

INTELLIGENCE LAW

LL4161V / LL5161V / LL6161V
Jan-Apr 2016

Simon Chesterman
National University of Singapore
chesterman@nus.edu.sg

Aims & Objectives

This course examines national and international legal regulation of the secret intelligence activities of states. It ranges from historical treatment of spies under the laws of war, to national constraints of contemporary signals intelligence. National case studies will include the United States, Britain, and Singapore. Underlying theoretical questions include the appropriateness of constraints on executive power in times of crisis, and how law that must be public can and should treat activities whose nature must often be kept secret.

Students will develop a critical understanding of modern executive authority and the importance and limitations of intelligence activities in securing national and international security.

Prerequisites

This is a demanding course that requires extensive preparation before class. Above and beyond reading the assigned materials, this means spending time reflecting on their content and preparing responses to the various questions that have been provided.

Note in particular the required **readings for the first class**, which are available in the IVLE Workbin. (The introduction to the book is also available [on SSRN.com here.](#)) You may need to print this material out as the use of laptops is not permitted in this course.

Schedule

Classes are scheduled on Thursdays from 12pm-3pm. The following provisional schedule is subject to change.

1.	14 Jan 2016	Introduction and Survey
2.	21 Jan 2016	Demystifying Spies: The Myth and Reality of Intelligence
3a	27 Jan 2016, 11am-12:30pm	Guest Lecture TBC
3b	28 Jan 2016 2pm-3pm	Theoretical Constraints: Should Intelligence Activities be Regulated by Law?
4.	4 Feb 2016	Practical Constraints: Can Secret Intelligence Be Regulated by Law?
5.	11 Feb 2016	The United States Before and After 9/11

6.	18 Feb 2016	Britain Before and After the European Convention on Human Rights
7.	3 Mar 2016	“The United Nations Has No Intelligence”
8.	10 Mar 2016	Singapore Before and After Independence
9.	17 Mar 2016	Singapore Part II (off campus)
10. 11.	24 Mar 2016 (double class)	Oversight of Intelligence Agencies & Limits on Collection or Use of Intelligence?
12.	7 Apr 2016	National Security, Human Rights, and the Rule of Law

Assessment

Assessment will be on the basis of (a) class participation (20%), (b) four 500-word reaction papers written for four classes during the semester (30%), and (c) an open-book examination (50%). The exam is scheduled for the afternoon of **Friday, 29 April 2016**.

Text & References

The reading guide is posted in the IVLE workbin as well as www.SimonChesterman.com (under “courses”). Please print it and bring it to class.

The main text is Simon Chesterman, *One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* (Oxford: Oxford University Press, 2011; paperback 2013). As the text will be relied on heavily you are expected to obtain your own copy. Options to do so can be found [here](#).

You will also receive (or must obtain) a course pack of materials. Readings for the first class will be posted online with the reading guide.

Do not come to class if you have not prepared. Additional readings are listed and available in the library or online, though you will not be expected to read these.

Note that during class **you will not be allowed to use a laptop computer**. Bring a pen.

Materials that follow are subject to change.

Outline of classes

- Part I: Issues.....iv**
 - 1. Introduction.....iv
 - 2. Demystifying Spies: The Myth and Reality of Intelligence.....iv
 - 3. Theoretical Constraints: Should Intelligence Activities be Regulated by Law? v
 - 4. Practical Constraints: Can Secret Intelligence Be Regulated by Law?..... v

- Part II: Casesvi**
 - 5. The United States Before and After 9/11vi
 - 6. Britain Before and After the European Convention on Human Rights.....vii
 - 7. “The UN Has No Intelligence” viii
 - 8. Singapore Before and After Independence..... viii
 - 9. Singapore (Cont’d) x

- Part III: Lessons x**
 - 10. Review & Oversight of Intelligence Agencies..... x
 - 11. Limits on Collection or Use of Intelligence?xi
 - 12. National Security, Human Rights, and the Rule of Law xi

Part I: Issues

1. INTRODUCTION

What is “intelligence”? How has the role of intelligence changed in recent years? What factors have been driving these changes? What implications do these changes have for the desirability and the possibility of accountability?

Required reading:

- 1.1. Chesterman, *One Nation Under Surveillance*, Introduction, pp. 1-13.

2. DEMYSTIFYING SPIES: THE MYTH AND REALITY OF INTELLIGENCE

What is the difference between collection and analysis of intelligence? How can and should intelligence influence policy? What is the role of intelligence after the end of the Cold War? After the beginning of the “war on terror”?

Required reading:

- 2.1. Hitz, Frederick P., *The Great Game: The Myth and Reality of Espionage* (New York: Alfred A. Knopf, 2004), pp. 3-7, 38-54. (ISBN 0-375-41210-7) [Printed Materials (PM) 1]
- 2.2. Chesterman, *One Nation Under Surveillance*, Chapter 1, pp. 17-40.

Further reading:

Herman, Michael, *Intelligence Power in Peace and War* (Cambridge: Cambridge University Press, 1996).

Johnson, Loch K., “Spies”, *Foreign Policy*, vol. 120 (2000), pp. 18-26. (ISSN 0015-7228)

Shulsky, Abram N., and Gary J. Schmitt, *Silent Warfare: Understanding the World of Intelligence*, 3rd ed. (Washington, DC: Potomac Books, 2002), pp. 1-9. (ISBN 978-1-57488-345-9)

Lowenthal, Mark M., *Intelligence: From Secrets to Policy*, 3rd ed. (Washington, DC: CQ Press, 2006), pp. 1-10. (ISBN 1-933116-02-1)

##

3. THEORETICAL CONSTRAINTS: SHOULD INTELLIGENCE ACTIVITIES BE REGULATED BY LAW?

Should efforts by the executive to guard against threats to the nation be limited by law? Why? What concerns have led to the increase or decrease in provisions for domestic oversight? What, if anything, does international law have to say on the matter?

Required reading:

- 3.1. Caparini, Marina, "Controlling and Overseeing Intelligence Services in Democratic States", in Hans Born and Marina Caparini (eds.), *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Aldershot: Ashgate, 2007), available at www.dcaf.ch/publications/kms/details.cfm?lng=en&id=33987, pp. 3-24. [PM 14]
- 3.2. Chesterman, *One Nation Under Surveillance*, Chapter 2, pp. 41-66.

Further reading:

Bernstein, Barton J., "The Road to Watergate and Beyond: The Growth and abuse of Executive Authority Since 1940", *Law and Contemporary Problems*, vol. 40, no. 2 (1976), pp. 58-86. (ISSN 0023-9186)

Leigh, Ian, "More Closely Watching the Spies: Three Decades of Experience", in Hans Born, Loch K. Johnson and Ian Leigh (eds.), *Who's Watching the Spies: Establishing Intelligence Service Accountability* (Washington, DC: Potomac Books, 2005), pp. 3-10. (ISBN 1-57488-896-X)

Issacharoff, Samuel, and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime", *Theoretical Inquiries in Law*, vol. 5, no. 1 (2004), available at <http://www.bepress.com/til/default/vol5/iss1/art1>

Goldsmith, Jack, *Power and Constraint: The Accountable Presidency After 9/11* (New York: W.W. Norton, 2012).

4. PRACTICAL CONSTRAINTS: CAN SECRET INTELLIGENCE BE REGULATED BY LAW?

How can law, which must generally be public, regulate activities whose nature must often be kept secret? How can legitimate interests in keeping sources and methods confidential be balanced against the need to protect the rights of individuals? Can we trust our spies?

Required reading:

- 4.1. Theoharis, Athan, *The Quest for Absolute Security: The Failed Relations Among U.S. Intelligence Agencies* (Chicago: Ivan R. Dee, 2007), ch. 7 “The Breakdown of the Cold War Consensus”. (ISBN 1-56663-697-3) [PM 25]
- 4.2. Chesterman, *One Nation Under Surveillance*, Chapter 3, pp. 67-89.

Further reading:

Ruby v Canada (Solicitor General) [2002] 4 SCR 3, 2002 SCC 75.

Schreier, Fred, “The Need for Efficient and Legitimate Intelligence”, in Hans Born and Marina Caparini (eds.), *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Aldershot: Ashgate, 2007), pp. 25-44. (ISBN 978-0-7546-4273-2)

Cole, David, Federico Fabbrini, and Arianna Vedeschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham: Edward Elgar, 2013).

Scott Horton, *Lords of Secrecy: The National Security Elite and America’s Stealth Warfare* (New York: Nation, 2015).

Part II: Cases

5. THE UNITED STATES BEFORE AND AFTER 9/11

To whom are the various members of the US intelligence community accountable? How effectively has accountability been enforced by executive, legislative, or judicial review? Was there a “failure” to prevent the September 11 attacks? If so, was this due to inadequate powers to collect intelligence, inability to analyse it correctly, or unwillingness to act? What was the response of the intelligence community to the September 11 attacks? What concerns, if any, are raised by the increasing U.S. reliance on private contractors for intelligence activities? How might any such concerns be mitigated?

Required reading:

- 5.1. Excerpt from President’s Daily Brief, 6 August 2001 (US Govt; declassified 10 April 2004). [PM 52]
- 5.2. National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (Washington, DC: U.S. Government Printing Office, 2004), available at www.gpoaccess.gov/911 (pp. 1-34, 254-277). [PM 53]
- 5.3. Chesterman, *One Nation Under Surveillance*, Chapter 4, pp. 93-130.

Further reading:

Congressional Reports, *Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001*, (December 2002) available at:

<http://www.gpoaccess.gov/serialset/creports/911.html>

Johnson, Loch K., "Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States", in Hans Born, Loch K. Johnson and Ian Leigh (eds.), *Who's Watching the Spies: Establishing Intelligence Service Accountability* (Washington, DC: Potomac Books, 2005), pp. 57-75. (ISBN 1-57488-896-X)

U.S. Justice Department, *Legal authorities supporting the activities of the National Security Agency described by the President* (Office of Legal Counsel, Washington DC, 19 January 2006), available at <http://www.fas.org/irp/nsa/doj011906.pdf>

Sims, John Cary, "What NSA Is Doing . . . And Why It's Illegal", *Hastings Constitutional Law Quarterly*, vol. 33 (2006), pp. 105-133.

Yoo, John C., *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing, 2010).

6. BRITAIN BEFORE AND AFTER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

To whom are the various members of the British intelligence community accountable? How effectively has accountability been enforced by executive, legislative, or judicial oversight? What impact, if any, has incorporation of the European Convention on Human Rights had on British intelligence agencies? Why did the British government move to put its intelligence agencies on a legislative footing after 1989? Does this matter? What concerns, if any, arise from the extensive use of closed-circuit television (CCTV) in Britain? Is automated systemic surveillance better or worse than surveillance more narrowly targeted by individuals?

Required reading:

- 6.1. The Maxwell-Fyfe Directive (issued by the UK Home Secretary, Sir David Maxwell-Fyfe, to the Director-General MI5, 1952), reprinted in Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994), p. 517. (ISBN 0-19-925234-X) [PM 83]
- 6.2. *Malone v United Kingdom* (European Court of Human Rights, 2 August 1984), available at <http://www.echr.coe.int>. [PM 84]
- 6.3. Chesterman, *One Nation Under Surveillance*, Chapter 5, 131-156.

Further reading:

Jefferey, Keith, *MI6: The History of the Intelligence Service, 1909-1949* (London: Bloomsbury, 2010).

7. "THE UN HAS NO INTELLIGENCE"

What role is there for intelligence sharing within multilateral organizations? What role should there be? How can concerns about leaked information be assuaged? To what extent does assuaging such concerns lead to problems in verifying the information? Was the 2003 invasion of Iraq an example of a weak institution failing to manage a threat – or of something else?

Required reading:

- 7.1. Chesterman, *One Nation Under Surveillance*, Chapter 6, pp. 157-201.
- 7.2. Chesterman, Simon, Ian Johnstone, and David M. Malone, *Law and Practice of the United Nations* (Oxford: Oxford University Press, 2016), pp. 503–507. [PM 97]

8. SINGAPORE BEFORE AND AFTER INDEPENDENCE

To whom are the various members of Singapore's intelligence community accountable? How effectively has accountability been enforced by executive, legislative, or judicial oversight? How have intelligence issues been influenced by Singapore's colonial past? How have intelligence issues influenced the development of the rule of law in Singapore?

*Do you agree with Sin Boon Ann's conclusion that "if the whole process of executive detention were to be judicialized, national interest may be compromised"? Is the judiciary a competent institution to review detention orders made on the basis of national security interests in Singapore, and elsewhere? Can discretion truly be exercised according to the law, and thus consistent with the rule of law, if judicial review is not allowed? What is the distinction between the objective test of discretionary power advocated in *Chng Suan Tze* and the subjective test?*

Required reading:

- 8.1. Constitution of the Republic of Singapore, 1999 Revised Edition (Singapore), Part XII (Special Powers Against Subversion and Emergency Powers). [PM 100]
- 8.2. Internal Security Act, 1985 Revised Edition (Singapore), sections 8-19, 48, 65-7, 72, 74. [PM 102]
- 8.3. *Chng Suan Tze v Minister of Home Affairs & Ors* [1988] SLR 132, paras 1-94, 126-127, 139-140. [PM 107]
- 8.4. Sin Boon Ann, "Judges and Administrative Discretion – A Look at *Chng Suan Tze v Minister of Home Affairs & Ors*", *Malayan Law Journal*, vol. 1989, no. 2 (1989), pp. ci-cviii. (ISSN 0025-1283) [PM 121]
- 8.5. *Teo Soh Lung v Minister of Home Affairs* [1990] SLR 40, paras 1-16, 23-. [PM 129]

- 8.6. Hor, Michael, "Terrorism and the Criminal Law: Singapore's Solution", *Singapore Journal of Legal Studies*, vol. 2002 (2002), pp. 30-34, 42-50. (ISSN 0218-2173) [PM 137]
- 8.7. Singapore Parliamentary Debates, 20 January 1999; 9 April 2007. [PM 146]
- 8.8. Speech by Minister for Law K Shanmugam at the New York State Bar Association Rule of Law Plenary Session, 28 October 2009, available at <http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=444>. [PM 148]

Further reading:

Harding, A.J., "Singapore", in A.J. Harding and J. Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey* (Dordrecht: Martinus Nijhoff, 1993), pp. 193-208.

Ban Kah Choon, *Absent History: The Untold Story of Special Branch Operations in Singapore 1915-1942* (Singapore: Raffles, 2001).

Singapore Ministry of Home Affairs, *White Paper: The JI arrests and the threat of Terrorism*, 7 January 2003, available at http://www.mha.gov.sg/publication_details.aspx?pageid=35&cid=354.

Hor, Michael, "Law and Terror: Singapore Stories and Malaysian Dilemmas", in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 273-294.

Chan, Gary K.Y., "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia", *Asian Journal of Comparative Law*, vol. 2, no. 1 (2007), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1036&context=asjcl>.

Teo Soh Lung, *Beyond the Blue Gate: Reflections of a Political Prisoner* (Singapore: Ethos, 2010).

Desker, Barry and Ang Cheng Guan (eds.), *Perspectives on the Security of Singapore : The First 50 Years* (Singapore: World Scientific, 2015).

Part III: Lessons

10. REVIEW & OVERSIGHT OF INTELLIGENCE AGENCIES

Drawing on the case studies and other examples, what are the most appropriate forms of review and/or oversight of intelligence agencies? Should review or oversight be primarily exercised by the executive, the legislature, the judiciary, or some combination of the three? What is the difference between “review” and “oversight”?

What can be learned from comparing the recommendations of the Arar Commission and the 9/11 Commission (see reading 5.2)? Should reforms be undertaken in the wake of scandal due to failure to prevent a terrorist attack, or in the wake of scandal due to overzealous efforts to prevent one?

Required reading:

- 10.1. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar: Analysis and Recommendations (Arar Commission Factual Inquiry) (Ottawa: Government of Canada, 2006), available at www.ararcommission.ca, pp. 9-49. [PM 152]
- 10.2. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, A New Review Mechanism for the RCMP’s National Security Activities (Arar Commission Policy Review) (Ottawa: Government of Canada, 2006), available at www.ararcommission.ca, pp. 309-328, 364-368, 377-393. [PM 173]
- 10.3. Chesterman, *One Nation Under Surveillance*, Chapter 7, pp. 205-222.

Further reading:

Kent Roach, “Review and Oversight of National Security Activities and Some Reflections on Canada’s Arar Inquiry”, *Cardozo Law Review*, vol. 29 (2007), pp.53-84, available at http://www.cardozolawreview.com/PastIssues/29.1_roach.pdf

Heymann, Philip B., and Juliette N. Kayyem, *Protecting Liberty in an Age of Terror* (Cambridge, MA: MIT Press, 2005).

Arar v. Ashcroft et al, (2d. Cir. 2008), available at <http://ccrjustice.org/files/Arar%20Court%20of%20Appeals%20Decision.pdf> (on appeal).

Mazigh, Monia, *Hope and Despair: My Struggle to Free My Husband, Maher Arar* (Toronto, ON: McClelland & Stewart, 2009).

11. LIMITS ON COLLECTION OR USE OF INTELLIGENCE?

Should the focus of accountability be on the collection of intelligence or its use? What is the difference between the functions of law enforcement agencies and those of intelligence agencies? How should the relationship between such governmental agencies be managed? When information collected by intelligence agencies would be useful in a criminal proceeding, what safeguards if any should be put in place to protect the rights of the accused? What safeguards should protect the sources and methods of the intelligence agency? If such information is collected, is it realistic to assume that law enforcement agencies will not have access to it regardless of any safeguards?

Required reading:

- 11.1. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISC, 2002). [PM 196]
- 11.2. *In re Sealed Case*, 310 F.3d 717 (FISA Ct Rev, 2002), pp. 1-37. [PM 213]
- 11.3. 9/11 Commission Report (see reading 5.2, above), pp. 78-80, 269-272. [PM 232]
- 11.4. Chesterman, *One Nation Under Surveillance*, Chapter 8, pp. 223-246.

Further reading:

Kris, David S., "The Rise and Fall of the FISA Wall", *Stanford Law & Policy Review*, vol. 17 (2006), pp. 487-529.

Boeglin, Jack and Julius Taranto, "Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court", *Yale Law Journal*, vol. 124 (2015), 2189-2201.

12. NATIONAL SECURITY, HUMAN RIGHTS, AND THE RULE OF LAW

How should a state determine the balance of human rights vs. national security, or personal privacy vs. public order? Is "balance" the right metaphor?

Required reading:

- 12.1. Chesterman, *One Nation Under Surveillance*, Chapter 9, pp. 247-261.
- 12.2. Additional materials to be provided.