

SCST 5336 – Law and Ethics in Homeland Security

Online Course

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Course Description

This course will focus on some key legal and challenges facing the homeland security enterprise. The course is divided into four units with each unit focusing on a different aspect of the legal underpinnings or legal/ethical debates that impact a range of homeland security-related institutions and policies. Unit 1 will focus on Constitutional questions relating to the separation of powers at the federal level, Unit 2 will focus on questions of federalism, Unit 3 will focus on the balance between security and civil liberties, and Unit 4 will look at the impact of technology on homeland security law and ethics.

Learning Objectives

- To examine the role of the Constitution, the separation of powers, and federalism, on homeland security-related issues.
- To assess the challenges involved in balancing civil liberties and security.
- To distinguish the role of technology in homeland security law and ethics.

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national anti-plagiarism database. Academic dishonesty can result in punishment ranging from failing the assignment to failing the class to expulsion from the program.

Required Readings

- Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World*. New York: W.W. Norton, 2016. ISBN-10: 039335217X ISBN-13: 978-0393352177
- Geoffrey Corn, Jimmy Gurulé, Eric Jensen, Peter Margulies, *National Security Law: Principles and Policy*. Alphen, The Netherlands: Wolters Kluwer, 2015. ISBN-13: 978-1454852742 ISBN-10: 1454852747
- Additional online articles in specific weekly assignments (links provided below).

Assignments and Tasks

- **Discussion Board student introduction during the first half-week of the semester.**
- **Four 7-8 page (not including bibliography or cover page) papers.**
- **At least one weekly posting discussing ideas/questions relating to the student's work on the papers.**

Papers will address a list of questions provided, but these questions all address a single overarching theme. This means that your responses should take the form of an paper with an introduction, body, and conclusion rather than a series of written answers to the questions.

Every week you will post at least one discussion board having to do with the progress of your work on the paper due during that unit. The discussion can include, but are not limited to, questions raised by the readings, your interpretation of the readings, examples you have found from the homeland security enterprise that pertain to issues raised in the readings.

Grading

Papers (88%) – each paper will be worth 22% of the final course grade.

Discussion Board Postings (12%) – the grade provided for discussion boards will reflect the overall quality and effort put into the discussion board postings during the course of the semester. Students are required to post at least one discussion per week, but more are welcomed and the more effort the student puts into the discussion boards, the higher the grade he/she will receive.

Grade Values: A=90+ B= 80+ C=70+

Unit 1: The Constitutional Framework and the Separation of Powers at the Federal Level

January 17- February 12 (Paper Due on February 12).

Readings:

- Corn, *et al*, Chapters 1 and 2.
- Charles R. Kesler, *What Separation of Powers Means for Constitutional Government*, First Principles Series Report #17 (Washington, D.C.: The Heritage Foundation, 2016), available at: <http://www.heritage.org/research/reports/2007/12/what-separation-of-powers-means-for-constitutional-government>
- William P. Marshall, "Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters," *Boston University Law Review*, Vol. 88:505 (2008): 505-521, available at: <https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

The system of government in the United States appears to have been designed to purposely create inefficiency on the theory that an inefficient government characterized by never-ending struggles between branches of government and levels of government will have a harder time restricting personal liberties than an efficient government with limited internal power struggles. According to James Madison, writing in *The Federalist* 47:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

And in *The Federalist* 48, Madison notes that:

...unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained. It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them

ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

Understanding the scope and limitation of the powers of the branches of the federal government, as well as the scope and limitation of the powers of state and local governments, is critical to understanding the operation of the homeland security enterprise. All public sector-based homeland security-related policies and activities occur within the framework of law and under the authority of one or another (or sometimes multiple) government agencies at the federal, state, or local levels (and sometimes combinations of these). The popular conception that homeland security is strictly a federal matter (and, indeed, that homeland security begins and ends with the Department of Homeland Security) ignores the nature of America's federalist system of government and the attempt in the Constitution to balance federal power with that of the states (with states further devolving power to county and municipal governments).

Write a 7-8 page paper addressing the following:

In his paper, Kesler refers to Wilson's argument that government should not be viewed in the 18th century conception of the framers as a Newtonian system in which the desire for power in each part of government could be kept in check by the same desire for power in other parts of government (much as planets are kept in their respective orbits by the force of gravity) but rather that government should be viewed as an organism that, in the Darwinian sense, adapts and evolves, and whose parts need to fit together in one coordinated piece rather than as competing components. Kesler argues against the Wilsonian approach positing, in the final paragraphs of his article, that a good government, as embodied in the Constitutional order, must "...secure private rights and the public good, rather than simply obeying the majority's will" (Kesler, 2016).

- How does Kesler use his defense of the Constitutional order to advocate for a robust executive branch of government?
- In which ways does he argue that the Progressive/Wilsonian approach would change the role of the executive branch?
- Do you agree with Kesler's argument that the United States has already moved some distance from the Constitutional system envisioned by the Framers to a system of government more in keeping with the Progressive/Wilsonian approach? Why or why not?

Marshall takes a different view on things and argues that presidential power (and thus the power of the executive branch) inevitably expands and that it has expanded dramatically since the days of the Framers.

- Which arguments does Marshall use to argue that the power of the Presidency is far greater today than ever?
- Which potential remedies does Marshall suggest to what he argues is an increase in Presidential and executive branch power that upsets the Constitutional balance?

Feel free to also reference chapters 1 and 2 in the Corn textbook in your response, particularly in the context of Supreme Court decisions that impacted the question of the separation of powers between the branches of the federal government.

- How might these arguments over which branch of government is growing increasingly powerful impact homeland security law and policy?
- Provide an example from an area within the homeland security enterprise (counterterrorism, intelligence, emergency management, public health, critical infrastructure protection, border security, transportation security, or any other field within the enterprise)

Remember to use evidence in the form of credible sources (academic, journalistic, governmental), properly cited, to support any assertions you make.

Unit 2: The Constitutional Framework and Federalism

February 13- March 9 (Paper Due on March 9).

Readings:

- Corn *et al*, Chapter 13.
- Ernest Young, "Federalism as a Constitutional Principle," *University of Cincinnati Law Review*, Vol. 83 (2015): 1057-1082, available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6120&context=faculty_scholarship
- Julian Hattam, "Obama Signs NSA Bill, Renewing Patriot Act Powers," *The Hill* (website), June 2, 2015, available at: <http://thehill.com/policy/national-security/243850-obama-signs-nsa-bill-renewing-patriot-act-powers>

- Charles Doyle, *Terrorism: Section by Section Analysis of the USA Patriot Act* (Washington, DC: Congressional Research Service, 2001), available at: <http://www.au.af.mil/au/awc/awcgate/crs/rl31200.pdf>
- Charles Doyle, *The USA PATRIOT Act: A Legal Analysis* (Washington, DC: Congressional Research Service, 2002), available at: <https://fas.org/irp/crs/RL31377.pdf>

The federalist system of government represents another mechanism for diffusing power across government in order to prevent the concentration of power in the hands of a few actors. While the separation of powers at the federal level represents a portion of this effort to diffuse power, the federal system itself arguably represents an even more impactful diffusion of power since it greatly limits the power of the federal government and provides virtually all legal and institutional power to the states (which can, in turn, further delegate their powers to the county and municipal levels, though each state does so in different ways). The 10th Amendment of the Constitution enshrines the principle that those powers not expressly given by the Constitution to the federal government and not prohibited to the states are therefore reserved to the states or to the people. This thus forms the American version of federalism (other federal countries use different version of federalism) which effectively defaults to the states any powers that cannot be Constitutionally-justified to reside with the federal government. Of course, the federal government exercises powers that are not enumerated in the Constitution (e.g., implied powers) but these are deemed to be necessary in order for the federal government to exercise its express powers as defined in the Constitution. For example, the federal government has the express power to raise taxes, but creating the Internal Revenue Service (IRS) to enforce taxation at the federal level, while not enumerated in the Constitution, is an implied power that allows the federal government to exercise its express power to raise taxes. No less important is the fact that the federal government can often convince state and local governments to follow its lead by providing significant funding to state and local governments (with state and local governments being required to implement federal government policy goals as a condition for access to the funding).

It is generally accepted that federal power has grown at the expense of state power since at least the first half of the twentieth century and homeland security is one area in which this has been exhibited given that not only does the federal government have statutory authority to deal with various homeland security threats (terrorism, emergency preparedness, public health, etc.) but it also has significant amounts of money with which to fund the homeland security policies and activities that it wants to see executed at the state and local government levels.

Write a 7-8 page paper addressing the following:

- According to Young, what are the benefits that federalism provides?
- Briefly describe “concurrent jurisdiction” as described by Young. Provide 2-3 examples of how “concurrent jurisdiction” operates within the Homeland Security enterprise.
- Summarize Chapter 13 in Corn *et al* with a focus on how federalism impacts the functioning of law enforcement and other first responders, the military, and the provision of support for emergency response and recovery (including the role of FEMA and the *Stafford Act*).
- Review the two Doyle articles and the Hattem news report and briefly describe some of the powers given to the federal government by the USA PATRIOT Act and how this impacts the balance between federal and state powers.

Remember to use evidence in the form of credible sources (academic, journalistic, governmental), properly cited, to support any assertions you make.

Unit 3: Security vs Civil Liberties

March 10 – April 6 (Paper Due on April 6).

Readings:

- Corn *et al*, Chapters 6, 7, and 8.
- Nancy Chang, “What’s So Patriotic About Trampling on the Bill of Rights?” in *Homeland Security and Terrorism: Readings and Interpretations*, 2e, Edited by James Forest, Russell Howard, and Joanne Moore (New York: McGraw Hill, 2013). <http://rci.rutgers.edu/~tripmcc/phil/chang-usapa.pdf>
- Robert S. Mueller, III, Testimony before the United States Senate Committee on the Judiciary, Washington, DC, May 24, 2004 (FBI Website), available at: <https://archives.fbi.gov/archives/news/testimony/usa-patriot-act>

One could argue that the first role of any government is to provide security for its citizens. Without the provision of basic physical security for people, societies will struggle to survive and governments will fail. In fact, the famed German sociologist Max Weber, in his 1918 lecture “Politics as a Vocation,” defined the state as having a monopoly on the legitimate use of force within a given territory. In other words, the state’s first role is to use force to provide security. Moreover security is generally seen as a basic human right. Article 3 of the United Nations’ *Universal Declaration of Human Rights* (UNHCR) notes that “everyone has the right to life, liberty, and security of person.”

At the same time, as Article 3 notes, the right to civil liberties is considered just as basic a right as that to physical security. Of course, in order to safeguard civil liberties, there must be some level of security in society (the pursuit of individual freedoms comes second to basic survival) but the challenge today for the United States and other developed democratic countries is not to provide basic security (that has long been achieved) but rather whether an increase in the modicum of security justifies a potential decrease in the modicum of civil liberties. While the security-civil liberties dichotomy need not always be a zero sum game, it frequently is. Generally-speaking, if one increases security, by, for example, increasing intelligence-gathering of potential terrorists, creating checkpoints to limit the freedom of movement of suspects, enhancing police powers, etc., that usually implies a concomitant decrease in personal rights and liberties (increasing intelligence-gathering means impinging on privacy rights, creating checkpoints means limiting the personal right to mobility, etc.). The dichotomy of security and civil liberties is frequently subject to the “pendulum effect” whereby in times of perceived insecurity, security becomes more important and society makes due with less civil liberties and in times of perceived security, the pendulum tends to swing back towards strengthening the safeguarding of civil liberties, even if this is at the expense of security.

Write a 7-8 page paper addressing the following:

- What are the arguments made by Chang regarding what she believes to be the threats that the Patriot Act poses to civil liberties? Which of these arguments are strong and which are weak? Please explain using examples (properly cited) to support your analysis.
- What are the arguments made by Mueller regarding what he believes to be the benefits of the Patriot Act? Which of these arguments are strong and which are weak? Please explain using examples (properly cited) to support your analysis.
- Summarize the Constitutional limits on investigatory powers, surveillance and warrant requirements, and Constitutional limitations on interrogations as described by Corn *et al* in Chapter 6. How do these various laws, court rulings, and administrative rules impact the balance between security and civil liberties? Do they maintain that balance or adversely affect it? How and why?
- Describe the role of the FISA process and FISA courts, the legal challenges to FISA, and the role of National Security Letters as described by Corn *et al* in Chapter 7. How do these institutions and procedures impact the balance between security and civil liberties? Do they maintain that balance or adversely affect it? How and why?
- Describe the history of detention and interrogation in and by the United States and how this has changed post 9/11 as outlined in Chapter 8 of Corn *et al*. What sort of impact do the use of extreme interrogation techniques as well as non-

Habeas Corpus detention have on the balance between the need for security and the need to safeguard civil liberties? How and why?

Unit 4: Technology and Implications for Homeland Security Law and Ethics

April 7 – May 4 (Paper Due on May 4).

Readings:

- Watch the Frontline Program: *The United States of Secrets*, Parts 1 and 2, available at: <http://www.pbs.org/wgbh/frontline/film/united-states-of-secrets/> and <http://www.pbs.org/wgbh/frontline/film/united-states-of-secrets/#video-2>
- Schneier, *Data and Goliath*
- Corn *et al*, Chapter 12.

Technological change has made the security vs civil liberties dichotomy increasingly complex. Technological developments provide the authorities with immeasurably more powerful tools to surveil, triangulate information, and archive (and quickly access) information. Other technologies allow the stealing from or disruption of cyber systems, the use of UAVs and autonomous systems, and the development of chemical, biological, and nano-technologies that can impact security, privacy, and the very nature of society.

Write a 7-8 page paper addressing the following:

- The Frontline documentary brings into question both the legality and the advisability of large-scale surveillance. What are some of the arguments both for and against the use of modern technology to gather increasing quantities of information about people as part of the effort to enhance personal security and homeland security?
- What are the main arguments being made in the Schneier book with respect to modern surveillance technology and its impact on privacy and other civil liberties?
- How does Schneier envision the use of surveillance technology in a way that would, in his view, better balance the need for security with the right to privacy?

- Beyond surveillance, what are the potential implications for the balance between security and civil liberties that are raised by some of the other technologies noted by Corn *et al* in Chapter 12?