

Syllabus – Law 492: Intelligence Law

(Updated: Aug. 15, 2023)

Antonin Scalia Law School – Fall 2023

Jason Chipman & Jamil N. Jaffer

Brief Course Description:

This course provides an overview and survey of basic legal issues, structures, and authorities that apply to intelligence activities undertaken by key elements of the military and the United States Intelligence Community (IC). Understanding of the framework of intelligence law is essential for understanding the scope of Executive power in relation to military and IC activities and is particularly important for national security, military, and intelligence professionals, as well as those working in the private sector who interact with these groups.

Learning Outcomes:

The class will examine the evolution of executive and legislative branch authorities, including issues related to the separation of powers, constitutional and civil liberties issues, and the application of legal principles to the resolution of pressing and novel national security problems. Of particular note:

- Students will learn about the tensions facing a democratic society engaged in national security activities, such as clandestine or covert executive branch activities and national security surveillance, and will study the legal framework governing those activities.
- Students will learn about the sources of authority for executive branch intelligence activities; the role of the legislative branch in authorizing and overseeing intelligence activities; and the impact of legislative, judicial, and technological developments.
- At the end of this course, students will understand the historical development of legal authorities related to U.S. government intelligence activities; be able to analyze intelligence-related legal issues, and provide cogent authorities-based arguments when addressing those issues.

Class Format: Between 20-25 students; two credits; one two-hour class per week, in-person only. Active participation in class discussions is required and students are expected to be fully prepared for each class session. This is an in-person course so all students are expected to be in class for each class session.

Class Details: Wednesdays: 8:10 pm – 10:10 pm.

Grading: Grades will be based on a 20-25 page paper and class participation consistent with the law school grading policy. Class attendance will also factor into grading, consistent with law school policy.

Office Hours: Appointments can be made to meet in person, over Zoom, or by telephone. Tatum Clifton can help make such appointments and can be reached at tclifto@gmu.edu.

Paper Due Date: Tuesday, December 12, 2023 – 11:00 pm ET.

- Papers are due via email to jjaffer@gmu.edu and jchipmal@gmu.edu no later than the date and time above; please note that late papers will receive a full grade deduction for every day the paper is late based on current law school policy, so please turn papers in on time.

Faculty Contact Information:

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Course Materials: The course does not use a textbook; the syllabus includes readings from a variety of sources. Course materials are available on WESTLAW/LEXIS (if cases/statutes/etc.) or are linked below or posted on TWEN (where indicated). Be sure to pull and read all materials ahead of the relevant class.

Course Specific Policies:

- Students are expected to complete the assigned readings before each week’s class and to come prepared to discuss them.
- Socratic dialogues will be employed by the instructors to facilitate learning outcomes.
- If unforeseen circumstances prevent a student from preparing for class, the student is nonetheless encouraged to attend and should inform the instructors in advance if they are not prepared to be called upon.
- All students are expected to treat each other and the instructors with courtesy and respect.
- Ideas and theories are welcome and encouraged to be challenged, but such critiques should never take the form of personal attacks on another speaker within the classroom setting.
- The instructors seek a safe academic environment wherein ethical and philosophical issues can be intellectually explored.
- Students must use their GMU email account to receive important University information, including communications related to this class.
- The instructors will not respond to messages sent from or send messages to a non-Mason email address; it is always best to text instructors in addition to sending emails to ensure prompt responses.

Use of Generative AI:

- Pursuant to Academic Regulation 4-3(b), the instructors of this course expressly permit the use of generative artificial intelligence (GAI) (as defined in Academic Regulation 4-3(a)) as an appropriate resource for work in this this course, including drafting and writing of papers

submitted for a final grade, so long as students using GAI strictly comply with the requirements provided herein.

- Pursuant to Academic Regulation 4-3(e), in order to permissibly use GAI in this course, including for the drafting and writing of papers submitted for a final grade, students using GAI must:
 - (1) disclose, in the first footnote of any written work submitted for the course, whether for a grade or not, whether they have used GAI in any manner in the course of drafting or writing of such written work and the specific GAI source(s) used in the paper and, if GAI has been used, certify that they have reviewed and are in strict compliance with the policies set forth in the Academic Regulations and herein, as follows:
 - “I, [insert student name], certify that I have reviewed Scalia Law Academic Regulation(s) related to the use of generative artificial intelligence (GAI) and the provisions and policies set forth in the syllabus for this course. Pursuant to those regulations, provisions, and policies, I disclose that I have used GAI in the course of drafting or writing of this written work, and specifically that I have used the following GAI source(s): [insert GAI source name(s)]. I hereby certify that I am in strict compliance with the policies set forth in the Academic Regulations and the syllabus for this course.”
 - (2) obtain the sources underlying any GAI generated output and independently verify any claims made therein;
 - (3) not use any GAI generated output where the student cannot obtain the sources underlying the GAI generated output and independently verify any claims made therein;
 - (4) not use any GAI generated output verbatim unless properly quoted and cited;
 - (5) not use any GAI generated output in any form, whether quoted, paraphrased, or otherwise without properly quoting and/or citing such output, just as one would with any standard written text;
 - (6) properly cite any GAI generated output used in the drafting or writing of the paper, whether quoted, paraphrased, or otherwise utilized in any manner, include to generate independent work;
 - (7) provide citations to GAI generated output that cite both the GAI generating source(s) as well as the underlying source from where the material originated.
- Pursuant to Academic Regulation 4-3(f), students who use GAI in a manner inconsistent with the Academic Regulations and this syllabus and the policies provided therein, may be subject to the disciplinary sanctions set forth in Section 3.01 of the Honor Code, as the use of GAI not in compliance with such provisions and policies is considered academic dishonestly involving cheating in violation of Section 1.01.1 and/or 1.01.5 of the Honor Code.
- Law School instructors and administrators, including those for this course, reserve the right to use AI detection software to find instances of GAI in student submissions.

Class Recordings Prohibited:

- Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device, camera, or computer.
- Any exceptions to this policy must be expressly authorized in writing by the instructor(s).
- The instructors do not intend to record the weekly course meetings.

Course Assignments:

Part I: What are the threats and issues that the Intelligence Community is intended to address? How is the Intelligence Community organized? What pressures or issues led to its structure?

Class 1 (8/23/23): Introduction: Intelligence, National Security & Separation of Powers

- Office of the Director of National Intelligence, *Annual Threat Assessment of the US Intelligence Community* (2023) (skim): <https://www.odni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf>
- Commission on the Intelligence Capabilities of the United States regarding Weapons of Mass Destruction, *Report of the Commission* (“WMD Commission Report”), *Appendix C: An Intelligence Community Primer*, pp. 579-589 (March 31, 2005): <https://www.govinfo.gov/content/pkg/GPO-WMD/pdf/GPO-WMD.pdf>
- *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579, 582-589 (1952)
- *Curtiss-Wright Export Corp. v. United States*, 299 U.S. 304 (1936) (majority opinion)
- Reflections on Jack Goldsmith's POWER AND CONSTRAINT:
 - Neal Kumar Katyal, *Book Review: Stochastic Constraint*, 126 Harv. L. Rev. 990 (2013): <https://harvardlawreview.org/2013/02/stochastic-constraint/>
 - Jack L. Goldsmith, *A Reply to Prof. Katyal*, 126 Harv. L. Rev. F. 188 (2013): <https://harvardlawreview.org/2013/04/a-reply-to-professor-katyal/>

Class 2 (8/30/23): Legal Framework and Legal Authorities

- Stephen Preston, *Remarks of The Honorable Stephen W. Preston, General Counsel, Central Intelligence Agency at Harvard Law School, CIA and the Rule of Law* (April 10, 2012): <https://www.lawfareblog.com/remarks-cia-general-counsel-stephen-preston-harvard-law-school>
- *Tenet v. Doe*, 544 U.S. 1 (2005)

- Congressional Research Service, *U.S. Intelligence Community Elements Establishment Provisions* (May 12, 2023): <https://crsreports.congress.gov/product/pdf/IF/IF10527>
- Statutory Organization of the IC
 - Table of Contents, *War and National Defense*, Title 50, US Code (skim): <https://uscode.house.gov/view.xhtml?path=/prelim@title50&edition=prelim>
 - Table of Contents, National Security, Title 50, Ch. 44, US Code (skim): <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter44&edition=prelim>
 - 50 USC §§ 3002-3003 (Congressional purpose and definitions)
 - 50 USC §§ 3021-3024 (Role of NSC, DNI, and ODNI)
 - 50 USC §§ 3035-3036 (Role of CIA and DCIA)
 - 50 USC §§ 3038 (Role of SecDef)
- Executive Organization of the IC
 - Executive Order 12,333 (as amended): <https://dpcl.d.defense.gov/Portals/49/Documents/Civil/eo-12333-2008.pdf>
- Congressional Oversight of the Intelligence Community: Accountability and Funding of Intelligence Activities
 - 50 USC §§ 3091-3094
 - Director of National Intelligence, *Intelligence Community Directive 112: Congressional Notification* (June 29, 2017): https://www.dni.gov/files/documents/ICD/ICD-112_17-00383_SIGNED.PDF

Class 3 (9/6/23): The US Intelligence Community – Shaped by Scandal and Failure

- Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (“Church Committee Report”) (1976): https://www.intelligence.senate.gov/sites/default/files/94755_II.pdf
 - *Letter of Transmittal and Preface* (i-x)
 - *Table of Contents*
 - Pages 1-21; 82-110; 137-164; and 183-204.
- National Commission on Terrorist Attacks Upon the United States, *Report of the Commission* (“9/11 Commission Report”) (2004): <https://9-11commission.gov/report/>
 - *Executive Summary*

- Chapter 8 (skim)
- Chapter 13
- *WMD Commission Report*: <https://www.govinfo.gov/content/pkg/GPO-WMD/pdf/GPO-WMD.pdf>
 - *Overview* (skim)
- David Kris, *The CIA's New Guidelines Governing Publicly Available Information* (2017): <https://www.lawfareblog.com/cias-new-guidelines-governing-publicly-available-information>

Part II: How do the Military and the Intelligence Community intersect?

Class 4 (9/13/23): US Military in the Intelligence Arena under Title 10

- Undersecretary of Defense for Intelligence: 10 USC § 137 (including note on Relationship to Authorities under National Security Act of 1947)
- DOD Intelligence Matters: 10 USC §§ 421-437
- Congressional Research Service, *Defense Primer: Intelligence Support to Military Operations* (May 12, 2023): <https://crsreports.congress.gov/product/pdf/IF/IF10574>
- Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. Nat'l Sec. L. & Pol'y 539 (2012): <https://jnsllp.com/wp-content/uploads/2012/01/Military-Intelligence-Convergence-and-the-Law-of-the-Title-10Title-50-Debate.pdf>

Class 5 (9/20/23): Covert Action under Title 50

- Watch *Zero Dark Thirty*
- *Covert Action Title 50 Authorities*: 50 U.S.C. §§ 3091-3093
- Michael E. DeVine, *Congressional Research Service, Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief* (Nov. 29, 2022): <https://crsreports.congress.gov/product/pdf/R/R45175>
- Eric Rosenbach & Aki Peritz, *Covert Action, Memo in Confrontation or Collaboration: Congress and the Intelligence* (July 2009): <https://www.belfercenter.org/publication/covert-action>

Part III: Surveillance – The Fourth Amendment and FISA

Class 6 (9/27/23): Fourth Amendment Foundations of Surveillance Law

- Robert S. Litt, *Privacy, Technology and National Security: An Overview of Intelligence Collection*, Office of the Director of National Intelligence (July 19, 2013): <https://www.dni.gov/index.php/newsroom/speeches-interviews/speeches-interviews-2013/item/896-privacy-technology-and-national-security-an-overview-of-%20intelligence-collection-by-robert-s-litt-odni-general-counsel>
- David Kris, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 3D, *Chapter 3: The History of National Security Electronic Surveillance and Physical Searches* (TWEN)
- *Katz v. United States*, 389 U.S. 347 (1967)
- *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972)

Class 7 (10/4/23): The Origins of FISA

- Robert H. Bork, *Reforming Foreign Intelligence*, Wall Street Journal (March 9, 1978) (TWEN)
- David Kris, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 3D, *Chapter 4: An Overview of FISA* (TWEN)
- Edward C. Liu, *Foreign Intelligence Surveillance Act (FISA): An Overview*, Congressional Research Service (April 6, 2021): <https://crsreports.congress.gov/product/pdf/IF/IF11451>
- Glenn Gerstell, *Making Sense of the Debates over FISA (Part One)*, Lawfare (June 22, 2020): <https://www.cfr.org/blog/making-sense-debates-over-fisa-part-one>

Class 8 (10/11/23): The Limitations of “Traditional” FISA and the NSA Terrorist Surveillance Program

- David Kris, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 3D, *Excerpts from Chapter 15: The President’s Statutory and Constitutional Authority to Conduct Foreign Intelligence Surveillance and Searches – the NSA Surveillance Program*, §§ 15:1-15:3; §§ 15:11-15:13 (TWEN)
- Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006): <https://www.justice.gov/archive/opa/docs/whitepaperonnsalegalauthorities.pdf>
- Gen. Michael Hayden, *Address to the National Press Club: What American Intelligence & Especially the NSA Have Been Doing to Defend the Nation* (Jan. 23, 2006): https://www.dni.gov/files/documents/Newsroom/Speeches%20and%20Interviews/20060123_speech_content.htm

Class 9 (10/18/23): FISA Modernization

- David Kris, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 3D, *Excerpts from Chapter 16: FISA Modernization*, §§ 16:1 through 16:7 (TWEN)
- David Kris, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 3D, *Excerpts from Chapter 17: Surveillance and Searches Abroad* §§ 17:1-17:3 (TWEN)
- Glenn Gerstell, *Making Sense of the Debates over FISA (Part Two)*, Lawfare (June 22, 2020), <https://www.cfr.org/blog/fisas-current-controversies-and-room-improvement-part-two>
- Edward C. Liu, *Surveillance of Foreigners Outside the United States Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)*, Congressional Research Service (April 13, 2016): <https://crsreports.congress.gov/product/pdf/R/R44457>
- Office of the Director of National Intelligence, *Annual Statistical Transparency Report Regarding the Intelligence Community's Use of National Security Surveillance Authorities, Calendar Year 2022*, pp. 4-8, 10, 13, 14-25, 26-27: https://www.dni.gov/files/CLPT/documents/2023_ASTR_for_CY2022.pdf

Part IV: What comes next?

Class 10 (10/25/23): The Future of Search, Surveillance, and the Fourth Amendment?

- Robert S. Litt, *The Fourth Amendment in the Information Age*, 126 YALE L.J. F. 8 (2016), <http://www.yalelawjournal.org/forum/fourth-amendment-information-age>
- *Carpenter v. United States*, 138 S. Ct 2206 (2018)
- Joseph Cox, *This Company Built a Private Surveillance Network. We Tracked Someone With It*, Vice.com (Sep. 17, 2019): <https://www.vice.com/en/article/ne879z/i-tracked-someone-with-license-plate-readers-drn>
- Stuart A. Thompson and Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, New York Times (Dec. 19, 2019): <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>
- The Editorial Board, *The Government Uses "Near Perfect" Surveillance Data on Americans*, New York Times (Feb. 7, 2020): <https://www.nytimes.com/2020/02/07/opinion/dhs-cell-phone-tracking.html>
- Sen. Ron Wyden, *Press Release on The Fourth Amendment Is Not for Sale Act* (July 27, 2023): <https://www.wyden.senate.gov/news/press-releases/wyden-paul-and-bipartisan-senators-reintroduce-the-fourth-amendment-is-not-for-sale-act>
- Kerr, Orin S., *Buying Data and the Fourth Amendment*, Hoover Institution Aegis Paper Series (July 4, 2021) (*download paper by clicking the Open PDF in Browser link*): https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3966951_code328150.pdf?abstractid=3880130&mirid=1

Class 11 (Nov. 1, 2023): Case Study

- Office of the Inspector General, U.S. Department of Justice, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation (Dec 2019): <https://www.justice.gov/storage/120919-examination.pdf>
- David Kris, *How the FISA Court Really Works*, Lawfare (Sep. 2, 2018): <https://www.lawfareblog.com/how-fisa-court-really-works>

Class 12 (11/8/23): Considering National Security Legal Practice

- Jeh Johnson, *National Security Law, Lawyers and Lawyering in the Obama Administration*, Yale Law School (Feb. 22, 2012): https://yalelawandpolicy.org/sites/default/files/YLPR/johnson_national_security_law_lawyers_and_lawyering_in_the_obama_administration.pdf
- Jamil N. Jaffer, *The Ethics of National Security Lawyering: A Response to Jeh Johnson*, 31 Yale L. & Pol'y Rev. 173 (2012) (requires login through your GMU account; also avail on LEXIS/Westlaw): <https://www.jstor.org/stable/23735774>

Class 13 (11/15/23): Review and Discussion