

Syllabus – Law 131: Intelligence Law

Antonin Scalia Law School – Fall 2021

Maggie Martin

Learning Outcomes:

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 United States Intelligence Community (IC). Understanding of the framework of intelligence law is essential for national security, military and intelligence professionals not only as it applies to specific programs and activities, but also for broader awareness of the status of these activities within the greater national and Constitutional structure. Among these issues, the class will examine the evolution of executive and legislative branch authorities (Separation of Powers), constitutional and civil liberties issues, and the application of legal principles to the resolution of pressing and novel national security problems.

- Students will understand the tensions facing a democratic society engaged in national security activities, such as clandestine or covert executive branch activities or national security surveillance, and will study the legal framework governing those activities.
- Students will know 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 know the historical development of legal authorities for 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: Course for up to 25; two credits; one two-hour class per week. Active participation in class discussions is required and students are expected to be fully prepared for each class session. 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: Grades will be based on a final exam and class participation consistent with the law school grading policy. Class attendance will also factor into grading, consistent with school policy.

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

Office Hours: Appointments can be made to meet in person, over Zoom, or by telephone.

Faculty Contact Information: mmart4@gmu.edu; 571-455-0387

Course Materials: The course does not use a textbook; the syllabus includes readings from a variety of sources. Course materials will be linked or posted on TWEN.

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

Aug 25, Class 1: Introduction: Intelligence, National Security & Separation of Powers

- [Skim only] Office of the Director of National Intelligence, *Annual Threat Assessment of the US Intelligence Community* (April 9, 2021), <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf>.
- [Focus on Articles I and II] The Constitution of the United States, <https://www.archives.gov/founding-docs/constitution>.
 - Focus on Articles I and II
- *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579 (1952)
- *Curtiss-Wright Export Corp. v. United States*, 299 U.S. 304 (1936)
- Reflections on Jack Goldsmith, *Power and Constraint* (TWEN)
 - 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/>.

Sep 1, Class 2: Legal Framework and Legal Authorities

- 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) [Read all of the opinions]
- Appendix C, *An Intelligence Community Primer*, The Commission on the Intelligence Capabilities of the United States regarding Weapons of Mass Destruction (“WMD Commission Report”), at 579-589 (March 31, 2005),

<https://www.govinfo.gov/content/pkg/GPO-WMD/pdf/GPO-WMD.pdf>

- Congressional Research Service, U.S. Intelligence Community Elements: Establishment Provisions (June 27, 2018), <https://fas.org/sgp/crs/intel/IF10527.pdf>
- Statutory Organization of the IC
 - **Table of Contents** of Title 50 of the US Code, “War and National Defense.”
 - **Table of Contents** for Chapter 44 of Title 50, “National Security,” where the National Security Act of 1947, the Intelligence Reform and Terrorism Prevention Act of 2002, the CIA Act of 1949, and others are codified.
 - 50 USC 3002 and 3003 (Congressional purpose and definitions)
 - Skim 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 12333
- Congressional Oversight of the Intelligence Community:
 - Review the **Table of Contents** for Title 50, Chapter 44, Subchapter III: Accountability for Intelligence Activities
 - 50 USC 3091-3092
 - Director of National Intelligence Daniel Coats, *Intelligence Community Directive 112: Congressional Notification* (June 29, 2017), https://www.dni.gov/files/documents/ICD/ICD-112_17-00383_SIGNED.PDF

Sep 8, Class 3: 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.
- *Report of the National Commission on Terrorist Attacks Upon the United States* (“9/11 Commission Report”) (2004), <https://9-11commission.gov/report/>
 - Executive Summary
 - Skim Chapter 8

- Chapter 13
- WMD Commission Report, <https://www.govinfo.gov/content/pkg/GPO-WMD/pdf/GPO-WMD.pdf>
 - Read Overview (pp 1-37)
- 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?

Sep 15, Class 4: US Military in the Intelligence Arena under Title 10

- 10 USC 137, *Undersecretary of Defense for Intelligence*, including note on “Relationship to Authorities under National Security Act of 1947”
- 10 USC 421-437 (Title 10, Chapter 21 of the U.S. Code: *DOD Intelligence Matters*)
- Congressional Research Service, *Defense Primer: Intelligence Support to Military Operations* (Dec 30, 2020), <https://fas.org/sgp/crs/natsec/IF10574.pdf>
- [Excerpts TBD] 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://jnslp.com/wp-content/uploads/2012/01/Military-Intelligence-Convergence-and-the-Law-of-the-Title-10Title-50-Debate.pdf>

Sep 22, Class 5: 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* (updated June 14, 2019), <https://fas.org/sgp/crs/intel/R45175.pdf>
- Eric Rosenbach & Aki Peritz, *Covert Action: Memo in report 'Confrontation or Collaboration: Congress and the Intelligence* (July 2009), <https://www.belfercenter.org/publication/covert-action>

Part III: Surveillance – The Fourth Amendment and FISA

Sep 29, Class 6: Fourth Amendment Foundations of Surveillance Law

- Robert S. Litt, ODNI General Counsel, *Speech: Privacy, Technology and National*

Security: An Overview of Intelligence Collection (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-intelligence-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 Case), 407 U.S. 297 (1972)

Oct 6, Class 7: The Origins of FISA

- *Reforming Foreign Intelligence*, Robert H. Bork, 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, Congressional Research Service, *Foreign Intelligence Surveillance Act (FISA): An Overview* (April 6, 2021), <https://fas.org/sgp/crs/intel/IF11451.pdf>
- Glenn Gerstell, *Making Sense of the Debates over FISA (Part One)* (June 22, 2020), <https://www.cfr.org/blog/making-sense-debates-over-fisa-part-one>.

October 13, Class 8: The Limitations of “Traditional” FISA and the NSA Terrorist Surveillance Program

- David Kris, *National Security Investigations and Prosecutions 3d*, chapter 15 (15:1 through 15:3 and 15:11 through 15:13), *The President’s Statutory and Constitutional Authority to Conduct Foreign Intelligence Surveillance and Searches – the NSA Surveillance Program* (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://fas.org/irp/news/2006/01/hayden012306.html>

Oct 20, class 9: FISA Modernization

- David Kris, *National Security Investigations and Prosecutions 3*, chapter 16 (Sections 16:1 through 16:7), *FISA Modernization*
- David Kris, *National Security Investigations and Prosecutions 3d*, chapter 17 (17:1

through 17:3), Surveillance and Searches Abroad

- Glenn Gerstell, *Making Sense of the Debates over FISA (Part Two)* (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://fas.org/sgp/crs/intel/R44457.pdf>
- Office of the Dir. of Nat'l Intelligence, *Section 702 Overview*, <https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf>
- Office of Civil Liberties, Privacy, and Transparency, ODNI, *Annual Statistical Transparency Report Regarding the Intelligence Community's Use of National Security Surveillance Authorities, Calendar Year 2020*, <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2021/item/2210-statistical-transparency-report-regarding-national-security-authorities-calendar-year-2020>

Part IV: What comes next?

Oct 27, class 10: 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>
- *One Nation, Tracked*, New York Times (Dec. 19, 2019), <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>
- *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>
- Kans, Michael, *Data Brokers and National Security* (Apr. 29, 2021), <https://www.lawfareblog.com/data-brokers-and-national-security>
- Bob Ashley and Neil Wiley, *How the Intelligence Community can get Better at Open Source Data* (July 16, 2021), <https://www.defenseone.com/ideas/2021/07/intelligence-community-open-source/183789/>

- Sen. Ron Wyden Press Release on The Fourth Amendment Is Not for Sale Act. <https://www.wyden.senate.gov/news/press-releases/wyden-paul-and-bipartisan-members-of-congress-introduce-the-fourth-amendment-is-not-for-sale-act->
- Kerr, Orin S., Buying Data and the Fourth Amendment (July 4, 2021). Hoover Institution Aegis Paper Series (forthcoming), <https://ssrn.com/abstract=3880130>

Nov 3, Class 11: 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*, Lawfareblog.com (Sep. 2, 2018), <https://www.lawfareblog.com/how-fisa-court-really-works>

Nov 10, Class 12: Guest Speakers TBD

Nov 17, Class 13: Considering National Security Legal Practice

- Matt G. Olsen, National Security Agency Law Day Speech (TWEN)
- Jeh Johnson, General Counsel of the Department of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration, Yale Law School (Feb. 22, 2012) (TWEN)

December 8: Final Exam