Overview. This class will address the law governing national security investigations and related litigation. Topics will include electronic surveillance, national security letters, and the differences between Article III courts and military commissions. National security law is often inaccessible, and can be particularly hard to follow when divorced from the context of historical tradition, governmental structures, and the operational reality in which it functions. While steering clear of classified or confidential aspects of the practice, the class will attempt to present the law in context. Participation in a four-hour exercise and two short papers are required.

Schedule. The class will meet on Tuesdays, from 3:30 - 5:30 PM, in Hotung 5021. There will be no class on February 21 (faculty retreat) and March 14 (spring break). There will be a mandatory four-hour final exercise on Friday, April 28, from 3:30 -7:30 PM.

Reading. There is no casebook, but there will be weekly reading assignments posted on Courseware. The anticipated reading assignments appear on the next page, but are subject to change as needed in this dynamic field of law.

Papers. There is no final paper required in this class, but during the course of the semester, each student will be expected to write two papers, of no more than 1500 words each, reacting to any two of the weekly reading assignments and class discussions that the student chooses. These papers are due to be emailed to us at [email protected] before the start of the following class. The papers should address statutory, constitutional, and/or policy issues raised by the reading assignments and class discussions, may (but need not) refer to materials other than the reading assignments, and should use short citation forms (e.g., “Church Report Book II”).

Final Exercise. On Friday, April 28 —the Friday after our last class—there will be a four-hour exercise from 3:30 to 7:30 PM. We will simulate a national security crisis requiring immediate investigation and response, with students playing the roles of various governmental officials.

Grading. Grading will be based on three components: class participation (20%); the two short papers (40%); and performance during the final exercise (40%).
Anticipated Reading Assignments

(1) January 17: Class Introduction: The Pendulum

1. Syllabus

2. List of course themes.


4. Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate (Church Report), Report No. 94-755 (1976), Intelligence Activities and the Rights of Americans, Book II. Please read the cover, letter of transmittal, and preface (pages i-x). Optional Reading: Part I (pages 1-20), Part II.B.6 (pages 34-36), Part II.C.4.a-b (pages 54-56), and Part II.D.1 (pages 67-70).


(2) January 24: National Security and the Constitution


2. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Please consider the various theories advanced by the government, and accepted by certain of the Justices, in favor of Presidential power, and pay special attention to Justice Jackson's concurring opinion, including his treatment of Curtiss-Wright in footnote 2. Please consider both the President's asserted powers (e.g., concerning foreign affairs), and also any limits on those powers when expressed in the domestic arena.

3. United States v. United States District Court, 407 U.S. 297 (1972) (Keith). Please consider this case in terms of separation of powers and the Fourth Amendment, and consider also the arguments for and against distinguishing between domestic and foreign threats to national security.


(3) January 31: The U.S. Intelligence Community


2. Executive Order No. 12333, United States Intelligence Activities (as amended through July 2008). Please read the opening paragraph, Part I and Part III of the order.

3. Intelligence Community Organizational Chart (modified).

(4) February 7: Regulation of the Intelligence Community Arising from Abuse


2. Executive Order No. 12333. Please read Part II of the order, focusing on links between provisions in the order and the history of abuse recounted in the Church Report.


(5) February 14: Criminal Collection Authorities, National Security Letters, and Section 215 Orders

Grand Jury Subpoenas, Search Warrants, and Pen Register/Trap Trace Devices

1. Federal Rule of Criminal Procedure 41.


National Security Letters


Compelled Production of Tangible Things (Patriot Act Section 215)


8. *Klayman v. Obama*, No. 13-0851 (D.D.C. 2013) (rev’d for lack of standing by the DC Cir.). Please focus on the discussion of whether the collection was consistent with the Fourth Amendment.

9. *ACLU v. Clapper*, No. 13 Civ. 3994 (WHP) (S.D.N.Y. 2013). Please focus on the discussion of whether the collection was consistent with the Fourth Amendment.


**February 21: No Class (Faculty Retreat)**

(6) February 28 and (7) March 7: Overview of FISA

*Note: The reading is the same for both of these classes, which will introduce you to the various methods of surveillance and search authorized and regulated by FISA. You should do all of the reading for the first class. You will then have none for the second class.*

1. David Kris & Douglas Wilson, *National Security Investigations and Prosecutions* (West 2013). Please read Chapters 4-7. (Please note that the chapters have not been updated to reflect passage of the USA FREEDOM Act.)

2. The Foreign Intelligence Surveillance Act of 1978 (FISA). Please read 50 U.S.C. §§ 1801-1805 (not including 50 U.S.C. §§ 1805A-C), 1821-1824, and 1841-44. It may make sense to begin by reading the provisions governing electronic surveillance, 50 U.S.C. §§ 1801-1805, with their legislative history (item 2 below), before moving on to the physical search provisions, 50 U.S.C. §§ 1821-1824. The search provisions were enacted after, and patterned on, the surveillance provisions.

3. *Optional Reading*: Foreign Intelligence Surveillance Act of 1978, H.R. Rep. No. 95-1283 (1978). Please read pages 13-68. It may make sense to read this legislative history with 50 U.S.C. §§ 1801-1805 (item 1 above). In most respects, the legislative history corresponds to the version of the statute that was enacted, but there are a few minor exceptions, so don't panic if you see a divergence.


5. Chart Summarizing FISA’s Definition of “Electronic Surveillance.”
March 14: No Class (Spring Break)

(8) March 21: The FISA Wall


2. *In re Sealed Case*, 310 F.3d 717 (FISCR 2002). Again, please consider the statutory, constitutional, and policy arguments for and against the wall. Please also focus on the court's interpretation of the USA PATRIOT Act - did it raise or lower the wall? - and the implications of that interpretation for the constitutional arguments concerning the wall. In particular, does the Court of Review's interpretation of the Patriot Act give the government a fallback Fourth Amendment argument?

(9) March 28: The Terrorist Surveillance Program & FISA Modernization

1. David Kris & Douglas Wilson, *National Security Investigations and Prosecutions* (West 2013). Please read Chapters 15 and 16. In addition to considering the statutory and constitutional arguments for and against the TSP, please consider the different approaches used by the government in tearing down the FISA wall (previous week’s reading), and in establishing the Terrorist Surveillance Program, and then consider the consequences, and relative costs and benefits, of each approach.


4. Optional Reading: Testimony of Ken Wainstein, Assistant Attorney General, National Security Division, before the Senate Select Committee on Intelligence, May 1, 2007.

(10) April 4: CIPA & FISA Litigation

Overview

1. David Kris & Douglas Wilson, *National Security Investigations and Prosecutions* (West 2013). Please read Chapter 25. (Please note that the chapters have not been updated to reflect passage of the USA FREEDOM Act.)

Criminal Discovery Rules

Please read items 1-4 only as necessary to (re)familiarize yourself with the basic discovery obligations in criminal cases, which are part of the background against which CIPA applies.


CIPA


FISA Litigation

7. FISA. Please read 50 U.S.C. §§ 1806, 1825, 1845, 1861 (g)-(h).
(11) April 11: Choice of Forum: Military Commissions and Article III Courts


(12) April 18: Future National Security Authorities


3. Human Rights First, The Case Against a Special Terrorism Court, March 2009.


(13) April 25: Review, Questions, Preparation for Exercise

There is no reading for this class.