PROSECUTING TERRORISM & CASES INVOLVING NATIONAL SECURITY

Fall 2018

Professor Carter Burwell

Syllabus

Overview: This seminar focuses on select topics associated with the law and policies underlying the investigation and prosecution of national security cases. Each class is divided into two parts. In the first part, 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, we will consider specific issues associated with the investigation and prosecution of counter-terrorism and counter-espionage cases. Here we will rely on a variety of materials, including judicial decisions, legal briefs, speeches and even magazine articles. Topics in this section will focus on the eternal and enduring clash between privacy and security and include the role of lawyers in the Intelligence Community, the Fourth Amendment, the Foreign Intelligence Surveillance Act, the War on Terror, classified information, the freedom of the press, 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 will develop their own ideas in a 20-page paper at the end of course.

Class Schedule: Mondays from 8:00pm to 9:50pm. Please note that our first class will be on August 27, not August 20, and that we will need to make up a class.

Contact Information and Availability: Please feel free to contact me via email at carterburwell@hotmail.com with any questions or concerns, or to request a meeting. Please remember that I (like many of you) have a full-time job and thus I may not always be able to respond immediately. I will not have office hours but can usually meet before or 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, with the exception of excerpts from one casebook.

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 skill you will continue to develop for the remainder of 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 10-15 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 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.** On October 22, students should be prepared to briefly (1-2 minutes) state a proposed paper topic in the class. As noted above, the final two classes will also be dedicated to 10-minute student presentations of the papers. Final papers are due on **Friday, December 14, 2018.** 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. Last year, they included senior officials in the Department of Justice, the Federal Defenders Office, and Congress.
1. **8/27/18** **Introduction: September 11, 2001**

   - 9-11 Report Chapter 1: We Have Some Planes

     In class, we will watch some videos of the 9/11 attacks and discuss the course. Please also take a look at the [Fatwah issued by Usama Bin Laden on February 23, 1998](#).

2. **9/3/18** **No Class (Labor Day)**

3. **9/10/18** **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](#)
   - [President Trump, The Administration’s National Security Strategy, 2017](#)

4. **9/17/18** **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)](#) (focus on Brandeis’s dissent)
   - [Katz v. United States, 389 U.S. 347 (1967)](#)
   - [Smith v. Maryland, 442 U.S. 735 (1979)](#)
   - [In re Directives of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (2008)](#)
   - [United States v. Carpenter, 585 U.S. ___ (2018)](#)
4. **9/24/18**  
**FISA and Electronic Surveillance**

- 9-11 Report Chapter 4: Responses to Al Qaeda’s Initial Assaults
- Kris & Wilson, Chapter 4: An Overview of FISA
- Kris & Wilson, Chapter 10: The Rise and Fall of the FISA Wall
- United States v. Daoud, 755 F.3d 479 (2014)
- [FISA Application on Former Trump Campaign Official Carter Page](#)

5. **10/1/18**  
**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
- [Tracking Down Terrorists in Court, New Yorker, May 15, 2017](#)
- [U.S. Citizen Convicted in 2009 Suicide Attack in Afghanistan, Wash. Post, 9/29/17](#)
- [Father of Accused Terrorist Nearly Causes Mistrial, N.Y. Post, 9/28/17](#)
- [Home Office Suspends Cooperation over US Death Penalty Threat for ISIS Pair, The Guardian, July 2018](#)

6. **10/9/18 (Tuesday)**  
**Constitutional & Evidentiary Issues: The 4th & 5th Amendments**

- 9-11 Report Chapter 6: From Threat to Threat
- *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157 (2d Cir. 2008)
- [U.S. v. Abu Kattalah, Order Denying Motion to Suppress (D.D.C. Aug. 16, 2017)](#)

7. **10/15/18**  
**Stings and Entrapment**

- 9-11 Report Chapter 7: The Attack Looms
- United States v. Cromitie, 727 F.3d 194 (2d Cir. 2013)
- [United States v. Viktor Bout, __ F.3d__ (2d Cir. Sep. 27, 2013)](#)
- [Documents Provide Rare Insight into FBI’s Terrorism Stings, Wash. Post, 4/13/12](#)
- [Disarming Viktor Bout, New Yorker, March 2012](#)
8. 10/22/18 Terrorists, Enemy Combatants, and Freedom Fighters

- 9-11 Report Chapter 8: The System Was Blinking Red
  - U.S. v. Hamidullin, 388 F.3d 62 (4th Cir. 2018) (affirming district court)
  - Lost in Syria, New Yorker, Feb. 16, 2015
  - Lost in the Jihad, New Yorker, 2003
  - American Held as ISIS Suspect, Creating a Quandary for Trump Administration, NY Times, 10/6/17

9. 10/29/18 CIPA, Trial Evidence, and Military Courts

- 9-11 Report Chapter 9: Heroism & Horror
  - One 9/11 Tally: $3.3 Billion, NY Times, Sept. 8, 2011
  - Kris & Wilson, Chapter 25: An Overview of CIPA
  - Shannon, The Use of Classified Information in Criminal Trials, Side Bar, Fall 2013
  - Comparison of Rights in Military Commission Trials and Trials in Federal Court, Congressional Research Service, March 2014
  - Steve Vladeck, Why Aren’t the Military Commissions Working? Look No Further than Al-Nashiri, Lawfare, May 21, 2018

10. 11/5/18 Espionage and the Unauthorized Disclosure of Classified Information

- 9-11 Report Chapter 10: Wartime
  - Department of Navy v. Egan, 484 U.S. 518 (1988)
  - Real Insiders, New Yorker, 7/4/05
  - Justice Dept. Seeks to Drop Charges against former AIPAC Officials, LA Times, 5/2/09
11. 11/12/18  The Press and National Security: Transparency v. Secrecy

- 9-11 Report Chapter 11: Foresight – and Hindsight
  - United States v. Zazi, 2010 WL 2710605 (E.D.N.Y.)
  - United States v. Sterling, 724 F.3d 382 (4th Cir. 2013)
  - Times Reporter Will Not Be Called in Leak Case, NY Times, 1/12/15
  - CIA Reporter is Found Guilty in in Leak Tied to Times Reporter, NY Times, 1/26/15
  - Ex-CIA Officer Sentenced in Leak Case Tied to Times Reporter, NY Times, 5/11/15
  - Ex-Senate Intelligence Staffer Indicted on charges of lying in leak probe, Politico, 6/6/18
  - United States v. James Wolfe (Senate Intelligence Committee Staffer) (2018)
  - Attorney General Jeff Sessions, Briefing on Leaks of Classified Information, 8/4/17

12. 11/19/18  Separation of Powers and the Role of the Courts

  - Doe v. Mattis, 889 F.3d 745 (D.C. Cir. 2018)
  - I’ve Been Covering the Detention of Terrorism Suspects for 15 Years. What have we learned? NY Times, July 26, 2018

13. 11/26/18  Student Presentations

- 9-11 Report Chapter 13: How to Do It? A Different Way of Organizing Government
  - Keen & Hamilton, 2016 Terror Threat Worse than 2001, USA Today, 9/11/16
  - Cordero, The Challenge for the Generation that Experienced 9/11, Lawfare, 9/10/16

14.  Student Presentations