

Syllabus – Law 705-
R01
Emerging Issues/National Security: National Security Leaks & the
Law

Antonin Scalia Law School– Fall 2021
Professors Edward C. O’Callaghan & Sarah M. Isgur

Course Background:

Dating back to the Vietnam War, the U.S. government has suffered substantial unauthorized leaks of classified intelligence and other information. The most famous is arguably the *Pentagon Papers*, wherein a Department of Defense Report titled *Report of the Office of the Secretary of Defense Vietnam Task Force* were released by Daniel Ellsberg and captured on the front page of *The New York Times* in 1971. The *Pentagon Papers*, the *Times* would later note, evinced that the Administration “systematically lied, not only to the public but also to Congress.”¹ As such, the *Papers* case makes clear the import of the news media in reporting on national security information—especially when it enables further debate; so, too, does it make clear the value of the First Amendment and the core freedom of the press principles embedded in this country’s founding. But at what cost?

The *Pentagon Papers* case only tells half the story. Compare that case to the 2017 *Vault 7* leaks, wherein WikiLeaks published detailed files outlining CIA technology used in cyberwarfare, thereby compromising crucial means by which our country protects itself and keeps tabs on its enemies abroad, significantly damaging international relations in the process. At no point were those tools deemed illegal, nor did the government lie about their capabilities to Congress or the American people. Thus, a countervailing policy argument would face even more scrutiny about the worthiness of the leak.²

The *Pentagon Papers* and *Vault 7* leaks sit at opposite ends of the spectrum; *most* cases fall further in the middle, where the public interest in the media presenting newsworthy information is simultaneously at odds with the government’s interest in protecting its citizens. This class will focus on that tension, beginning with the Constitutional, statutory, and regulatory rules governing these scenarios as well as the practical difficulties in conducting these investigations.

It is also a particularly auspicious time to study this topic. National Security leaks continue to transpire at an alarming rate, news stories continue to leak regarding the Trump Administration’s use of subpoenas to investigate government leakers, and President Biden—rather than Attorney General Garland, who subsequently effectuated President Biden’s wish—has pronounced a change in the Justice Department’s policy with regard to whether it will be allowed to seek certain types of records from reporters to investigate future and past leaks alike.

¹R.W. Apple Jr., *25 Years Later: Lessons From the Pentagon Papers*, N.Y. TIMES (June 23, 1996).

²At present, a jury was deadlocked on the substantive charges against the former CIA employee accused of executing the *Vault 7* leak.

³See, e.g., Alexandra Jaffe, *Biden won’t allow Justice Dept. to seize reporters’ records*, ASSOC. PRESS (May 21, 2021).

⁴See, e.g., Eric Tucker, *Justice Dept. says it’ll no longer seize reporters’ records*, ASSOC. PRESS (June 5, 2021).

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Learning Outcomes:

Students will demonstrate basic understanding of the sometimes antithetical interests of the news media and federal prosecutors seeking to prosecute cases of unauthorized disclosure of classified information. Students will be able to debate how the government should protect national security secrets using recent case examples and be able to write persuasively about how to balance the values of the First Amendment with an increasingly broad set of classified information in the digital age.

Class Format:

Class participation will be important. Discussion is expected to be lively and engaged every week. This is a hybrid course, with some students participating in the classroom and some participating via Zoom. Students will be sent information on the classroom location and the Zoom meeting invitation prior to the first class.

Grading:

Grading will be based on the final paper (65%) and class participation (35%).

Class Details:

Class will meet on Thursdays from 8pm-10pm for 7 sessions.

Grading Details:

Grading will be based on a final paper. Students enrolled in the 1-credit course will be expected to submit an 8-10 page paper and students enrolled in the 2-credit course will be expected to submit a 15-20 page paper on a topic of their choosing related to a topic discussed in class. All papers are due by Dec 6th. At the Aug. 26 introductory class session, the instructors will provide additional information about the 1- and 2-credit options.

Office Hours:

Office hours are by appointment--in person or over zoom.

Course Assignments:

THERE IS NO BOOK for this class; rather, all assignments will be posted on TWEN or provided by the professors at least 6 days in advance of class.

Class 1: Introduction

Date: Aug 26 [Note: This session will be an abbreviated intro to the material that we will cover and then the next class is not until Sept 16]

Topics

- Introductions
- Seminar overview and requirements
- Discussion of differences between 1- and 2- credit options and how to register in the 2-credit course
- Snapshots of two compelling national security leak cases: Edward Snowden, and Vault 7

Required Reading

1. The Basics

- U.S. Const. amd. I.
- The Espionage Act
- 18 U.S.C. §§ 793, 798.
- *Schenck v. United States*, 249 U.S. 47 (1919).

2. Snowden

- Glenn Greenwald, [*NSA collecting phone records of millions of Verizon customers daily*](#), THE GUARDIAN (June 6, 2013).
- Nick Hopkins, [*UK gathering secret intelligence via covert NSA operation*](#), THE GUARDIAN (June 7, 2013).
- James Ball, Julian Borger, & Glenn Greenwald, [*Revealed: how US and UK spy agencies defeat internet privacy and security*](#), THE GUARDIAN (Sept. 6, 2013).

3. Vault 7

- Shane Harris & Paul Sonne, [*WikiLeaks Dumps Trove of Purported CIA Hacking Tools*](#), WALL ST. J. (Mar. 7, 2017).
- Cyrus Farivar, [*Man who allegedly gave Vault 7 cache to WikiLeaks busted by poor opsec*](#), ARSTECHNICA (June 19, 2018).
- Jeff Stone, [*A researcher made an elite hacking tool out of the info in the Vault 7 leak*](#), CYBERSCOOP (Feb. 27, 2019).
- Alexander Culafi, [*CIA unaware of Vault 7 theft until WikiLeaks Dump*](#), TECHTARGET: SEARCH SECURITY (June 16, 2020).

Optional Reading

- David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).
- Susan Hennessey & Helen Klein Murillo, [*The Law of Leaks*](#), Lawfare (Feb. 15, 2017).

- [WikiLeaks releases CIA hacking documents “Vault 7”](#), CBS NEWS (Mar. 7, 2017).
- [The Law and Leaks to the Press](#), CONG. RESEARCH SERVICES: LEGAL SIDEBAR (Feb. 22, 2017).
- *The Lawfare Podcast: ‘National Security, Leaks and Freedom of the Press’*, Apr. 20, 2021.

Class 2: The Building Blocks of First Amendment and Prior Restraint Law

Date: Sept 16

Topics

- The First Amendment to the United States Constitution
- The Espionage Act
- Prior Restraint and its intersection with national security

Required Reading

- *Near v. Minnesota*, 283 U.S. 697 (1931).
- *New York Times Co. v. United States*, 403 U.S. 713 (1971).
- *U.S. v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wisc. 1979).

Optional Reading:

- *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).
- *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
- *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 610–611 (7th Cir. 2012) (Posner, J., Dissenting).
- William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech Subsequent Punishment and the Cost of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982).
- Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 B.Y.U L. REV. 1151 (2016).

Class 3: How the Media Handles Classified Information

Date: Sept 23

[MEDIA GUEST SPEAKER]

Topic

- How should the media act when it receives confidential information from a government leaker?

Required Reading

- Peter Maass, [How Laura Poitras Helped Snowden Spill His Secrets](#), N.Y. TIMES (Aug. 13, 2013).

- Roy Greenslade, [*How Edward Snowden led journalist and film-maker to reveal NSA secrets*](#), THE GUARDIAN (Aug. 19, 2013).
- Scott Shane, [*When Spies Hack Journalism*](#), N.Y. TIMES (May 12, 2018).
- Jack Goldsmith, [*The WikiLeaks-ization of the American Media*](#), WASH. EXAMINER (May 14, 2018).
- Charlie Savage, [*How The Times Decides When to Publish Leaked News*](#), N.Y. TIMES (June 7, 2018).

Optional Reading

- Floyd Abrams, [*The Pentagon Papers a Decade Later*](#), N.Y. TIMES (June 7, 1981).
- Adam Liptak, [*A First Amendment Case That Made an 'Incoherent State of the Law'*](#), N.Y. TIMES (June 9, 2021).
- [*'We're Going to Publish': An Oral History of the Pentagon Papers*](#), N.Y. TIMES (June 9, 2021).

Class 4: *The Government's Reaction to a Leak Story*

Date: Sept 30

Topics

- Once a leak has been committed and a news outlet publishes the content of the leak, how do Government agencies/DOJ react?
- How do we square the inherent tension of avoiding confirmation of the classified information but also suggesting that the DOJ will find and prosecute a leaker?

Required Reading

- DOJ Guidelines: Justice Manual § 1-7.400, *Disclosure of Information Concerning Ongoing Criminal, Civil, or Administrative Investigations*.

Optional Reading

- Thomas Burr, [*Mr. No Comment: Meet the Utahn who speaks for the special counsel's Russia-Trump probe, but don't expect him to say too much*](#), SALT LAKE TRIB. (Apr. 14, 2018).
- Matt Zapotosky & Devlin Barrett, [*Inside the Mueller Team's Decision to Dispute BuzzFeed's Explosive Story on Trump and Cohen*](#), WASH. POST (Jan. 19, 2019).

Class 5: *Investigating the Leak, Part I*

Date: Oct 7

Topics

- Once the government has in fact determined there was a leak of classified information that is damaging to national security, what tools does the government have at its disposal to investigate the matter and determine the leaker?
- What are the mechanics of those involved in the investigation? Who is in those meetings? Who takes point? How are decisions made, including what venue to

assign the investigation and pursue a prosecution (if multiple options are available)?

- DOJ Media Policy – balancing investigative interests with freedom of press considerations; should DOJ have abandoned the policy or amended it?

Required Reading:

- 28 C.F.R. § 50.10; Justice Manual § 9-13.400, *Obtaining Information From, or Records of, Members of the News Media; and Questioning, Arresting, or Charging Members of the News Media.*

Class 6: Investigating the Leak, Part II – A Case Study

Date: Oct 14

[GOVERNMENT GUEST SPEAKER]

Topics

- Leak Simulation and/or Particular Case Study

Required Reading

- TBD

Class 7: Recent Trends in Leaks, Recent Changes and Controversies in Policy

Date: Oct 21

Topics

- What have recent leaks looked like?
- How have the Obama, Trump, and Biden Administrations handled leak cases?

Required Reading

- Alexandra Jaffe, [Biden won't allow Justice Dept. to seize reporters' records](#), ASSOC. PRESS (May 21, 2021).
- Katelyn Polantz & Evan Perez, [Trump administration pursued CNN reporter's records in months-long secret court battle](#), CNN (June 9, 2021).
- Press Release, [Federal Government Contractor Sentenced for Removing and Transmitting Classified Materials to a News Outlet](#), U.S. Dep't of Justice (Aug. 23, 2018).
- Press Release, [Former FBI Agent Sentenced for Leaking Classified Information](#), U.S. Dep't of Justice (Oct. 18, 2018).
- Press Release, [Former CIA Officer Sentenced for Conspiracy to Commit Espionage](#), U.S. Dep't of Justice (Nov. 22, 2019).
- Press Release, [Former CIA Officer Sentenced to Prison for Espionage](#), U.S. Dep't of Justice (May 17, 2019).
- Press Release, [Former DIA Analyst Sentenced for Leaking Classified Information to Journalists](#), U.S. Dep't of Justice (June 18, 2020).
- Press Release, [Former CIA Officer Arrested and Charged with Espionage](#), U.S. Dep't of Justice (Aug. 17, 2020).