

COUNTERTERRORISM, COVERT ACTION AND SPECIAL OPERATIONS LAW

COURSE NUMBER: 148-R01
SEMESTER: FALL 2021 (2 credits)

Faculty Contact Information:

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Learning Outcomes:

This seminar course will explore the laws and policies around U.S. government counterterrorism efforts broadly and will survey the wide range of legal issues implicated by such efforts at home and overseas. The course will bring the legal and ethical considerations into focus by delving into case studies in the covert action and special operations law spaces. Issues to be addressed will include, but not be limited to: international and domestic law applicable to counterterrorism activities, the authorities for the use of force, offensive operations overseas, domestic counterterrorism efforts, surveillance of terrorists, detention and interrogation of terrorism suspects, and other legal issues related to counterterrorism, covert actions and special operations. A portion of this course will be dedicated to learning how counterterrorism law fits into the greater national security law apparatus and plays out in the American legal system with its separation of powers—specifically how to think like a counterterrorism lawyer.

Throughout this course, students will not only expand their knowledge of the laws and policies that govern these three-related areas, but also conduct basic academic research. Through the short written assignments, students will focus on writing for a legal audience, presenting and defending a clear thesis, researching in law and other disciplines, and writing a well-organized and thoughtful position paper. In addition, there will be two in-class exercises where students will be able to hone their briefing and/or public speaking proficiencies. At the end of this course students will not only have a better understanding of substantive areas of law, but also increase their academic research, writing, and speaking skills.

CLASS FORMAT:

Seminar class of up to 25 students; 2 credits; one class per week. The instructors will utilize the Socratic method for class discussions, invite occasional guest speakers with professional expertise on selected course topics, and conduct two in class exercises. **Active participation in class discussions is required** and students are expected to be **fully prepared** for each class session. Pending and subject to any further administrative decisions by the Law School, this class will be held in a hybrid fashion that will include in-person and/or online attendance; each student is permitted to decide how they choose to attend the seminar. The format election made at the first class must be submitted in writing prior to Friday, Sept. 3 and is binding for the semester, absent extenuating circumstances.

GRADING:

- Class discussions showing thoughtful review and critical analysis of the assigned materials will be an integral part of the learning process. As such, 10% of your final grade will be based on over all class participation.
 - On class participation, if we call on you and you participate in a meaningful way, you get your participation point. If you volunteer in a discussion in a meaningful way you get a participation point. If we call on you in class and you are absent and you are not excused from class you miss your point. If you are not prepared in class you will miss your point. If you are not prepared and you waste time by intentionally trying to obfuscate your lack of preparation you not only will miss your point, we will take a point away (just say you are not prepared so we can move on). To be clear, incorrect answers and genuine questions are never a problem in this course. There will never be sanctions for trying in this course, only for not trying or misrepresenting.
 - We will be taking class attendance, consistent with the law school policy. Students must attend class regularly and must be prepared for class.
 - If this class is virtual, we have an on-camera policy. If you can't keep your camera on for some reason, just let us know ahead of time.
- We will have two class exercises (accompanied by a 1-page writing assignment) that will each account for 20% of your grade.
 - LATE assignments will be penalized. Please DO NOT turn in your work late. If you will be late please let us know and be prepared to submit a motion for an extension of time for your late assignment (p.s. 8:11 pm is not 8:10pm.) Late assignments will be assessed 5% of maximum grade for each day they are late.
- The remaining 50% of your grade will be made up by a final exam, as scheduled by the Law School administration.

CLASS DETAILS:

Wednesdays: 6:05 – 8:05 PM

Class will be conducted in a hybrid fashion, and students may attend in person OR via Zoom (if required by COVID considerations).

OFFICE HOURS:

By appointment.

SYLLABUS AND TENTATIVE READING ASSIGNMENTS:

Please note that the assigned readings may be revised during the semester but no less than one full week before the applicable class session.

Week 1 = August 25th

Introduction to Counterterrorism, Covert Action, and Special Operations Law

[M. Peterlin & Sean Kanuck]

Required Readings (all publicly available on the Internet):

- United States Constitution: Article I, Sections 8-10; Article II; Sections 2-3; Article III, Section 2; Article IV, Section 4; Article VI; Amendments 1, 4, 5, 6, 8, and 14 (Section 1).
- United Nations Charter: Chapter I (Articles 1-2); Chapter VI (Articles 33-38); Chapter VII (Articles 39-42, 48-51); Chapter XIV (Articles 92-96).
- Universal Declaration of Human Rights: Articles 1-3, 5-15, 17-20, 28-30.

Week 2 = September 1st

Domestic Legal Framework for Counterterrorism Operations

[M. Peterlin]

Required Readings:

- *US v. Curtiss-Wright Export Corp* – judicial interpretation
- Text of 2001 AUMF
- War Powers Resolution - 1973
- OLC opinions - Libya (2011), Iraq (2014), Syria (2018)

Week 3 = September 8th

Foreign and Domestic Surveillance

[Sean Kanuck]

Required Readings:

- USA PATRIOT and USA FREEDOM Acts (**selected excerpts tbd**)
- Commission on CIA Activities Within the United States, *Report to the President* (June 1975) – Chs. 1-2, pp. 3-8 (TWEN) (6 pp.)
- John Napier Tye, *Meet Executive Order 12,333: The Reagan Rule that Lets the NSA Spy on Americans*, Wash. Post, pp. 1-4 (July 18, 2014) (TWEN) (4 pp.)
- Charlie Savage, *Declassified Report Shows Doubts About Value of N.S.A's Warrantless Spying*, New York Times (April 24, 2015) (2 pp.)
- James P. Pfiffner, *Presidents Bush, Obama, and the Surveillance of Americans*

in *THE QUEST FOR LEADERSHIP: ESSAYS IN HONOR OF THOMAS E. CRONIN*, Cambria Press (2015) (TWEN) – pp. 1-12 of PDF (12 pp.)

- Office of the Director of National Intelligence, *The FISA Amendments Act: Q&A*, pp. 1-10 (Apr. 18, 2017) (TWEN) (10 pp.)

Week 4 = September 15th

Detention and Interrogation

[Sean Kanuck]

Required Readings (**to be reduced**):

- Geneva Convention (III) Relative to the Treatment of Prisoners of War, Common Article 3 (1949) (1 pp.)
- Jay S. Bybee, *Memorandum for Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, U.S. Department of Justice, pp. 1-46 (Aug. 1, 2002) (46 pp.)
- *Hamdan v. Rumsfeld*, 548 U.S. 557, 557-65 (2005) (9 pp.)
- *Hamdi v. Rumsfeld* (2004) (selected excerpts tbd)
- Detainee Treatment Act of 2005 (selected excerpts tbd)
- President Trump's Executive Order re lawful detention of terrorist
- 2012 National Defense Authorization Act - section 1022 (indefinite military detention without charge or trial)
- CRS report - Wartime Detention Provisions in Recent Defense Authorization Legislation – Congressional reaction to Executive efforts.
- August 2020 decision by Rao - <https://www.cadc.uscourts.gov/internet/opinions.nsf/D0E6FA5B87B19006852585D2004F674C/%24file/19-5079-1858799.pdf>
- John Brennan, CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program (June 27, 2013) (TWEN) – pp. 1-7, 12-15, 21-23 (14 pp.).
- Central Intelligence Agency, CIA Fact Sheet Regarding the SSCI Study on the Former Detention and Interrogation Program (Dec. 12, 2014) (TWEN) – pp. 1-2 (2 pp.)

Week 5 = September 22nd

Ethical and Civil Liberty Concerns

[M. Peterlin]

Required Readings:

- Jeh Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration* (Feb 22, 2012)
- Jamil N. Jaffer, *The Ethics of National Security Lawyering: A Response to Jeh Johnson*, 31 Yale L. & Pol. Rev. 173, 173-183 (2012)

- Office of Legal Counsel, *Memorandum Regarding OLC War on Terror Opinions* (Jan 15, 2009)

Week 6 = September 29th

State Sponsors of Terrorism – and CT sanctions

[M. Peterlin]

Required Readings:

- 18 U.S.C. 2339A
- People’s Mojahedin Organization v. U.S. Department of State
- E.O. 132224
- FTO statute 8 USC 1189 (tbd)
- DC Circuit FTO cases on the group PMOI (circa 2010 or 2011)

Week 7 = October 6th

Midterm Classroom Exercise – Case Study re Qasem Soleimani

This is the first classroom exercise with written assignment (20% of your grade)

[Sean Kanuck & M. Peterlin]

Required Readings (**source materials re Quds Force to be added**):

- Mark J. Gasiorowski, The 1953 Coup D’Etat in Iran, 19 Int’l J. of M. E. Studies 261 (Aug 1987) (TWEN) — pp. 261-279 (19 pp.)
- U.S. State Department, Proposal to Organize a Coup D’Etat in Iran (Nov. 26, 1952) (TWEN) — pp. 1-4 (4 pp.)
- U.S. State Department, British Proposal to Organize a Coup D’Etat in Iran (Dec. 3, 1952) (TWEN) — pp. 1-2 (2 pp.)
- United Nations General Assembly, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* (Dec. 9, 1981) (TWEN) (3 pp.)
- Torey L. McMurdo, The Economics of Overthrow: The United States, Britain, and the Hidden Justification of Operation TPAJAX, 56 Studies in Intelligence 15 (June 2012) (TWEN) — pp. 15-24 (10 pp.)
- Lawrence E. Walsh, Final Report of the Independent Counsel for Iran/Contra Matters, Vol 1: Investigations and Prosecutions (Aug. 4, 1993) (TWEN) — pp. xiii – xxi (9 pp.)
- DOJ Office of Legal Counsel, Application of the Neutrality Act to Official Government Activities (Apr. 25, 1984) (TWEN) — pp. 58-81 (24 pp.)
- Lawrence E. Walsh, Political Oversight, the Rule of Law, and Iran-Contra, 24 Clev. State L. Rev. 587 (1994) (TWEN) — pp. 587-597 (11 pp.)
- Ruth Marcus, Intelligence Law: What Notice Does It Require?, Washington Post (Dec. 21, 1986) (TWEN) — pp. 1-2 (2 pp.)

Week 8 = October 13th

Domestic Legal Framework for Covert Action and Special Operations

[Sean Kanuck]

Required Readings (**to be reduced**):

- William Colby, Memorandum for National Security Advisor Dr. Henry A. Kissinger: Congressional Pressure to Curtail or Modify CIA's Statutory Authority to Perform Functions Directed by the National Security Council (Aug. 28, 1973) (TWEN) — pp. 1-6 (6 pp.)
- DOJ Office of Legislative Counsel, Memorandum re: Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency (Jan. 17, 1962) (TWEN) — pp. 1-13 (13 pp.) (note: this memo is attached to the Colby memo above).
- Executive Order 12333, as amended (2008) (TWEN) — sects 1.1-1.2, 1.3(b)(3), 1.3(b)(20), 1.7(a), 1.7(b)(1)-(2), 1.7(c)(1), 1.7(f)(1)-(2), 1.7(g)(1)-(2), 1.7(h)(1)-(2), 1.7(i)(1), 1.7(j), 1.8(a), 1.9, 1.10(a)-(d), 2.9-2.13, 3.1, 3.5(a)-(b) (10 pp.)
- Andrew Feickert, U.S. Special Operations Forces (SOF): Background and Issues for Congress, Congressional Research Service (2019) (TWEN) — pp. 1-11 (11 pp.)
- Joint Chiefs of Staff, Special Operations, Joint Pub. 3-05 (2014) (TWEN) — pp. ix-xv, II-1-10, II-1-II-18 (35 pp.)
- 10 U.S.C. § 167 (2016), Unified Combatant Command for Special Operations Forces (TWEN) — pp. 1-5 (5 pp.)
- Department of State, Note on U.S. Covert Action Programs, Foreign Relations of the United States 1969-1976, Volume E-12, Documents on East and Southeast Asia, 1973- 1976 (TWEN) — pp. 1-4 (4 pp.)
- Congressional Research Service, Reported Foreign and Domestic Covert Activities of the U.S. Central Intelligence Agency: 1950-1974 (TWEN) — pp. 1-13 (13 pp.)
- Statement of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence, House Select Committee on Intelligence (Dec. 9, 1975) (TWEN) — pp. 1729-1738 (9 pp.)
- Michael E. DeVine & Heidi M. Peters, Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief, Congressional Research Service (2018) (TWEN) — pp. 1-8 (8 pp.)

Week 9 = October 20th

Paramilitary Operations: The Title 10 Versus Title 50 Debate

[M. Peterlin]

Required Readings (**tentative**):

- E.O. 12333
- Director of Central Intelligence, *Report of Interdepartmental Working Group on Paramilitary Requirements* (undated), pp. 1-2

- Richard A. Best Jr. & Andrew Feickert, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress* (2006) pp.1-6
- Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 2 Harv. Nat. Sec. L. J. 85 (2011) pp. 85-115.
- Caroline D. Krass, *Responses to QFR* (2014), pp. 1-4

Week 10 = October 27th

High Value Targets: Case Study re Osama Bin Laden and the Pakistan Raid

[Sean Kanuck]

Required Readings:

- Report of the National Commission on the Terrorist Attacks of September 11, 2001 (9/11 Commission Report) (July 22, 2004) (TWEN) — pp. 126-143 (18 pp.)
- Marty Lederman, The U.S. Perspective on the Legal Basis for the bin Laden Operation, *Opinio Juris* (May 24, 2011) (TWEN) — pp. 1-9 (9 pp.)
- Charlie Savage, How 4 Lawyers Enabled Killing of Bin Laden, *The New York Times* (Oct. 29, 2015) (TWEN) — pp. 1-4 (4 pp.)
- Marty Lederman, Further on the Law of the bin Laden Operation, Part I, *Just Security* (Nov. 3, 2015) (TWEN) — pp. 1-12 (12 pp.)
- Marty Lederman, Further on the Law of the bin Laden Operation, Part II, *Just Security* (Nov. 4, 2015) (TWEN) — pp. 1-7 (7 pp.)
- Stephen L. Carter, Obama's Secret Rationale for the Raid on Bin Laden, *Bloomberg Opinion* (Jan. 29, 2019) (TWEN) — pp. 1-4 (4 pp.)
- Charlie Dunlap, Yes, the Raid that Killed Osama Bin Laden was Lawful, *Lawfare* (Jan. 31, 2019) (TWEN) — pp. 1-5 (5 pp.)

Week 11 = November 3rd

Drone Strikes and Targeted Killings – focus is due process

[M. Peterlin]

Required Readings:

- Elizabeth B. Bazan, Assassination Ban and E.O. 12333: A Brief Summary (Jan. 4, 2002) (TWEN) — pp 1-6 (6 pp.)
- David J. Barron, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Legal Operations Against Shaykh Anwar al-Aulaqi, Office of Legal Counsel, at 12-30, 38-41 (July 16, 2010) (TWEN) (22 pp.)
- Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, *New York Times* (Oct. 28, 2015) (TWEN) (7 pp.)
- Daniel Byman, *Why Drones Work*, *Foreign Affairs* (July/August 2013) (TWEN) (13 pp.)

- Audrey Kurth Cronin, *Why Drones Fail*, Foreign Affairs (July/August 2013) (LEXIS) (6 pp.)

Week 12 = November 10th

Cyber Operations

[Sean Kanuck]

Required Readings (**to be reduced**):

- Hans-Georg Dederer and Tassilo Singer, *Adverse Cyber Operations: Casualty, Attribution, Evidence, and Due Diligence*, 95 Int'l L. Stud. 430, 430-66 (2019) (TWEN) (36 pp.)
- Catherine A. Theohary & Anne I. Harrington, *Cyber Operations in DOD Policy and Plans: Issues for Congress*, Congressional Research Service (Jan. 5, 2015) (TWEN) — pp. 1-13 (13 pp.)
- Paul K. Kerr, John Rollins, and Catherine A. Theohary, *The Stuxnet Computer Worm: Harbinger of an Emerging Warfare Capability*, Congressional Research Service (Dec. 9, 2010) (TWEN) — pp. 1-8 (8 pp.)
- Dorothy E. Denning, *Stuxnet: What Has Changed?*, 2012 Future Internet 672 (2012) (TWEN) — pp. 672-685 (14 pp.)⁶
- Dr. Kathrine Ziolkowski, *Stuxnet – Legal Considerations*, N ATO Cooperative Cyber Defence Centre of Excellence (2012) — pp. 3-25 (23 pp.)
- Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 2 Harv. Nat. Sec. L. J. 85 (2011) (TWEN) — pp. 115-141 (27 pp.)
- Department of Defense, *Summary - Cyber Strategy 2018* (TWEN) — pp. 1-7 (7 pp.)
- United States Cyber Command, *Achieve and Maintain Cyberspace Superiority Command Vision for U.S. Cyber Command* (2018) (TWEN) — pp. 2-10 (9 pp.)
- John S. McCain National Defense Authorization Act for Fiscal Year 2019 – Selected Cyber Provisions, P.L. 115-232 (Aug. 13, 2018) (TWEN) — pp. 1-6 (6 pp.)
- President Trump's Executive Order re offensive cyber operations

Week 13 = November 17th

Final Classroom Exercise - Congressional Oversight and Accountability

This is the second classroom exercise with written assignment (20% of your grade)

[M. Peterlin and Sean Kanuck]

Required Readings (**source materials re Abu Ghirab prosecutions to be added**):

- War Powers Resolution, 50 U.S.C. §§ 1541-1550 (1973) (TWEN) (3 pp.)
- James S. Van Wagenen, *A Review of Congressional Oversight: Critics and Defenders*, 97 Stud. in Intel. ___, (Apr. 14, 2007) (TWEN) (3 pp.)
- Freedom of Information Act, 5 U.S.C. § 552 et seq. [selected excerpts] (TWEN) (7 pp.)

- Congressional Research Service, *Intelligence Community Whistleblower Protections*, (Sept. 23, 2019) (TWEN) (15 pp.)
- Michael E. DeVine, *Covert Action and Clandestine Activities of the Intelligence Community: Framework for Congressional Oversight in Brief* (Aug. 9, 2019) (TWEN) — pp. 1-9 (9 pp.)