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.

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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 Thursday, 3 May 2018 (AM).

Reaction Papers

Each student will be assigned four classes for which he or she must write 500-word reaction papers. (In other words, in the course of the semester each student will write four papers.) A reaction paper should briefly address the materials in the readings and consider some of the questions. The papers are not, however, expected to answer every question. You may also raise your own questions or link the materials to other fact situations. Good reaction papers will engage with the materials, formulate a view on the topic(s) addressed, and defend those views.

The reaction papers must be emailed to lawsec@nus.edu.sg at least 72 hours before the start of the class for which that chapter has been assigned. The email should have the subject “Intelligence Law – Reaction Paper” and the text of your “paper” should be in the body of the email, rather than as an attachment. All the papers will be uploaded to the IVLE discussion forum at least 48 hours before the start of the relevant class.

Students should read all the reaction papers as well as the materials prior to each class.

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. The NUS Coop can arrange a special order. To request this, email Mr Arman 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.
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? ............................ iv
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     Be Regulated by Law? ........................................... v

Part II: Cases ..................................................................... vi
  5. The United States Before and After 9/11 ................. vi
  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
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Part III: Lessons ............................................................... x
  10. Review & Oversight of Intelligence Agencies ....... x
  11. Limits on Collection or Use of Intelligence? .......... xi
     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:


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:


2.2. Chesterman, One Nation Under Surveillance, Chapter 1, pp. 17-40.

Further reading:


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:

3.2. Chesterman, One Nation Under Surveillance, Chapter 2, pp. 41-66.

Further reading:


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:


Further reading:

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]


5.3. Chesterman, One Nation Under Surveillance, Chapter 4, pp. 93-130.

Further reading:


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


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:


6.3. Chesterman, One Nation Under Surveillance, Chapter 5, 131-156.

Further reading:

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:


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:


8.2. 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]


8.5. *Teo Soh Lung v Minister of Home Affairs* [1990] SLR 40, paras 1-16, 23-. [PM 129]


Further reading:


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

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:


Further reading:


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 208]
11.3. 9/11 Commission Report (see reading 5.2, above), pp. 78-80, 269-272. [PM 244]

Further reading:


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:

12.2. Additional materials to be provided.