Seminar: Emergency Power and Constitutional Theory

Law 397S/ GOV 381L (Spring 2012)
Sanford Levinson
Jeffrey K. Tulis

Tuesdays, 3:30 – 6:30PM TNH 3.126

Requirements:
Regular preparation and active participation in seminar.

Two short agenda setting essays for seminar. These are ungraded pieces, 750 to 1000 words, on some aspect of the reading for that week that can serve as a springboard for discussion. These short pieces will be distributed by email or Blackboard to the class by noon on the day of the session and also read and discussed during seminar.

For graded work, there are two options:

1. A traditional seminar paper on a topic in constitutional theory or constitutional law. (Topics chosen in consultation with the instructors, who will also respond to a first draft prior to the final submission, if so desired.) This paper should be 5000-6000 words. Topic should be chosen by April 1, and the paper is due May 7.
2. A review essay on one or more of the books assigned and one or more books on the topic of emergency power not included in the syllabus. 2500-3000 words. *Plus,* two additional response papers of 1500-2000 words that will be graded. These response papers may build upon one or both of the shorter ungraded papers presented in class. All written work is due by May 7.

While not graded, regular and active participation is a fundamental requirement for the seminar and is a prerequisite for receiving a grade for written work.

Except for documented medical or other emergencies, no extensions for written work will be granted.

SYLLABUS

Week 1 January 17 -- Introduction

Locke "Of Prerogative" Second Treatise, Chap. XIV
http://www.constitution.org/jl/2ndtr14.htm

Harvey Mansfield, "The Law and the President" Weekly Standard
http://www.austinchronicle.com/documents/sparks.opinion.pdf

David Luban, Critique of Mansfield in Balkinization
http://balkin.blogspot.com/2006/01/mansfield-on-bush-machiavelli-made-me.html

Jeffrey K. Tulis, "The Possibility of Constitutional Statesmanship," in Tulis and Macedo eds., *The Limits of Constitutional Democracy*.

Week 2 January 24 – Ancient Rome and Constitutional Dictatorship

*Machiavelli, Discourses on Livy, Chapter 34

Rossiter, *Constitutional Dictatorship*, pp. 3-32

*Nome Claire Lazar, *Making Emergencies Safe for Democracy: The Roman Dictatorship and the Rule of Law*, 13 CONSTELLATIONS 506-521 (2006)

*Sanford Levinson and Jack Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1790 (2010)

Week 3 January 31 – American Constitutional Tradition I

Kleinerman, *The Discretionary President*, pp. 1-164

Recommended: Clement Fatovic, *Outside the Law* (Hopkins, 2009)

Week 4 February 7 - American Constitutional Tradition II Lincoln

*Paul Brest et al, Processes of Constitutional Decisionmaking 261-287

Rossiter, Constitutional Dictatorship pp. 209-239

*Thomas H. Lee and Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in Schroeder and Bradley eds, Presidential Power Stories 53-92.

*Burtis Bradley, *The Story of Ex Parte Milligan*, in Presidential Power Stories 93-132.

Week 5 February 14 - Lincoln and his legacy

Kleinerman, Discretionary President, pp. 165- 248

Kleinerman, "In the Name of National Security" chap. 5, in Tulis and Macedo eds., *The Limits of Constitutional Democracy*

Week 6 February 21 Exemplary Emergency Power Cases in the U.S.

**Ex parte Debs*

**Moyer v. Peabody*

**Sterling v. Constantin*

**Korematsu v. U.S.*

*Harry Scheiber, *Property Rights versus "Public Necessituy:" A Perspective on Emergency Powers and the Supreme Court*, Journal of Supreme Court History

Week 7 February 28 Youngstown and War

*Youngstown Steel v. Sawyer

Joseph Bessette, "Confronting War: Rethinking Justice Jackson's Concurrence in Youngstown v. Sawyer," in Tulis and Macedo, eds. *Limits*.

Mark Brandon, "War and Constitutional Change" in Tulis and Macedo, *Limits*.

Week 8 March 6 Varieties of Emergencies and Emergency Provisions

*John Ferejohn and Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, I.CON, Volume 2, Number 2 (2004) pp. 210-239

Kim Scheppele, "Exceptions that Prove the Rule: Embedding Emergency in Everyday Constitutional Life," in Tulis and Macedo, *Limits*.

*A selection of constitutional provisions from outside the United States.

Spring Break March 12-17

Week 9 March 20 Taking Stock – Toward a Theory

Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice.* Part One (pages 1-243).

Week 10 March 27 Economic Emergencies

**Home Building & Loan Assn v. Blaisdell*, 290 U.S. 398 (1934)

*William Scheurmann, *The Economic State of Emergency*, 21 Cardozo L. Rev. 1869

Week 11 April 3 Health Emergencies (Swine Flu and other pandemics)

Guest Speaker, Leslie Gerwin (Princeton University). Writings to be provided. This date is also tentative, and may be switched with the preceding week.

Week 12 April 10 Legalistic Reponses to a Political Problem I

Bruce Ackerman, *Before the Next Attack*

Week 13 April 17 Legalistic Reponses to a Political Problem II

Richard Posner, *Not a Suicide Pact*

Week 14 April 24 A Political Response to a Political Problem

Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy*

Week 15 May 1

Presentation of drafts of seminar papers.