

5325 National Security Law – Fall 2020 – Section 16400

Professor Emily Berman

University of Houston Law Center

Class Information:

Zoom link: <https://uhlc.zoom.us/j/204081290>

Room: BLB-144

Class meetings: M & W 10:30am-12pm

Exam: December 7, 2020, 9a-12p

Professor Information:

Office: TUII #228

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Office hrs: Thurs 11a-1p &
by appointment

COURSE DESCRIPTION: This course surveys the framework of domestic laws—constitutional, statutory, and regulatory—that variously authorizes and constrains the U.S. government’s pursuit of national security policies, with an emphasis on developments in this area since 9/11/2001.

LEARNING OUTCOMES: Through and as a result of this course, students will: (1) develop an understanding of substantive law applicable in various national security contexts; (2) engage in legal analysis and reasoning—both written and oral—related to legal issues raised by U.S. national security policy; (3) evaluate the strength of legal arguments presented on either side of national security debates; and (4) assess the efficacy and implications of various doctrines applied in U.S. courts.

I. GENERAL INFORMATION A/K/A LAW SCHOOL IN THE TIME OF COVID-19

To Zoom or Not to Zoom

- We will begin the semester with exclusively on-line classes. I prefer to hold in-person classes, but I will not do so unless and until it is safe for all of us. Therefore, I will not consider holding any in-person classes unless the Harris County COVID-19 Threat Level drops to Level 1 (green) or Level 2 (yellow).
- Nobody will be required to attend class in person this semester, even if I begin holding in-person classes for those who are interested in attending.
- There will be no in-person activity after Thanksgiving—all post-Thanksgiving classes will be via Zoom and the exam will be administered via Electronic Blue Book.
- Classes will include a synchronous meeting, meaning that we will meet live during the scheduled class times, whether on-line via the Zoom link above, or in-person in BLB-144.
- Classes will also include asynchronous (i.e., recorded) elements.

Electronic Logistics

- **Zoom link:** All live classes will use the same Zoom meeting “room,” which you can access here: <https://uhlc.zoom.us/j/204081290>.
- **Zoom etiquette**
 - ♦ To the extent that it is possible, please Zoom from somewhere with a stable Internet connection and minimal background noise.
 - ♦ My expectation is that you will **have your camera on** and your audio muted unless you are speaking. If for some reason you cannot be on camera, please notify me **prior to class**. And don’t worry—Zoom bombs by children and/or pets are welcome! I can pretty much guarantee that my cat will make occasional appearances.
 - ♦ You are welcome to use either real or virtual backgrounds.
 - ♦ Join the session early enough to test your speakers and microphone and work out any technological kinks before class starts.
 - ♦ Please identify yourself with your last name as it appears on the class roster and the first name by which you would like to be addressed.

I. GENERAL INFORMATION A/K/A LAW SCHOOL IN THE TIME OF COVID-19 (CONTINUED)

- ♦ You may ask a question either via the “chat” function or by raising your blue “hand.”
- **Attendance Procedures**
 - ♦ Attendance for each synchronous session will be tracked through an online sign-in process. At the start of each class I will assign a code word. You will then go here: [\[website TBA\]](#) and enter your last name and the code word for that day.
 - ♦ Signing in for a day that you did not attend, or signing in for someone else is an honor code violation.
 - ♦ For asynchronous video lectures I will take attendance by tracking whether you have accessed the video.
- **Class recordings:**
 - ♦ I expect you to attend all live class sessions, however, I know that unavoidable conflicts or challenges may occasionally arise that prevent you from attending. I will therefore record all synchronous class sessions.
 - ♦ Links to class recordings will be available on Blackboard.
 - ♦ The recordings are for the sole educational purpose of allowing students to stream the recorded sessions for review or to enable students who missed a class to hear the class presentation. There is a chance that your contributions to class discussion, whether voluntary or while on call, may be included in the recording. Your continued registration in this class indicates your acquiescence to any such incidental recording for the purposes described above.
 - ♦ Links to recordings of asynchronous class elements will be available on Blackboard.
- **Office Hours**
 - ♦ I will be available in the Zoom classroom on Thursdays from 11:00a-1p.
 - ♦ If you are unavailable at that time, feel free to email me to schedule an alternative.
 - ♦ I will also remain in the Zoom classroom to answer questions after class.
- **Class Blackboard Website**
 - ♦ All class-related materials, including handouts, PowerPoint slides, the syllabus, and links to videos of synchronous and asynchronous elements of class will be posted on Blackboard.
 - ♦ To access our web course on Blackboard:
 - Log into [Access UH](#).
 - In the “University Services” box, click the “Blackboard Learn 9” icon.
 - On the Blackboard site, click [2020FA-16400-LAW5325-National Security Law](#).
 - You will be automatically enrolled in our web course.
 - The site should be available to you 5-7 days before class starts.
 - ♦ Below are some links to useful information about Blackboard:
 - [Information for new Blackboard and CougarNet users](#)
 - [Blackboard help and resources for students](#)
 - [Blackboard support](#)

II. CLASS REQUIREMENTS & GRADING

Assessment

- **Exam:** Your grade will be based on one final three-hour exam, administered via Electronic Bluebook, which will consist of both multiple choice and essay questions, and will be limited open book—you may refer to your class notes, any assigned reading material, and any study guides or outlines that you participated in generating.
- **Participation:**
 - ♦ I may “bump” your final grade up/down one “iteration” (e.g., B+ to A- or to B) based upon your participation.
 - ♦ In class, I will use a combination of cold calling and volunteers.
 - ♦ I expect you to be prepared for every class. If you are unable to attend or to prepare for a particular class, let me know before class, preferably via e-mail, and I will refrain from calling on you that day. My presumption is that no student will need to avail him- or herself of this option more than 3 times during the semester; any student who does so will not be penalized, but will be ineligible for the participation bump.
 - ♦ If you fail to attend at least 80% of class meetings, you will be in violation of Law Center policy and may be dropped from the course.
 - ♦ Class participation has two elements:
 - 1) **A short video:**
 - Designed to be watched prior to class.
 - The video will be about 15 minutes long and will consist of a recap of the previous class and some introductory information pertinent to the upcoming class.
 - Links to these videos will be available on Blackboard.
 - 2) **A live class meeting:**
 - Whether via Zoom or in-person, the synchronous class sessions will be a mixture of lecture, Socratic dialogue, and class discussion.
 - Due to the asynchronous video, the class meetings will be shorter than usual.
 - I expect you to be prepared for every class and I may call on you at any time.
 - There may also be occasional in-class exercises to complete.
 - **Post-Class Q&A:** After each synchronous class session ends, I will stay in the Zoom classroom to answer any student questions.

****Caveat:** Given the unprecedented circumstances of COVID-19, these course procedures and protocols may change as we learn together what works well and what does not. Please email me feedback or suggestions at any time. In addition, I will periodically seek anonymous feedback to assess how things are going and to solicit any suggested modifications. I promise to carefully consider all student suggestions. In fact, some of the best adjustments I made in the spring came from student suggestions, and they improved the class experience for all of us. I will do my best to incorporate suggestions if they are consistent with my pedagogic goals and will benefit the entire class.

III. MISCELLANEOUS POLICIES AND INFORMATION

Reading Materials:

- The casebook is *National Security Law* (Dycus et al. eds, 6th ed. 2016).
- In addition, the syllabus indicates multiple reading assignments not contained in the case book. Some of them are from a new edition of this case book, some are from last year's supplement, and some are unrelated to the case book altogether.
- Each assignment that is not in the 6th edition of *National Security Law* will be posted on Blackboard in the Handouts folder.

Assignments:

- Each numbered item on the syllabus is designed to be covered in one class session.
- There might be times, however, when one topic spills over into the beginning of the next class.
- I reserve the right to modify the syllabus. I will notify students of any modification far in advance of any changes.

Preparation: Unless it is labeled as “optional” on the syllabus, you are expected to read all of the material indicated on the syllabus for each class session.

Chosen Names/Preferred Pronouns: I will gladly honor requests to use alternate names or gender pronouns—including non-binary ones such as they/them/theirs. Please advise me of your preference early in the semester so that I may make appropriate changes to my records.

Computer Policy: Use of computers or other electronic devices (beyond Zoom) is permitted for class-related purposes only. Violations of this policy will be treated as unpreparedness.

University Resources: A reminder that Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments, or if you or someone you know is in crisis. No appointment is necessary for the “Let's Talk” program, a drop-in consultation service (http://www.uh.edu/caps/outreach/lets_talk.html) available at convenient times.

IV. READING ASSIGNMENTS

NSL: *National Security Law* (Dycus et al. eds, 6th ed. 2016)

Handout #x: Posted in the Handouts folder on Blackboard

NATIONAL SECURITY & THE SEPARATION OF POWERS		
	Class Date & Topic	Assignment
1	August 24: Introduction to National Security Powers <ul style="list-style-type: none"> ✦ The Class Syllabus ✦ Select Provisions of The U.S. Constitution ✦ The Spectrum of the President's National Security Powers 	Yes, this document, esp. p. 1. [NSL 7-10; 1419-25] Handout #1: 26-54
2	August 26: The President's National Security Powers <ul style="list-style-type: none"> ✦ The Prize Cases ✦ Little v. Barreme ✦ The President's Emergency Powers 	[NSL 81-87] [NSL 89-95] Handout #2: 68-79 (nn. 1, 2, 6)
3	August 31: Congress's Natl Security Powers <ul style="list-style-type: none"> ✦ Declarations of War & AUMFs ✦ The 2001 Authorization for the Use of Military Force – what did it authorize? ✦ The War Powers Resolution ✦ Harold Koh Testimony re: Libya 	[NSL 105-113] [NSL 112 n.4; PODCAST: Radiolab, “60 Words,” http://www.radiolab.org/story/60-words/ Required: Introduction – 00:00-06:30 & Segment 2 – 23:40-40:25; otherwise optional [NSL 349-62] Handout #3
4	September 2: The Courts' National Security Role <ul style="list-style-type: none"> ✦ Justiciability ✦ Causes of Action & Qualified Immunity ✦ The State Secrets Privilege 	Handout #4 129-49 Handout #4 149-52 Handout #4 154-64

THE USE OF FORCE		
	Class Date & Topic	Assignment
5	September 9: Use of force <ul style="list-style-type: none"> ✦ U.N. Charter, <u>only</u> Articles 2(4) & 51 ✦ Unilateral use of force ✦ Syria and Beyond 	[NSL 255-56] [NSL 385-404] [NSL 404-09: Handout #4.1: Supp. 87-90; 93-94]
6	September 14: Targeted Killing <ul style="list-style-type: none"> ✦ Introduction ✦ Targeted Killing Standards ✦ Targeting U.S. Citizens 	[NSL 418-20] [NSL 425-29 (nn. 2, 4, 8); Handout #4.2: Supp. 96-99] [NSL 430-45]
7	September 16: Cyber Operations <ul style="list-style-type: none"> ✦ Cyber weapons & int'l law ✦ Cyber weapons and domestic law ✦ Information warfare 	Handout #5 413-27 Handout #5 427-32 Handout #5 432-35

INTELLIGENCE COLLECTION		
	Class Date & Topic	Assignment
8	September 21: The Intelligence Community <ul style="list-style-type: none"> ✦ Introduction to Intelligence ✦ [Optional]: The “-INTs” & SIGINT processes ✦ Statutory authorities for intelligence activities ✦ Presidential authority for intelligence activities ✦ Post-9/11 Intelligence Reorganization 	[NSL 490-92] [NSL 492-99] [NSL 503-11] [NSL 517-29] [NSL 534-41]
9.	September 23: A National Security Exception to the Fourth Amendment? <ul style="list-style-type: none"> ✦ The <i>Keith</i> Case & In re Directives ✦ In re Terrorist Bombings of U.S. Embassies in East Africa 	[NSL 592-14] [NSL 621-29 (thru n.2)]
10	September 28: The Foreign Intelligence Surveillance Act <ul style="list-style-type: none"> ✦ United States v. Rosen ✦ In re Sealed Case 	[NSL 633-52] [NSL 653-59; Handout #5.1: Supp. 117-20]
11	September 30: Programmatic Foreign Intelligence Surveillance <ul style="list-style-type: none"> ✦ Terrorist Surveillance Program (TSP) ✦ The FISA Amendments Act (FAA) ✦ [Optional]: PBS Frontline, The United States of Secrets, Part One – The Program ✦ [Optional]: <i>Citizenfour</i> (2015) (documentary about Snowden and the leaks) 	[NSL 667-69] [NSL 677-702 (thru n.4); Handout #6: Supp. 121-126] http://www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/#part-one---the-program
12	October 5: The Fourth Amendment & The Third Party Doctrine <ul style="list-style-type: none"> ✦ Origins ✦ Carpenter v. United States ✦ Applications of the Third Party Doctrine 	[NSL 707-12] Handout #7 684-700 Handout #7 701-05
13	October 7: Bulk Collection <ul style="list-style-type: none"> ✦ ACLU v. Clapper ✦ In re Application of the FBI ✦ USA Freedom Act 	[NSL 744-56] [NSL 756-64, 773-74] [NSL 765-68; Handout #8: Supp. 155-57]
14	October 12: Domestic Intelligence Collection <ul style="list-style-type: none"> ✦ Excerpt of the Church Committee Report ✦ Attorney General’s Guidelines for the FBI ✦ <i>Raza v. New York</i>, Ruling on Proposed Settlement Agreement ✦ [Optional] <i>Raza v. New York</i>, Settlement FAQs ✦ [Optional] This American Life, “The Convert” 	[NSL 513-17] [NSL 532-33 nn.4-7] + Optional Handout #9 Handout #10 [Parts I, IV, V, IX] Handout #11 http://www.thisamericanlife.org/radio-archives/episode/471/the-convert

DOMESTIC SECURITY		
	<u>Class Date & Topic</u>	<u>Assignment</u>
15	October 14: Screening for Terrorists <ul style="list-style-type: none"> ✦ Border Searches ✦ The Trump Administration Travel Bans 	[NSL 775-87] Handout #12 794-819
16	October 19: Domestic Emergency Response <ul style="list-style-type: none"> ✦ Disaster Response Authorities ✦ Domestic Use of the Military 	Handout #13 1161-72; 1175-83 Handout #13 1185-96; 1203-08

DETENTION & INTERROGATION		
	<u>Class Date & Topic</u>	<u>Assignment</u>
17	October 21: Law-of-War Detention of U.S. Persons <ul style="list-style-type: none"> ✦ Introduction ✦ Hamdi v. Rumsfeld ✦ Doe/ACLU v. Mattis 	[NSL 831-34] [NSL 898-912] Handout #14: Supp. 202-203 (facts); 204-05 (“d. Legal Questions”)
18	October 26: The Suspension Clause Abroad <ul style="list-style-type: none"> ✦ The Scope of the Suspension Clause ✦ The Requirements of the Suspension Clause 	[NSL 857-71; 873 (n.3)] [NSL 874-83]
19	October 28: Other Preventive Detention <ul style="list-style-type: none"> ✦ Turkmen v. Hasty ✦ Ashcroft v. Al-Kidd 	[NSL 961-76] [NSL 979-87]
20	November 2: Interrogation <ul style="list-style-type: none"> ✦ Post 9/11 CIA Interrogation Methods ✦ Torture & International Law Standards ✦ [Optional] Post-9/11 U.S. Interrogation Program ✦ Senate Intelligence Committee Study ✦ [Optional] Bybee Memo, Abu Zubaydah Memo 	[NSL 993-998] [NSL 1000-03; 1007-11] [NSL 1019-24] [NSL 1024-36; 1045-46] Handouts # 15 & 16

PROSECUTING TERRORISM & WAR CRIMES		
	<u>Class Date & Topic</u>	<u>Assignment</u>
21	November 4: Federal Crimes of Terrorism <ul style="list-style-type: none"> ✦ Material Support for Terrorism – <i>Holder v. HLP</i> 	[NSL 1064-84, 1094]
22	November 9: Procedural Issues in Civilian Court <ul style="list-style-type: none"> ✦ Presentment & <i>Miranda</i> Warnings (<i>U.S. v. Khattaleh</i>) ✦ Coerced Evidence ✦ The Classified Information Procedures Act 	[NSL 1095-1100; Handout #16.1: Supp. 228-29] [NSL 1117-22] [NSL 1123-31 (thru n.3)]

23	November 11: Military Commissions <ul style="list-style-type: none"> ✦ Ex parte Quirin ✦ Al Bahlul v. United States ✦ Al-Nashiri ✦ [Optional] Vladeck, Why Aren't the MCs Working? 	[NSL 1161-68] [NSL 1176-93 (thru n. 3); Handout #17: Supp. 230-32 Handout #18: Supp. 232-35 Handout #19
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NATIONAL SECURITY INFORMATION		
	<u>Class Date & Topic</u>	<u>Assignment</u>
24	November 16: The Espionage Act & “Authorized” Leaks <ul style="list-style-type: none"> ✦ <i>Optional:</i> Kahn, The Law of Classified Information: A Primer ✦ The Espionage Act, <i>United States v. Rosen</i> (redux) 	Handout #20 [NSL 1363-82; Handout #21: Supp. 267-68]
25	November 18: National Security Information <ul style="list-style-type: none"> ✦ The Media: The “Pentagon Papers” Case ✦ Congress 	[NSL 1392-1403 (ONLY nn. 1, 2, 7; 1406-09] [NSL 1338-44 (thru n.5)] Handout #22: Trump v. Mazars
THANKSGIVING – NOVEMBER 25-NOVEMBER 27		
	<u>Class Date & Topic</u>	<u>Assignment</u>
26	November 30: Review Session	Send me your questions.