

## **HOMELAND SECURITY LAW SEMINAR**

Antonin Scalia Law School

George Mason University

Professor James McCament

Spring 2022

### **COURSE OVERVIEW:**

The 21st Century risk environment facing our nation is a complex mix of manmade and naturally occurring threats and hazards including terrorism, hurricanes, earthquakes, floods, power outages, hazardous materials spills, industrial accidents, pandemic influenza, cyber intrusions, among various others. In addition, our nation continues to be engaged in a series of critical policy discussions-some related to these threats and hazards and others to long-running debates regarding immigration, law enforcement and intelligence and information sharing.

At the beginning of the 21<sup>st</sup> century, the terrorist attacks of September 11th, 2001 served as a catalyst for exploring new mechanisms of coordinated decision-making and response to this complex mix of what are now referred to as homeland security issues.

One such critical mechanism was the establishment of the Department of Homeland Security (DHS) in 2002 as the first new Cabinet-level Department created in over 30 years. The broad policy, decision-making and execution authority of the now well-established DHS covers many areas of homeland and national security. Yet, even with the centralization of issues formerly controlled by multiple federal agencies, since its operational inception in 2003 DHS has continued to work with a multitude of Federal, state, local, tribal and private sector organizations in constructing responses to the critical homeland security issues we face. Although surrounded by robust policy discussion, these responses are ultimately statutory and regulatory in nature and are based upon legal issues of both first impression and long-standing precedent.

This course introduces the policy, strategy and operational application of homeland Security as it has evolved over the past 19 years by utilizing DHS principle source documents and related laws, regulations, and polices. The course also includes a practical examination of stakeholder interaction and key subject matter areas through an interactive tabletop exercise and a research paper assignment as well as other interactive opportunities throughout the course.

This is a multi-faceted course designed to expose students to complex intergovernmental and public-private sector policymaking, operational planning and crisis management. The course is designed to promote subject matter understanding, critical analysis of issues and insight into senior governmental leader decision making.

## **COURSE INFORMATION:**

**Credits:** 2 Credits

**Class Format:** Class will consist of lecture and class discussions covering administrative law principles and recent legal issues across the DHS mission, including counterterrorism, border security, immigration, cybersecurity, and disaster relief. In addition, students will be expected to participate in an incident management exercise and write a research paper. As law students, you are to learn, in an independent manner, a body of knowledge pertaining to federal agency decision-making and its application to the critical issues faced by the DHS and to communicate your understanding and assessment of that knowledge to fellow students and faculty via discussions and written papers.

**Office Hours:** I do not have set office hours but I am happy to meet either in the hour before class meets or after class. My contact information is listed below.

Professor James McCament: [jmccamen@gmu.edu](mailto:jmccamen@gmu.edu); [james.mccament@cbp.dhs.gov](mailto:james.mccament@cbp.dhs.gov)

**Tape Recording:** Tape recording of any class session is strictly prohibited.

**In-class Laptop Usage:** Note-taking during class using personal laptops is permissible. Accessing and use of the GMU wireless area network during class, however, is not permitted while class is in session.

## **COURSE REQUIREMENTS:**

**Grading:** Grades will be based upon class participation, class exercises and a written research paper on a topic selected by each student and approved by the professors. Grading will be determined as follows:

Class Participation 15%  
Class Exercises 15%  
Research Paper 70%

**Class Participation:** Students are expected to come to class prepared to meaningfully participate during lecture discussions. This includes reading all assigned readings for that class. Some sections contain reference readings that, while not required, may be helpful in understanding that section's topic.

### **Class Exercises:**

**1. DHS Stand-up Exercise:** At the conclusion of Class One, you will be assigned to serve in a senior official position within the Department of Homeland Security, a role which you will hold for the remainder of our semester together. That position is one specifically named in the Homeland Security Act and I hope will help frame your participation and your perspective on the issues discussed through the semester. In addition to your readiness to discuss the general concepts found in the assigned weekly reading, you will also be asked to provide questions and input based upon your position within the Department of Homeland Security. In the section covering the DHS regulatory agenda, you will be asked to present on a recent regulatory action relevant to your assigned position.

**2. SAFETY Act Exercise:** Based on an understanding of the SAFETY Act application process, students will be presented with some basic information on a hypothetical technology company ("Get Them Before They Get You") and will have to prepare and defend responses to these questions in front of officials from the SAFETY Act Office (Professor McCament) and meet the demands of your clients (Guest Lecturer).

**3. Incident Management Exercise:** Students will participate in an interactive tabletop exercise simulating a complex, well-coordinated terrorist attack on critical infrastructures and population centers within the United States. Each student will be assigned a role as a key public or private sector official with attendant concerns and responsibilities. The exercise will include an emerging threat phase, operational response phase and post-incident recovery phase. Students are expected to play a dynamic and informed role playing during the class exercise.

## **Final Course Requirement:**

**Research Paper:** Each student will write a 20-25 page research paper, not including citations, on a current homeland security issue of their choice (National, regional, state, local, sector or international focus). The paper should be completed using the following organizational format: problem statement, background (include key players, authorities, resources, etc.), discussion (presentation of alternatives with the identification of pros and cons for each alternative) and recommendations (including rationale behind their selection).

Your research paper is expected to reflect thorough legal research and analysis while understanding many of the topics may be policy oriented. Citations may be entered as footnotes or endnotes, but there must be a consistent format. The paper should focus on the benefits, drawbacks and obstacles, including practical, policy and legal, to the application of proposed policy alternatives. The recommendations section should clearly describe the rationale for the option of choice.

**Prior approval of the topic for the research paper is required.** Students should submit a one paragraph written description of their proposed topic via email for approval **by the beginning of the 6th class session.** Students may also subsequently submit an outline of their paper for review.

**Final papers are to be delivered electronically to Professor McCament by nlt 10 p.m. on Monday, May 2.**

## COURSE OUTLINE

### Class One: January 20, 2022:

#### (Part 1) Homeland Security Guiding Principles

1. Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001),  
<http://supreme.justia.com/us/531/457/case.html>

#### (Part 2) September 11, 2001: Future Threat Attacking the Future of our Homeland Security

2. 9/11: *The 9/11 Commission Report*. Chapters 1 & 8.  
<http://govinfo.library.unt.edu/911/report/index.htm>
3. [The FBI's Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001: Statement of Eleanor Hill: September 24, 2002 \(fas.org\)](http://fas.org)

### Class Two: January 27, 2022

#### (Part 1) Department of Homeland Security Leadership Roles and Responsibilities:

At the end of our first class you will be assigned one of the following positions as a member of the 2003 DHS Leadership Team, as outlined in the 2002 Homeland Security Act:

1. Secretary of Homeland Security;
2. Deputy Secretary of Homeland Security;
3. Under Secretary of Management;
4. Under Secretary of Border & Transportation Security;
5. Under Secretary of Intelligence Analysis & Infrastructure Protection;
6. Under Secretary for Emergency Preparedness & Response;
7. Under Secretary for Science & Technology;
8. General Counsel;
9. Officer of Civil Rights and Civil Liberties;
10. Director, United States Secret Service;
11. Commandant, United States Coast Guard;
12. Director, Bureau of Citizenship & Immigration Services;
13. Assistant Secretary, Bureau of Border Security;
14. Commissioner, Bureau of Customs & Border Protection;
15. Assistant Secretary, Transportation Security Administration;
16. Assistant Secretary, Intelligence & Analysis;
17. Assistant Secretary, International Affairs;
18. Assistant Secretary, Private Sector.

For class two please research your assigned position within DHS and be prepared to present to our class a no more than 5 minute brief overview of your position to include: (1) where the duties and functions of your position existed before DHS; (2) where this position existed within the DHS framework circa 2003; (3) how your position has evolved in the years following the initial creation of DHS; and (4) potential challenges or benefits resulting from your position's inclusion in DHS. As noted in the class overview, your assigned position also determines those assigned readings for which you are responsible to present throughout the semester. In addition to your readiness to discuss the general concepts found in the assigned weekly reading, you will also be asked to provide questions and input based upon your position within the Department of Homeland Security.

## **(Part 2): Homeland Security: Strategic and Threat Environment Then and Today**

### **1. The Office of Homeland Security:**

[Federal Register: Establishing the Office of Homeland Security and the Homeland Security Council](#)

### **2. Pre-DHS Homeland Security Environment:**

White House Office of Homeland Security. *National Strategy for Homeland Security*. July 2002 (pp. 1-14, 63-69).

<https://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf>

### **3. DHS Today: Strategic Environment:**

[Department of Homeland Security's Strategic Plan for Fiscal Years 2020-2024 | Homeland Security \(dhs.gov\)](#)

### **4. DHS Today: Threat Environment:**

DHS 2020 Homeland Threat Assessment

[https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf)

## **Reference:**

### **5. Presidential Proposal of the Department of Homeland Security: June 2002**

<https://www.dhs.gov/xlibrary/assets/book.pdf>

### **6. Homeland Security Presidential Directive-2 (October 2001).**

<http://www.fas.org/irp/offdocs/nspd/hspd-2.htm>

### **7. Crisis Bureaucracy: Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates. 59 STAN. L. REV. 673 (2006). Cohen, Dara K., Cuellar, Mariano-Florentino and Weingast, Barry R.**

[https://www.researchgate.net/publication/46454123\\_Crisis\\_Bureaucracy\\_Homeland\\_Security\\_and\\_the\\_Political\\_Design\\_of\\_Legal\\_Mandates](https://www.researchgate.net/publication/46454123_Crisis_Bureaucracy_Homeland_Security_and_the_Political_Design_of_Legal_Mandates)

## **Class Three: February 3, 2022**

### **(Part 1) Congressional Oversight of DHS: Control or Quagmire?**

#### **1. 9/11: *The 9/11 Commission Report*. Chapter 13.**

<http://govinfo.library.unt.edu/911/report/index.htm>

2. O'Hara, Joan V. Turf Wars-How a Jurisdictional Quagmire in Congress Compromises Homeland Security New York University Journal of Legislation and Public Policy 18.1 (2015).  
[Turf Wars: How a Jurisdictional Quagmire in Congress Compromises Homeland Security](#)
3. **Congress and the Secretaries of DHS**  
[Former and Acting Secretaries of Homeland Security sign open letter on consolidating congressional jurisdiction over DHS - Atlantic Council](#)
4. **Changing the Landscape of Oversight**  
[The Future of DHS Project: Key Findings and Recommendations: Congressional Oversight - Atlantic Council](#)

**(Part 2) DHS Regulatory Implementation:**

5. Federal Rulemaking
  - a. Overview of Federal Regulations and the Rulemaking Process  
Congressional Research Service (CRS)  
<https://crsreports.congress.gov/product/pdf/IF/IF10003>
  - b. Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs  
Congressional Research Service (CRS):  
<https://fas.org/sgp/crs/misc/RL32397.pdf>
6. [Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions](#)
7. Spring 2021 Unified Agenda-Department of Homeland Security Rulemaking  
[Current Unified Agenda of Regulatory and Deregulatory Actions \(reginfo.gov\)](#)

Please review the DHS Unified Agenda and be prepared to share with the class an overview of those sections of proposed rulemaking which are within your assigned position.

**Class Four: February 10, 2022**

**(Part 1): Homeland Security Intelligence Enterprise**

1. [The Office of Intelligence and Analysis FY 2020-2024 Strategic Plan | Homeland Security \(dhs.gov\)](#)
2. Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress: Mark A. Randol. (CRS)  
<https://fas.org/sgp/crs/homsec/R40602.pdf>

**(Part 2): Countering Threats to the Homeland**

1. [DHS Strategic Framework for Countering Terrorism and Targeted Violence | Homeland Security](#)
2. DHS 2020 Homeland Threat Assessment  
[https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf)

## **Class Five: February 17, 2022**

### **(Part 1) Cybersecurity to Protect and Promote the Homeland**

1. Department of Homeland Security Cybersecurity Strategy 2018  
[https://www.dhs.gov/sites/default/files/publications/DHS-Cybersecurity-Strategy\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/DHS-Cybersecurity-Strategy_1.pdf)
2. Class-Action [lawsuit](#): Plaintiff v. Solarwinds Corporation et. al. U.S. District Court Western District of Texas

### **(Part 2) Protecting Infrastructure and Promoting Risk and Resilience**

3. Department of Homeland Security Artificial Intelligence Strategy 2020  
[U.S. Department of Homeland Security Artificial Intelligence Strategy | Homeland Security \(dhs.gov\)](https://www.dhs.gov/u-s-department-of-homeland-security-artificial-intelligence-strategy)
4. Executive Order 13859  
<https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence>
5. Reducing the Significant Risk of Known Exploited Vulnerabilities  
[cyber.dhs.gov - Binding Operational Directive 22-01](https://www.cyber.dhs.gov/binding-operational-directive-22-01)

### **Reference**

6. Cybersecurity Issues and Challenges in Brief: Eric Fischer: CRS  
<https://fas.org/sgp/crs/misc/R43831.pdf>

## **Class Six: February 24, 2022**

### **Terrorist Screening and Watch Listing**

#### **(Part 1):**

1. The Terrorist Screening Database and Preventing Terrorist Travel  
<https://fas.org/sgp/crs/terror/R44678.pdf>

#### **(Part 2): Presidential Decision-Making Regarding Terrorist Screening and Travel:**

1. 2021-Present:
  - a. [Proclamation on Ending Discriminatory Bans on Entry to The United States | The White House](#): January 21, 2021
  - b. Reference: Donald J. Trump, President of the United States, et al., Petitioners v. Hawaii, et al  
[https://www.supremecourt.gov/opinions/17pdf/17-965\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf) (  
Reference: [Docket for 17-965 \(supremecourt.gov\)](#))

**Reminder: Paper Topics Due To Professor McCament**

## **Class Seven: March 3, 2022**

### **Federal Emergency Management Background and Reform**

1. [Executive Order 12127 \(fas.org\)](https://www.fas.org/publications/analysis/2017/01/13/EO-12127/) (1979)
2. The Federal Response to Hurricane Katrina: Lessons Learned  
<https://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned>  
(Chapters 1, 5 (sub sections 1-3,15), & 6.
3. Post-Katrina:
  - a. Post-Katrina Emergency Management Reform Act
  - b. [Written testimony of the FEMA for a House Homeland Security Subcommittee on Emergency Preparedness, Response, and Communications hearing titled "Five Years Later: An Assessment of the Post Katrina Emergency Management Reform Act" | Homeland Security \(dhs.gov\)](https://www.dhs.gov/press/20191015100000)
4. DHS [National Response Framework | FEMA.gov](https://www.fema.gov/national-response-framework) October 2019:  
(Review Introduction, Operational Coordination, Operational Planning)

*Reference:* The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Selected Readings

## **Class Eight: March 10, 2022**

### **Overview of Federal Immigration Development and Reform**

*Reference:*

- a. Refugee Act of 1980, Public Law 96-212  
<https://uscode.house.gov/statutes/pl/96/212.pdf>
- b. Immigration Reform and Control Act of 1986, Pub.L. 99-603  
<https://www.govtrack.us/congress/bills/99/s1200>
- c. Immigration Act of 1990, Pub.L. 101-649  
[Pub. L. 101-649 Immigration Act of 1990](https://www.congress.gov/101/plaws/publ649/PLAW-101-649.pdf)
- d. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208  
<https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>

### **Additional Topical Readings May Be Assigned**

**SPRING BREAK: March 17, 2022-Enjoy!**

## **Class Nine: March 24, 2022**

### **Federal Immigration Through Litigation Part I**

Border and Immigration:

1. U.S. v. Martinez-Fuerte (1976): <https://supreme.justia.com/cases/federal/us/428/543/>
2. Arizona v. U.S., <https://supreme.justia.com/cases/federal/us/567/11-182/>

3. United States v. Cotterman, 709 F.3d 952, 956–57 (9th Cir. 2013) (en banc)  
<https://caselaw.findlaw.com/us-9th-circuit/1624272.html>
4. Memorandum from Secretary Janet Napolitano Establishing DACA:  
<https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>
5. [Memorandum from Secretary Kirstjen M. Nielsen on the Rescission Of Deferred Action for Childhood Arrivals \(DACA\) | Homeland Security \(dhs.gov\)](#)
6. DEPARTMENT OF HOMELAND SECURITY ET AL. v. REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL  
[https://www.supremecourt.gov/opinions/19pdf/18-587\\_5ifl.pdf](https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf)

**Reminder: Paper Outlines Due**

**Class Ten: March 31, 2022**

### **Federal Immigration Through Litigation Part II**

1. Wolf v. Innovation Labs  
<https://www.supremecourt.gov/DocketPDF/19/19-1212>
2. [DHS Announces Process to Address Individuals in Mexico with Active MPP Cases | Homeland Security](#)
3. State of Texas, Et. Al. v. Joseph R. Biden, Jr. Et. Al.  
[Memorandum Opinion and Order \(Ordered by Judge Matthew J. Kacsmaryk on 8/13/2021\) \(vls\) \(justia.com\)](#)
4. BIDEN, PRESIDENT OF U.S., ET AL. V. TEXAS, ET AL  
[Miscellaneous Order \(08/24/2021\) \(supremecourt.gov\)](#)
5. State of Texas, Et. Al. v. Joseph R. Biden, Jr. Et. Al.  
[Texas v. Biden, No. 21-10806 \(5th Cir. 2021\) :: Justia](#)
6. [Huisha-Huisha v. Mayorkas, Civ. Action 21-100\(EGS\) | Casetext Search + Citator](#)
7. [Huisha-Huisha v. Mayorkas-D.C. Circuit-IM-DC-0096-0001.pdf \(clearinghouse.net\)](#)

**Class Eleven: April 7, 2022**

**(Part 1): Protecting Against Catastrophic Liability: The Meaning and Application of the SAFETY Act**

1. In re: September 11th Litigation. 280 F.Supp.2d 279 (S.D.N.Y. 2003)  
<https://law.justia.com/cases/federal/district-courts/FSupp2/280/279/2501198>
2. [DHS SAFETY Act \(Home\)](#)

**(Part 2): SAFETY Act Exercise: Directions will be provided at the beginning of the exercise.**

**Class Twelve: April 14, 2022**

Selected Topics Regarding the Future of Homeland Security

**(Part 1):** Protecting Foreign Investment in the United States: CFIUS and FIRREA

**31 C.F.R. Part 800.**

- [Provisions Pertaining to Certain Investments in the United States by Foreign Persons \(31 C.F.R. part 800\)](#)
- [Final Rule on Mandatory Declaration Provisions \(31 C.F.R. part 800\)](#)

**(Part 2): TWEN Readings**

**Class Thirteen: April 21, 2022**

Table-Top Exercise: Details to be provided during Class Eleven