

CIVIL-MILITARY RELATIONS AND THE CONSTITUTION
University of Florida College of Law
Spring 2011
Professor Diane H. Mazur

This seminar explores a wide variety of issues in constitutional law connected by one theme: the constitutional structure for civilian control of the military and the legal relationship between civilian and military concerns. Topics may include the following: judicial deference to military judgment; interpretation of the Constitution's military clauses; federal and state power over the modern-day state militia, the National Guard; the role of the military in homeland defense; government policy concerning treatment of detainees; the Uniform Code of Military Justice and the military's Article I legal system; equal protection on the basis of sex in a military context; First Amendment rights of servicemembers; the future of "Don't Ask, Don't Tell"; military recruiting on law school campuses; military service and concepts of citizenship; and proposals to reinstitute the military draft. Satisfies writing requirement.

REQUIRED TEXTS AND COURSE MATERIALS

Diane H. Mazur, *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (2010)

Robert Heinlein, *Starship Troopers* (1959)

All other course materials will be available through the course web site.

SEMINAR TOPICS AND READINGS

Class Meeting 1: Introduction to the Course

A More Perfect Military: Introduction

Victor Hansen, Understanding the Role of Military Lawyers in the War on Terror, 50 South Texas Law Review 617 (2009)

Class Meeting 2: *Heller*, the Second Amendment, and the Constitutional Militia

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (selected sections, pages 2799-2802, 2809-11, 2831-37, 2841-42)

Stephen Vladeck, The Calling Forth Clause and the Domestic Commander in Chief, 29 Cardozo Law Review 1091 (2008)

10 U.S. Code § 311, Militia: Composition and Classes
18 U.S. Code § 1385, Use of Army and Air Force as Posse Comitatus
10 U.S. Code §§ 331-333, Insurrection Act

President Dwight D. Eisenhower, Executive Order No. 10730, Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas (1957)

Virginia House Bill No. 2474 (Eligibility for State National Guard Service)
<http://lis.virginia.gov/cgi-bin/legp604.exe?111+ful+HB2474>

Class Meeting 3: Judicial Deference to the Military and Constitutional Review

A More Perfect Military: Chapters 1-4

Class Meeting 4: The Military Justice System

American Bar Association Journal, A Panel of Their Peers (April 2010)
http://www.abajournal.com/magazine/article/a_panel_of_their_peers/

Eugene R. Fidell, Criminal Prosecution of Civilian Contractors By Military Courts, 50 South Texas Law Review 845 (2009)

Major Franklin D. Rosenblatt, Non-Deployable: The Court-Martial System in Combat, The Army Lawyer (September 2010)

Class Meeting 5: Presidential Authority, Congressional Authority, and the Repeal of “Don’t Ask, Don’t Tell”

A More Perfect Military: Chapters 9-10

10 U.S. Code § 654, Don’t Ask, Don’t Tell
Public Law 111-321, Don’t Ask, Don’t Tell Repeal Act of 2010

Palm Center, Presidential Authority to Suspend Discharges for Homosexual Conduct and Draft Executive Order (May 2009), pages 11-14, 24-15
<http://www.palmcenter.org/files/active/0/Executive%20Order%20on%20Gay%20Troops%20-%20final.pdf>

Dawn E. Johnson, What’s A President to Do?, 88 Boston University Law Review 395 (2008)

Class Meeting 6: The Torture Memos

A More Perfect Military: Chapter 7

Film: *The Response* (courtroom drama based on transcripts from Combatant Status Review Panels at Guantanamo)

New York Times, Report Faults 2 Authors of Bush Terror Memos (February 19, 2010)
<http://www.nytimes.com/2010/02/20/us/politics/20justice.html>

Department of Justice Memorandum of Decision, by David Margolis, Associate Deputy Attorney General: Issues Relating to Legal Memos Authorizing Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (January 5, 2010), pages 44-54 (Commander-in-Chief power)

American Bar Association, Model Rules of Professional Conduct 1.1, 1.2, 1.4, 2.1

Class Meeting 7: Political Partisanship and the Military

A More Perfect Military: Chapters 5, 6, 8, and 11

Class Meeting 8: Book & Movie Club: *Starship Troopers*

Read the book, watch the movie, and enjoy the popcorn.

ADVANCED WRITING REQUIREMENT

This seminar requires completion of a research paper meeting the law school’s advanced writing requirement: “All J.D. candidates must complete — under close faculty supervision — a major finished product that shows evidence of original systematic scholarship based on individual research.” Research papers must be at least 25 pages, with double-spaced text in 12-point font. Footnotes (not endnotes) should be single-spaced, in 10-point font, and in Blue Book form.

RESEARCH SOURCES

- [Department of Defense](#) - DoD news releases, briefings, speeches, testimony
- [DoD Publications](#) - DoD Directives and Instructions
- [Government Accountability Office \(GAO\)](#) - Research and analysis on military topics
- [RAND Research](#) - Research and analysis on military topics
- [Congressional Research Service Reports](#) - Research and analysis on military

topics

- [The Federalist Papers](#) - Searchable version of the essays urging ratification of the U.S. Constitution
- [U.S. Constitution: Analysis & Interpretation](#) - By the Congressional Research Service/Library of Congress
- [UCMJ Legislative History](#) - Congressional hearings and reports on the Uniform Code of Military Justice
- [U.S. Ct. App. for the Armed Forces](#) - The official CAAF website
- [CAAF Opinion Digest](#) - Digest of opinions from the U.S. Court of Appeals for the Armed Forces
- [CAAFlog](#) - Blog by CAAF practitioners; extensive research links
- [National Institute of Military Justice](#) - Resources on military justice
- [Stars and Stripes](#) - Editorially independent newspaper for the overseas U.S. military community
- [Balkinization](#) - Blog by law professors in national security law
- [National Security Advisors](#) - Blog by law professors in national security law
- [The Best Defense](#) - Blog on civil-military relations from Foreign Policy magazine
- [Military Religious Freedom Foundation](#) - Legal advocacy for free exercise and religious diversity within the military
- [Servicemembers Legal Defense Network](#) - Legal advocacy for gay servicemembers and veterans
- [The Palm Center](#) - Research and analysis on “Don't Ask, Don't Tell”
- [DoD's "Don't Ask, Don't Tell" Page](#) - The official DoD perspective on “Don't Ask, Don't Tell”
- [Wired: Danger Room](#) - Blog on national security, with emphasis on technology and communication

SUGGESTIONS FOR PAPER TOPICS

These are only suggestions for those who are looking for ideas. You may write on any civil-military topic of your choosing provided it relates in some way to constitutional regulation of military forces.

The Constitution's Military Clauses

When is Judicial Deference to Military Policy Appropriate?

The Constitution and the Modern Military: Did the Drafters Anticipate an All-Volunteer Force?

The Role of State Militia in a Global War on Terror: Another Look at *Perpich v. Department of Defense*

Recent Amendments to the Insurrection Act: Federalism and the Use of Military Force in Domestic Emergencies

What Does It Mean to Be the Commander-in-Chief? What Are the Limits of the President's Authority?

Does the Commander-in-Chief Have Authority to Suspend "Don't Ask, Don't Tell"?

The Meaning of *Youngstown Sheet and Tube Company* (the Steel Seizure Case) Today

Military Criminal Law

Abu Ghraib and the Structural Weaknesses of Military Justice: Is the System Inherently Biased Toward Prosecution of Lower-Ranking Individuals?

Falling Between the Cracks: When Can Civilian Military Contractors Be Tried by Court-Martial?

Civilian Prosecutions of Former Servicemembers: The Stealth Provision of the Military Extraterritorial Jurisdiction Act

The Future of Military Commissions at Guantanamo

Kennedy v. Louisiana and the Death Penalty: Can the Military Be Crueler and More Unusual?

[See other current criminal-law topics at <http://www.caaflog.com/>. Motto: "Military justice blogs are to blogs as military music is to music."]

Legal Education

Military Recruiting in Law Schools After *Rumsfeld v. FAIR*: How to Bridge the Civil-Military Divide

Torts

The *Feres* Doctrine and the Federal Torts Claims Act

Evidence

Hearsay and the Military Commissions System

Professional Responsibility

Legal Ethics and Military Commissions: When Defense Lawyers Rebel

The JAG Memos and Detainee Abuse: Ethical Obligations When Lawyers Disagree

Independent Legal Advice from the JAG Corps in a System of Civilian Control of the Military

Do the Torture Memos Violate the Model Rules of Professional Conduct?

International Law

An International Perspective on Command Responsibility and Abu Ghraib: Just a Few Bad Apples?

The First Amendment

Blogging From Iraq: Servicemember Speech and the First Amendment

The Revolt of the Generals: Do Senior Military Officers Have the Right to Public Dissent After Retirement? Before?

Political Participation and Partisanship By Members of the Military

Free Exercise and Establishment of Religion in the Military: Revisiting *Goldman v. Weinberger*

Stolen Valor Act: The First Amendment and Phony Heroes

Equal Protection & Due Process

Should the U.S. Supreme Court Overrule *Rostker v. Goldberg* and Require Women to Register for the Draft?

The Future of Policies Excluding Women From Combat

Military Regulation of Consensual Sexual Behavior After *Lawrence v. Texas*

Recent Court Decisions on “Don’t Ask, Don’t Tell”: Is There Anything New?

Environmental Law

Winter v. NRDC: Naval Sonar, Marine Life, and Military Exceptions from Environmental Law

Law and Literature

Starship Troopers, 50 Years Later: Is It Still Fiction?