

Syllabus – Law 654-001:

Counterterrorism Law (Updated: August 2024)

Antonin Scalia Law School – Fall 2024

Craig R. Lisher

Brief Course Description:

This course will explore the laws and policies around U.S. government counterterrorism efforts and will survey the wide range of legal issues implicated by such efforts at home and overseas. Issues to be addressed will include 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, prosecutions, immigration matters, and other legal issues related to counterterrorism.

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 legal tools used by the executive branch in combating international and domestic terrorism in the United States; the role of the legislative branch in shaping the conduct of counterterrorism activities; and the impact of significant judicial opinions in this field.
- Students will learn about the tensions facing the United States in conducting counterterrorism activities by exploring the legal framework surrounding electronic surveillance, criminal detention and interrogation, entrapment, and immigration issues.
- Throughout the course, students will study the events surrounding 9/11, other significant terrorist attacks, and designated Foreign Terrorist Organizations; and be able to analyze counterterrorism-related legal issues, and provide cogent authorities-based arguments when addressing those issues.

Class Format: Between 10-15 students; 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 will be held in-person and all students are expected to be in class for each class session.

Class Details: Wednesdays: 6:05 pm – 8:05 pm.

Grading: Grades will be based on a final paper and class participation consistent with the law school grading policy. The final paper will consist of 75% of the final grade, while class participation, including any classroom presentations, will consist of the remaining 25%. Class attendance will also factor into grading, consistent with law school policy.

Classroom Participation and Attendance (25%): As the seminar tries to address complicated and controversial legal issues associated with national security and counterterrorism, a free-flowing discussion of divergent views necessarily enriches the learning experience.

To help encourage class participation and to help you to develop your own skills as a lawyer, each class we will assign students to help lead the discussion during that class. The assigned student or students should be prepared to lead the discussion of the assigned reading materials for the week.

In addition, at the end of the course, each student will also be required to give a 5-10 minute oral presentation on their final paper.

Final Paper (75%): 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. **Final Papers are due on Wednesday, November 27.** 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.

Final Paper Topics are due on Wednesday, September 25. Final Paper Outlines are due Wednesday, October 30.

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.

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

Faculty Contact Information: Professor Craig Lisher clisher@gmu.edu

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.

We will rely heavily on the National Commission on Terrorist Attacks Upon the United States, Report of the Commission (“9/11 Commission Report”) (2004): <https://9-11commission.gov/report/>

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

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:

Class 1 (8/21/2024): Introduction: September 11, 2001

- 9-11 Report Chapter 1: We Have Some Planes
- "Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Mosques," Al Islah (London), September 2, 1996. <https://ctc.westpoint.edu/wp-content/uploads/2013/10/Declaration-of-Jihad-against-the-Americans-Occupying-the-Land-of-the-Two-Holiest-Sites-Translation.pdf>
- Interview with Osama Bin Laden, May 1998, PBS Frontline: <https://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html>
- Mike Mukasey, The Political Pendulum, Speech at Boston College, 2008: <https://www.justice.gov/archive/ag/speeches/2008/ag-speech-0805236.html>
- Guest Speaker: 9/11

Class 2 (8/28/2024): National Security and the Separation of Powers

- 9-11 Report Chapter 2: The Foundation of the New Terrorism
- Curtiss-Wright Export Corp. v. United States, 299 U.S. 304 (1936)
- Youngstown Sheet & Tube Co. et al. v. Sawyer, 343 U.S. 579 (1952)
- Executive Order 12333: <https://dpcl.d.defense.gov/Portals/49/Documents/Civil/eo-12333-2008.pdf>

No Class 9/4/2024

Class 3 (9/11/2024): Separation of Powers and the Role of the Courts

- 9-11 Report Chapter 3: Counter-Terrorism Evolves
- Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
- Bin Ali Jaber v. United States, 861 F.3d 241 (D.C. Circ. 2017)

Class 4 (9/18/2024): Clash of Absolutes -- Safety & Security v. Privacy & Liberty

- 9-11 Report Chapter 4: Responses to Al Qaeda's Initial Assaults
- Student Presentations
- Victoria L. Killion, Congressional Research Service: Terrorism, Violent Extremism, and the Internet: Free Speech Considerations (May 6, 2019)
<https://crsreports.congress.gov/product/pdf/R/R45713>
- U.S. v. United States District Court, 407 U.S. 297 (1972) (the "Keith Case")
- George C. Harris, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security, 36 Cornell Int'l L.J. 135 (2002).

Class 5 (9/25/2024): Intro to Counterterrorism Investigations

- **Paper Topics Due**
- 9-11 Report Chapter 5: Al Qaeda Aims at the Homeland
- David Kris, Law Enforcement as a Counterterrorism Tool, Brookings Institute, 2010:
<https://www.justice.gov/opa/speech/assistant-attorney-general-david-kris-speaks-brookings-institution>
- Terrorism Crimes:
 - 18 U.S.C. § 2331
 - 18 U.S.C. 2332
 - 18 U.S.C. 2332a
 - 18 U.S.C. 2332b
 - 18 U.S.C. 2332f
 - 18 U.S.C. 2339A
 - 18 U.S.C. 2339B
- Holder v. Humanitarian Law Project, 561 U.S. 1 (2010)
- In re Terrorist Bombings, US Embassies East Africa, 552 F.3d 157 (2d Cir. 2008)
- U.S. v. Shibin, 722 F.3d 233 (4th Cir. 2013) (Somali Pirates case).
- Indictment: U.S. v. Alexandra Kotey and Elshafee Elsheikh, 1:20-CR-239 (EDVA Judge Ellis filed October 6, 2020).

Class 6 (10/2/2024): FISA Surveillance and 702

- 9-11 Report Chapter 6: From Threat to Threat
- Edward C. Liu, Foreign Intelligence Surveillance Act (FISA): An Overview, Congressional Research Service (April 6, 2021):

<https://crsreports.congress.gov/product/pdf/IF/IF11451>

- 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>
- United States v. Muhtorov, 20 F.4th 558 (10th Cir. December 8, 2021).
- Guest Speaker: FBI Counterterrorism Investigations

Class 7 (10/9/2024): Domestic Terrorism

- 9-11 Report Chapter 7: The Attack Looms
- Lisa N. Sacco, Congressional Research Service: Understanding and Conceptualizing Domestic Terrorism (December 29, 2023): <https://crsreportscongress.gov/product/pdf/R/R47885>
- Bobby Chesney, Should We Create a Federal Crime of ‘Domestic Terrorism’?, Lawfare (August 2019) <https://www.lawfaremedia.org/article/should-we-create-federal-crime-domestic-terrorism>
- Mary McCord, Lessons for Countering the Domestic Terrorism Threat 20 Years After 9/11, Journal of National Security Law & Policy: https://jnslp.com/wp-content/uploads/2021/10/Lessons-for-Countering-the-Domestic-Terrorism-Threat-20-Years-After-911_2.pdf
- Seth G. Jones, Catrina Doxsee, and Nicholas Harrington, “The Escalating Terrorism Problem in the United States.” CSIS Brief (June 2020) <https://www.csis.org/analysis/escalating-terrorism-problem-united-states>

Class 8 (10/16/2024): Detention and Interrogation

- 9-11 Report Chapter 8 The System Was Blinking Red
- Boumediene v. Bush, 553 US 723 (2008).
- EO 13493 (Obama) <https://obamawhitehouse.archives.gov/the-press-office/2009/01/22/executive-order-13493-review-detention-policy-options>
 - OLC memo on Standards for Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>
 - OLC memo on Interview of Abu Zubaydah https://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf

- EO 13823 (Trump) <https://www.govinfo.gov/app/details/CFR-2019-title3-vol1/CFR-2019-title3-vol1-eo13823>
- Trump Inherits Guantanamo's Remaining Detainees, NPR (Jan. 17, 2017) <https://www.npr.org/2017/01/19/510448989/trump-inherits-guantanamos-remaining-detainees>
- CRS report - Wartime Detention Provisions in Recent Defense Authorization Legislation – Congressional reaction to Executive efforts: https://www.everycrsreport.com/files/20160314_R42143_72344b26ab56494b0f3413ff3c90e3c3cc3b6a71.pdf
- David Ignatius, “Opinion: That clock ticking on our border policy impasse could be a time bomb.” Washington Post (June 26, 2024). <https://www.washingtonpost.com/opinions/2024/06/26/border-policy-terrorist-time-bomb/>

Class 9 (10/23/2024): Intersection of Immigration and National Security Law

- 9-11 Report Chapter 9: Heroism & Horror
- Trump v. Hawaii, 585 U.S. 667; 138 S. Ct. 2392; 201 L. Ed. 2d 775 (2018)
- Department of Homeland Security, “Annual Threat Assessment: 2024” https://www.dhs.gov/sites/default/files/2023-09/23_0913_ia_23-333-ia_u_homeland-threat-assessment-2024_508C_V6_13Sep23.pdf
- “A Primer on U.S. Immigration Policy.” Congressional Research Service, R45020 (22 June 2018): <https://crsreports.congress.gov/product/pdf/R/R45020/7>
- “An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border.” Congressional Research Service, LSB10150 (10 June 2019): <https://crsreports.congress.gov/product/pdf/LSB/LSB10150/11>
- Hillel R. Smith, “U.S. Customs and Border Protection’s Powers and Limitations: A Primer,” Congressional Research Service (Updated November 30, 2021) <https://crsreports.congress.gov/product/pdf/LSB/LSB10559>
- Eileen Sullivan, “More Migrants on Terrorism Watch List Crossed U.S. Border.” The New York Times, (Nov. 15, 2023): <https://www.nytimes.com/2023/11/15/us/politics/immigration-terrorism-watch-list.html>
- Jeffrey S. Passel and Jens Manuel Krogstad, “What we know about unauthorized immigrants living in the U.S.” Pew Research Center (November 16, 2023): <https://www.pewresearch.org/short-reads/2023/11/16/what-we-know-about-unauthorized-immigrants-living-in-the-us/>
- Jynnah Radford, “Key findings about U.S. Immigrants.” Pew Research Center (17 June 2019): <https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/>

Class 10 (10/30/2024): State Sponsors of Terror – Material support

- **Paper Outlines Due**
- 9-11 Report Chapter 10: Wartime
- Daniel Byman, “Iran, Terrorism, and Weapons of Mass Destruction” Brookings Institute (2008) https://www.brookings.edu/wp-content/uploads/2016/06/03_iran_byman.pdf
- Class Presentations on State Sponsors (Iran, Syria, North Korea, Cuba)

Class 11 (11/6/2024): Constitutional & Evidentiary Issues

- 9-11 Report Chapter 11: Foresight – and Hindsight
- U.S. v. Abdulmuttalab, Order Denying Motion to Suppress, 2011 WL 4345243 (D. Mich. Sept. 16, 2011)
- U.S. v. Abu Kattalah, Order Denying Motion to Suppress (D.D.C. Aug. 16, 2017)

Class 12 (11/13/2024): Stings and Entrapment

- 9-11 Report Chapter 12: What to Do? A Global Strategy
- United States v. Cromitie, 727 F.3d 194 (2d Cir. 2013)
- United States v. Mohamud, 843 F.3d 420 (9th Cir. 2016)
- Rozina Ali, “The ‘Herald Square Bomber’ Who Wasn’t”, NY Times Magazine (Apr, 15, 2021): <https://www.nytimes.com/2021/04/15/magazine/fbi-international-terrorism-informants.html>
- Guest Speaker: Fireside Chat with Former FBI EAD

Class 13 (11/20/2024): Student Paper Presentations

- 9-11 Report Chapter 13: How to Do It? A Different Way of Organizing Government