

THE UNIVERSITY OF TENNESSEE AT CHATTANOOGA

**The Supreme Court and Presidential Powers in War-Making  
and Foreign Affairs  
3 Credit Hours**

POLS 4210, Section 01 Fall, 2014 CRN#: 45660

Dr. Carrithers (425-4229)

Office: 417 Fletcher

[David-Carrithers@utc.edu](mailto:David-Carrithers@utc.edu)

Office Hours: M, W, F: 9:30-10:30; TTH, 9:30-10:45; or by appointment

<http://www.utc.edu/political-science-public-administration-nonprofit-management/profiles/nfw641.php>

**TEXTS**

The following texts for the course are required and are available for purchase at the UTC bookstore:

Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-94*, ed., Morton J. Frisch (Indianapolis: Liberty Fund, 2007)

David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* (University Press of Kansas, 1996)

Jack Goldsmith, *The Terror Presidency. Law and Judgment Inside the Bush Administration* (Norton, 2009)

**COURSE CONTENT**

Post 9/11, few political topics have received such widespread public attention and scrutiny as the scope of presidential powers in foreign affairs. After the attack on the World Trade Center on 9/11 President George W. Bush claimed power to initiate preventive war against Iraq, suspend the Geneva Conventions between the U.S. and Afghanistan, house detainees without trial at Guantanamo Bay, use waterboarding as a method of interrogation, and practice rendition (the sending of captured enemies to other countries for questioning). All these tactics proved extremely controversial and resulted in several Supreme Court decisions rejecting some of the Bush administration assumptions regarding the broad scope of presidential powers under the Constitution.

The Bush-era debates were hardly the first political struggles regarding the scope of presidential powers in war and foreign affairs. Such difficult and divisive questions have been with us ever since the founding of our republic. The Constitution awards the power to “declare war” to Congress rather than the President, and yet ever since the Korean War American presidents have been extremely aggressive regarding what they perceive as their power to commit troops into hostile situations on their own authority. The Korean conflict marked a new departure in presidential war-making since, unlike our entry into both World Wars of the twentieth century, President Truman did not seek Congressional authorization prior to committing American troops to combat. Instead he relied on our membership in the United

Nations and on United Nations Security Council Resolutions as his authority for committing troops to what he euphemistically called a “UN police action.”

The Vietnam War began the practice (followed later in the two Gulf Wars and the war against the Taliban and Al-Qaeda in Afghanistan) of open-ended Congressional delegations of war-making authority to the president. The Congress authorized the Vietnam War by passing the Tonkin Gulf Resolution in August, 1964 empowering the President to take all steps he deemed necessary to prevent further Communist aggression in Laos, Cambodia, or South Vietnam. Whether or not Congress should have written the President a blank check for presidential war-making in Vietnam, most observers—though surely not all—believe that the Constitutional requirement that Congress either declare war or otherwise authorize U.S. military operations was met. In suits filed by servicemen opposed to being sent to Vietnam, federal courts ruled that, in addition to the Tonkin Gulf Resolution, Congress’s passage of legislation authorizing the draft and appropriating money to be spent in the Vietnam War constituted authorization of the war in accordance with Constitutional requirements.

Because the Vietnam War ground on interminably without prospects for victory and because previously undisclosed facts were eventually made public regarding the Gulf of Tonkin incidents of August, 1964, Congress repealed the Tonkin Gulf Resolution in 1970. Three years later, Congress passed the War Powers Resolution (WPR), hoping to curb the power of presidents to make war. The WPR specifies that although the president may commit troops into hostilities on his own authority, he is obligated by law to inform Congress of the reasons for such actions within 48 hours. The president’s report to Congress starts a 60-day clock ticking during which time the President must gain approval of Congress for his actions, or withdraw the troops. Although the WPR was designed to restore to Congress the initiative in war-making, critics have concluded that the law has actually increased presidential war-making powers and should be repealed. A significant portion of the course will be devoted to close analysis of the key issues surrounding the purpose, design, and attempted implementation of the War Powers Resolution in order to pose precisely the question of whether the current law should be amended or repealed.

The course will begin with the debates at the Constitutional Convention of 1787. We will see that when the Founding Fathers met in Philadelphia to revise the Articles of Confederation, they devoted very little attention to presidential powers in general and even less to presidential powers in foreign affairs. There was brief discussion of this topic on June 1 and another on August 17, both of which we will carefully analyze in class. As Alexander Hamilton explained in *The Federalist*, the American President, under the original constitutional design, was to possess nowhere near the range of powers the English people had bestowed on their hereditary king. The balance of power in foreign affairs was to reside with the Congress—not the executive. Thus James Wilson remarked in the Pennsylvania ratifying convention: “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man...to involve us in such distress; for the important power of declaring war is vested in the legislature at large.” What has been termed “the verdict of history” has substantially altered the Founding Fathers’ intentions. It is now the president rather than the Congress that takes the lead in foreign affairs, and Congress has proven not only willing but even eager, in our last four major wars, to delegate the war-making decision to the president. Course readings have been chosen to assist in comprehending the key developments since the Founding Era that have produced this Constitutional transformation.

## **COURSE REQUIREMENTS AND GRADING**

Course requirements are: 1) class participation; 2) a take-home mid-term exam focused on the constitutional issues posed by the Neutrality Proclamation of 1793; and 3) a term paper approximately twenty pages in length assessing the constitutionality of the War Powers Resolution of 1973 and discussing whether it should be either revised or repealed. Both class participation and the mid-term will be weighted at 25% of the course grade. The term paper will be weighted at 50% of the course grade and will be based on materials carefully analyzed in class as the semester progresses. Detailed information regarding the term paper assignment will be distributed as the course progresses.

The course will be taught in a discussion format, but it will be advisable to take notes during class sessions so that salient points can be recorded for subsequent use.

### **DUE DATES FOR WRITTEN ASSIGNMENTS**

**October 17:** Take-home mid-term exam due by twelve noon.

**December 1:** Term papers due by twelve noon.

### **ATTENDANCE POLICY**

Regular attendance is required. Students who are unable to attend regularly are advised to drop the course at their earliest possible convenience since there will be a close correlation between attendance and success in this class. Three unexcused absences will be allowed each student without penalty. Four or more unexcused absences will result in a one-half letter grade reduction at the end of the term, i.e. an "A" will be reduced to a "B+," a "B" to a "C+" etc. Seven or more unexcused absences will result in a one-letter grade reduction at the end of the term. Ten or more unexcused absences will result in a two letter grade reduction in the course grade. Twelve or more unexcused absences will result in an F for the course. Excused absences will be granted for documented illness, or for absences resulting from circumstances beyond a student's control and judged acceptable by the instructor. Students arriving more than ten minutes after the start of class will be counted absent for that day unless an explanation justifying such tardiness is presented.

### **ACCOMMODATION STATEMENT**

**ADA STATEMENT: Attention:** If you are a student with a disability (e.g. physical, learning, psychiatric, vision, hearing, etc.) and think that you might need special assistance or a special accommodation in this class or any other class, call the Disability Resource Center (DRC) at 425-4006 or come by the office, 102 Frist Hall  
<http://www.utc.edu/Administration/DisabilityResourceCenter/>.

### **COUNSELING CENTER STATEMENT**

If you find that personal problems, career indecision, study and time management difficulties, etc. are adversely affecting your successful progress at UTC, please contact the Counseling and Career Planning Center at 425-4438.

### **HONOR CODE PLEDGE**

UTC has an honor court system designed to ensure that the highest standards of academic integrity are maintained. The honor code to which UTC students adhere reads as follows: “I pledge that I will neither give nor receive unauthorized aid on any test or assignment. I understand that plagiarism constitutes a serious instance of unauthorized aid. I further pledge that I will exert every effort to insure that the Honor Code is upheld by others and that I will actively support the establishment and continuance of a campus-wide climate of honor and integrity.”

## OUTLINE OF COURSE TOPICS

### **Segment I: An Overview of the Presidency and War Powers: The Original Understanding**

Readings:

Debates in the Constitutional Convention: (Blackboard)  
*The Federalist* 69, 74, 75 (Blackboard)  
 Adler in Adler and George, eds., 20-22  
 Adler in Adler and George, eds., 190-198

### **Segment II: The Neutrality Proclamation of 1793 and the Hamilton-Madison Debate over War Powers**

Readings:

The Pacificus/Helvidius Exchange between Hamilton and Madison, ed. Frisch  
 Adler on the Presidential Recognition Power, in Adler and George, eds., 133-157  
 Spitzer on Treaties and Executive Agreements, in Adler and George, eds., 85-89

### **Segment III: The Civil War and the War Powers of the President: President Lincoln's Blockade of the Southern States**

Readings:

Schlesinger, *The Imperial Presidency*, 58-67 (Blackboard)  
 Goldsmith, *The Terror Presidency*, 82-83  
*The Prize Cases (1863)* (Blackboard)

### **Segment IV: The Presidency Triumphant in Foreign Affairs: The Supreme Court Decision in *Curtiss Wright Export Corporation v. U.S.* (1936)**

Readings:

Robinson in Adler and George, eds., 121-122  
 Adler in Adler and George, eds., 25-27  
*Curtiss-Wright Corporation v. United States* (1936) (Blackboard)

### **Segment V: President Truman and the Korean War**

## Readings:

Louis Fisher, "Truman in Korea," in Adler and George, eds. 320-330

Robinson in Adler and George, 119-121

*Youngstown Sheet and Tube v. Sawyer* (1952) (Blackboard)

### **Segment VI: Was the Vietnam War Constitutional?**

## Readings:

Text of the Tonkin Gulf Resolution (Blackboard)

Schlesinger, *The Imperial Presidency*, 177-207 (Blackboard)

Alexander Bickel, "Congress, the President, and the Power to Wage War," 49 *Chi. Kent Law Rev.* (1971) (Blackboard)

William Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," 121 *University of Pennsylvania Law Review* (1972): 1-28

### **Segment VII: The War Powers Resolution**

## Readings:

Text of the War Powers Resolution (Blackboard)

Text of President Nixon's Veto Message (Blackboard)

Edward Keynes, "The War Powers Resolution and the Persian Gulf War," in Adler and George, eds., 241-256

Robinson in Adler and George, eds., 123-24

Cyrus R. Vance, "Striking the Balance: Congress and the President under the War Powers Resolution," 133 *U. of Pa L. Rev.*: 81-87

J. Terry Emerson, "The War Powers Resolution Tested: the President's Independent Defense Power," 51 *Notre Dame Law* (1975) (Blackboard)

Eugene V. Rostow, "Once More unto the Breach: The War Powers Resolution," 21 *Val. U. L. Rev.* (1986) (Blackboard)

Philip Bobbit, "War Powers: An Essay on John Hart Ely's *War and Responsibility*....," 92 *Mich. L. Rev.* (1994) (Blackboard)

Robinson in Adler and George, eds. 123-125

### **Segment VIII: The Track Record of the WPR from Gerald Ford to Barack Obama**

## Readings:

D.H.H., "The War Powers Resolution: A Tool for Balancing Power Through Negotiation," 70 *Univ. Va. L. Rev.* (1984), 1037-1058 (Blackboard)

Robinson in Adler and George, eds. 126-128

Fisher 2006, 1211-1212; 1219-1223 (Blackboard)

Fisher *Presidential War Power*. 3rd ed. Lawrence: University Press of Kansas.

2013, 181-191; 197-200 (Blackboard)

Cyrus R. Vance, "Striking the Balance: Congress and the President under the War Powers Resolution," 133 *U. of Pa L. Rev.*: 87-90

Abraham Sofaer, "John Ely, War and Responsibility," *Stanford Law Review*, Vol. 57, No. 3, Symposium in Honor of John Hart Ely (Dec. 2004), 785-791.

*Campbell v. Clinton* (1998) (Blackboard)

## **Segment IX: How Might the WPR Be Improved?**

### Readings:

Cyrus R. Vance, "Striking the Balance: Congress and the President under the War Powers Resolution," 133 *U. of Pa L. Rev.*: 90-95

Ely, "What If We Wanted a War Powers Resolution that Really Worked? 88 *Col. L. Rev.* 1379-1431. (Blackboard)

"War Powers and the Responsibility of Congress" (Special Session on Capitol Hill) Proceedings of the Annual Meeting (American Society of International Law), Vol. 82 (1988), 1-21 (Blackboard)

Louis Fisher, "The Law: The Baker-Christopher War Powers Commission," *Presidential Studies Quarterly* Vol. 39 (2009), 128-40. (Blackboard)

## **Segment X: The War Power under President George W. Bush**

### Readings:

Adler, "The Law: Presidential Power and Foreign Affairs in the Bush Administration: The Use and Abuse of Alexander Hamilton," *Presidential Studies Quarterly*, Vol. 40 (2010), 531-544 (Blackboard)

Fisher 2006, 1212-1213; 1234-1254 (Blackboard)

Goldsmith, *The Terror Presidency*

James P. Pfiffner, "Did President Bush Mislead the Country in His Arguments for War with Iraq?" *Presidential Studies Quarterly* 34, no. 1 (March 2004), 25-46 (Blackboard)

Senator Robert S. Byrd, Op-Ed., Congress Must Resist the Rush to War, *N.Y. Times*, Oct. 10, 2002, at A39 (Blackboard)

Louis Fisher, "Deciding on War Against Iraq: Institutional Failures" 118 *Pol. Sci. Q.* (2003), 389-410. (Blackboard)