

Poli Sci 219 (67830)
Democracy, Civil Liberties and National Security

THU 12:30 pm – 3:20 pm
SSTR (Social Science Trailer) Room 102
Professor Menachem Hofnung

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Office Hours: Thu. 10:30-11:30 Thu. 3:30-4:30 or by appointment

COURSE DESCRIPTION

This course deals with tension between two basic principles which constitute the basic foundations of every democratic state. On the one hand, the liberal democratic state is required, by definition, to protect the basic principles of the rule of law and human rights. On the other hand, in times of war or under external or internal threat, the exigencies of security are deemed ultimate considerations, even if this requires the government to suspend certain human rights. Such decisions are to be taken, in theory, by elected institutions and be subject to public control and audit. We will ask who is making decisions in security matters, who is informed of the decisions, what social goals are advanced under the name of national security, what are the methods and techniques of civil control on national security?

Student Requirements and Participation:

Students will participate in a variety of activities including class discussions, structured debates (taking the position of an assigned author) and presentations. The course will include lecture and active discussion. Discussion is a large part of the course. Students will be expected to come to class having completed the readings for that day and be prepared to discuss them. Participation is an important part of the grade. Participation means both attending and participating actively.

A major thrust of this course is to assist you in writing requirement. Optimally, you will produce a scholarly paper of approximately 20 pages which will reflect your college training and the development of analytical, research and writing skills.

Grade Distribution

20% Active participation
20% Mid-semester Exam
60% Final paper

Mid-Semester Exam

The mid-semester exams will be made up of combination of identification, multiple-choice, and true/false questions. They may or may not include essay questions.

Course Schedule

Dates for subjects are approximate. You should plan to have all the readings completed for a topic by the date we begin class meetings about it.

Jan. 6, 2011

1) What is National Security?

Caudle Sharon (2009). "National Security Strategies: Security from What, for Whom, and by What Means". *Journal of Homeland Security and Emergency Management*, 6(1) Article 22.

<http://www.bepress.com/jhsem/vol6/iss1/>

Further Suggested Reading

Katzenstein Peter (Editor), 1996. *The culture of national security: Norms and identity in world politics*. NY, Columbia University Press, pp. 7-25.

http://books.google.com/books?hl=en&lr=&id=bPjkBhKWBOsC&oi=fnd&pg=PR11&dq=what+is+national+security&ots=WBsCNX_CF6&sig=M3aoPKU5nMvzUC2viAyKnVvO8WE#v=onepage&q&f=false

US National Security Council homepage:

<http://www.whitehouse.gov/nsc/>

UN Security Council:

<http://www.un.org/Overview/Organs/sc.html>

Israel's National Security Council

<http://www.nsc.gov.il/NSCWeb/TemplatesEnglish/HomePageEN.aspx>

2) State of Emergency, Definitions and Forms

Hofnung, *Law and National Security in Israel*, 23-70.

Class Website

Ex parte Milligan (1866) 71 US (4 wall.) 2.

<http://www.constitution.org/ussc/071-002a.htm>

Korematsu v. United States (1944). 323 U.S. 214

<http://supreme.justia.com/us/323/214/case.html>

January 13

1) World Wars I and II: state of emergency against external threats

Scheppele Kim, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11". 6 *Pennsylvania Journal of Constitutional Law* (2004), 1001-54.

http://www.pennjcl.com/issues/vol6/53_arti_Law_in_a.pdf

Duncan v. Kahanamoku (1946) 324 U.S. 304.

<http://supreme.justia.com/us/327/304/>

Ex parte Quirin (1942), 317 US 1.

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0317_0001_ZO.html

2) Court Review of National Security policies and Practices

Judge Richard A. Posner / President (rtd) Aharon Barak (2008). *Can Democracy Overcome Terror*. Transcript of public debate held at the Hebrew University of Jerusalem, December 18, 2008, pp. 5-32.

Menachem Hofnung and Keren Weinshall-Margel (2010). "Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice". *Journal of Legal Empirical Studies* 7(4) pp. 664–692.

<http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2010.01192.x/abstract>

January 20

1) Freedom of Expression and State Secrets

H.C. 73/53 *Kol Haam v. the Minister of Interior*

http://elyon1.court.gov.il/files_eng/53/730/000/Z01/53000730.z01.pdf

Dennis v. United States. (1951). 341 U.S. 494

<http://supreme.justia.com/us/341/494/case.html>

New York Times Co. v. United States. 403 U.S. 713

<http://supreme.justia.com/us/403/713/case.html>

Further Suggested Reading

H CJ 5627/02 *Saif v. Government Press Office*

http://elyon1.court.gov.il/files_eng/02/270/056/L17/02056270.117.htm

H CJ 680/88 *Schnitzer v. The Chief Military Censor* (58 pp)

http://elyon1.court.gov.il/files_eng/88/800/006/Z01/88006800.z01.pdf

2) Political Rights

1 Peter Niesen, "Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties" (Part I & II). *German Law Journal*: Vol. 3 No. 7 - July 2002

(<http://www.germanlawjournal.com/index.php?pageID=11&artID=164>)

Laird v. Tatum, 408 U.S. 1 (1972).

Further Suggested Reading

H CJ 11225/03 *MK Azmi Bishara v. Attorney-General*

http://elyon1.court.gov.il/files_eng/03/250/112/v08/03112250.v08.pdf

January 27, 2011

1) Freedom of Movement

Nesbitt Katherine (2007). "Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis," *Public Interest Law Journal*, Vol. 17(1) pp. 39-98

<http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol17no1/documents/17-1NesbittArticle.pdf>

Oehmichen Anna (2008), "Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences". 9 *German Law Journal* No. 7(1), pp. 855-888

<http://www.germanlawjournal.com/article.php?id=974>

Further Suggested Reading

HCJ 5784/03 Salama v. IDF Commander in Judea and Samaria
http://elyon1.court.gov.il/Files_ENG/03/840/057/A05/03057840.A05.pdf

Barak-Erez, Daphne, "Israel: Citizenship and immigration law in the vise of security, nationality, and human rights". *International Journal of Constitutional Law* 2008 6(1):184-192.

<http://icon.oxfordjournals.org/cgi/content/full/6/1/184>

2) Individual Meetings with students: drafting research question

Feb. 3 2011

1) Compulsory or voluntary Military Service

Joseph Vasquez (2005) "Shouldering the Soldiering." *Journal of Conflict Resolution* 49(6), pp. 849-873.

<http://jcr.sagepub.com/content/49/6/849.full.pdf+html>

Suggested Reading

Diane Mazur (2003), "Why Progressives Lost the War When They Lost the Draft". *32 Hofstra Law Review*, 553.

<http://www.law.ufl.edu/faculty/pdf/mazur.pdf> Or LexisNexis

Menachem Hofnung (2009). Litigating Military Service at Civil Court. Australian Journal of Political Science 44(1) 97-114.

HCJ 4541/93 Miller v. Minister of Defence

http://elyon1.court.gov.il/files_eng/94/410/045/Z01/94045410.z01.pdf

2) Modern Wars

Mariano-Florentino Cuéllar (2007), The Untold Story of al Qaeda's Administrative Law Dilemmas. *91 Minnesota Law Review*, pp. 1302-1321 and 1354-1368).

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=990945

Further Suggested Reading

International Humanitarian Law Research Initiative, Harvard University

<http://ihl.ihlresearch.org/>

H.C. 3451/02 *Mohammed Almandi v. Minister of Defence*

http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf

February 10, 2011

1) Intelligence Operations and the Use of Secret Evidence

Dycus Stephen, Berney Arthur, Banks William and Raven-Hansen Peter, *National Security Law*. Aspen Publishers Inc., 3rd ed. 2002. Pp. 415-435.

[Class Website](#)

Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection ([Class Website](#)).

Further Suggested Reading

H.C. 6163/92 *Eisenberg v. Minister of Housing*
http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.htm

2) Individual Meetings (*Structure and methodology of research paper*).

February 17, 2011

Terrorism and Civil Liberties

Vermeule Adrian (2008). "Emergency Lawmaking After 9/11 and 7/7". *Chicago Law Review* 75 (3) pp. 1155-1190.

<http://m.jstor.org/iPhone/article?&id=10.2307/2014193>

Koc-Menard Sergio, (2009). "Trends in Terrorist Detection Systems," *Journal of Homeland Security and Emergency Management* 6(1).

<http://www.bepress.com/jhsem/vol6/iss1/4>

Further Suggested reading

Noah Feldman, "Choices of Law, Choices of War." 25 *HARVARD JOURNAL OF LAW AND PUBLIC POLICY* (2002): 457-485 (Lexis/Nexis).

Barak-Erez Daphne (2008) Terrorism and Profiling: Shifting the Focus from Criteria to Effects. *Cardozo Law Review*, 29(1) pp. 1-9.

<http://www.tau.ac.il/law/barakerez/articals/cardozo.pdf>

HCJ 3799/02 *Adalah v. GOC Central Command*

http://elyon1.court.gov.il/files_eng/02/990/037/A32/02037990.a32.pdf

Tzanou Maria (2008). "Case note on Joined Cases C402/05 P & C415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities". *German Law Journal* 10(2) 123-154.

http://www.germanlawjournal.com/pdfs/Vol10No02/PDF_Vol_10_No_02_123-154_Developments_Tzanou.pdf

US 08-1498 Holder, Attorney General v. Humanitarian Law Project.

<http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>

February 24, 2011

1) War Laws and the Right of Self Defence

Geneva Convention relative to the Protection of Civilian Persons in Time of War

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>

HCJ 2056/04 Beit Sourik v. the Government of Israel.

http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm

Suggested Reading

INTERNATIONAL COURT OF JUSTICE

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
Advisory Opinion of 9 July 2004.

<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>

H CJ 4764/04 1. Physicians for Human Rights v. IDF Commander in Gaza
http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf

2) Individual meetings: research paper drafts.

March 3, 2011

1) Illegal Combatants, Targeted Killings and the Use of Torture

Kenneth Watkin (2005). "Canada/United States Military Interoperability and Humanitarian Law Issues : Land Mines, Terrorism, Military Objectives and Targeted Killing". 15 *Duke Journal of Comparative & International Law* pp. 281-315.

[LexisNexis](#)

Suggested

H CJ 769/02 Public Committee against Torture in Israel v. Government of Israel
http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf

Waldron Jeremy Torture and Positive Law: Jurisprudence for the White House." *Columbia Law Review* 105(6), pp. 1681- 1750.

<http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>

J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Vol. 1, 2005), pp. 3-24 (Available at the class website).

March 10

1) War Crimes and Weapons of Mass Destruction

Harknett, Richard J.; Callaghan, John P.; and Kauffman, Rudi (2010), "Leaving Deterrence Behind: War-Fighting and National Cybersecurity," *Journal of Homeland Security and Emergency Management*: 7(1) pp. 1-24.

<http://www.bepress.com/cgi/viewcontent.cgi?article=1636&context=jhsem>

Ronen Yael (2010), "ICC Jurisdiction over Acts Committed in the Gaza Strip." *Journal of International Criminal Justice* 8(1) pp. 3-27.

<http://jicj.oxfordjournals.org/content/8/1/3.full.pdf+html>

Further Suggested Reading

Human Rights Watch, Courting History: The Landmark International Criminal Court's First Years

<http://www.hrw.org/en/reports/2008/07/10/courting-history>

UNITED STATES v W. CALLEY, JR., *First Lieutenant, U.S. Army*

http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MYL_uscma.htm

2) Individual paper presentations (in class).