

NEW YORK UNIVERSITY
DEPARTMENT OF POLITICS

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Fall 2006

EMERGENCY POWERS IN THE WAKE OF 9/11
G.53.3101

Wed. 4:00-6:00

726 Broadway, Room: 700

This is a preliminary syllabus. A fuller and definitive version will be available on the first day of class.

II. Schedule of classes

6 Sept.: Introduction: Liberalism and emergency powers. Does terrorism call for emergency powers? Preview

13 Sept: Emergency powers in Ancient Rome. The republican praise of Roman dictatorship

Reading: Machiavelli, *Discourses on Livy*, Bk. I, ch. 34; Rousseau, *On the Social Contract*, Bk. IV, ch. 6; C.J. Friedrich, *Constitutional Government and Democracy*, chapter XXV ; C. Rossiter, *Constitutional Dictatorship*, chapter II.

Recommended reading: A. Lintott, *The Constitution of the Roman Republic*, chs. TBD

20 Sept.: The liberal alternative to dictatorship: suspending *Habeas Corpus*

Reading: Locke, *Second Treatise of Government*, ch. 14; B. Constant, *Political Writings; The Spirit of Conquest...*, ch. 16; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, chs. V, VIII, Appendix X

Recommended reading: C. Crawford, "The Suspension of the Habeas Corpus Act and the Revolution of 1689", *The English Historical Review*, Oct. 1915; W. Duker, *A constitutional history of Habeas Corpus*, chs. 1, 2, 3.

27 Sept.: Liberalism and emergency powers: a law for the exception?

Reading: J. Ferejohn, P. Pasquino, "The law of the exception", *International Journal of Constitutional Law*, 2004, 2; D. Dyzenhaus, "Schmitt v. Dicey: Are states of emergency inside or outside the law", 2005, Mimeo

4 Oct.: The US Civil War and the suspension of Habeas Corpus

Reading: J.G. Randall, *Constitutional problems under Lincoln*, chs.TBD; G. Stone, *Perilous Times: Free Speech in Wartime*, 2004, ch. II

Recommended reading: Lincoln, "Message to Congress in special session" [4 July, 1861], Letter to Erastus Corning and others" [12 June, 1863], "Reply to the Ohio Democratic Convention" [29 June, 1863], in A. Lincoln, *Speeches and Writings*, vol.2, pp. 232, 236, 246-261, 371, 454-463, 465-470. U.S. Supreme Court decisions: Ex parte Merryman [1861], 17 Federal Cases, 144-153; Ex parte Vallandigham [1864], 68 U.S. 243-254; Ex parte Milligan [1866], 4 Wall. 107-142.

11 Oct.: World War II: the internment of people of Japanese ancestry. Korematsu.

Reading: U.S. Supreme Court, Toyosaburo Korematsu v. United States, 323 U.S. 214 (1944); G. Stone, *Perilous Times*, ch. III; M. Tushnet, "Defending Korematsu? : Reflections on civil liberties in wartime", *Wisconsin Law Review*, 2003, 273

18 Oct.: Article 48 of the Weimar constitution and the collapse of the republic

Reading: C.J. Friedrich, "Dictatorship in Germany", *Foreign Affairs*, vol.9, 1, 1930. C.J. Friedrich, "The development of the executive power in Germany", *American Political Science Review*, April 1933; John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law*, ch. IV; C. Schmitt, selections TBD.

Recommended reading: Friedrich Watkins, *The failure of constitutional emergency powers under the German republic*

25 Oct.: Using the paradigm of emergency powers in the context of terrorism? Bruce Ackerman

Reading: B. Ackerman, "The emergency constitution", *Yale Law Journal*, 2004, vol. 113, 5; B. Ackerman, *Before the Next Attack*, 2006, chs. TBD

Recommended reading: *Responses to Ackerman. T.B.D.* D. Cole, L. Tribe?

1 Nov.: Balancing security and liberties? Posner's "pragmatism"

Reading: R. Posner, *Law, Pragmatism and Necessity*, ch. 8, "Legality and necessity"; R. Posner, *Preventing Surprise Attacks in the wake of 9/11*, ch. 6

Recommended reading: M. Rosenfeld, "Judicial balancing in times of stress: comparing diverse approaches to the war on terror", 2005, Mimeo

8 Nov.: Distinguishing the war model from the crime model? R. Dworkin

Reading: R. Dworkin, "Terror and the attack on civil liberties", *New York Review of Books*, 6 Nov. 2003; R. Dworkin, "What the court really said", *New York Review of Books*, 12 August 2004

15 Nov.: Anti terrorist policies in Britain from Northern Ireland to the aftermath of 9/11

Reading: John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law*, chs. 2, 3; M. Rosenfeld, "Judicial balancing in times of stress: comparing diverse approaches to the war on terror", 2005, Mimeo; Decision of the Law Lords: A(FC) et al. v. Secretary of State for the Home Department [2004], UKHL 56 (House of Lords).

22 Nov.: The French anti terrorist legislation, a model?

Reading: J. Shapiro, B. Suzan, "The French experience of counter-terrorism", *Survival*, 2003, 45, 1, pp. 67-98; B. Manin, "Emergency powers and anti terrorist policies", 2006, Mimeo

29 Nov.: What principles in interrogating suspects?

Reading: Israeli Supreme Court, "Public Committee against torture v. Israel", HCJ 5100/94, [1999]; A. Barrak, "A judge on judging: the role of a supreme court in a democracy", *Harvard Law Review*, 2002, vol. 116, Section VI, "The supreme court and the problem of terrorism", pp. 148-152; A. Dershowitz, *Why Terrorism Works*, 2002, chs. TBD

6 Dec.: Individual rights and common good in health emergencies: from bioterrorism to epidemics

Reading: L. Gostin, "Health of the People: the Highest law?", *Australia and New Zealand Journal of Public Health*, 2004; L. Gostin "Public health in an age of terrorism: re-thinking individual rights and common goods", Working paper No. 346501, Georgetown University Law Center, 2002

13 Dec.: Overview.