

# **INVESTIGATING AND PROSECUTING NATIONAL SECURITY CASES**

**Spring 2022**

**Professor Carter Burwell**

## **Syllabus**

**Overview and Learning Outcomes:** This seminar focuses on the law and policies underlying the investigation and prosecution of national security cases. Each class is divided into two parts. In the first part of each class, we will study the single greatest terrorist attack in American history. Week by week, we will work our way through the 9-11 Commission Report and its analysis and discussion of the events that led to 9/11 and, more importantly, how the nation has changed (and continues to change) in its aftermath. In the second part of each class, we will consider specific issues associated with the investigation and prosecution of national security cases by the Department of Justice. Here we will rely on a variety of materials, including cases, legal briefs, speeches, and articles. Topics in this section will focus on the eternal and enduring clash between liberty and security and include: the role of lawyers in the Intelligence Community; the role of the Department of Justice in national security; the role of the Constitution and the Bill of Rights, the Foreign Intelligence Surveillance Act; military and civilian prosecutions of terrorists; the challenges of classified information; and the separation of powers. Students will come away with a better understanding of both the practice and the principles of national security law, and they will develop their own ideas in a 20-page paper at the end of course.

**Class Schedule:** Mondays from 6:05 pm to 8:05 pm in Hazel Hall Room TBD.

**Contact Information and Availability:** I can be best reached via email at [carterburwell@hotmail.com](mailto:carterburwell@hotmail.com). Feel free to contact me with any questions or concerns, or to request a meeting, but please remember that I (like many of you) have a full-time job and therefore I may not always be able to get back to you immediately. I will not have office hours, but I am happy to meet with you after class.

**Required Court Materials:** The Final Report on the National Commission on Terrorist Attacks Upon the United States (the “9-11 Commission Report”). Hard copies are available, and a complete version is available online. Other materials are outlined below for each class. Most of this information is also available online.

**Classroom Participation and Attendance:** Classroom participation is part of the course requirements and will comprise approximately 25% of your final grade. As the seminar tries to address complicated and controversial legal issues associated with the investigation and prosecution of national security cases, a free-flowing discussion of divergent views necessarily enriches the learning experience. Class participation is beneficial to everyone and helps everyone to “think like a lawyer.” Everyone should develop the habit of applying facts to the law and legal principles, arriving at plausible analyses, and discussing those ideas with others. For those inclined towards policy development, students should understand that every policy choice creates consequences. Understanding how to reconcile the policy choices with the consequences, and “thinking like a lawyer,” are skills you will develop in your career.

To help encourage class participation and to help you to develop your own skills as a lawyer, **each class I will assign one or two students to help lead the discussion during that class regarding the relevant chapter from the 9-11 Commission Report.** I encourage the assigned student or students to prepare written “talking points” to help to facilitate the discussion during the first 15 minutes of class. The assigned student or students should also be prepared to participate in the discussion of the other materials.

In addition, at the end of the course, **each student will also be required to give a 5-10 minute oral presentation on their final paper.** Again, I recommend that you prepare written “talking points” to help guide your discussion of your paper.

Class attendance is obviously important and will be monitored. If you fail to attend class without sufficient explanation, your final grade will be impacted.

**Final Paper:** The remaining portion of your grade in this class will be based on a **final paper of no less than 20 pages on a subject of your choice and approved by your professor.** By early April, students should be prepared to briefly (1-2 minutes) state a proposed paper topic in the class. As noted above, the final class will be dedicated to a short student presentations of the papers. **Final papers are due on Friday, May 6.** Papers must be double-spaced, in 12-point Times New Roman font, with one-inch margins, and with page numbers. Citations should be in footnotes. Please provide both a PDF version and a Word processing version of your paper. The electronic copy makes it easier to check for plagiarism.

Do not plagiarize. Plagiarism is the appropriation of the words, ideas, or thoughts of another and representation of them as one’s own original work. You must cite your sources not just when you quote them directly, but also when you paraphrase them or use their ideas. In some sections of your paper, this may require a citation for each sentence. If you plagiarize, you will fail and be disciplined.

A good paper will do more than simply describe or summarize the cases and articles concerning a certain area of the law. It will not just explain the two sides of an issue and conclude that you agree with one side of the reasons it expressed in its arguments. A good paper will contribute something new: a unique, creative theme or idea that will drive your paper. A good paper will also reflect first-rate editing (i.e., style, structure, organization, grammar, spelling, etc.) and citation technique and format, such as you would use in submitting a document to a court or to your employer.

**Internet, Phone and Recording Policies:** Please only use the internet for class purposes during class and turn your phone to “silent.” Recording of the class in any way is prohibited.

**Guest Lecturers:** I intend to invite a significant number of colleagues from different parts of the Intelligence Community to join us during the course. These guest lecturers will have “real world” experience related to the assigned topics and will help to provide additional perspectives on the investigation and prosecution of national security cases. In the past, guests have included current and former senior government officials.

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## Class Assignments

### 1. 1/24/22 Introduction: September 11, 2001

- 9-11 Report Chapter 1: We Have Some Planes
- [Fatwah issued by Usama Bin Laden on February 23, 1998.](#)

### 2. 1/31/22 National Security and the Role of Lawyers and the Law

- 9-11 Report Chapter 2: The Foundation of the New Terrorism
- [Jim Comey, Intelligence Under the Law, \*The Green Bag\*, May 2005](#)
- [David Kris, Law Enforcement as a Counterterrorism Tool, Brookings Institute, 2010](#)
- [Mike Mukasey, The Political Pendulum, Speech at Boston College, 2008](#)

### 3. 2/7/22 Clash of Absolutes: Safety & Security v. Privacy & Liberty

- 9-11 Report Chapter 3: Counter-Terrorism Evolves
- [Olmstead v. United States, 277 U.S. 438 \(1928\) \(Brandeis's dissent\)](#)
- [In re Directives of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 \(2008\)](#)
- [United States v. Carpenter, 138 U.S. 2206 \(2018\)](#)

### 4. 2/14/22 FISA, Section 702, and CIPA

- 9-11 Report Chapter 4: Responses to Al Qaeda's Initial Assaults
- [United States v. Muhtorov, \(10<sup>th</sup> Cir. December 8, 2021\)](#)
- [Executive Summary of OIG Report on Carter Page FISA Application and Other Aspects of the FBI's Crossfire Hurricane Investigation](#)

### 5. 2/21/22 Law Enforcement as a National Security Tool

- 9-11 Report Chapter 5: Al Qaeda Aims at the Homeland
- Terrorism Crimes: 18 U.S.C. §§ 2331, 2332, 2332a, 2332b, 2332f, 2339A, 2339B
- [Holder v. Humanitarian Law Project, 561 U.S. 1 \(2010\)](#)
- [Tracking Down Terrorists in Court, New Yorker, May 15, 2017](#)
- [Father of Accused Terrorist Nearly Causes Mistrial, N.Y. Post, 9/28/17](#)

**6. 2/28/22      Constitutional & Evidentiary Issues**

- 9-11 Report Chapter 6: From Threat to Threat
- [In re Terrorist Bombings of U.S. Embassies in East Africa \(Fourth Amendment Challenges\)](#)
- [U.S. v. Abdulmuttalab, Order Denying Motion to Suppress \(D. Mich. Sept. 16, 2011\)](#)
- [U.S. v. Abu Kattalah, Order Denying Motion to Suppress \(D.D.C. Aug. 16, 2017\)](#)

**7. 3/7/22      Stings and Entrapment**

- 9-11 Report Chapter 7: The Attack Looms
- [United States v. Cromitie, 727 F.3d 194 \(2d Cir. 2013\)](#)
- [Documents Provide Rare Insight into FBI's Terrorism Stings, Wash. Post, 4/13/12](#)

**NO CLASS ON 3/14**

**8. 3/21/22      Terrorists, Enemy Combatants, and Freedom Fighters**

- 9-11 Report Chapter 8: The System Was Blinking Red
- [U.S. v. Hamidullin, 388 F.3d 62 \(4<sup>th</sup> Cir. 2018\) \(affirming district court\)](#)
- [Lost in Syria, New Yorker, Feb. 16, 2015](#)
- [It's Time to Admit That the Military Commissions Have Failed, Steve Vladeck, Lawfare, April 16, 2019.](#)

**9. 3/28/22      Separation of Powers and the Role of the Courts**

- 9-11 Report Chapter 9: Heroism & Horror
- [Hamdi v. Rumsfeld, 542 U.S. 507 \(2004\)](#)
- [Bin Ali Jaber v. United States, 861 F.3d 241 \(D.C. Circ. 2017\)](#)
- [Doe v. Mattis, 889 F.3d 745 \(D.C. Cir. 2018\)](#)

#### **10. 4/4/22 Domestic Terrorism**

- 9-11 Report Chapter 10: Wartime
- Mary McCord, [Filing the Gap in our Terrorism Statutes \(Aug. 2019\)](#)
- Bobby Chesney, [Should We Create a Federal Crime of ‘Domestic Terrorism’?](#), *Lawfare* (August 2019)
- [Letter from Leadership Conference on Civil and Human Rights \(January 2021\)](#)
- Mary McCord, [Lessons for Countering the Domestic Terrorism Threat 20 Years After 9/11](#), *Journal of National Security Law & Policy*

#### **11. 4/11/22. Espionage and the Department of Justice’s China Initiative**

- 9-11 Report Chapter 11: Foresight – and Hindsight
- Espionage Crimes: 18 U.S.C. §§ 793-794; 18 U.S.C. §§ 798 & 1924
- [The Department of Justice’s China Initiative](#)
- [“As U.S. Hunts for Chinese Spies, University Scientists Warn of Backlash, November 28, 2021, New York Times.](#)

#### **12. 4/18/22. Student Presentations The New World of National Security and Geo-Political and Geo-Economic Competition: Sanctions, CFIUS, and Export Controls**

- 9-11 Report Chapter 12: What to Do? A Global Strategy
- [The Treasury 2021 Sanctions Review](#)
- [CFIUS Reform Under FIRMMA \(Update by Congressional Research Service\)](#)
- [Beyond CFIUS: The Growing Use of U.S. Export Controls to Control Foreign Direct Investment](#) (Client Update by Sherman & Sterling)

#### **13. 4/25/22 Wrap up and Student Presentations**

- 9-11 Report Chapter 13: How to Do It? A Different Way of Organizing Government