Bush (D.D.C. 1990), Vol. I/96-100
Dellums v. Bush (D.D.C. 1990), Vol. I/100-106

The take home essay, based on the reading material up to this point, will be due on Monday, February 10.

PART II:**NATIONAL SECURITY AND CONSTITUTIONAL RIGHTS****I. NATIONAL SECURITY AND FREEDOM THE PRESS**

Wed. 2/5: NY Times v. United States (1971), Vol. II/1-14
United States v. The Progressive, Vol. II/14-18

Mon. 2/10: **Take Home Essay Due**
Video: "Daniel Ellsberg and the Pentagon Papers"

Wed. 2/12: No class

II. NATIONAL SECURITY AND ELECTRONIC SURVEILLANCE

Mon. 2/17: "Introduction," Vol. II/19-24
Olmstead v. United States (1928), Vol. II/25-28
Katz v. United States (1967), Vol. II/28-32
Omnibus Crime Control and Safe Streets Act
of 1968 (Title III), Vol. II/32-37

Wed. 2/19: United States v. District Court (aka the "Keith" case) (1972), Vol. II/37-45
Foreign Intelligence Surveillance Act
of 1978, Vol. II/45-48

III. NATIONAL SECURITY AND PERSONAL LIBERTY**A. World War II and the Japanese Internment**

Mon. 2/24: Hirabayashi v. United States (1943),
Vol. II/49-58

Wed. 2/26: Korematsu v. United States (1944), Vol. II/58-64
Ex parte Endo (1944), Vol. II/64-69

B. Personal Liberty and the Wartime Use of Military Tribunals

Mon. 3/2: *Ex parte Milligan* (1866), Vol. II/69-77
Ex parte Quirin (1942), Vol. II/77-83

C. Personal Liberty and the War on Terrorism

Wed. 3/4: Key Documents in the War on Terrorism, Vol. II/83-85
Hamdi v. Rumsfeld (2004), Vol. II/85-97

Mon. 3/9: *Padilla v. Rumsfeld* (2004), Vol. II/97-98
Padilla v. Hanft (4th Cir. 2005), Vol. II/98-104
Padilla v. Hanft (4th Cir. 2005), Vol. II/104-108

IV. NATIONAL SECURITY AND THE TRUMP ADMINISTRATION: THE TRAVEL BAN CASE

Wed. 3/11: *Trump v. Hawaii* (2018), Vol. II/109-124

Mon. 3/16: **Paper Due**
Review

Final Examination:

Wednesday, March 18 (11:30-1:30)