**National Security Law & Process**

**LAW 7807, Fall 2023**

**Drinko 251**

**Tu Th 2:35 to 4:35**

**Professor Dakota Rudesill**

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**Office Hours: by appointment and M W 2:35 to 4:35, zoomed**

**[2023-10-23]**

Note to the Reader. Do not be intimidated by the length of this syllabus. The vast majority of it is optional reading, provided mainly for the deeper dives you will take into particular issues once you have your role assignment for The Ohio State National Security Simulation.

**Course Overview**

**Generally**

Purpose & Scope. This course critically examines the Legal, Process, Policy, Political, and Personality (LP4) aspects of U.S. government national security efforts, as conducted by lawyers and policymakers. It explores horizontal federal institutional interactions (Legislative, Executive, and Judicial Branches) and vertical federalism (federal, state, and local). As an experiential learning course, the course in significant part during term and during The Ohio State National Security Simulation allows students to learn-by-doing. In particular, student learn-by-doing legal practice, collaboration with professionals from non-legal fields, advisement of busy senior leaders, and use of multiple interconnected government processes to yield law and policy decisions.

Learning Objectives. This course provides training in support of each of the College’s seven Program Learning Goals. These are: learning legal doctrine and substantive knowledge; ability to use law-related materials and processes; critical thinking and problem solving; communication; skills for continued development (meta-cognition); interpersonal skills and professionalism; and professional judgment. As described in this Course Overview and in the simulation overview, the course will pursue these learning goals via a combination of classroom discussion and exercises, readings, classroom training in short-form briefing (the Class Daily Brief (CDB)), and two days of simulated legal practice in the simulation. Special emphasis will be placed in the course and simulation on key professional skills: role assumption; identification and analysis of legal questions and use of legal processes to problem-solve; short-form briefing and advisement of demanding senior leaders; ethics; and communication and teamwork across professional boundaries. Assessment methods in the course are multi-modal, involve both formative and summative feedback, and are discussed below. Assessment methods particular to your participation in the simulation (50% of the grade) are discussed in a separate document on grading.

![Text

Description automatically generated]()Course Ethos. Our work in this course in all its aspects reflects the lawyer’s ethical obligations, including professionalism. Our spirit is one of intellectual rigor and reflection, together with good humor and collegiality. Our ethos is *purple*: whether one leans blue or leans red, or has other preferences, everyone is welcome. A diverse range of viewpoints and opinions are encouraged, in the context of respectful and professional dialogue. Students may regard what they say in the classroom and do in the Simulation as being protected by something like attorney-client privilege: your questions, comments, and simulated lawyering are not matters of public record. As both a lawyer and a student you have the freedom to analyze, critique, and argue positions without assumption that you are advancing your own personal views.

Course Arc. Generally, this course’s arc is one of (a) learning the substance and process of national security law, and training in briefing senior leaders during the course; (b) preparing for the Simulation; (c) simulated practice as a lawyer in the simulation; and then (d) reflecting on your performance, challenges, and growth.

The classroom portion of the course is divided into modules:

* Course introduction, including a decision case study, conceptual framing, and constitutional framing
* Process for decision-making in the federal government;
* The five National Instruments of Power (diplomatic, military, law enforcement, intelligence, and economic);
* Cross-cutting issues, including surveillance, secrecy (legal and factual) and information management, homeland security & domestic incident response, detainees and interrogation, the Counter-Terrorism (CT) “Playbook,” new technologies (including cyber and A.I.), and the role of the national security lawyer;
* Simulation preparation;
* Simulated practice as a lawyer in The Ohio State National Security Simulation;
* Reflection on your learning in the course and simulation performance.

**The course plan / syllabus will generally follow this outline but will change as necessary to allow us to talk about relevant current events in real time, and due to the availability of special guests.**

Pedagogical Methods. This course uses a multimodal combination of in-class lecture and discussion together with experiential learning. All students will do several written and oral briefings – the Class Daily Brief (CDB) – during term, will have contact with national security practitioners, and will role-play government officials and their legal advisors in the two-day simulation.

Evaluation and Feedback. Students will be evaluated based on their performance in the national security simulation in which they will role-play lawyers; three short papers and memos; several written and oral CDBs; and class participation & professionalism. Students will receive both formative and summative feedback: feedback both while critically learning the substance of the law and developing practice skills, and after completion of performance. Students will develop learning goals for the Simulation, and will meet with the Professor both before and after the Simulation to discuss their goals and reflect on their performance. Separate assignment memos describe the CDB and simulation.

**Logistics**

Enrollment. The course is open to law students and, on the basis of petition, graduate students in related disciplines.

Where & When.

* The class meets Tu Th 2:35 to 4:35 in Drinko 251. Sessions will be taped.
* Some days we will meet entirely via zoom, particularly when we have guests.
  + To facilitate discussion and community, keep your camera on. You may turn it off for a moment if necessary, but please return promptly. Do not be embarrassed if children, pets, or other co-habitants appear in your background – we will assume all of us are doing our best at WFH.
* A mandatory two day simulation is scheduled for November 3-4, 2023, on campus. Students must plan to be available in person 8:00 AM to 5:00 PM on Friday, November 3 when they do not have another truly unavoidable on-campus academic commitment (and if you do think you have such a commitment, please come talk to me), and 8:00 AM to 4:00 PM on Saturday, November 4. (Students role-playing intelligence roles may want to start the second day earlier, and all students may continue but are not required to role play on the evening of the first day and morning of the second day). Students will participate in the simulation by role-playing government officials, their lawyers, and lawyers in private practice.
* The course will conclude before Thanksgiving, in recognition of hours outside of the regular class periods devoted to the simulation.

Office Hours / Drop-in Time. M W 2:35 to 4:35. Office hours are entirely zoomed. This time is there for you! Please stop by to discuss the course, your path as a lawyer, or anything else related.

Contacting Me. [Rudesill.2@osu.edu](mailto:Rudesill.2@osu.edu).

Public Health.

* We will follow all OSU guidance on public health.
* Students are welcome to wear masks, and indeed encouraged to do so if they have any concern.
* Illness policy – if you are sick with anything (a cold, Covid, etc.), or have well-founded belief that you may be contagious, please zoom in rather than coming in person if you are feeling well enough to do so. Put protection of your colleagues first! Just drop me a note in advance to let me know why you are zooming in.
* Compassion – Many members of our community continue to experience heightened stress due to our excessively eventful times. Remember to be especially compassionate and collegial toward one another. If you are struggling in ways that are impacting your studies, be sure to let me know. Resources are available.

Policy on Electronics. We use movie theater rules: turn off the ringer on your phone and do not text. Laptops and other electronics will be allowed in the classroom. In the interests of raising the level of discussion, and ensuring that other students are not distracted during the class, however, the use of the Internet for any activity outside of accessing the course materials or related information is not allowed. No audio or visual recording devices are allowed in the classroom without permission from the Professor, nor may students take a direct transcript of the class proceedings. The purpose behind this is to encourage students to take risks in the ideas they put forward and to allow the class to examine arguments from all angles, without attribution. Exceptions will be made only for individuals with disabilities or other special needs.

Special Guests. Unless otherwise clearly stipulated by the Professor, consider all comments by special guests to be *off the record* outside of our classroom. Also, please appear in dress casual or something like it when we have special guests. You are representing Moritz and OSU.

Academic Misconduct. Academic misconduct as defined by the College of Law will not be tolerated. Here is the standard guidance:

Academic integrity is essential to maintaining an environment that fosters excellence in teaching, research, and other educational and scholarly activities. The Ohio State University and the College of Law expect that all students have read and understand the [Moritz College of Law Honor Code](https://lawintranet.osu.edu/wp-content/uploads/2023/07/Honor-Code-2023.pdf) and that all students will complete all academic and scholarly assignments and examinations in compliance with the Honor Code. Students must recognize that failure to follow the rules and guidelines established in the Honor Code and this syllabus may constitute academic misconduct as defined in Article IV.B of the Honor Code. Examples of academic misconduct include (but are not limited to) plagiarism, collusion (unauthorized collaboration), copying the work of another student, unauthorized use of a generative A.I. tool, and possession of unauthorized materials during an examination. Ignorance of the Honor Code is never considered an excuse for academic misconduct, so I recommend that you review the Honor Code. If I suspect that a student has committed academic misconduct in this course, I am obligated by College rules to report my suspicions to the College Administration. The sanctions for the misconduct could include a failing grade in this course, suspension or dismissal from the College and University, and a report to the relevant bar authorities. If you have any questions about the above policy or what constitutes academic misconduct in this course, please contact me.

One strictly limited exception in this course relates to plagiarism: in the simulation, students may repurpose parts of existing real world documents, so long as they acknowledge and explain their borrowing in the materials they submit summarizing their work in the simulation. For example, lawyers often borrow language from an existing statute, regulation, or court ruling when drafting legal text. You can do it, as long as you let me know you have done it in the course of your simulated legal practice.

Students may use software to help them improve their writing – catching typos, grammar, etc. However, students may not use ChatGPT or any other Generative A.I. or software to do the writing for them, including creating first drafts. The College faculty voted in April 2023 to amend the Honor Code definition of “cheating” on an examination to include “knowingly receiving information from . . . a generative A.I. tool.” Content created by the Simulation’s Game Team (on which you will not serve) for the Simulation – the course’s final examination – is an exception in this course (and you would not know if the Game Team used A.I. to help draft injects in any event!).

During the simulation, any dishonorable or disreputable conduct will not be tolerated – and will lead to a failing grade.

I will make available to you a single Honor Code attestation that I ask all students to sign in advance of all of the term’s work, rather than when each piece of written work is submitted. It reflects the clarification I have made here regarding plagiarism.

Students with Disabilities. Moritz is committed to providing an environment that ensures that no individual is discriminated against on the basis of disability. **If you anticipate or experience academic barriers based on your disability (including mental health, chronic, or temporary medical conditions),** you should notify Assistant Dean for Students Darren Nealy as soon as possible at 614-688-4676 or [nealy.1@osu.edu](mailto:nealy.1@osu.edu). Dean Nealy will work with you and Student Life Disability Services to coordinate reasonable accommodations for students with documented disabilities**. Student Life Disability Services contact information:**[slds@osu.edu](mailto:slds@osu.edu)**; 614-292-3307; 098 Baker Hall, 113 W. 12th Avenue. Students seeking to request COVID-related accommodations may do so through the University's**[request process](https://slds.osu.edu/covid-19-info/covid-related-accommodation-requests/)**, managed by Student Life Disability Services.**

Religious Accommodations. It is Ohio State’s policy to reasonably accommodate the sincerely held religious beliefs and practices of all students. The policy permits a student to be absent for up to three days each academic semester for reasons of faith or religious or spiritual belief. Students planning to use religious beliefs or practices accommodations for course requirements must inform the instructor in writing no later than 14 days after the course begins. The instructor is then responsible for scheduling an alternative time and date for the course requirement, which may be before or after the original time and date of the course requirement. These alternative accommodations will remain confidential. It is the student’s responsibility to ensure that all course assignments are completed.

**Grading, Exercises, and Workload**

Grading. The components of the grade are as follows. In view of the course’s emphasis on skill building and the personalized feedback each student will receive, the course is graded on the seminar curve.

*Simulation:* 50%

*Pre-Simulation Briefing Memo (4 pages):* 10%

*Post-Simulation Reflection Memo (3 pages):* 10%

*Class Participation & Professionalism:* 15%

*Class Daily Brief (CDB):* 15%

National Security Simulation. See separate materials for details.

Papers. There are three required short papers or memos. Students are required to write one short 4 page Briefing Memo in advance of the simulation, based on the specific role that the student will play. After the simulation, students will be required to prepare a 3 page Reflection Memo. Students will present their Reflection Memos orally in class during sessions after the Simulation. You will also collect your work product after the simulation, which will inform your simulation grade (50% of the course grade). See the Handbook for details on the short papers.

The Class Daily Brief (CDB). Most class sessions (and a handful of times outside of class) will include oral briefing of a CDB by a team of two students. Each student will do two CDBs, each time in written and oral form. The CDB will train you to be simultaneously precise and concise in written and oral short-form briefings to busy senior leaders in informal practice settings – a skill set that will benefit you in the simulation and throughout your career in any professional setting. Each student will receive individual written formative feedback after each briefing, incorporating qualitative evaluation and quantitative grading. The opportunity to review and reflect on detailed constructive feedback between each briefing will facilitate iterative improvement over time through conscious effort along with development of your mental muscle memory and instincts. See separate CDB Assignment Memo for more information.

Class Participation & Professionalism. Students are expected to have done the required reading. The Class Participation grade includes professionalism: how professionally you approach all aspects of your participation in the course. This includes integrity, diligence, and collegiality. Class participation also includes attendance. Students are expected to attend unless they have a compelling personal or professional reason not to attend. Students should consult or inform the Professor in advance whenever feasible, or promptly thereafter if there was not time in advance.

Unless students want a different model, our class participation model will be open discussion. However, if people are not participating I reserve the right to cold call. We will also have exercises during term where students will assume roles or address particular topics. Some weeks we will have a sign-up to be first contributors (this is not Paper Chase style cold calling).

Course Workload. This course will meet 240 minutes a week for 12 weeks (the course ends early because the final examination is participation in The Ohio State National Security Simulation, which happens before Thanksgiving), for a total of 2880 minutes or 48 hours of class time. Each student will spend approximately a total of four hours outside of class preparing two briefings they will deliver during class. The Simulation will run all day on a Friday and Saturday in November, for a total of roughly 16 hours. The planned readings consist of statutes, regulations, cases, media stories, and secondary legal materials. The upper-level students enrolled in this course should be able to complete about 20 pages of these readings in an hour. I plan to assign approximately 800 pages of required reading over the course of the semester, for a total reading time investment of approximately 40 hours. Finally, students can expect to spend around 80 hours preparing three short papers, reviewing class materials (including optional reading), synthesizing information, and otherwise preparing for and reflecting on the Simulation. [Total workload = 184 hours for 4 academic credits].

**Course Themes**

1. What is national security? How does invoking national security change the nature of the legal or policy discussion, for better or for worse?

2. Tradeoffs, Tensions, Risk Balancing, and Appraisal through Process. The international security environment is characterized by competition, scarcity, peril, and finite resources. Uncertainty is endemic. Change is rapid. The United States and other actors also bring to bear profound commitments to security and liberty, expansive resources, and noble aspirations for a better world. Here, options and decisions may have anticipated costs and benefits but also ones that are not fully understood or at all anticipated. Security and liberty, speed and diligence, and secrecy and accountability are examples of values in constant tension and equal necessity. Aligning them in sustainable – and ideally favorable – friction is the unavoidable challenge of national security work, which inevitably involves balancing risks. That in turn requires processes that provide meaningful, timely, and contextual appraisal of matters of fact and law.

3. Analytical Framework. What can we learn as lawyers through analyzing problems in their Law, Process, Policy, Political, and Personality (LP4) aspects?

4. Legal Authority, Options, and Appraisal. National security powers are distributed among and shared by the three branches of the federal government, states and localities, international actors, and non-governmental actors. National security legal authorities often overlap, have grey areas, and gaps. In these contexts, lawyers identify and appraise legal options and their implications, advise principals and clients, and facilitate quality decision.

5. Process. *Formal* and *informal* processes in all three branches of the federal government – and especially in the two elected branches – combine to yield policy, law, and compliance with policy and law. Process involves *inter-institution* interaction, *inter-agency* interactions, and *inter-professional* collaboration by professionals in different fields. Processes shape practice and identification of legal authorities (a form of choice of law) and actors, and ultimately policy outcomes and their political ramifications. Processes at the international, state, and local levels are also relevant, and interact with those at the federal level of government. Each of these processes happen in context of national security secrecy, media and public scrutiny, and accelerating instances of leaks. National security decisionmaking can have the meaningful implications imaginable for the liberty, security, and prosperity of people outside government and of the private sector, both in the United States and abroad.

6. Legal Actors. Who decides whether to act, and what to do? Legally, factually, and ideally? For instance, should the President, Attorney General, the Director of National Intelligence, or the FISA Court decide whether to authorize individual surveillance wiretaps and programs? The Congress? How does the actor who wields national security legal authority and process matter?

7. Oversight. Who watches the watchers – and the deciders? In a republic, how do the People remain self-governing regarding activities that are hidden from public view? How is national decisionmaking reviewed, in the context of justicibility doctrines, privileges, and secrecy that often function to keep national security matters out of court?

8. Federalism. How do the three federal branches interact in lateral federal terms, and in vertical terms with state and local government?

9. Ethics. What is distinctive in terms of ethics about practice in the national security space? How do process maladies of secrecy, speed, ego, and consequence affect ethical questions?

10. Transferable lawyering skills. How are the qualities of good national security lawyers valuable – transferrable – to any practice setting? What can we learn-by-doing, particularly about oral and written briefing, and the interaction of lawyers and non-lawyer decisionmakers? About communication and teamwork among professionals from different professional communities? About briefing demanding senior leaders? What can we learn from the simulation practice experience about meta-cognition: learning about how we each learn and develop as lawyers?

**Course Plan**

In the syllabus below, reading assignments are grouped by topic, within the context of the course modules. The flow of our in-class conversation and the fast pace of current events with national security law/policy implications will result in changes. Additionally, the scheduling needs of practitioners who will be our guests usually produce changes. ***In short: consider the syllabus a working plan rather than a rigid schedule.*** You will always have reasonable notice (several days) of significant changes.

***Always check the version of the syllabus on Carmen*** to make sure you are suing the current one.

**Course Plan – Day-by-Day Quick Reference**

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| --- | --- | --- |
| **Date** | **Class No.** |  |
| Tuesday, Aug 22 | Week 1,  Class 1 | **Introduction**  Course Introduction & Simulation Overview  Bin Laden Raid Case Study, Part 1 |
| Thursday,  Aug 24 | Class 2 | Bin Laden Raid Case Study, Part 2 (guest: Mary DeRosa) (zoomed) |
| Tuesday, Aug 29 | Week 2,  Class 3 | Conceptual Framing: Defining National Security |
| Thursday,  Aug 31 | Class 4 | Constitutional Framing, Part 1 – Overall; the “Constitution Crawl” |
| Tuesday, Sept 5 | Week 3,  Class 5 | Constitutional Framing, Part 2 – The Supreme Court Canon and *Youngstown*  Framework |
| Thursday,  Sept 7 | Class 6 | **Process**  Process: Executive Branch |
| Tuesday, Sept 12 | Week 4,  Class 7 | Process: Executive Branch, cont.  Legislative Branch |
| Thursday, Sept 14 | Class 8 | Process: Judicial Branch (guest. Prof. Beth Cooke) |
| ***MAKE-UP:***  ***Fri Sept. 15, 10-12 AM*** | Class 9  ***ENTIRELY ZOOMED*** | **Instruments of National Power**  Diplomatic Instrument of National Power (guest: Prof. Mohamed Helal) |
| Tuesday,  Sept 19 | Week 5,  Class 10 | Diplomatic Instrument, cont. – Logan Act; int’l law of sea, air, and space  Military Instrument of National Power:  DOD 101 - Organization and Chain of Command |
| Thursday, Sept 21 | Class 11 | Use of Force – Domestic Legal Framework |
| Tuesday,  Sept 26 | Week 6,  Class 12 | Id., International Legal Framework: *Jus ad Bellum* |
| Thursday, Sept 28 | Class 13 | Id., International Legal Framework: *Jus in Bello*  (special guest: Col. Josh Berry) |
| ***MAKE-UP:***  ***Fri Sept. 29,***  ***10-12 AM*** | Class 14  ***ENTIRELY ZOOMED*** | Intelligence – Generally & Covert Action |
| Tuesday,  Oct 3 | Week 7,  Class 15 | **Simulation Role Section – overview of roles and selection process**  **Cross-Cutting Issues**  Economic Instrument of National Power  Law Enforcement Instrument of National Power |
| Thursday,  Oct 5 | Class 16 | Surveillance (begin) |
| Tuesday, Oct 10 |  | NO CLASS – FALL BREAK |
| Thursday, Oct 12 |  | NO CLASS – FALL BREAK |
| Tuesday,  Oct 17 | Week 8,  Class 17 | Surveillance, cont. |
| Thursday, Oct 19 | Class 18 | Surveillance (finish)  Cyber |
| Tuesday  Oct 24 | Week 9  Class 19 | Cyber (finish)  Detainees and Interrogation  Counter-Terrorism (CT) Playbook |
| Thursday,  Oct 26 | Class 20 | Homeland Security & Domestic Use of the Military |
| Tuesday,  Oct 31 | Week 10  Class 21 | The National Security Lawyer  (guest: Judge Jamie Baker)  **~~\*\*Due by noon: Pre-Sim Memo\*\*~~** |
| Wednesday,  Nov. 1 |  | **\*\*Due by noon: Pre-Sim Memo\*\*** |
| Thursday,  Nov 2 | Week 11  Class 22 | Information Management: Secrecy, Free Speech, FOIA, and the Media  **Review Session / Catch-up Day / Pre-Sim Exercise**  (guest: Lt. Col. Dan Maurer) |
| **Friday,**  **Nov 3** |  | **Simulation, Day 1**  **Keynoter: Ashley Deeks, former Deputy NSC Legal Advisor** |
| **Saturday,**  **Nov 4** |  | **Simulation, Day 2**  **Keynoter: former US Rep. & Maj. Gen. Steve Stivers** |
| Tuesday, Nov 7 | Week 12 | NO CLASS – ELECTION DAY |
| Wednesday,  Nov 8 |  | **\*\*No Class – Post-Sim Memo & Materials Due by 5:00 PM\*\*** |
| Thursday,  Nov 9 | Class 23 | Post-Sim Reflection |
| Tuesday, Nov | Week 13  Class 24 | Post-Sim Reflection |

*Special make-up sessions are in* ***bold italics***

Notes on the Readings

Text**.** There is one required text: James E. Baker, In the Common Defense: National Security Law in Perilous Times (2007).[[1]](#footnote-1)

Other assigned readings**.** Academic and media articles, judicial decisions, statutes, regulations, and other documents will be used to supplement the texts. I will distribute them via links on the syllabus, or via Carmen. For cases, statutes, and legal literature I intentionally will provide only the citation, as a means of strengthening your research skills.

Required vs. Optional Syllabus Readings **(IMPORTANT!)**

* *Required Reading* is required. It is a manageable amount. Note that the list may be long, but usually in that case the list includes a series of fairly short documents. I will indicate which documents you can skim for basic familiarity, or should read carefully.
* *Optional Reading* is optional. It is the majority of the syllabus readings. It provides a starting point for deeper inquiry. We may reference it in class, or not. I do not recommend trying to read all of the Optional Reading for every class session unless you have a very light schedule outside this course. Sources listed here may be valuable to you during the simulation and during your simulation preparation, depending of course on what role you play in the simulation. So, for example, once you get your assignment as State Department Legal Advisor you may want to go back to the Diplomatic Instrument unit and read the Optional Reading in the run-up to the simulation.

“Situational Awareness” Independent Reading**.** It will enhance your learning in this course – and your CDB and simulation performances – if throughout term you make a consistent effort to expand and maintain your knowledge of national security developments. There is too much going on in the world that could be relevant to “national security” for anyone to keep current on it all. What you can and should do is to make a reasonable effort on a consistent basis to keep current. Do not worry if you do not have prior background in international affairs, homeland security, etc. Just start reading and you will see your knowledge base and analytical sophistication build over term. I recommend taking a few minutes (15 to 30) each day to read hard news stories in publications reflecting high professional journalism standards (the AP Wire, *Reuters*, *New York Times, Wall Street Journal*, etc.), and/or by visiting the national security law blogs *Lawfare* ([www.lawfareblog.com](http://www.lawfareblog.com)) or *Just Security* ([www.justsecurity.org](http://www.justsecurity.org)), where you can sign up for emailed daily news summaries. It is again optional, but I also recommend the weekly *National Security Law Podcast* with Steve Vladeck and Bobby Chesney, and the *Intelligence Matters* podcast with Michael Morell. Definitely feel free to bring up in class or office hours anything you read or pod that is interesting to you.

**Reading Assignments**

**I. Course Introduction, Conceptual Framing, and Constitutional Framing**

*Excerpt from first week assignment distributed this summer:*

DAY 1 AND 2: BIN LADEN RAID CASE STUDY

The first two days we will jump right into our first case study in U.S. national security law and decision process: the 2011 raid that killed Usama bin Laden (UBL). This case study will start our training in analyzing legal practice situations in government in their wonderful complexity, via assessing their LP4 (Law, Process, Policy, Politics, Personality) aspects.

Assigned Reading for Day 1 (Tuesday):

* Robert M. Gates, Duty: Memoirs of a Secretary at War 538-46 (2016)
* Charlie Savage, Power Wars 257-71 (2016)
* List of Personalities – *Dramatis Personae*
* Post-9/11 Authorization for the Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224 (2001)
* Covert Action statute excerpt, 50 U.S.C. 3093
* Mary DeRosa biography

As you read, ask yourself how and why Gates (Secretary of Defense, and a former intelligence officer) and Savage (a law-trained journalist) emphasize different angles of the same story.

Also ask yourself the following mapping questions for your reading and our conversation. I recommend preparing a few notes for yourself in response to each. We will start the LP4 framework analysis at the bottom with Personalities (with the humans involved) and work our way up.

Mapping Questions for Week 1, on UBL raid case study:

1. Personalities – Based on the reading, who were the key players? On policy matters? On legal matters? Who had surprisingly little role? Also, what professional communities were represented among the people who were involved in this decision?
2. Politics – What kinds of political considerations/dynamics do you think were operating in the background? By “politics” we broadly mean the use of power in a political/governance system. Politics can be international, partisan, bureaucratic, institutional, or interpersonal.
3. Policy – What key questions and matters of policy were on their minds? Under “policy” we can include interests/motives, facts, threats, and government capabilities. What potential courses of action (COAs) did they identify? Which did they select, and why?
4. Process – How would you describe the decision processes that led to raid that killed bin Laden? This may be the toughest question on the list if the processes used here strike you as very different from those you have studied to date in law school. Who ultimately bore responsibility for decisions? What institutions seemed to play little if any role, and why?
5. Law – What legal questions and issues did the U.S. government actors apparently identify and confront? How did they resolve them? Make a list as you read. One particular question is the legal authority to act (to carry out the raid, a use of force) under U.S. law. Based on the reading, why does it seem that the Executive Branch team chose to rely on the Covert Action statute? Especially when authority under the Authorization for the Use of Military Force (AUMF) statute passed by Congress after the 9/11 attacks was also available?

Reflecting on all of this:

1. Ultimately, what drove and shaped President Obama’s decision the most, in your assessment: personalities, politics, policy, process, or law?
2. From a process standpoint, do you think that the decision to kill bin Laden was made in the right way? Did bin Laden and the various considerations/values involved get due process – the process they were due?
3. Do you personally think the right decision was made? Why or why not?

Optionally, if you want to dive deeper with your video streaming password, a couple movies might be of interest. The drama/comedy “Charlie Wilson’s War” (2007) provides background on the origins of the terrorist threat based in Afghanistan. The latter part of “Zero Dark Thirty” (2012) depicts the bin Laden raid at a field level. Be aware that the earlier part of the movie shows brutal interrogations – evident torture that many legal experts believe was illegal, and which subsequent investigations indicated had not been effective in eliciting information in the way that this movie and the George W. Bush Administration suggested.

Do not worry if this all feels foreign and complex. Do not worry if you do not understand the legal issues yet. We are just getting our feet wet. This is a fascinating and consequential zone of lawyering we will come to know well this term. Do the reading and come ready to discuss.

UPDATES: We will be joined on Thursday by Mary DeRosa, who was the central lawyer in the bin Laden deliberations as National Security Council (NSC) Legal Advisor. What do you want to ask her? Thursday’s session will be zoomed. Note also the following optional readings.

*Optional Readings:*

* Dakota S. Rudesill, *My Experience of 9/11 on Capitol Hill*, Sept. 10, 2021 (remarks for OSU Mershon Center conference on “9/11 at 20”)
* Dakota S. Rudesill, *From 9/11 to 1/6: Lessons for Congress from Twenty Years of War, Legislation, and Spiraling Partisanship*, 11 J. Nat’l Security L. & Pol’y \_\_\_ (2021), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920089>

DAYS 3 and 4: CONCEPTUAL FRAMING

After the bin Laden case study and some course logistics, we will pull back and do some critical thinking about the idea of “national security” generally. That discussion may continue the following week.

**The Meaning of “National Security”**

*Assigned Reading* for Day 3 on the idea of national security:

* Office of the Director of National Intelligence (ODNI), Annual Threat Assessment of the U.S. Intelligence Community (Feb. 6, 2023), <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf> - read pages 2-6, and peruse the rest as interests you
* FBI & Department of Homeland Security, Strategic Intelligence Assessment and Data on Domestic Terrorism (June 2023), [~~https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf~~](https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf) - on Carmen - skim
* U.S. Const., Preamble – on Carmen
* Federalist No. 6 (Hamilton) – excerpt on Carmen
* Federalist No. 8 (Hamilton) – excerpt on Carmen
* Federalist No. 10 (Madison) – excerpt on Carmen
* James E. Baker, In the Common Defense (2007)*,* Introduction; Chapter 1 (Perilous Times: Describing the Threat), Chapter 2 (The Meaning of National Security), & Chapter 3 (National Security Law) – all on Carmen

*Mapping Questions* on the idea of national security:

1. How should we define “national security”? What should it include, and not include?
2. Do you see common and/or differing understandings of “national security” reflected at the Founding, when Baker wrote his book in 2007, and today?
3. What could be potential Pros and Cons of characterizing something as a matter of “national security”?
4. Should we consider pandemic disease a matter of national security? How about A.I.?
5. How does Baker see the roles of law and lawyers in national security? Do you agree?

**The Constitution as a National Security Document**

* Sign up to speak up to one minute in class on a national security-related provision of the Constitution: <https://docs.google.com/document/d/12shPXtQzBqwMLrQ5zYRv_SBV-_Mfo2TAGLr6kOCj4lQ/edit>

*Readings Required*:

* Baker, Chapter 4 (Constitutional Framework)
* U.S. Const. – skim the full text (stopping after the 5th Amendment) – on Carmen
* *Little v. Barreme*, 6 U.S. 170 (1804) – full text (find on Westlaw etc.)
* *The Prize Cases,* 67 U.S. 635 (1863) – excerpt on Carmen
* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) – full text (find on Westlaw etc.)
* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) – read case syllabus, and Jackson concurrence (find on Westlaw etc.)
* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) – excerpt on Carmen
* *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006) – excerpt on Carmen
* *Zivitofsky v. Kerry,* 576 U.S. 1059 (2015) – excerpt on Carmen

*Optional Readings:*

* *Youngstown* – other opinions
* Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. Cin. L. Rev. 391 (2018), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3022012>

*Mapping Questions:*

1. Starting with the Constitution’s text, which provisions bear on national security? (We will do a lightning survey in class). What does the Constitution’s text tell us about the national security roles and powers of Congress, the President, and the Courts? What guarantees made to the states and to the people are relevant to national security? What security-related powers are denied to the states (and are any provided)?
2. Courts tend to defer to the political branches regarding national security, and try to toss related cases. What are pros and cons of this deference and avoidance? Should courts sometimes not defer? If so, when?
3. Separation of powers (“lateral federalism”) doctrine regarding Congress vs. the President in national security: Who wins? What is well settled? What is contested and ambiguous? What does the limited but important canon of Supreme Court national security cases tell us? What are Congress-favoring and President-favoring readings of *Little v. Barreme*, *The Prize Cases*, and *Curtiss-Wright*? What is the *Youngstown* framework? How would you fit the other national security cases into it?
4. Reflecting on all we know about the Constitution, is it fair to say that the Constitution a “war machine”? Or is it a counter-authoritarian apparatus? Or both? Does it create strong mechanisms for balancing security and liberty?
5. Why are lawyers practicing in informal practice settings especially important to the Constitution? What is Baker’s view of the role of the lawyer regarding the Constitution, and do you find it compelling?

**II. Process**

Often, the relevance of national security law and lawyers on a particular decision is a function of the quality of the decision process.  Often the quality of the process drives the quality of the policy decisions made.  Note too that process and practice inside the Executive Branch and Congress are different in important ways from traditional law firm, court-focused litigation, or transactional process.  That is doubly true regarding national security decision process in the Art. I and II branches, due to the special attributes of national security work (secrecy especially).  So, process could not be more important to understanding how the law is relevant to the federal government's most capacious powers, and could not be more important to our studies and prep for practice in the Simulation.

**Executive Branch Inter-Agency and Inter-Profession Decision Process (and especially NSC)**

Note: the National Security Council (NSC) overlaps with the Homeland Security Council (HSC), but don't get hung up on the distinction. In the classroom and in the Simulation we will focus mainly on the NSC, for reasons of time and efficiency.

*Readings Required:*

* Baker, Chapter 4 (National Security Law, previously assigned), Chapter 6 (Process)
* National Security Council (NSC) Statute, 50 U.S.C. § 3021 (formerly § 402)[[2]](#footnote-2)
* NSM-2, Renewing the National Security Council (NSC) system (Feb. 4, 2021) (Biden Administration) [Carmen]
* Homeland Security Council (HSC) Statute, 6 U.S.C. §§ 491-96
* Simulation case studies in bad process [Carmen]
* Video: White House Situation Room, <https://www.youtube.com/watch?v=T7ch13ZuMu8>
* 9/11 Case Study
  + 9/11 Commission Report 35-46 (2004) (on National Crisis Management), [https://govinfo.library.unt.edu/911/report/911Report\_Ch1.pdf](https://govinfo.library.unt.edu/911/report/911Report_Ch1.pdf ) [only pp. 35-46 required]
  + Military Chain of Command Statute, 10 U.S.C. § 162(b) [Carmen]
* 2003 Iraq War Case Study
  + Do a few minutes of independent research on the Iraq War, both its origins in 2002-3 and the subsequent U.S. involvement in Iraq 2003-11
  + Richard N. Haass, War of Necessity, War of Choice 233-37 (2009) [Carmen] -- Haas was Director of the Policy Planning Staff at the State Department
  + Donald Rumsfeld, Known and Unknown (2011), excerpted in Wall St. J., Feb. 8, 2011 [Carmen] -- Rumsfeld was Secretary of Defense
* 2011 Usama bin Laden (UBL) Raid Case Study – refresh your recollections from Week 1

*Optional Readings:*

* NSC Staff Org Charts [Carmen]
* Dakota S. Rudesill, *At the Elbow and Under Pressure: Legal, Military, and Intelligence Professionals,* 49 Hofstra L. Rev. 161 (2020) (Carmen)
* Michael Crowley & David E. Sanger, *Under O’Brien, NSC Carries Out Trump’s Policy, but Doesn’t Develop It*, N.Y. Times, Feb. 21, 2020, <https://www.nytimes.com/2020/02/21/us/politics/national-security-council-trump-policy.html?referringSource=articleShare> [also on Carmen]

*Mapping Questions:*

1. Case studies in Presidential and National Security Council (NSC)-level decision process: 9/11, 2003 Iraq War, and 2011 Usama bin Laden (UBL) raid. For each case study, what decisions were they making? How would you describe each decision process overall? What was similar, and what was different? Did process shape outcomes? What seemed to matter more in each case, formal process (formal meetings of the NSC) or informal process? What were the roles of the President and other actors? How much of a role did law and lawyers seem to play?
2. Why should we study government decision process, generally? In the Executive Branch? How is it related to law, legal practice, and the Constitution?
3. What are features of “good process” and “bad process”? What are particular process maladies when the Executive Branch makes decisions about national security?
4. What are the National Security Council (NSC) and Homeland Security Council (HSC)? What are their purposes and functions? Who is on these Councils? Who are the central actors – the *dramatis personnae*? Who should be at one of their meetings? When should a meeting be called – when should an issue be brought to the NSC? What is the standard formal decision process? Going back to our case studies, which one followed the classic formal process most closely?
5. What are classic NSC decision process models? (I will mainly lecture on this). What model would you like to see used by President Mansoor in the Simulation – or when you are in government for real?
6. Inter-professionalism: How might the participation of people from different professional communities shape process – for the better or for the worse?
7. How do you run a “Gates meeting” – a meeting with “good process”? (We will figure this out together).

**Legislative Branch Process**

*Required Readings*:

* U.S. Const, art. I, §§ 8, 9 (previously assigned); § 6, cl. 1 (Speech or Debate Clause)
* Rudesill, Congress in Eight Pages – 2021 [Carmen]
* The Senate in the Simulation (note that this is a 2021 sim doc, to be updated) [Carmen]
* Robert M. Gates, Duty: Memoirs of a Secretary at War, Author’s Note & 579-84 (2014) [Carmen]
* U.S. Senate (website), Senate Legislative Process, <http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm> -- **skim**
* Dakota S. Rudesill, *Classified Legislation: Tracking Congress’s Library of Secret Law*, Lawfare, May 19, 2016, <https://www.lawfareblog.com/classified-legislation-tracking-congresss-library-secret-law>
* Congress’s Delegation of Emergency Powers to the President
  + - Elizabeth Goitein, Trump’s Hidden Powers, Dec. 5, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/trumps-hidden-powers>
    - Brennan Center for Justice, A Guide to Emergency Powers and Their Use (Published Dec. 5, 2018, last updated Sept. 4, 2019), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> -- **skim**

*Optional Readings*:

* 18 U.S.C. § 1001 – criminalization of false statements to Congress
* 2 U.S.C. §§ 192, 194 – criminal contempt of Congress
* 2 U.S.C. § 288d – civil contempt of Senate
* Requirements to report to Congress we have covered or will cover in other units (e.g., 10 U.S.C. § 130f on DOD reporting of off-battlefield CT operations; 50 U.S.C. §§ 3092, 3093 on intelligence generally and covert action; 50 U.S.C. §§ 1541-48 War Powers Resolution (WPR) reports)
* Senate National Security Committee Rules in the Simulation [Carmen]
* Office of Management & Budget (OMB), Statement of Administration Policy (SAP) on S. 1042, NDAA for FY 2006, July 21, 2005 [Carmen] (simply an example of a SAP – do not focus on the particular content of this document)
* Standing Rules of the U.S. Senate, <http://www.senate.gov/reference/reference_index_subjects/Rules_and_Procedure_vrd.htm> -- skim generally, and Rule XXVI(1) on subpoenas
* Rules of the House of Representatives, <http://clerk.house.gov/legislative/house-rules.pdf> -- skim generally, and Rule XI(m)(1)(B) & (3) on subpoenas
* Todd Garvey, Congressional Research Service, Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, May 12, 2017, <https://fas.org/sgp/crs/misc/RL34097.pdf>
* Michael Stern, *Congressional Release of Classified Information and the Speech or Debate Clause*, Point of Order Blog, Aug. 6, 2013, <https://www.pointoforder.com/2013/08/06/congressional-release-of-classified-information-and-the-speech-or-debate-clause/>
* Dakota S. Rudesill, *From 9/11 to 1/6: Lessons for Congress from Twenty Years of War, Legislation, and Spiraling Partisanship*, 11 J. Nat’l Security L. & Pol’y \_\_\_ (2021), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920089>

*Mapping Questions*:

1. What are advantages of legislative solutions to problems of law and policy, versus Executive or Judicial solutions, or self-help (non-government action)?
2. Reflecting on your education and our studies so far, how is Legislative process different from Executive or Judicial Branch processes? Similar?
3. What are Congress’s key actors and their responsibilities?
4. Under the Constitution, what are Congress’s legislative and oversight powers? What protections are provided to Members (Senators and Representatives) by the Speech or Debate Clause? How do committee hearings, requests for testimony, subpoenas, and contempt powers operate? How are Congress’s internal rules relevant?
5. How do the Legislative and Executive Branches typically interact? How does the Executive Branch participate in the legislative process? What work does the NSC Legislative Affairs Director do? What is a Statement of Administration Policy (SAP)?
6. What are pros and cons of Congress’s delegation of a large body of standing emergency authorities to the President? Should Congress reign them in?
7. Secrecy – What are particular challenges of oversight of classified activities? How does Congress get access to classified information? How does Congress write “secret law,” and what are pros and cons of this practice?
8. How well do you think Congress has been doing its job regarding national security?
9. How will Congress work in the Simulation? (lecture/slides)

**Judicial Branch Process**

Guest: Prof. Elizabeth Ilgen Cooke, Civil Litigation Clinic Director, Moritz

*Required Readings*

* Prof. Cooke Biography, <https://moritzlaw.osu.edu/faculty/elizabeth-ilgen-cooke/>
* Federal question jurisdiction – 28 U.S.C. 1331
* Civil rights jurisdiction – 28 U.S.C. 1343
* Habeas Corpus Statute – 28 U.S.C. 2241 *et seq*. excerpt as modified for Simulation – [**skim** excerpt on Carmen]
* F. R. Civ. Pro. 3, 4, 8, 10, 11 – [**skim** on Carmen]
* Filing Examples and Fillable Forms [Carmen]
  + Civil Suit – examples and fillable forms
  + *Habeas* Petition – example and fillable form
  + Criminal complaint – fillable form
  + Motion – fillable form
  + FISC order – fillable form
  + FISC order application – fillable form

*Mapping Questions*

1. What are advantages of judicial solutions to problems of law and policy, versus Executive or Legislative solutions, or self-help (private non-government action)?
2. Reflecting on your education and our studies so far, how is judicial process different from Executive Branch and Legislative Branch process? Similar?
3. What are examples of legal process in the Judicial Branch?
4. What is involved with filing a civil suit? A *habeas corpus* petition?
5. What is involved with filing a search, seizure, or surveillance warrant/order application in federal court? A criminal complaint? (lecture/slides)
6. How will the Judicial Branch operate in the Simulation? (lecture/slides)

**III. National Instruments of Power**

**Diplomatic Instrument**

Special Guest: Prof. Mohamed Helal, Moritz College of Law

*Required Readings*:

* Bio – Prof. Mohamed Helal, <https://moritzlaw.osu.edu/mohamed-s-helal>
* The Secretary of State (S), the U.S. State Department, and their Legal Authorities
  + State Department website, [www.state.gov](http://www.state.gov) – spend a few minutes navigating around
  + 22 U.S.C. – **skim** table of contents so you know your way around (<https://www.law.cornell.edu/uscode/text/22>), and particularly chapter 38, 22 U.S.C. § 2651 *et seq.* (<https://www.law.cornell.edu/uscode/text/22/chapter-38>)
  + 22 U.S.C. § 2651a(a) (Secretary’s authorities)
  + 22 U.S.C. § 2656 (presidential direction)
  + Exec. Order 12333 as amended by Exec. Order 13470 (July 30, 2008) – U.S. Intelligence Activities, §§ 1.4, 1.7(i), 1.8 – Carmen
* The Legal Advisor (L)
  + Harold Hongju Koh (then State Department Legal Advisor) speech to ASIL – Part I (“The Role of the Legal Advisor”) in the full doc on Carmen
  + Harold Hongju Koh, *The Legal Advisor’s Duty to Explain*, 41 Yale J. Int’l L. 189 (2016) – excerpt on Carmen
* Logan Act, 18 U.S.C. § 953 (original statute at 1 Stat. 613 (1799)) – Carmen
* ~~Oona A. Hathaway, Maggie Mills & Heather Zimmerman,~~ *~~The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly~~*~~, Just Security, May 5, 2023,~~ [~~https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/~~](https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/) ~~--~~ **~~skim~~**

*Optional Readings*

* War Powers Resolution (WPR) (we will address WPR mainly during the Military Instrument unit)
  + Statute: Pub. L. No. 93-148, 87 Stat. 555 (1973), also at 50 U.S.C. § 1541-48
  + John Bellinger, *So Where Do War Powers Reports Come From?,* Lawfare (blog), Aug. 19, 2014, <http://www.lawfareblog.com/2014/08/so-where-do-war-powers-reports-come-from/> (a former State Department Legal Advisor explains inter-agency process for drafting War Powers Resolution reports to Congress)
* Post-9/11 AUMF, P.L. 107-40 (Sept. 18, 2001) – on Carmen in Week 1 readings
* Designation of Foreign Terrorist Organizations (FTOs), 8 U.S.C. § 1189 (power of Secretary of State to be addressed as part of the Economic Instrument unit)
* United Nations Charter – ***skim***: <http://www.un.org/en/charter-united-nations/> , particularly arts. 2(4) (use/threat of force), 39 (collective security operations authorized by UN Security Council short of armed force), 41 (interruption of communications, options other than use of armed force), 51 (individual and collective self-defense in the event of armed attack), <http://www.un.org/en/documents/charter/chapter7.shtml>
* Law of the sea, air, and space
  + slides – Carmen
  + United Nations Convention on the Law of the Sea (UNCLOS), <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> - **skim table of contents** (very long)
  + Alpaslan Ozerdem, *What the Montreaux Convention Is, and What It Means for the Ukraine War*, The Conversation, March 1, 2022, <https://theconversation.com/what-the-montreux-convention-is-and-what-it-means-for-the-ukraine-war-178136>
* Dakota S. Rudesill, *Foreign Public Opinion and National Security*, 36 Wm. Mitchell L. Rev. 5223 (2010), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111595>

*Key Points and Questions*:

1. The roles of diplomacy and international law in national security
2. Organization & authorities of the U.S. Department of State
3. Interaction among states, regional security organizations (such as NATO and the Arab League), and international organizations (most notably the UN)
4. Activities of the Diplomatic Instrument of national power in the US government:
   1. Policy Development
   2. Advising within the US Government
   3. Conducting Diplomacy – who has the authority to act on behalf of, and to speak for, the United States, and who does not? Is the Logan Act good law and good policy?
   4. Legal Actor – and especially the role of the Legal Advisor (L)
   5. Intelligence Actor – role of the Department & its Bureau of Intelligence and Research (INR)
5. The law of the sea, air, and space – in brief
6. How diplomacy and the State Department will work in the Simulation

**Military Instrument:  DOD 101 – Department of Defense (DOD) Organization & Authorities, and the Chain of Command**

*Required Reading*:

* Baker, Chapter 8, pp. 176-77, 225-239 (introduction, and chain of command)
* National Security Act of 1947 (as amended) § 2, codified at 50 U.S.C. 3002 (Declaration of Policy; formerly 50 U.S.C. § 401)
* 10 U.S.C. § 162 (assignment of forces to the combatant commands (COCOMS) and military chain of command), § 163 (role of Chairman of the Joint Chiefs of Staff (JCS)), § 164 (authorities of combatant commanders), § 168 (mil-mil), § 151 (organization and function of JCS, including dissenting advice and recommendations to Congress), § 152 (CJCS), § 153 (CJCS functions), § 155 (Joint Staff), § 156 (Chairman’s Legal Counsel)
* DOD Unified Command Plan (UCP) map [Carmen]
* DOD Org Chart [Carmen]
* Office of the Secretary of Defense (OSD) Org Chart (Jan. 2008), [http://commons.wikimedia.org/wiki/File:Org\_Chart\_for\_Office\_of\_Secretary\_of\_Defense.png](https://email.osu.edu/owa/redir.aspx?C=1mr8OZfoVUij60TT8QkqOYkPXS7chNAIcHXaKTYZne_YBZzUXbocVGJNfha196Vr6_nefXYGip8.&URL=http%3a%2f%2fcommons.wikimedia.org%2fwiki%2fFile%3aOrg_Chart_for_Office_of_Secretary_of_Defense.png)

*Optional Reading*:

* Previously Assigned – refresh your memory:
  + U.S. Const. art. I, § 8, cl. 12 (Army Clause), 13 (Navy Clause), 14 (Land and Naval Forces Clause), 15 & 16 (Militia Clauses), 17 (military property); art. II, § 1, cl. 1 (Executive Vesting Clause), § 2, cl. 1 (CINC Clause)
  + 50 U.S.C. § 3021 (NSC statute, formerly § 402) [Carmen]
  + 6 U.S.C. § 493 (HSC statute) [Carmen]
  + NSM-2 (2021) [Carmen] – portions concerning SECDEF and DOD
  + EO 12333 (2008) [Carmen] – skim for portions concerning DoD
  + Robert M. Gates, Duty: Memoirs of a Secretary at War, Author’s Note & 579-84 (2014) (former Defense Secretary’s reflections on Congress-Pentagon relations) [Carmen]
* Titles 10, 32, & 50 U.S.C. – review list of provisions online so you know your way around if you have a related job in the simulation
* Defense Department website, [http://www.defense.gov](https://email.osu.edu/owa/redir.aspx?C=1mr8OZfoVUij60TT8QkqOYkPXS7chNAIcHXaKTYZne_YBZzUXbocVGJNfha196Vr6_nefXYGip8.&URL=http%3a%2f%2fwww.defense.gov) – peruse
* Uniform Code of Military Justice (UCMJ), [http://www.au.af.mil/au/awc/awcgate/ucmj.htm](https://email.osu.edu/owa/redir.aspx?C=1mr8OZfoVUij60TT8QkqOYkPXS7chNAIcHXaKTYZne_YBZzUXbocVGJNfha196Vr6_nefXYGip8.&URL=http%3a%2f%2fwww.au.af.mil%2fau%2fawc%2fawcgate%2fucmj.htm) -- peruse
* 10 U.S.C. 1034, Whistleblower Protection Act – (a) and (b)(1)
* Civil-Military Relations Case Study 1: President Trump and Gen. Milley
  + Gen. Mark Milley, CJCS, Message to the Joint Force, June 2, 2020 [Carmen]
  + Isaac Stanley-Becker, *Top General Was So Fearful Trump Might Spark War that He Made Secret Calls to His Chinese Counterpart, New Book Says*, Wash. Post, Sept. 14, 2021 [Carmen] (discussion of book by Woodward & Costa, *Peril*)
  + Joint Chiefs of Staff, Memorandum for the Joint Force, Jan. 6, 2021 [Carmen]
  + Lauren Sforza, *US General Says He Never Received ‘Illegal Order’ Post-Election Day*, The Hill, Sept. 17, 2023, <https://thehill.com/homenews/4208800-us-general-says-he-never-received-illegal-order-post-election-day/>
* Civil-Military Relations Case Study 2: President Biden and Gen. Milley
  + Peter Baker, *Top U.S. General Urges Diplomacy in Ukraine While Biden Advisers Resist*, N.Y. Times, Nov. 10, 2022 [Carmen]

*Optional Viewing – Movies:*

* “A Few Good Men” (1992) (movie about prosecution for murder in the military justice system)

*Key Points*:

(1)   Uses of the Military Instrument:  traditional combat, counter-insurgency (COIN), peacekeeping, humanitarian response, domestic incident response

(2)   Structure of the Department of Defense (DoD) and the military – Office of the Secretary of Defense (OSD), the Unified Combatant Commands (COCOMS), the military departments, and the military services; Active and Reserve components (including the National Guard)

(3)   The chain of command under the Constitution and under statute after the Goldwater-Nichols Defense Reform Act of 1986, as amended (optional: in operation in crisis: case studies of relationships between Presidents Trump and Biden, and Gen. Mark Milley)

(4)   Roles of the military advisor to the policymaker, and of the lawyer advisor to the military and to the policymaker

(5)   Bureaucratic politics within the Executive Branch inter-agency NSC process and vis-à-vis Congress

(6)   The military justice system under the Uniform Code of Military Justice (UCMJ)

(7) DoD as a major intelligence actor

**Military Instrument: Use of Force**

**Use of Force – Generally**

*Required Reading:*

* Baker, Chapter 8, pp. 176-225

**Use of Force – Domestic Framework**

*Required Reading*:

* Previously Assigned
  + U.S. Const, art. I, sec. 8, cl. 11 (Declare War Clause), art. II, sec. 1, cl. 1 (Executive Vesting Clause), art. II, sec. 2, cl. 1 (CINC Clause)
  + 2001 Post-9/11 AUMF, P.L. 107-40 (Sept. 18, 2001) [Carmen]
  + 2002 Iraq AUMF, P.L. 107-243, Oct. 16, 2002 [Carmen]
* War Powers Resolution, P.L. 93-148 (Nov. 7, 1973), <http://library.clerk.house.gov/reference-files/PPL_93_148_War_Powers.pdf>
* Brian Finucane, *The House Tackles Zombie War Authorizations: Possibilities and Perils*, Just Security, Aug. 14, 2023, <https://www.justsecurity.org/87560/the-house-tackles-zombie-war-authorizations-possibilities-and-perils/>

*Optional Reading:*

* Previously Assigned
  + Revisit Con Law unit’s canon of national security cases, especially *Little v. Barreme (1804), The Prize Cases* (1863), *Curtiss-Wright* (1936), *Youngstown* (1952), *Hamdi* (2004), and *Hamdan* (2006)
  + War Powers Resolution (WPR), Pub. L. No. 93-148, 87 Stat. 555 (1973), also at 50 U.S.C. 1541-48
* War Crimes Act, 18 U.S.C. § 2441 (war crime prosecution basis in Art. III courts)
* Art. 18, UCMJ, 19 U.S.C. § 818 (court martial jurisdiction to try war crimes)
* Legislation – War Powers Resolution (WPR)
  + John Bellinger, *So Where Do War Powers Reports Come From?,* Lawfare, Aug. 19, 2014, <http://www.lawfareblog.com/2014/08/so-where-do-war-powers-reports-come-from/> (a former State Department Legal Advisor explains inter-agency process for drafting War Powers Resolution reports to Congress)
  + Barack Obama, Letter from the President to the Speaker of the House and President Pro Tempore of the Senate on the War Powers Resolution Regarding Iraq, Sept. 8, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/08/letter-president-war-powers-resolution-regarding-iraq> (example of War Powers Resolution reporting letter)
* Legislation – AUMFs
  + 1964 Vietnam (Gulf of Tonkin) AUMF, P.L. 88-408 (1964) [Carmen]
  + Sample proposed legislative text:
    - To repeal 1991 Iraq AUMF – Amdt. 115, 117th Cong. (Rep. Spanberger, D-VA), <https://amendments-rules.house.gov/amendments/SPANVA_115_xml220701140900865.pdf>
    - To repeal 1957 Middle East AUMF – Amdt. 22, 117th Cong. (Rep. Meijer, R-MI), <https://amendments-rules.house.gov/amendments/MEIJER_022_xml220705111957101.pdf>
    - To reform 2001 9/11 AUMF, adding ISIL/ISIS and other associated forces, and imposes sunsets and process limits – S.J. Res. 43, 115th Cong. (Sen. Flake, R-AZ with Sen. Kaine, D-VA), <https://www.congress.gov/115/bills/sjres43/BILLS-115sjres43is.pdf> (reforms 2001 9/11 AUMF to include
    - To enact new AUMF against ISIS/ISIL – S.J. Res. 43, 113th Cong. (Sen. Inhofe, R-OK), <https://beta.congress.gov/113/bills/sjres43/BILLS-113sjres43is.pdf>
    - To declare war against ISIS/ISIL, with stipulated limitations – S.J. Res. 46, 113th Cong. (Sen. Rand Paul, R-KY), <https://www.congress.gov/113/bills/sjres46/BILLS-113sjres46is.pdf>
  + *ISIS AUMF Proposals in the 115th Congress (2017-18)*, Just Security, June 19, 2017, <https://www.justsecurity.org/wp-content/uploads/2017/06/Just-Security-AUMF-Chart-June-19-2017fin.pdf>
  + Tess Bridgeman, Ryan Goodman, Stephen Pomper, and Steve Vladeck, *Principles for a 2021 Authorization for the Use of Military Force (AUMF)*, Just Security, March 4, 2021, <https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/>
  + Jordain Carney, *Senate Votes Down Paul’s Bid to Revoke War Authorizations,* The Hill*,* Sept. 13, 2017,<http://thehill.com/blogs/floor-action/senate/350462-senate-votes-down-pauls-bid-to-revoke-war-authorizations>
  + Ryan Goodman, *Sec. Kerry's Difficult Defense of 2001 AUMF Application to ISIL [ISIS] -- and Senators' Disbelief*, Just Security, Sept. 17, 2014, <http://justsecurity.org/15152/sec-kerrys-defense-2001-aumf-applies-isil-senators-disbelief/#more-15152>
  + Robert Chesney, *A White House Trial Balloon Trying Out the 2002 Iraq AUMF?,* Lawfare, Sept. 9, 2014, <http://www.lawfareblog.com/2014/09/a-white-house-trial-balloon-trying-out-the-2002-iraq-aumf/> (with links to debate among Jack Goldsmith, Chesney, and Wells Bennett about whether the 2002 Iraq AUMF could provide legal authority for strikes on ISIS)
  + Jack Goldsmith, *Further Reflections on the Legal Rationale for Using Force Against the Islamic State*, Lawfare, Sept. 12, 2014, <http://www.lawfareblog.com/2014/09/further-reflections-on-the-legal-rationale-for-using-force-against-the-islamic-state/> (arguing that the POTUS has Art. II authority for strikes on ISIS, but not statutory authority under the 2001 Post-9/11 AUMF; linking to contrary arguments; linking to OLC opinion regarding the 1999 Kosovo war that explains OLC view that appropriations by Congress for war can constitute a use of force authorization because they come second-in-time to the WPR)
* Executive Branch Views
  + U.S. Department of Justice Office of Legal Counsel (OLC), Memorandum for the Attorney General: Authority to Use Military Force in Libya, April 1, 2011, <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>
  + Jack Goldsmith, *Office of Legal Counsel Opinion on Libya Intervention*, Lawfare, April 17, 2011, <http://www.lawfareblog.com/2011/04/office-of-legal-counsel-opinion-on-libya-intervention/>
  + Charles Faulkner, Bureau of Legislative Affairs, U.S. Dep’t of State, Letter to Senator Bob Corker, Chairman, U.S. Senate Foreign Relations Committee, Aug. 2, 2017, <https://assets.documentcloud.org/documents/3911844/8-2-17-Corker-Response.pdf> (Trump Administration argument that 9/11 AUMF provides authority for US strikes against al-Assad regime in Syria that is fighting Al Qaeda and ISIL)

**Use of Force – International Framework**

*Required Reading*:

* U.S. Dep’t of Defense, Law of War Manual (2016 ed.) <https://www.documentcloud.org/documents/2997317-DoD-Law-of-War-Manual-June-2015-Updated-May-2016.html> -- **skim** table of contents on pp. vii-xvii, and Part II (Principles) on pp. 50-70 (do not print out the full document – it is 1,199 pages)
* Geneva Conventions of 1949 – for each, **skim** full text, **read** Common Article 3 of:
  + I (forces in the field), <http://www.icrc.org/ihl.nsf/FULL/365?OpenDocument>
  + II (naval personnel), <http://www.icrc.org/ihl.nsf/FULL/370?OpenDocument>
  + III (POWs), <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument>
  + IV (civilians), <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>
* United Nations Charter, <http://www.un.org/en/documents/charter/index.shtml> -- **read**:
  + - Art. 2(4) (refrain from use or threat of force)
    - Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression:
      * Art. 39 (UN Security Council SC (UNSC) authority to determine threats, breaches of peace, acts of aggression, and to decide to take action “to restore international peace and security”)
      * Art. 40 (UNSC provisional measures short of force)
      * Art. 41 (UNSC actions short of use of force, including economic sanctions)
      * Art. 42 (UNSC actions involving force)
      * Art. 51 (individual and collective self-defense in the event of armed attack, reporting of such acts to UNSC)
  + Chapter VIII: Regional Arrangements
    - Art. 52 (regional action to deal with “the maintenance of international peace and security)
    - Art. 53(1) (no regional action without UNSC authorization)
    - Art. 54 (regional actions must be reported to UNSC)

*Optional Reading*:

* North Atlantic Treaty (1949), Arts. 1 (consistency with UN Charter), 4 (consultation in event of threat), 5 (collective self-defense), 6 (armed attack defined), <http://www.nato.int/cps/en/natolive/official_texts_17120.htm>
* United Nations Charter, <http://www.un.org/en/documents/charter/index.shtml>
  + Chapter IV: Pacific Settlement of Disputes. Read:
    - Art. 35(1) (any UN member may bring disputes to the UN)
    - Art. 36(3) (legal disputes generally should be referred to the International Court of Justice (ICJ))
  + Chapter V: The Security Council (composition and proceedings)
* 1977 Additional Protocols to the Geneva Conventions: I (victims of international armed conflicts), <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>; II (victims of non-international armed conflicts), <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>
* Ashley Deeks, *Narrowing Down the U.S. International Legal Theory for ISIS Strikes in Syria*, Lawfare, Sept. 12, 2014, <http://www.lawfareblog.com/2014/09/narrowing-down-the-u-s-international-legal-theory-for-isis-strikes-in-syria/> (arguing that Obama Administration’s arguments for both domestic and international legal authority to strike ISIS – including in Syria – have a common nexus in a theory that ISIS is a successor – a continuation of Al Qaeda)
* Oona A. Hathaway, Maggie Mills & Heather Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, Just Security, May 5, 2023, <https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/> -- **skim**

*Optional Viewing – Movies:*

* “Lone Survivor” (2013) (based on a SEAL Team Six mission in Afghanistan)
* “Saving Private Ryan” (1998) (fictionalized depiction of Army in combat during World War II)

*Key Points*:

1. Domestic Law Framework: Constitutional text, War Powers Resolution (WPR), AUMFs (existing and proposed), and practice
2. International Law Framework: *Jus ad bellum* and *Jus in bello* under International Humanitarian Law (IHL) and the Law of Armed Conflict (LOAC) – What do these bodies of law require? Are they binding or advisory? How are they moral, practical, both, or neither? What are the responsibilities and challenges of practicing LOAC – practicing “op law”?
3. Nature, opportunities, and risks of war / armed conflict / use of force

**Intelligence Instrument**

*Required Readings:*

* Baker, In the Common Defense, Chapter 7 (Intelligence), pp.126-75
* 50 U.S.C. (chapter 15 thereof):
  + § 3003 (definitions of intel, counter-intel, and IC; formerly § 401a)
  + § 3091 (congressional oversight generally, formerly § 413)
  + § 3092 (reporting requirements other than for covert actions, formerly § 413a)
  + § 3093 (covert action statute, formerly § 413b)[[3]](#footnote-3)
  + § 3094 (intelligence funding, formerly § 414)
* Exec. Order (EO) 12333, as amended by EO 13470 (July 30, 2008), <http://www.fas.org/irp/offdocs/eo/eo-12333-2008.pdf>
* Examples of intelligence products:
  + “Bin Laden Determined to Strike in US,” President’s Daily Brief (PDB) on Intelligence for President George W. Bush, Aug. 6, 2001, <https://fas.org/irp/cia/product/pdb080601.pdf>
  + Joint Statement from the Department of Homeland Security & Office of the Director of National Intelligence on Election Security, Oct. 7, 2016, <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> (you do not need to dive deeply into the specifics; this is mainly an illustrative example of a publicly released intelligence estimate)
* A Tour of the IC
  + Members of the IC, <http://www.dni.gov/index.php/intelligence-community/members-of-the-ic> (descriptions of work of each intel agency)
  + Alex Finley, *A Brief Tour of the Intelligence Community*, Overt Action, April 25, 2016, [www.overtaction.org/2016/04/a-brief-tour-of-the-intelligence-community/](http://www.overtaction.org/2016/04/a-brief-tour-of-the-intelligence-community/) (humorous short overview of IC, from a CIA viewpoint)
  + Peruse:
    - Office of the Director of National Intelligence (ODNI) website: [www.dni.gov](http://www.dni.gov)
    - Central Intelligence Agency (CIA) website: [www.cia.gov](http://www.cia.gov)
    - Senate Select Committee on Intelligence (SSCI) website (<http://www.intelligence.senate.gov/>) or that of the House Permanent Select Committee on Intelligence (HPSCI) (<http://intelligence.house.gov/>).
* Professional Standards for the IC
  + IC Standards, <http://fas.org/blogs/secrecy/2015/12/ic-competencies/>
  + IC Ethics Principles (2015), <https://www.dni.gov/index.php/who-we-are/organizations/clpt/clpt-related-menus/clpt-related-links/ic-principles-of-professional-ethics>
  + IC Transparency Principles, <https://www.odni.gov/index.php/how-we-work/transparency>

*Optional Reading and Listening:*

* + Covert agent cover:
    - § 3121 (penalties for blowing cover of covert agent; formerly § 421)
    - § 3122 (exceptions to covert agent cover-blowing penalties for USG disclosure, disclosure to SSCI & HPSCI, or self-disclosure; formerly § 422)
    - § 3124 (extraterritorial application of §3121; formerly §424)
    - § 3125 (rule of construction that statute may not be construed as authority to withhold information from Congress; formerly §425)
    - § 3126 (definitions; formerly § 426)
* Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, and other statutory provisions regarding intelligence community (IC) organization, authorities, and congressional oversight. Particularly, in 50 U.S.C. (chapter 15 thereof):
  + - § 3023 (establishment of DNI and roles; formerly § 403)
    - § 3024, all, but esp. (a), (b), (f), (k), (o) (DNI responsibilities and authorities; formerly § 403-1)
    - § 3025 (establishment of ODNI; formerly § 403-3)
    - § 3036 (Director of the CIA (D/CIA; formerly § 403-4a))
    - § 3038 (SECDEF responsibilities regarding intel; formerly § 403-5)
    - § 3039 (IC may collect info abroad on non-USPs for law enforcement; formerly § 403-5a)
    - § 3040 (“The Wall” between intelligence and law enforcement information coming down in USA PATRIOT Act: law enforcement must disclose foreign intel to DNI gained via criminal investigations; formerly § 403-5b)
    - § 3365 (“The Wall” coming down in USA PATRIOT Act: intelligence info gained in criminal investigation may be shared with any federal law enforcement, intel, or national security official, and shared with federal, state, local, or foreign officials to respond to a threat; formerly 403-5d)
    - § 3056 (National Counter-Terrorism Center (NCTC); formerly § 404o)
    - § 3057 (National Counter-Proliferation Center (NCPC); formerly § 404o-1)
    - §§ 3303, 3304 (construction and improvement of facilities for use by intel community; formerly § 403-2a, -2b)
    - § 3324 (prohibition on using journalists as agents or assets, waiver, and report; formerly § 403-7)
    - § 3325 (ban on drug trafficking; formerly § 403-8)
* ICD 112: Congressional Notification, June 29, 2017, <https://www.dni.gov/files/documents/ICD/ICD-112_17-00383_SIGNED.PDF> -- **skim**
* Dakota S. Rudesill, *Classified Legislation: Tracking Congress’s Library of Secret Law*, Lawfare, May 19, 2016, <https://www.lawfareblog.com/classified-legislation-tracking-congresss-library-secret-law> (previously assigned)
* 9/11 Commission Report (2004), Chapter 8 (“The System Was Blinking Red”), pp. 254-77; 407-19; <http://govinfo.library.unt.edu/911/report/911Report.pdf>
* Office of the Director of National Intelligence (ODNI), Annual Threat Assessment of the U.S. Intelligence Community, April 9, 2021, <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf>
* Greg Miller, *‘The Intelligence Coup of the Century,’* Wash. Post, Feb. 11, 2020, <https://www.washingtonpost.com/graphics/2020/world/national-security/cia-crypto-encryption-machines-espionage/> (also on CARMEN)
* Barton Gelman & Greg Miller, *U.S. Spy Network’s Successes, Failures, and Objectives Detailed in ‘Black Budget’ Summary*, Wash. Post, Aug. 29, 2013, <http://articles.washingtonpost.com/2013-08-29/world/41709796_1_intelligence-community-intelligence-spending-national-intelligence-program>; *$52.6 Billion: The Black Budget* [graphic], Wash. Post, <http://www.washingtonpost.com/wp-srv/special/national/black-budget/> (both also on Carmen)
* Audio and Video
  + Michael Morell, *Intelligence Matters* (pod), <https://www.cbsnews.com/feature/intelligence-matters-podcast-with-michael-morell/> (hosted by non-lawyer former senior Acting and Deputy CIA Director). For example:
    - “Michael Morell on 9/11, the CIA, and Afghanistan: Part 1,” Sept. 15, 2021, <https://podcasts.apple.com/us/podcast/michael-morell-on-9-11-the-cia-and-afghanistan-part-1/id1286906615?i=1000535417758> (CIA successfully provided strategic warning about Al Qaeda’s threat before 9/11, but did not successfully provide tactical warning of the specific attack on 9/11)
    - “Michael Morell on 9/11, the CIA, and Afghanistan: Part 2,” Intelligence Matters, Sept. 22, 2021, <https://www.cbsnews.com/news/intelligence-matters-michael-morell-on-911-the-cia-and-afghanistan-part-2/> (first 28 minutes, on CIA activity in the first months after 9/11, including covert ops)
  + Michael Hurley, Remarks, “9/11 at 20” conference, Mershon Center for International Security Studies, The Ohio State University, Sept. 10, 2021, <https://www.youtube.com/watch?v=jk7pWyGypeI> (Hurley short remarks about his experience in Afghanistan after 9/11 starts at 31:33 mark).

*Optional Viewing - Movies:*

* "The Bourne Identity" (2001), "Dr. No" (1962) (first Bond movie), "Casino Royale" (2006) (best Bond movie), "Austin Powers" (1997) (best satire of Bond movies), “Charlie Wilson’s War” (2007) (covert operation in Afghanistan to oust Soviets), "Argo" (2012) (covert operation to extract U.S. hostages from Iran)

*Key Points & Mapping Questions – Intelligence Generally*

1. Introductory Questions

* A. What is intelligence?
* B. What is not intelligence?
* C. What are the common challenges of intelligence work? The significance of Knowns and Unknowns?
* D. Goals of the Intelligence Community (IC)?
* E. Who does it? Who are intel actors?
* F. Who is it for? Who are the customers and consumers?
* G. Who has legal authority over intel? Is it in the Constitution?

(2) Organization of the Intelligence Community (IC); National Intelligence Program (NIP) vs. Military Intelligence Program (MIP); Snowden revelations of the NIP budget and IC organization

(3) Five intelligence functions (activities) – collection, analysis and dissemination, covert action, liaison, counter-intelligence (CI) – and the Intelligence Cycle

(4) The INTs: SIGINT, HUMINT, MASINT, GEOINT, OSINT – and RUMINT

(5) Intelligence reform in 2004

(6) Intelligence reform tensions: “Need to Know” vs. “Need to Share,” and Zero Leaks vs. Zero Attacks

(7) Intelligence oversight: checking error and abuse, and ensuring the people remain self-governing regarding matters hidden from public view

(8) Banned intelligence activities

(9) IC standards: analytical independence, ethical integrity, and transparency

*Mapping Questions – Covert Action*

1. What in colloquial terms is covert action? Can you think of general Pros and Cons of engaging in it?
2. What is the legal positive definition of covert action?
3. What is the legal negative definition of covert action? And what covert actions are banned?
4. What are the Executive Branch decision process and congressional notification process under the statute and EO 12333 (2008)?
5. How do you think legally the covert action statute might relate to the President’s Article II authorities and any statutory authorities such as the 9/11 AUMF?
6. Covert action’s scope: Is all secret or clandestine activity covert action? Is all covert action done by CIA?
7. What are roles of law and lawyers regarding covert action?

**Law Enforcement Instrument**

*Required Readings*:

* Robert H. Jackson, The Federal Prosecutor, Address to the Second Annual Conference of United States Attorneys, April 1, 1940, <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf> (also on Carmen)
* Neutrality Act – **skim** these authorities
  + 18 U.S.C. § 951 (crime to be an unregistered agent of a foreign power)
  + § 952 (crime to publish or distribute foreign government diplomatic communications or codes)
  + § 953 (Logan Act; crime to correspond with foreign government with intent to influence their conduct or “defeat the measures of the United States”)
  + § 956 (crime to conspire to kill or injure persons or damage property abroad)
  + § 958 (crime to serve a foreign entity in war against an entity with which the US it at peace)
  + § 959 (crime to enlist self or others in marine or naval forces of foreign entity)
  + § 960 (crime to engage in “any military or naval expedition or enterprise” against foreign entity with which the US is at peace)
  + §§ 961-62 & 964 (crime to provide naval assistance to foreign entities)
  + § 963 (President may detain armed vessel until clear it will not commit hostilities against foreign entity with which the US is at peace)
  + § 970 (crime to damage or trespass upon property of foreign state or international organization within the US)
* Material Support to Terrorism
  + Statute: 18 U.S.C. § 2339A (Carmen)
  + Delowar Hossain Case
    - DOJ U.S. Attorney’s Office (USAO) for SDNY, July 26, 2019, <https://www.justice.gov/usao-sdny/pr/bronx-man-arrested-attempting-provide-material-support-terrorism> (also on Carmen)
    - Complaint filed with SDNY, July 26, 2019, <https://www.justice.gov/usao-sdny/press-release/file/1187731/download> (also on Carmen) – **skim**
    - Shayna Jacobs, *N.Y. Uber Driver Tried to Travel to Afghanistan to Join the Taliban, Prosecutors Say*, Wash. Post, Sept. 29, 2021, <https://www.washingtonpost.com/national-security/ny-uber-driver-tried-to-travel-to-afghanistan-to-join-the-taliban-prosecutors-say/2021/09/29/cfb906ba-216a-11ec-9309-b743b79abc59_story.html> (also on Carmen)
* EO 12333 (2008) (previously assigned; read for roles of Attorney General, DOJ, and FBI) (Carmen)
* Websites of the Department of Justice ([www.justice.gov](http://www.justice.gov)) and FBI ([www.fbi.gov](http://www.fbi.gov)) – **peruse**

*Optional Readings:*

* Material Support to Designated Foreign Terrorist Organization (FTO) Statute: 18 U.S.C. § 2339B (Carmen)
* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (material support to international terrorism)
* U.S. Department of Justice Office of Legal Counsel (OLC) Memos on Interrogation and Surveillance (STELLARWIND) (2001-2) (Carmen) – **they are long so just skim**
* Terrorism-Related Statutes (Some)
  + Terrorism Definitions, 18 U.S.C. § 2331
  + Killing Americans Abroad, § 2332
  + Weapons of Mass Destruction (WMD), § 2332a
  + International Terrorism, § 2332b
  + US Person Financial Support to State Sponsors of Terrorism, § 2332d
  + Bombings, § 2332f
  + Missile Systems Designed to Destroy Aircraft, § 2332g
  + Radiological Devices, § 2332h
  + Nuclear Terrorism, § 2332i
  + Victims of Terrorism Civil Remedies, § 2333 (jurisdiction and venue, § 2334)
  + Federal Court Jurisdiction, § 2338
* David J. Barron, Acting Assistant Att’y. Gen., Office of Legal Counsel, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>
* Adam Goldman, Jia Lynn Yang and John Muyskens, *The Islamic State’s Suspected Inroads into America*, Wash. Post, Aug. 8, 2016, [https://www.washingtonpost.com/graphics/national/isis-suspects/?ct=t(Today\_s\_Headlines\_and\_Commentary11\_3\_2015)](https://email.osu.edu/owa/redir.aspx?SURL=3s1yEgFp7VWaj2G5yBvOIoqyYMQz2tZZUNXpUCNY0-BvcjoalY_TCGgAdAB0AHAAcwA6AC8ALwB3AHcAdwAuAHcAYQBzAGgAaQBuAGcAdABvAG4AcABvAHMAdAAuAGMAbwBtAC8AZwByAGEAcABoAGkAYwBzAC8AbgBhAHQAaQBvAG4AYQBsAC8AaQBzAGkAcwAtAHMAdQBzAHAAZQBjAHQAcwAvAD8AYwB0AD0AdAAoAFQAbwBkAGEAeQBfAHMAXwBIAGUAYQBkAGwAaQBuAGUAcwBfAGEAbgBkAF8AQwBvAG0AbQBlAG4AdABhAHIAeQAxADEAXwAzAF8AMgAwADEANQApAA..&URL=https%3a%2f%2fwww.washingtonpost.com%2fgraphics%2fnational%2fisis-suspects%2f%3fct%3dt(Today_s_Headlines_and_Commentary11_3_2015)) (also on Carmen) (interactive chart showing 100 cases in which charges have been brought in connection with ISIL activities)
* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. Nat. Sec. L. & Pol’y 1, 96-104 (2011) (only **charts at end of article** comparing aspects of civilian criminal prosecution, military commission prosecution, and law of war detention)

*Mapping Questions – Law Enforcement Instrument*:

1. What Pros of Cons can you think of for using law enforcement as a means of advancing national security? On its own, and in context with availability of the other National Instruments of Power?
2. What are key law enforcement activities, and what are the roles of the Attorney General, FBI, and other DOJ actors? (I will lecture on this).
3. What does the “Executive Branch intelligence charter,” EO 12333 (2008), have to say about the roles of the Attorney General, DOJ, and FBI in intelligence?
4. What are particular challenges associated with the Law Enforcement Instrument? Do you agree with then-Attorney General Robert Jackson? How important in your view is the independence of the Justice Department from the President, the elected Chief Executive? How does a lawyer or investigator reflect it in their work?
5. Are you comfortable with the idea that DOJ can make “law of the Executive Branch” via judicial interpretations, ones that are binding on the Executive Branch? Ones that can be kept secret?
6. In short, what does the Neutrality Act mean? (skim through the list of statutory provisions on the syllabus; reading them all is optional)
7. Do you think that the federal statutory criminalization of material support to terrorism is over-broad? Generally? In the current case of Delowar Hossain?
8. How will DOJ operate in the Simulation?

**Economic Instrument**

*Required Readings*:

* Foreign Assistance Act, as amended – skim

*Optional Readings:*

* Designation of Foreign Terrorist Organizations (FTOs), 8 U.S.C. § 1189
* Material Support to Terrorism, 18 U.S.C. §§ 2339A, 2339B
* Assistance to Specially Designated Nationals (SDN) under International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-07
* Current lists:
  + Foreign Terrorist Organizations (FTOs): <https://www.state.gov/j/ct/rls/other/des/123085.htm>
  + Specially Designated Individuals (SDNs): <http://www.treasury.gov/sdn>
* Transactions with State Sponsors of Terrorism, 18 U.S.C. § 2332d
* U.S. Attorney’s Office for the Western District of Michigan, Terrorist Financing, <https://www.justice.gov/usao-wdmi/anti-terrorism-advisory-council/terrorist-financing>

*Key Points*:

1. Importance of money to U.S. national security, and adversaries
2. Statutory authorities for use of the Economic Instrument, including aid, sanctions, trade promotion, and disruption of terrorist financing

**IV. Cross-Cutting Issues**

**Surveillance – Intelligence, Military, & Law Enforcement Instruments**

*Required Readings*:

* Baker, Chapter 5:  Electronic Surveillance: Constitutional Law Applied, pp. 71-86 -- start your reading here.  This assigned part of Baker's chapter provides an insightful orientation on the factual and legal history of electronic surveillance and FISA.  However, note that Baker's book is current only to 2006-7 and pre-dates the 2008 FISA Amendments Act (including its § 702) and the 2015 USA FREEDOM Act (including its changes to § 215 of the USA PATRIOT Act) and other important changes to surveillance law.
* U.S. Const., Fourth Amendment (previously assigned)
* National Security Investigative Authorities “Cheat Sheet” (CARMEN)
* Surveillance – Extra Guidance (a document about how surveillance will work during the Sim, which is imperative for players with related responsibilities to know) (CARMEN)
* Exec. Order 12333, §§ 1.4 (a,b), 1.7(c)(1), 2.2, 2.3, 2.4, 2.5 (2008) – previously assigned EO in full; these provisions relate to collection of publicly available information and collection on US persons abroad
* Adam Liptak, *At the Supreme Court, a Plea to Reveal Secret Surveillance Rulings*, N.Y. Times, Sept. 20, 2021, <https://www.nytimes.com/2021/09/20/us/supreme-court-fisa-surveillance-rulings.html?smtyp=cur&smid=tw-nytimes> [also on Carmen]
* Ellen Nakashima, *NSA Gathered Thousands of Americans' E-mails Before Court Struck Down Program*, Wash. Post, Aug. 21, 2013, <http://articles.washingtonpost.com/2013-08-21/world/41431823_1_court-opinion-chief-judge-government-surveillance>

*Optional Readings* **(readings in bold are highly recommended for players who are Attorney General, DOJ NSD, the Chief Judge’s law clerk, and NSA General Counsel)**

* Baker, pp. 87-98 – see note about Baker above
* Title III of 1968 Omnibus Crime Control and Safe Streets Act as amended
  + , and Electronic Communications Privacy Act (ECPA): 18 U.S.C. 2510-22 – *Forward-looking* criminal wiretap authority; note especially sec. 2511 (general prohibition on interception and disclosure of wire, oral, or electronic communications and criminal penalties) and 2518 (“Title III warrant” requirements)
  + **Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2701 – *backward-looking* criminal search warrant**
  + Title III Pen/Trap, 18 U.S.C. 3121-27
* Foreign Intelligence Surveillance Act (FISA) of 1978 as amended
  + “Classic FISA,” 50 U.S.C. 1801-1811 – authority for particularized national security surveillance orders
  + Sec. 702 of the FISA Amendments Act of 2008 as amended, 50 U.S.C. 1881a – basis for PRISM and Upstream collection
  + FISA Business Records, 50 U.S.C. 1861 – current provision after sunset of Sec. 215 of the USA PATRIOT Act
  + FISA Physical Searches, 50 U.S.C. 1821-25
  + FISA Pen/Trap, 50 U.S.C. \_\_\_ -29
* *Cases*
  + *Katz v. United States*, 389 U.S. 347 (1967)
  + ***U.S. v. U.S. District Court*, 407 U.S. 297 (1972) (*Keith*) – excerpt (Carmen)**
* **Writing and Analysis**
  + **Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 Harv. Nat. Sec. J. 241, 293-305 (2015),** [**https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2687223**](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687223) **(discussing “secret law” on surveillance in OLC memos and FISA orders)**
  + **Charlie Savage, Power Wars 162-223 (2016) – deep dive into history of surveillance for students in roles related to surveillance (district court clerk, AG, NSD, NSA General Counsel)**
  + Iggy Pop, *Caesar Lives*, 2 Classics Ireland 94 (1995) [Carmen]
* **Peter M. Shane, *The NSA and the Legal Regime for Foreign Intelligence Surveillance*, 9 ISJLP 260 (2014) (surveying surveillance law history** and arguing that FISC is giving its assent to Executive Branch legal arguments about surveillance authority in exchange for Executive’s submission to FISC program monitoring to protect privacy)
* **Ali Watkins, *Most of NSA’s Data Collection Authorized by Order Ronald Reagan Issued*, McClatchy, Nov. 21, 2013,** [**http://www.mcclatchydc.com/2013/11/21/209167/most-of-nsas-data-collection-authorized.html**](http://www.mcclatchydc.com/2013/11/21/209167/most-of-nsas-data-collection-authorized.html) **(asserting that a majority of metadata – inferentially to include foreign metadata – has been acquired by NSA not under the Sec. 215 program but under EO 12333 § 2.5, and quoting SSCI Chair saying 12333 programs need more oversight)**
* **Office of the Director of National Intelligence (ODNI), IC on the Record,** [**http://www.odni.gov/index.php/carousel-items/916-the-intelligence-community-launches-ic-on-the-record**](http://www.odni.gov/index.php/carousel-items/916-the-intelligence-community-launches-ic-on-the-record) **-- peruse site that provides information and declassified documents**
* Eric Schmitt & Michael S. Schmidt, *Qaeda Plot Leak Has Undermined U.S. Intelligence*, N.Y. Times, Sept. 29, 2013, <http://www.nytimes.com/2013/09/30/us/qaeda-plot-leak-has-undermined-us-intelligence.html?hp>
* James Risen & Laura Poitras, *NSA Gathers Data on Social Connections of US Citizens*, N.Y. Times, Sept. 28, 2013, <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?hp&_r=0>
* ~~Submarine [Undersea] Cable Map 2013, Telegeography.com,~~ [~~http://submarine-cable-map-2013.telegeography.com/~~](http://submarine-cable-map-2013.telegeography.com/)
* Last Week Tonight with John Oliver, Interview with Gen. Keith Alexander (NSA Director), April 27, 2014, <https://www.youtube.com/watch?v=k8lJ85pfb_E> (provocative and at times hilarious video on NSA domestic surveillance; 9:25 minutes)
* On Sec. 215 of the USA PATRIOT Act, if you want to do deep research:
  + - First document leaked by Snowden: Secondary Order for bulk metadata collection served on Verizon Business Services, BR 13-80, FISC (Vinson, J.), April 25, 2013
    - Primary Order for bulk metadata collection, BR 13-80, FISC (Vinson, J.), April 25, 2013
    - Amended Memorandum Opinion, reauthorizing bulk metadata collection, BR 13-109, FISC (Eagan, J.), Aug. 29, 2013 – note that “The Wall” between intelligence and law enforcement is back up for this program, at 4
    - Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 Harv. J.L. & Pub. Pol’y 757 (2014) (arguing that bulk collection of metadata is illegal)
    - Marty Lederman, *The Kris Paper, and the Problematic FISC Opinion on the Section 215 “Metadata” Collection Program*, Just Security, Oct. 1, 2013, <http://justsecurity.org/2013/10/01/kris-paper-legality-section-215-metadata-collection/> -- This is Prof. Lederman’s incisive response to Kris and to Judge Eagan’s Aug. 29, 2013 opinion on the Sec. 215 program. Also long but excellent. For the FISA junkies among you.
* On Sec. 702 of the FISA Amendments Act, if you want to do deep research:
  + Katie Bo Williams, *Sessions, Coats Push for Permanent Renewal of Controversial Surveillance Law*, The Hill, Sept. 11, 2017, <http://thehill.com/policy/national-security/350155-sessions-coats-push-for-permanent-702-renewal> (Sec. 702 up for reauthorization by Dec. 31, 2017)
  + Scott Shane, *No Morsel Too Miniscule for All-Consuming N.S.A.*, N.Y. Times, Nov. 2, 2013, [http://www.nytimes.com/2013/11/03/world/no-morsel-too-minU.S.C.ule-for-all-consuming-nsa.html](http://www.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html) (thousands of documents leaked by Snowden describe extensive NSA foreign surveillance abroad, including gathering intelligence on leaders of UN and friendly foreign states to get “diplomatic [and] economic advantage”); documents at <http://www.nytimes.com/interactive/2013/11/03/world/documents-show-nsa-efforts-to-spy-on-both-enemies-and-allies.html?ref=world> (pie chart showing one week of collection at one facility, with legend; 2007 US SIGINT System (USSS) Strategic Mission List; and 2008-13 Strategic Plan).
  + Senators Mark Udall, Ron Wyden, & Martin Heinrich, Letter to U.S. Solicitor General Donald Verrilli, Jr., Nov. 20, 2013, *available at* <https://www.documentcloud.org/documents/837839-112013-clapper-v-amnesty-letter-1.html> (noting that Sec. 702 of the FAA has been interpreted by NSA to authorize collection not only of communications of targeted individuals reasonably believed to be outside of the United States, but also communications of USPs anywhere whose contents include an identifier – such as an email address – that is merely “about” a target, and asking whether DoJ plans to correct its assertions to the Supreme Court in Clapper v. Amnesty International (2013) inconsistent with this understanding of Sec. 702)

*Mapping Questions*

1. How would you organize the history of surveillance – factually and legally? How have technological change, change in the threat, evolution of Supreme Court doctrine, and scandal (1970s, 2005, 2013, 2020-21) driven changes to law and process?
2. What are the purposes and uses of surveillance? On what legal bases are different kinds of national security-related surveillance collection conducted? What is the legal basis for the vast majority of it?
3. Should a warrant or other court order be required for surveillance for national security purposes? Of U.S. Persons? Of non-U.S. Persons? Located in the United States? Abroad? Why or why not?
4. Specifically, how does surveillance work under Title III, EO 12333, “Classic FISA,” and FISA as amended? How do the decision processes, actors, standards, information collected, and oversight mechanisms compare?
   1. Who can be targeted and what can be collected under each authority? (Get to know the surveillance “Cheat Sheet” well).
   2. Under FISA, what is “foreign intelligence information”?
   3. Under FISA, what is an “agent of a foreign power”?
   4. Why is the content vs. non-content (“metadata”) legal distinction important?
   5. What are the roles of the Foreign Intelligence Surveillance Court (FISC) (also known as the “FISA court”) and its amicus?
   6. What is a National Security Letter (NSL)?
5. Why has FISA been controversial since enactment – and especially again in recent decades?
   1. How did the Executive Branch and then the courts and Congress change the FISA legal regime in the decades after 9/11?
   2. How was legal secrecy – “secret law” and secret decision-making – used to grow the Executive Branch’s surveillance powers post-9/11, via STELLARWIND and other programs? How was the “presidentialist” minority theory of national security constitutional separation of powers important? Has Congress now fixed the “secret law” problem regarding surveillance?
   3. What FISA authorities lapsed in 2020? Should they be reauthorized?
   4. What should Congress do in view of the recent Inspector General (IG) report on FISA? (I’ll mainly lecture on this, but you can [read this](https://www.lawfareblog.com/fbis-fisa-mess), too).
6. Overall, do you think that surveillance law and process appropriately balance liberty and security?
   1. Is it good that “the wall” between intelligence and law enforcement came down after 9/11, and that intelligence collection (with and without a court order) can in some circumstances come in as evidence in federal courts?
   2. In your view, have secrecy and standing doctrines operated too effectively to insulate national security surveillance from review by the public and courts?
   3. Where has the Supreme Court’s doctrine on privacy and electronic information collection been headed?
   4. If the Supreme Court grants cert this week or next in ACLU’s First Amendment challenge to FISC secret law, how do you think it should rule?
   5. If you could help Congress amend FISA or Title III, how would you do it?
7. How will surveillance law and process operate in the Simulation?

**Cyber & A.I.**

*Required Readings - Cyber*:

* 18 U.S.C. § 1030, Computer Fraud and Abuse Act (CFAA), particularly § 1030(a) (Carmen)
* National Defense Authorization Act (NDAA) for 2012 – § 954 and related report language (Carmen)
* NDAA for 2019 – § 1642 and related report language, <https://sgp.fas.org/news/2018/07/ndaa-1642.html> (also on Carmen)
* Fed. R. Crim. P. 41, especially (b)(6) (Carmen)
  + April Falcon Doss, *We’re From the Government, We’re Here to Help: The FBI and the Microsoft Exchange Hack*, Just Security, April 16, 2021, <https://www.justsecurity.org/75782/were-from-the-government-were-here-to-help-the-fbi-and-the-microsoft-exchange-hack/>
  + Affidavit in Support of an Application for a Seizure Warrant, June 7, 2021, <https://www.scribd.com/document/510927692/Seizure-Warrant#download&from_embed> – **skim**
* Office of the Director of National Intelligence (ODNI), Annual Threat Assessment of the U.S. Intelligence Community, April 9, 2021, <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf> (also on Carmen) – **read the cyber sections on pages 8, 10-11, 20-21**
* Websites – **peruse**:
  + NSA ([www.nsa.gov](http://www.nsa.gov))
  + USCYBERCOM (<http://www.stratcom.mil/factsheets/Cyber_Command/>)
  + Cybersecurity and Infrastructure Security Agency (CISA) of the U.S. Department of Homeland Security (DHS) (<https://www.cisa.gov/>)
  + FBI – Cyber Crime (<https://www.fbi.gov/investigate/cyber>)
* David Ignatius, *An Undeclared War is Breaking Out in Cyberspace. The Biden Administration is Fighting Back*, Wash. Post, Aug. 10, 2021, <https://www.washingtonpost.com/opinions/2021/08/10/an-undeclared-war-is-breaking-out-cyberspace-biden-administration-is-fighting-back/> (also on Carmen)

*Optional Readings, etc. - Cyber*:

* 10 U.S.C. § 2224, Defense Information Assurance Program authorities for DOD
* Gerrit De Vynck, *First Came the Ransomware Attacks, Now Come the Lawsuits*, Wash. Post, July 25, 2021, <https://www.washingtonpost.com/technology/2021/07/25/ransomware-class-action-lawsuit/> (also on Carmen)
* Podcast – “Kate Hanniford on the SEC’s New Cyber Disclosure Rule,” *Lawfare Podcast*, Sept. 7, 2023, [https://podcast.app/kate-hanniford-on-the-secs-new-cyber-disclosure-rule-e338614467/?utm\_source=ios&utm\_medium=share](https://urldefense.com/v3/__https:/podcast.app/kate-hanniford-on-the-secs-new-cyber-disclosure-rule-e338614467/?utm_source=ios&utm_medium=share__;!!KGKeukY!1Lzc9scThdCrYpqJiZ_AKdvMQm1Az1Oy1TtrTN50B6HZyEKqcH-Xh4AwIFNisdEU2u5CnO_FEF2Dj7ZD4HtlMe79gog$)
* Barton Gellman & Ellen Nakashima, *U.S. Spy Agencies Mounted 231 Offensive Cyber-Operations in 2011, Documents Show*, Wash. Post, Aug. 30, 2013, <http://www.washingtonpost.com/world/national-security/us-spy-agencies-mounted-231-offensive-cyber-operations-in-2011-documents-show/2013/08/30/d090a6ae-119e-11e3-b4cb-fd7ce041d814_story.html> (also on Carmen)
  + Executive Orders
    - EO 13636, Improving Critical Infrastructure Cybersecurity, Feb. 12, 2013, <http://www.gpo.gov/fdsys/pkg/FR-2013-02-19/pdf/2013-03915.pdf> (calling for development of a voluntary Cybersecurity Framework for assisting private actors in protecting cybersecurity).
    - DHS Fact Sheet on EO 13636 and PPD-21, March 13, 2013, <http://www.dhs.gov/sites/default/files/publications/EO-PPD%20Fact%20Sheet%2012March13.pdf>.
    - Presidential Policy Directive (PPD) 21, Critical Infrastructure Security and Resilience,, Feb. 12, 2013, <http://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil> (directing Executive Branch to enhance its understanding of the cyber threat to critical infrastructure and preparations).
    - PPD-20, U.S. Cyber Operations Policy (2012), <http://epic.org/privacy/cybersecurity/presidential-directives/presidential-policy-directive-20.pdf> (classified Presidential memo leaked and posted on several websites, including EPIC and FAS).
    - HSPD-7, Critical Infrastructure (2003), <http://www.dhs.gov/homeland-security-presidential-directive-7> (under sec. 16, DHS is a lead for much critical infrastructure that could be targeted in cyberattacks)
* UN Charter, art. 41, *available at* <http://www.un.org/en/documents/charter/chapter7.shtml> (measures the UN Security Council can take other than use of armed force include turning off communications – which could in theory include turning off internet to/from a country).
* Budapest Convention (Council of Europe Cybercrime Convention) (2001), <http://conventions.coe.int/Treaty/en/Treaties/html/185.htm>
* Tallinn Manual on the International Law Applicable to Cyber Warfare (Michael N. Schmitt, gen. ed., 2013), <http://issuu.com/nato_ccd_coe/docs/tallinnmanual?e=5903855/1802381> (unofficial manual commissioned by NATO – very long, so pick and choose what you read)
* Department of Defense, Strategy for Operating in Cyberspace (July 2011), <http://www.defense.gov/news/d20110714cyber.pdf>
* (FEMA) National Response Framework, Cyber Incident Annex, <http://www.fema.gov/media-library-data/20130726-1825-25045-8307/cyber_incident_annex_2004.pdf>
* Dakota S. Rudesill, *Cyber Operations, Legal Secrecy, and Civil-Military Relations, in* Reconsidering American Civil-Military Relations: The Military, Society, Politics, and Modern War (Lionel Beehner, Risa Brooks & Daniel Maurer, eds.) (2020) (Carmen)
* Harold Hongju Koh, (then) State Department Legal Advisor, “International Law in Cyberspace,” Remarks at USCYBERCOM Inter-agency Legal Conference, Sept. 18, 2012, <http://www.state.gov/s/l/releases/remarks/197924.htm>

*A.I. Readings – Required*

* Statement on A.I. Risk, Center for A.I. Safety, May 30, 2023, <https://www.safe.ai/statement-on-ai-risk> [open letter signed by Geoffrey Hinton, Bill Gates, and other tech leaders, still open for public signature]
* Chris Vallance, *Artificial Intelligence Could Lead to Extinction, Experts Warn*, BBC, May 30, 2023, <https://www.bbc.com/news/uk-65746524>
* Pause Giant A.I. Experiments: An Open Letter, FutureOfLife.org, March 22, 2023, <https://futureoflife.org/open-letter/pause-giant-ai-experiments/> [open letter signed by Elon Musk, Steve Wozniak, and other tech leaders]
* Azimov’s Three Laws of Robotics [Carmen]
* ~~James E. Baker, The Centaur’s Dilemma: National Security Law for the Coming A.I. Revolution (2021) – excerpt [Carmen]~~
* ~~Recent Legislation on A.I. – excerpts [Carmen]~~

*Mapping Questions*:

1. How would you characterize the threat to cyber security, in scope, complexity, and severity?
2. Context, Threat, and Definitions (I will lecture us through this):
   * What is hacking? What are examples, in ascending order of severity?
   * Is hacking crime, war, espionage, or terrorism?
   * How do we know? What investigative authorities can government use? Should the nature of the attack dictate how the government responds?
3. Cyber Defense by the U.S. Government
   * Who in government is responsible for computer network defense – for the .mil, .gov, and .com realms? Who should be?
   * How easy should it be for federal agencies to share cyber-related information – internally and externally? What are potential risks?
   * How active should defense be?
   * Are you comfortable with how the U.S. Government this year has used court orders pursuant to Fed. R. Cr. P. 41 to counter ransomware attacks?
4. Cyber Attack by the U.S. Government
   * What legal authorities are available to the U.S. Government to engage in cyber attack – computer network attack?
   * What actor(s) in the federal government can do it? Should do it? What rules should operate?
5. In terms of decision process:
   * When should a cyber incident be brought to the NSC and/or the President, vs. being left at the agency level?
   * Is legal secrecy a problem regarding the law concerning cyber defense and attack?
6. How does international law govern cyber operations? What principle(s) of the law of armed conflict (LOAC) do you think might be most difficult to apply?
7. What does the Ohio state-level response involve, in terms of legal authorities and actors? (lecture)
8. What are particular risks and options for the private sector when facing cyber attack, including by foreign actors? Should the private sector have the ability to “hack back”?
9. Regarding A.I., how does A.I. potentially implicate national security? What risks and opportunities does it present? What do you think should be done?

**Detainees & Interrogation**

*Required Readings:*

* Detainees
  + Non-Detention Act, 18 U.S.C. 4001(a) (Carmen)
  + *Padilla v. Hanft*, Cert Grant Denial – Concurrence by Justice Kennedy, April 3, 2006, <https://www.law.cornell.edu/supct/html/05-533.ZA.html> (concise history of the Padilla case)
  + *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) – skim (Carmen)
* Interrogation
  + Anti-Torture Statutes (Carmen, all in one doc)
    - Anti-Torture Statute, 18 U.S.C. §§ 2340, 2340A (as amended)
    - McCain Amendment and Interrogator Liability Relief in 2006 Detainee Treatment Act, in the 2006 NDAA, P.L. 109-163, Sec. 1401-4, 119 Stat. 3136
    - NDAA for 2016, Pub. L. No. 114-92, § 1045, 129 Stat. 726, 977–79 (2015) (extending to the U.S. government generally the limitation of acceptable interrogation techniques to those found in the Army Field Manual)
* Skim (shared not for their accuracy on every detail, but to provide a sense of the intensity of the activities involved and the intensity of the public conversation):
  + Jose Padilla, Wikipedia, <http://en.wikipedia.org/wiki/José_Padilla_(prisoner)>
  + Yaser Esam Hamdi, Wikipedia, <https://en.wikipedia.org/wiki/Yaser_Esam_Hamdi>
  + Enhanced Interrogation Techniques, Wikipedia, <https://en.wikipedia.org/wiki/Enhanced_interrogation_techniques>
  + Abu Ghraib, Wikipedia, <http://en.wikipedia.org/wiki/Abu_Ghraib_torture_and_prisoner_abuse>
  + Khalid Sheikh Mohammed, Wikipedia, <http://en.wikipedia.org/wiki/Khalid_Sheikh_Mohammed>

*Previously Assigned Readings*:

* Geneva Conventions III (POWs) & IV (Civilians), Common art. III
* Post-9/11 AUMF, P.L. 107-40 (2001) (Carmen)
* Terrorism Definitions (International and Domestic), 18 U.S.C. 2331
* Material Support to Terrorism Statutes, 18 U.S.C. 2339A, 2339B (Carmen)

*Optional Readings*:

* 9/11 Commission Report (2004) (Philip Zelikow was Executive Director), <https://govinfo.library.unt.edu/911/report/>
* Detention – Optional
  + *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) – skim O’Connor plurality (Carmen)
  + *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) – skim Stevens majority opinion Parts I-IV, VI minus VI-D-iv; other parts of opinion are optional (Carmen)
  + *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) – skim (Second Circuit held that the President does not have authority to detain as an enemy combatant a U.S. citizen captured on U.S. soil; SCOTUS dismissed the habeas petition and remanded case to South Carolina)
* Material Witness Statute, 18 U.S.C. § 3144
* *Material Witness Statute*, 125 Harv. L. Rev. 222-31 (2011)
* 2012 National Defense Authorization Act (NDAA), P.L. 112-81 (H.R. 1540), §§ 1021 (indefinite detention without charge), 1022 (military custody requirement for some non-citizen detainees), 1023-25 (status review), 1026-29 (other provisions), <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>
* Barack Obama, Signing Statement on 2012 NDAA, Dec. 31, 2011, <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>
* Executive Order 13567 (Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the [AUMF]), March 7, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>
* Executive Order 13492 (Review and Disposition of Individuals Detained at [GTMO] and Closure of Detention Facilities), Jan. 22, 2009, <http://www.presidency.ucsb.edu/ws/index.php?pid=85670#axzz2fh4kPs6r>.
* U.S. Dep’t of Defense, News Release No. 709-13, Periodic Review Board Process [for Guantanamo Detainees] Underway, Oct. 9, 2013, <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16302>
* Barack Obama, National Archives Speech on National Security, May 21, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> -- read the first portions on detainees and five options for GTMO detainees, skim the rest
* Michael B. Mukasey, *Civilian Courts are No Place to Try Terrorists*, Wall St. J., Oct. 19, 2009 (Carmen)
* Podcast – Robert Chesney & Steve Vladeck, *The National Security Law Podcast: Enemy Combatants, Agents of Foreign Powers*, Lawfare, Sept. 19, 2017, <https://lawfareblog.com/national-security-law-podcast-enemy-combatants-agents-foreign-powers> -- from 12:45 to 39:50 this podcast provides a deep dive into legal issues surrounding recent reported capture of U.S. citizen in Syria and transfer to U.S. military custody
* Interrogation – Optional
  + DOJ OLC Interrogation Memo, Aug. 1, 2002 – **skim** (it is very long, at 50 pages) (Carmen)
  + Convention Against Torture [CAT] and other Cruel, Inhumane, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>
  + Executive Order 13491 (Ensuring Lawful Interrogations), Jan. 22, 2009, (<http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations> (revokes Executive Order 13440 interpreting Common Article 3 of Geneva Conventions; bars reliance on any legal advice rendered during Bush Administration on interrogation after Sept. 11, 2001; bars CIA operation of detention facilities; requires all USG personnel to use only interrogation techniques specified in Army Field Manual)
  + Charles C. Krulak & Joseph P. Hoar, *It’s Our Cage, Too: Torture Betrays Us and Breeds New Enemies*, Wash. Post, May 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602395.html> (also on Carmen)
  + CIA Inspector General’s Report on Counterterrorism Detention and Interrogation Activities (May 2004), <https://www.aclu.org/human-rights_national-security/cia-office-inspector-generals-may-2004-counterterrorism-detention-and>

*Mapping Questions*:

1. What are the government’s powers to detain?
2. What is the history and architecture of the law today regarding detention of suspected terrorists and fighters for 9/11-linked organizations?
   1. What fairly extreme claims did the George W. Bush Administration make about government powers to detain the enemy after 9/11? How did they fare?
   2. What is the menu of authorities available the next time the U.S. government seeks detention of such an individual, and their Pros and Cons?
   3. Can a *U.S. citizen* be detained indefinitely under the 9/11 AUMF and the international law of armed conflict (LOAC) as an “enemy combatant”? *Should* they?
   4. What happens to detention powers if the AUMF does not apply to terrorist organizations arising post-9/11? Or, if the armed conflict with Al Qaeda and the Taliban is over because the war in Afghanistan is over? Or, if the 9/11 AUMF is repealed? Maybe the underlying policy and legal question is this: is the “war on terrorism” over? Or just very different than in 2001?
3. What is the history and architecture of the law regarding interrogation? Generally and of suspected terrorists?
   1. What fairly extreme claims did the George W. Bush Administration make about the ability of the U.S. government to use “enhanced interrogation techniques” against suspected terrorists? Why do you think those claims emerged, and indeed emerged from a really unusual ad hoc “war council” national security decision process, when set against the classic NSC process we have studied?
   2. What has been the role of legal secrecy – secret law – in keeping the programs and their legal basis secret, and insulating them from judicial review?
4. What do you want to learn from Philip Zelikow? About how to be a national security practitioner? About the lessons of the 9/11 attacks? About what we can learn from Bush Administration decision-making on 9/11, regarding interrogation and the STELLARWIND surveillance program, and the decision for war against Iraq?

**“The Playbook”: Executive Branch Decision-making on “Off-Battlefield” Counter-Terrorism (CT) Targets**

This unit is focused on this fascinating and important aspect of counter-terrorism (CT) operations. It calls on us to integrate much of what we have learned to date during the course about Instruments of National Power, decision-making process, lawyering, and constitutional values.

"The Playbook" is shorthand for the guidelines that the Obama Administration developed after the 2011 Usama bin Laden raid for targeting terrorists (and especially high-value targets (HVTs)) “off-battlefield,” meaning not in Afghanistan, Syria, or Iraq.  The Playbook was revised by the Trump Administration to provide more freedom of action to the Defense Department and CIA, allowing protections for civilians to be lowered (while still informed by the law of armed conflict (LOAC)) and also requiring less review by the NSC and less decision responsibility for the President. The Biden Administration has moved back toward the Obama approach.

Below are the Mapping Questions we will work through as we together construct the Playbook in class as best we can based on media accounts and classified documents that are surfacing.

Do not be discouraged if this seems new and complex.  As you dig into this it is going to seem very familiar, because this is about what our Usama bin Laden raid case study was about during week one: what should law and decision process look like regarding strikes against suspected big deal terrorists? What the role of the lawyer?

Also remember too that digesting documents and advising principals about what they mean for decision-making is *exactly* the kind of work that lawyers do in government. If you keep reading and reflecting on what we have learned to date, how the pieces fit together should become clearer.  Finally, even practitioners in this field find making sense of this bundle of law/policy/technology issues challenging. We are focusing on the Playbook because it is one of the most challenging and fascinating aspects of national security – and of American governance in the current era.

*Required Readings:*

* Law
  + - 10 U.S.C. § 130f (requirements for DOD reporting to Congress on “sensitive military operations”)
    - Previously Assigned
      * U.S. Const., art. II, § 2, cl. 1 (CINC Clause; previously assigned)
      * 9/11 AUMF (previously assigned, on Carmen under week 1)
      * Covert Action Statute, 50 U.S.C. § 3093 (id.)
* Biden Playbook
  + [Biden] Presidential Policy Memorandum (PPM) Governing Direct Action Counterterrorism Operations Outside Areas of Active Hostilities (2022) (redacted and declassified 2023) (Carmen)
  + Charlie Savage, White House Tightens Rules on Counterterrorism Drone Strikes, N.Y. Times, Oct. 7, 2022, <https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html> (also on Carmen)
  + ~~Charlie Savage,~~ *~~Afghanistan Collapse and Strikes in Somalia Raise Snags for Drone Warfare Rules~~*~~, N.Y. Times, Aug. 28, 2021,~~ [~~https://www.nytimes.com/2021/08/28/us/politics/biden-drones.html~~](https://www.nytimes.com/2021/08/28/us/politics/biden-drones.html) ~~(also on Carmen)~~
  + Luke Hartig, *Biden’s Drone Policy Review: Recommendations for a Reset*, Just Security, March 5, 2021, <https://www.justsecurity.org/75189/bidens-drone-policy-review-recommendations-for-a-reset/>
* Case Studies (prior to 2013 PPG, but critical in the Playbook’s development)
  + Non-U.S. Citizen Target: Osama bin Laden
    - Slides from bin Laden case study on Carmen
    - Robert M. Gates, Duty: Memoirs of a Secretary at War 538-46 (2014) (account of decisionmaking behind 2011 bin Laden raid in Pakistan) (previously assigned) (Carmen, under week 1)
  + U.S. Citizen Target: Anwar al-Awlaki
    - Do independent self-directed internet research about 2011 drone strike in Yemen that killed Anwar Al-Awlaki

*Recommended Readings*:

* Trump Playbook (the PSP)
  + [Trump] Principles, Standards, and Procedures [PSP] for U.S. Direct Action Against Terrorist Targets (2017) (redacted and released 2020) (Carmen)
  + Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y. Times, March 30, 2017, <https://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html?_r=0> (also on Carmen)
* Obama Playbook (the PPG)
  + [Obama] White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Outside the United States and Areas of Active Hostilities, May 23, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>
  + [Obama] Presidential Policy Guidance [PPG]: Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013, <https://www.documentcloud.org/documents/3006440-Presidential-Policy-Guidance-May-2013-Targeted.html>
  + Jonathan Horowitz & John Reed, *The PPG Visualized, What the US Kill and Capture Bureaucracy Looks Like*, Just Security, Aug. 15, 2016, <https://www.justsecurity.org/32391/ppg-visualized-kill-capture-bureaucracy/>

*Optional Readings*

* Obama Playbook (the PPG) – the 2011 Anwar al-Awlaki Strike and Playbook Development
  + - Eric Holder, Letter on Targeted Killings to Senator Patrick Leahy, Chairman, Senate Judiciary Committee, May 22, 2013, <http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html?_r=0>
    - U.S. Dep’t of Justice, White Paper: Lawfulness of Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida for an Associated Force, Feb. 2013, <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf>
    - David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. Nat. Sec. L. & Pol’y 1, 96-104 (2011) (charts at end of article comparing aspects of civilian criminal prosecution, military commission prosecution, and law of war detention)
    - Ayaz Gul, VOA News, Oct. 22, 2013, <http://www.voanews.com/content/us-accused-of-unlawful-killings-pakistan-drone-strikes/1774276.html> (White House spokesman says drone strikes are legal and U.S. “does not take lethal strikes when we or our partners have the ability to capture individual terrorists”), quoted in Ryan Goodman, *Targeted Killings – The US Power to Kill and the Yemeni Power to Capture*, Just Security, Oct. 23, 2013, <http://justsecurity.org/2013/10/23/targeted-killings-yemen-power-capture/>.

*Optional Viewing*: “Eye in the Sky” (2015) (movie about drone strike operations)

*Mapping Questions:*

* + - 1. At the outset, do you think there should be special rules or higher standards for strikes against high-value targets (HVTs) in off-battlefield areas? Or should the usual US government decision processes and usual US rules of engagement (ROE) based in the law of armed conflict (LOAC) govern?
      2. When intelligence comes in suggesting the off-battlefield location of a terrorist target and particularly a HVT, the three broad options available are continued intelligence collection, capture, and targeted killing.  (A fourth option is action by a “liaison” – asking a friendly country to act instead). Generally speaking, what Pros and Cons of each option can you think of?
      3. What actors in the field (organizations and technological instrumentalities) could be available to carry out these options?  What Pros and Cons of each can you identify?
      4. What law/policy legal authorities to act could be available?
      5. What law/policy authorities providing decision *process* are relevant?  What does that process involve? What decision-making actors are relevant? What are the roles of the President, and other policy, intelligence, military, media, and legal actors (and particularly lawyers)?
      6. How are on/off battlefield, and U.S. Citizen / non-U.S. Citizen (and U.S. Person / non-U.S. Person) distinctions meaningful?  What can we learn from non-citizen (bin Laden) and citizen (al-Awlaki) case studies?
      7. Reflecting critically, do you think that internal Executive Branch process as we understand it is sufficient due process for deprivation of the life of a U.S. Person?  For a non-U.S. Person?

**Homeland Security**

*Required Readings:*

* Baker, 243-47, 265-274 (on Military Instrument, including Posse Comitatus, Insurrection Act, and Stafford Act, but skip the content at 271-2 starting with the second paragraph on 271 -- this 2006 amendment to the Insurrection Act has since been repealed), 300-1 (on federalism)
* Devi Nair, Melissa Dalton, and Suzanne Spaulding, Center for Strategic and International Studies, Buttressing Institutional Integrity in an Election Year: Guardrails Limiting the Role of U.S. Federal Forces, Oct. 27, 2020, <https://www.csis.org/analysis/buttressing-institutional-integrity-election-year> (also on Carmen)
* Aland D. Cohn slides:
  + Domestic Incident Management II: Federal Authorities (CARMEN)
  + Domestic Incident Management IV: Role of the Military (CARMEN)
* Federal
  + Republican Form of Government & Domestic Violence, U.S. Const., art. IV, sec. 4
  + Insurrection Act, 10 U.S.C. §§ 251-55 (formerly §§ 331-35)
  + Posse Comitatus Act, 18 U.S.C. § 1385
  + Troops, Polls, Intimidation of Voters, and Election Interference, 18 U.S.C. 592-95
  + Rebellion or Insurrection, 18 U.S.C. 2383
  + Seditious Conspiracy, 19 U.S.C. 2384
  + National Guard – Federal Militia Classes, 10 U.S.C. § 246 (formerly § 311)
  + National Guard – Calling Forth Act, 10 U.S.C. 12406
  + Stafford Act, 42 U.S.C. §§ 5121 *et seq*. (see also Cohn slides, Domestic Incident Management II)
  + Select maritime authorities
    - 18 U.S.C. § 963 (armed vessel may be detained until clear it will not commit hostilities against foreign entity with which the US is at peace), 965 (cargo manifest required before ship departs port), 966-67 (authority for US to forbid departure of vessel from US waters)
  + Terrorism Definitions (International and Domestic), 18 U.S.C. 2331
  + DHS website:  [www.dhs.gov](http://www.homelandsecurity.gov.) -- peruse
  + DHS org chart: <http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf>  -- peruse
* State (Ohio)
  + Lt. Col. Joseph A. Schwade, Chief Legal Counsel, OHARNG, Ohio National Guard and Other Organized Militia – Ohio Law (Carmen)
  + Ohio Military Forces Websites – peruse
    - The Ohio Adjutant General’s Department (Ohio National Guard), <https://www.ong.ohio.gov/>
    - Ohio Naval Militia, <http://navalmilitia.ohio.gov/>
    - Ohio Military Reserve, <http://www.ohiomilitaryreserve.com/>
    - Ohio Cyber Reserve, <https://www.ong.ohio.gov/special-units/cyber/ohcr/index.html>

*Previously Assigned*

* Homeland Security Council (HSC) Statute, 6 U.S.C. §§ 491-96 (Carmen)
* Military Chain of Command Statute, 10 U.S.C. 162 (Carmen)
* EO 12333 (2008) (review for portions concerning the HSC, DHS, and Coast Guard) (Carmen)
* NSM-2 (2021) (Secretary of Homeland Security a member of the NSC by executive order) (Carmen)

*Optional Readings*

* Baker, 240-43, 290-306
* 6 U.S.C. §§ 111-112 (Homeland Security Act)
* 14 U.S.C. authorities, especially § 89(a) (Coast Guard empowered to search and seize any vessel on the high seas subject to US jurisdiction), § 637 (stopping vessels)
* The White House, Fact Sheet: National Strategy for Countering Domestic Terrorism, June 15, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/15/fact-sheet-national-strategy-for-countering-domestic-terrorism/> (link to full strategy)
* Catrina Doxsee, Center for Strategic and International Studies, Examining Extremism: The Militia Movement, Aug. 12, 2021, <https://www.csis.org/blogs/examining-extremism/examining-extremism-militia-movement>
* Robert Chesney, *The Quarantine Power: A Primer in Light of the Coronavirus Situation*, Lawfare, Feb. 7, 2020, <https://www.lawfareblog.com/quarantine-power-primer-light-coronavirus-situation>
* Cohn Slides: Transborder Security III: Interdiction Law (CARMEN)
* Alan Cohn, Domestic Preparedness (2012), 109-115, 119-121, 149-50, 166-67, 183-184 (including excerpted sec. 101 of Homeland Security Act of 2002), 212-14, 487-91, 515 ("Is Martial Law a Declared State or a Functional State?") (CARMEN)
* Cohn, 2012 Supplement: Border and Interdiction Law (this is over 100 pages and is here as a reference and research aid for deeper inquiries you might want to make in relation to the simulation) (CARMEN)
* FEMA National Response Framework, [http://www.fema.gov/nrf](https://legacy.law.georgetown.edu/exchweb/bin/redir.asp?URL=http://www.fema.gov/nrf)
* U.S. Strategic Command (USSTRATCOM), CONPLAN 8888-11: Counter-Zombie Dominance (Apr. 30, 2011), available at <https://www.scribd.com/doc/223872345/CONPLAN-8888>.
* Gordon Lubold, *The Pentagon Has a Plan to Stop the Zombie Apocalypse. Seriously.*, For. Policy, May 13, 2014, <http://www.foreignpolicy.com/articles/2014/05/13/exclusive_the_pentagon_has_a_plan_to_stop_the_zombie_apocalypse?>

**Information Management**

*Required Readings*:

* Freedom of Information Act (FOIA)
  + 5 U.S.C. § 552, esp. exceptions in § 552(b)
  + National Archives FOIA guide (noting that FOIA does not apply to Congress, courts, or state/local government), <http://www.archives.gov/foia/foia-guide.html> -- **Skim**
* Regarding Classified Information and Clearances:
  + EO 13526 (2009), Classified National Security Information, <https://www.archives.gov/isoo/policy-documents/cnsi-eo.html> -- full text, and especially §§ 1.1-1.7(a), 1.7(d), 1.8, 3.1, 3.3(a), (b), and (h), 4.1(a)-(h), 4.3, 5.3, and 5.5
  + 18 U.S.C. § 641 (theft of government property and records)
  + 18 U.S.C. § 793 (Espionage Act, criminalizing inter alia causing national defense information to removed, lost, stolen, or destroyed in grossly negligent way, or with intent)
  + 18 U.S.C. § 798 (unlawful transmission of classified information to an unauthorized person)
  + 18 U.S.C. § 1924 (misdemeanor to remove classified information knowingly from appropriate systems and facilities)
  + 18 U.S.C. § 2071 (illegal to conceal, remove, or destroy a federal record willfully or unlawfully)
  + *N.Y. Times Co. v. United States,* 403 U.S. 713(1971) (Pentagon Papers case) – read the very short *per curiam* opinion; the six concurrences and three dissents are optional
  + Dakota S. Rudesill & Rolf Mowatt-Larssen, *Good Governance Paper No. 22: Preventing Politicization of the Security Clearance System*, Just Security, Nov. 2, 2020, <https://www.justsecurity.org/73231/good-governance-paper-no-22-preventing-politicization-of-the-security-clearance-system/>
  + Self-directed research regarding classified information controversies concerning Edward Snowden, Hillary Rodman Clinton, and Gen. David Petraeus
* Regarding Secret Law:
  + Dakota S. Rudesill, *It’s Time to Come to Terms with Secret Law: Part I*, Just Security, July 20, 2016, <https://www.justsecurity.org/32120/time-terms-secret-law-part/>
  + Dakota S. Rudesill, *It’s Time to Come to Terms with Secret Law: Part II*, Just Security, July 22, 2016, <https://www.justsecurity.org/32142/time-terms-secret-law-part-ii/>
  + IC Transparency Principles, <https://www.dni.gov/index.php/ic-legal-reference-book/the-principles-of-intelligence-transparency-for-the-ic>

*Previously Assigned:*

* EO 12333 (2008) (review for information access and sharing authorities of DNI and classified information)
* 50 U.S.C. §§ 3091 (congressional oversight generally), 3092 (reporting requirements other than for covert actions), 3093 (covert action statute)
* Office of the Director of National Intelligence (ODNI), Intelligence Community Directive (ICD) 112: Congressional Notification, June 29, 2017, <https://www.dni.gov/files/documents/ICD/ICD-112_17-00383_SIGNED.PDF>

*Optional Readings*:

* Jennifer K. Elsea, Congressional Research Service (CRS), *The Protection of Classified Information: The Legal Framework* (May 18, 2017), <https://fas.org/sgp/crs/secrecy/RS21900.pdf>
* Department of the Navy v. Egan, 484 U.S. 518 (1988) (Classified Information and Security Clearances)
* United States v. Reynolds, 345 U.S. 1 (1953) (State Secrets)
  + Read alongside 50 U.S.C. § 3093, the Covert Action statute
* 50 U.S.C. § 3024(i-j) (DNI responsibilities for protecting sources & methods, and for classified information; formerly § 403-1)
* 50 U.S.C. § 3161 (Congressional effort to extend regulation and oversight over classified information and clearances while also deferring to Executive Brach on clearance decisions; formerly § 435)
* 50 U.S.C. § 3162 (authority for clearance, counter-intelligence, and law enforcement investigations to get financial and official travel data, with definitions in § 3164; formerly § 436) (previously assigned)
* Atomic Energy Act of 1954, as amended, § 11y (classification of nuclear information)
* 50 U.S.C. §§ 3141-3146 (FOIA exceptions for files of intelligence agencies; formerly §§ 431, 432, 432a, 432b, 432c, 432d)
* 10 C.F.R. § 1045 (Nuclear Classification and Declassification)
* *Ctr for Effective Government v. U.S. Dep’t of State*, 2013 WL 6641262 (D.D.C., Dec. 17, 2013) (Huevelle, J.)
* EO 12968 (1995) (Access to Classified Information), <https://fas.org/sgp/clinton/eo12968.html> [read §§ 1.2, 3.1, 5.1, 6.2, and 6.4, skim 5.1, and ignore the rest], and amendments in Executive Order 13467 (2008), <https://www.govinfo.gov/content/pkg/WCPD-2008-07-07/pdf/WCPD-2008-07-07-Pg932.pdf> [read § 3.5, ignore the rest] [the document at the old deleted link integrated the two EOs; it is not on the ODNI site anymore so I have here included links to the two separate orders]
* U.S. Attorney General, Memorandum, *Policies and Procedures Governing Invocation of the State Secrets Privilege*, Sept. 23, 2009, <https://fas.org/sgp/news/2009/09/ag092309.pdf>
* Lindy Kyzer, *Top Reasons for Security Clearance Denial in 2017*, ClearanceJobs.com, Jan. 31, 2018, <https://news.clearancejobs.com/2018/01/31/top-reasons-security-clearance-denial-2017/>
* Jason V. Herring, Acting Assistant FBI Director, Letter to Chuck Grassley, Chairman, Senate Judiciary Committee (regarding FBI recommendation not to refer Sec. Clinton for prosecution, noting inter alia that “extremely careless” is not the same as “gross negligence” under statute), <http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=93A31C9E-7E49-4921-A06C-1EEFF52150BA&SK=5E8BCB806A143024315945D557858EAA>

*Mapping Questions*:

1. What are Pros and Cons of secrecy? (review)
2. How would you describe the law and process architecture regarding creation and control of classified information? What are the levels of classification?
3. How would you describe the law and process architecture regarding access to classified information – security clearances? Why are people most often denied or lose access?
4. Do you think that the system is being administered fairly? Regarding leaks and mishandling of classified information, what do the Snowden, Clinton, and Petraeus scandals suggest, set against one another, and against the common practice of “official leaks”? Regarding security clearances, what do the Brennan and Kushner cases during the Trump years suggest?
5. How does oversight of the classification system and classified activities work? What are the roles of Congress, the courts, and the public? What is the Freedom of Information Act (FOIA), what is its scope, and how does it work?
6. Government/press/leaker relations – are you comfortable with the status quo that the government can prosecute clearance holders who leak classified information, cannot stop journalists from publishing classified information, but can intimidate journalists via the threat of subpoenaing journalists for their sources and potentially jail them if they protect their sources?
7. Secret law and state secrets – are these necessary aspects of a superpower with expansive national security responsibilities? Or do they need to be reformed? If so, who should do it – Congress, the Executive Branch, or the courts?
8. How will classified information work in the Simulation?

**National Security Lawyer & Ethics**

*Required Readings*:

* Baker, Chapter 10: The National Security Lawyer (pp. 307-25); also re-read pp. 93-96 regarding lawyering
* ABA Model Rules of Professional Conduct, Rule 2.1 (Advisor) and Comments, <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/> (also on Carmen)
* Principles of Professional Ethics for the Intelligence Community (2014), <https://www.dni.gov/index.php/how-we-work/ethics>
* Practice Points Slides (Carmen)

*Previously Assigned:*

* Harold Hongju Koh, *The Legal Advisor’s Duty to Explain*, 41 Yale J. Int’l L. 189 (2016) – skim, and read excerpt on Carmen
* David J. Barron, Acting Assistant Att’y. Gen., Office of Legal Counsel, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>
* Dakota S. Rudesill, *At the Elbow and Under Pressure: Legal, Military, and Intelligence Professionals,* 49 Hofstra L. Rev. 161 (2020) (Carmen)

*Optional Readings:*

* Stephen L. Carter, Integrity (1996), Chapter 1 (pp. 3-14) (Carmen)
* ABA Model Rules of Professional Conduct (in full), <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/>
* James E. Baker, *Process, Practice, and Principle: Teaching National Security Law and the Knowledge that Matters Most*, 27 Geo. J. L. Ethics 163 (2014) (note especially his discussion of immersive simulations, praise for the CDB exercise, and discussion of process maladies including client-itis, groupthink, and role conflation, and n.34 about integrity in the practice of law)
* Mitt Regan, Professional Responsibility, Judgment, and Decisionmaking – Memo for Georgetown National Security Crisis Law Simulation (2015) (Carmen)

*Key Points*:

1. What are the roles and ethical obligations of the lawyer? Are they especially challenging in national security practice, in view of the national security process maladies we and Judge Baker have identified? How does a lawyer mitigate them?
2. Do you think that a government lawyer’s ethical responsibilities are satisfied by willingness to make as an advocate any non-frivolous argument on behalf of their institutional client or a senior official? Do you think that the circumstances of government practice, and especially national security practice, impose a higher standard?
3. What is integrity? Why is it especially important in national security practice? Why do you think people are tempted to compromise it – generally and in the national security context? What do you think you can do to help ensure you always practice with integrity?
4. How do you think that legal, intelligence, and military advisors to principals might be similarly situated?
5. The client and illegal, unethical, and improper conduct: (a) What is the lawyer’s duty regarding a principal, supervisor, or client who is contemplating doing something illegal, unethical, or improper? (b) What is the lawyer’s duty regarding a principal, supervisor, or client who has been accused of already having done illegal, unethical, or improper actions, or is being investigated in that regard? (c) What is the lawyer’s duty regarding a principal, supervisor, or client who has stated their intent to take illegal, unethical, or improper action?

**Catch-up / Review Session / Pre-Sim Exercise**

*Reading:*

* Simulation materials on Carmen under Files / Simulation Docs
  + Simulation Case Studies in Bad Process [previously assigned] [Carmen]
  + Memo: Thoughts on Simulation Preparation and Grading [Carmen]

1. Note also that the Baker text uses outdated citations to provisions of Title 50 U.S. Code. Recently, the Office of Law Revision Counsel of the U.S. House of Representatives undertook a reorganization of Title 50, home to the National Security Act of 1947 as amended and other key national security statutes of immediate interest to us.  [Their explanation is here](http://uscode.house.gov/editorialreclassification/t50/index.html), including charts showing old and new citations.  In the syllabus I have inserted the new citations, while noting the former citations, too. Please use the new, correct citations. [↑](#footnote-ref-1)
2. Again, 50 U.S.C. was reorganized. We will use the new citations. The Baker text uses the old ones. [↑](#footnote-ref-2)
3. As amended by Sec. 331(c) of the 2010 Intelligence Authorization Act, an amendment subsequent to Baker’s book. [↑](#footnote-ref-3)