Syllabus: Surveillance Law

Syllabus – Law 641-001: Surveillance Law Seminar

George Mason University Law School – Fall 2015 Arlington Hall, Hazel Hall

Professor Jake Phillips

Brief Course Description:

This seminar course will expose students to laws and policies relating to surveillance, with a primary focus on U.S. government surveillance. The course will review the legal regime governing traditional criminal wiretaps and surveillance conducted for national security purposes. The course will conclude with an overview of restrictions applicable to surveillance conducted by other countries and possession and use of personal data by private companies.

Topics will include the applicability of the Fourth Amendment’s search and seizure caselaw to government surveillance efforts; wiretaps in drug and organized crime cases; an overview of the U.S. government’s pre-FISA surveillance programs; legislative efforts to constrain surveillance; the expansion of government surveillance following the attacks of 9/11; the implications of new surveillance technologies in an increasingly cyber- and technology-oriented world; and the impact of surveillance in all its forms on individual privacy. The class will necessarily focus on the now-declassified bulk metadata and foreign content collections conducted by the National Security Agency.

Class Format:

Seminar of 10-20 students; two credits; one two-hour class per week.

Active participation in class discussions is required. Students are expected to be fully prepared for each class session. Optional materials are marked below.

Grading:

Substantive grades will be based on class participation (15%), 2 short (3-5 page) reaction papers to weekly reading (25%) and one longer (15-20 page) paper on surveillance law (60%).

Office Hours:

By appointment.

Faculty Contact Information:

Email: jakep1@gmail.com Phone: 202-441-1793 (during business hours only, please)
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Course Materials:
The bulk of the course materials are cases or articles available on Westlaw or Lexis-Nexis or materials posted on TWEN. Materials posted on TWEN are indicated below.

The only book required for purchase is James Bamford’s THE PUZZLE PALACE: INSIDE AMERICA’S MOST SECRET INTELLIGENCE ORGANIZATION. Please purchase this book as soon as possible as it will be discussed in the first class.

The syllabus and readings for later weeks may change, as additional materials are declassified; any changes will be announced in class, but students are asked to regularly check email and TWEN for updates as well.

Course Assignments:

Week One – Introduction to Government Surveillance

1. Excerpts from James Bamford, THE PUZZLE PALACE, 15-81
2. Olmstead v. United States, 277 U.S. 438 (1928)
4. Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014) (TWEN)

Optional:

HBO Series, “THE WIRE,” Episode 6: The Wire

Week Two – Introduction to Criminal Wiretaps and Bugs

2. On Lee v. United States, 343 U.S. 747 (1952)

Week Three – Criminal Wiretaps and Bugs Under Title III: “The Wire” in Practice – Part I


Week Four – Non-Content Surveillance Under Title III: Pen Registers and Tracking Devices

1. Smith v. Maryland, 442 U.S. 735 (1979)
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Week Five – Introduction to Foreign Intelligence Surveillance

1. Executive Order No. 12333, United States Intelligence Activities
2. United States v. United States District Court (Keith), 407 U.S. 297 (1972)
3. United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (en banc) (only read thru 608)
4. United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980) (only read thru 917)

Week Six – National Security Surveillance Pre-FISA: COINTELPRO and SHAMROCK

1. United States Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the “Church Committee”, Book III, National Security Agency Surveillance Affecting Americans (http://www.aarclibrary.org/publib/church/reports/book3/pdf/ChurchB3_10_NSA.pdf)
2. Excerpts from S. Rep. 95-604, Foreign Intelligence Surveillance Act of 1977 (TWEN)
3. Excerpts from James Bamford, THE PUZZLE PALACE, 302-90
4. Excerpts from James E. Baker, IN THE COMMON DEFENSE, 71-78 (TWEN)

Week Seven – The Foreign Intelligence Surveillance Act of 1978 (FISA)

2. Excerpts from James E. Baker, IN THE COMMON DEFENSE, 78-86 (TWEN)
3. Excerpts from Dycus, et al., NATIONAL SECURITY LAW 4TH, 512-32 (TWEN)

Week Eight – Foreign Intelligence Surveillance After FISA: Information Sharing, “The Wall,” and the FISA Court of Review

5. United States v. Cavanaugh, 807 F.2d 787 (9th Cir. 1987) (Kennedy, J.)

Week Nine – Surveillance in the Post-9/11 Era: The PATRIOT Act, NSLs, and Modern NSA Surveillance

4. Excerpts from U.S. Department of Justice, Office of the Inspector General, A REVIEW OF
the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records (Jan. 2010) (TWEN)

NOTE: PROPOSED PAPER TOPICS DUE THIS WEEK

Week Ten – Post 9/11 Surveillance: The Terrorist Surveillance Program

1. U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (“DOJ White Paper”) (TWEN)
2. Office of the Director of National Intelligence, Remarks by General Michael Hayden at the National Press Club (Jan. 23, 2006) (TWEN)
3. Letter from Alberto Gonzalez to Senators Leahy and Specter, Re: Terrorist Surveillance Program (Jan. 17, 2007)
4. Excerpts from James E. Baker, IN THE COMMON DEFENSE, 87-98 (TWEN)

Optional:
- Testimony of James Comey, Senate Judiciary Committee (May 15, 2007) (TWEN)

NOTE: FINAL PAPER TOPICS DUE THIS WEEK

Week Eleven – Post 9/11 Surveillance: FISA Modernization and the FISA Court of Review II

1. Testimony of Ken Wainstein, Assistant Attorney General, National Security Division, before the Senate Select Committee on Intelligence, May 1, 2007. (TWEN)

Week Twelve – Snowden Disclosures: PRISM and Metadata Collections

1. NSA Fact Sheets on the Telephony Metadata (Section 215) and PRISM (Section 702) Programs, June 2013 (TWEN).
3. Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (July 2, 2014)
4. House Committee on the Judiciary, Report on USA FREEDOM Act of 2015, pp. 2-10,
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16-29 (May 8, 2015)

Optional:

Week Thirteen – Future of Government Surveillance and Privacy

Week Fourteen – Activities of Foreign Governments and Commercial Entities