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

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


Week 2  January 24 – Ancient Rome and Constitutional Dictatorship

*Machiavelli, Discourses on Livy, Chapter 34

Rossiter, Constitutional Dictatorship, pp. 3-32


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


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 Necessity”: 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*


Week 8  March 6 Varieties of Emergencies and Emergency Provisions


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

Spring Break  March 12-17

Week 9  March 20  Taking Stock – Toward a Theory


Week 10  March 27  Economic Emergencies


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 Responses to a Political Problem I

Bruce Ackerman, *Before the Next Attack*

Week 13  April 17  Legalistic Responses 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.