

Syllabus – Law 731 – Surveillance Law

**George Mason University Law School
Fall 2022**

Brief Course Description:

This course will expose students to laws and policies relating to government surveillance, from traditional criminal wiretaps to foreign intelligence surveillance.

The course will involve a survey of the Fourth Amendment’s search and seizure caselaw and the application of that body of law to government surveillance efforts. Issues discussed will include: wiretaps in drug and organized crime cases; warrantless surveillance programs in the 60s and 70s; legislative efforts to constrain surveillance; the expansion of government surveillance following the attacks of 9/11; and the implications of new surveillance technologies in an increasingly cyber- and technology-oriented world, including the post-COVID era.

Learning Objectives:

Upon completion of this course, students will have developed an understanding of constitutional and federal statutory law that impacts federal government surveillance, particularly the Fourth Amendment, the Wiretap Act, the Electronic Communications Privacy Act, and the Foreign Intelligence Surveillance Act.

Students will become familiar with the history that shaped the current legal framework, as well as with tools that can be used to evaluate how the current legal framework might address future technological developments.

Class Format:

Seminar of 15-25 students; two credits; one two-hour class per week. Active participation in class discussions is required and students are expected to be fully prepared for each class session.

Course Schedule:

This course will meet in-person for J.D. students (and via Zoom or in-person for J.M. and LL.M. students) on Tuesdays from 8:10 pm to 10:10 pm ET.

Exam Date/Time:

The exam for this course will be held on Dec. 5, 2022 at 6:00 pm ET.

Grading and Attendance:

Grades will be based on the exam and class participation consistent with the law school grading policy. We will also be taking class attendance, consistent with the law school policy.

Office Hours:

By appointment.

Faculty Contact Information:

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Course Materials:

All course materials are cases or articles available on Westlaw or Lexis-Nexis, posted on TWEN, or available on the Internet through links provided in the syllabus.

Course Assignments:

Week One (8/23/22) – Introduction to Government Surveillance Under the Fourth Amendment

1. *Olmstead v. United States*, 277 U.S. 438 (1928)
2. *Katz v. United States*, 389 U.S. 347 (1967)
3. IG Report on the President’s Surveillance Program (July 10, 2009), pp. 5-7, 10-38 (TWEN)
4. Declassified Letters and Report on NSA’s Bulk Collection Programs, July 2011 (TWEN)

Week Two (8/30/22) – Introduction to Criminal Wiretaps and Bugs

1. *Goldman v. United States*, 316 U.S. 129 (1942)
2. *On Lee v. United States*, 343 U.S. 747 (1952)
3. *Silverman v. United States*, 365 U.S. 505 (1961)

Week Three (9/6/22) – Criminal Wiretaps and Bugs Under Title III: “The Wire” in Practice

1. *Berger v. New York*, 388 U.S. 41 (1967) (only read thru 118)
2. *Lee v. Florida*, 392 U.S. 378 (1968)
3. *Scott v. United States*, 436 U.S. 128 (1978)

Week Four (9/13/22) – Non-Content Surveillance: Pen Registers and Tracking Devices

1. *Smith v. Maryland*, 442 U.S. 735 (1979)
2. *United States v. Knotts*, 460 U.S. 276 (1983)

3. *United States v. Karo*, 468 U.S. 705 (1984)
4. Congressional Research Service, *Privacy: An Abridged Overview of the Electronic Communications Privacy Act* (Oct. 9, 2012) (TWEN)

Week Five (9/20/22) – Surveillance and New Technologies

1. *United States v. Jones*, 565 U.S. 400 (2012)
2. *Riley v. California*, 134 S. Ct. 2473 (2014)
3. *Carpenter v. United States*, 138 S. Ct. 2206 (2018)

Week Six (9/27/22) – Introduction to Foreign Intelligence Surveillance

1. *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972)
2. *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc) (only read thru 608)
3. *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (only read thru 917)

Week Seven (10/4/22) – The FBI, NSA, and the Foreign Intelligence Surveillance Act

1. Excerpts from S. Rep. 95-604, Foreign Intelligence Surveillance Act of 1977 (TWEN)
2. Excerpts from James Bamford, *THE PUZZLE PALACE* (TWEN)
3. Excerpts from James E. Baker, *IN THE COMMON DEFENSE*, 71-86 (TWEN)
4. Congressional Research Service, *Foreign Intelligence Surveillance Act (FISA): An Overview* (Apr. 6 2021) (TWEN)

NOTE: No Class on 10/11/22 as Fall Break requires a Monday schedule on Tues, 10/11/22.

Week Eight (10/18/22) – FISA, “The Wall,” and Dismantling “The Wall” After 9/11

1. *United States v. Cavanaugh*, 807 F.2d 787 (9th Cir. 1987) (Kennedy, J.)
2. Department of Justice, Instructions on Separation of Certain Foreign Counterintelligence and Criminal Investigations (Mar. 1995) (“Gorelick Memo”) (TWEN)
3. *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000)
4. Excerpts from the 9/11 Commission Report, pp. 266-277 (2004) (TWEN)
1. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002)

Week Nine (10/25/22) – The Aftermath of 9/11: The Terrorist Surveillance Program and FISA Modernization

1. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (TWEN)
2. U.S. Department of Justice, Letter of Attorney General Alberto Gonzales to Chairman Patrick Leahy and Senator Arlen Specter (Jan. 17, 2007) (TWEN)
3. Department of Justice, AAG Ken Wainstein – Excerpts of Testimony before the House Permanent Select Committee on Intelligence concerning the Foreign Intelligence Surveillance Act, pp. 1-22, 29 (Sept. 20, 2007) (TWEN)

4. Excerpts from S. Rep. 110-209, Senate Select Committee on Intelligence, Report on S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007 (Oct. 26, 2007) (TWEN)

Week Ten (11/1/22) – The Snowden Leaks and Metadata Collection

1. Congressional Research Service, *NSA Surveillance Leaks: Background and Issues for Congress* (Sept. 4, 2013) (TWEN)
2. *In re: Application of the FBI for an Order Requiring the Production of Tangible Things*, BR 13-109, pp. 1-29 (FISC Oct. 11, 2013) (TWEN)
3. Prepared Testimony of ACLU Foundation Deputy Director Jameel Jaffer before the Senate Judiciary Committee (July 2013) (TWEN)
4. Prepared Testimony of former NSA General Counsel Stewart Baker before the Senate Judiciary Committee (July 2013) (TWEN)
5. Congressional Research Service, *Origins and Impact of the Foreign Intelligence Surveillance Act (FISA) Provisions That Expired on March 15, 2020* (Mar. 31, 2021) (TWEN)

Week Eleven (11/8/22) – Modern Intelligence Collection and FISA Section 702 Surveillance

1. *In re: Directives [redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008)
2. Congressional Research Service, *Surveillance of Foreigners Outside the United States Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)* (Apr. 13, 2016) (TWEN)
3. Bob Litt, ODNI General Counsel, *Speech: Privacy, Technology and National Security: An Overview of Intelligence Collection* (July 2013) (TWEN)
4. *Memorandum Opinion and Order Approving FISA Section 702 Certifications* (FISC Nov 6, 2015) (TWEN)

Week Twelve (11/15/22) – Ongoing Debates Over FISA

1. Office of the Inspector General, Department of Justice, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, pp. i-xix (Dec. 2019) (TWEN)
2. *Upstream "Abou's" Collection Opinion* (FISC Oct. 3, 2011) (TWEN)
3. *Upstream "Abou's" Collection Follow-On Opinion* (FISC Nov. 30, 2011) (TWEN)
4. *Suspended "Abou's" Collection Opinion*, pp. 1-8, 14-29 (FISC Apr. 26, 2017) (TWEN)
5. Glenn Gerstell, *Making Sense of the Debates over FISA (Parts 1 & 2)*, Council on Foreign Relations (June 22 & 24, 2020) (TWEN)

Week Thirteen (11/22/22) – Surveillance and Privacy in the Age of COVID

1. Alan Z. Rozenshtein, *No One Should Have the Right to Opt Out of Coronavirus Surveillance*, Lawfare (May 19, 2020) (TWEN)
2. Herb Lin, *Cybersecurity Lessons from the Pandemic, or Pandemic Lessons From Cybersecurity*, Lawfare (June 2, 2020) (TWEN)
3. Ángel Díaz, *Coronavirus, Location Tracking, and Civil Liberties*, Brennan Center (Apr. 7, 2020) (TWEN)