

U.S. Intelligence Law

Fall 2009

Professor Jordan

Course Syllabus



Washington and Lee University School of Law

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I. BASIC COURSE INFORMATION

A. General Information

1) Credit Hours

3 Credit Hours

2) Meeting Time and Location

Days: Thursday & Friday

Time: 2:30 pm – 4:00 pm

Room: Classroom B

3) Professor Contact Information

Office: Sydney Lewis Hall 450C

Email: jordand@wlu.edu

B. General Course Description

This course examines the activities of the U.S. Intelligence Community and the domestic and international legal framework governing actions taken at the various stages of the intelligence cycle. Particular emphasis will be placed on domestic accountability mechanisms and the international legal conflicts inherent in intelligence agency operations. Students will be asked to examine the law in this area keeping in mind the often contradictory nature of utilitarian justifications and deontological aspirations. The critique is meant to provide a better understanding of the normative environment within which these agencies operate and to highlight the challenges posed to international law in the national security context. Topics to be discussed include intelligence oversight, foreign intelligence surveillance, military and geospatial reconnaissance, cyber espionage, data mining, interrogation, extraordinary rendition, psychological operations, assassination, and targeted killing.

C. Investigative Methodology

The study of intelligence is marked by the unique difficulties posed by information classification and strict operational secrecy. Much can be divined, however, from an examination of the legal framework within which intelligence agencies operate. Readings for this course will focus primarily on analysis of the applicable statutory law, judicial decisions, declassified internal agency directives, reports from legislative oversight committees, and other similar materials. During classroom discussions we will attempt to assess the legal framework qualitatively, using modern examples and current events as a means to evaluate its effectiveness in ensuring U.S. intelligence agencies operate within the rule of law.

To facilitate analysis, this course and its accompanying draft text are structured around the operational aspects of intelligence practice. Intelligence work is generally conducted in five steps known collectively as the “intelligence cycle.” The five individual steps are: (1) Planning and Direction; (2) Intelligence Gathering; (3) Intelligence Processing, Collation, and Storage; (4) Analysis and Production; and (5) Dissemination. The readings for the first part of this course are structured around these five steps and are designed to demonstrate the legal considerations that arise as a result of actions taken at each individual stage. The second part of the course will focus on what I have termed the “Sixth Step” in the intelligence cycle - i.e. “Intelligence Exploitation.” Our discussions during this second part will focus largely on the international and domestic legal implications of the use of covert action as a political tool to achieve U.S. foreign policy objectives.

D. Course Themes

The almost complete secrecy within which intelligence agencies are required to operate results in a dearth of practical examples for those attempting to engage in scholarly inquiry in the field. When reading the laws and regulations governing agency operations, students must think beyond the black-letter text of these provisions and attempt to extrapolate how each rule is likely to be implemented in practice. While the specific details of contemporary practical examples may be in relatively short supply, the broader aims of intelligence practice are a matter of public knowledge, and many of the methods used to achieve intelligence objectives are well-known. By studying the law in this area with a focus on the operational aspects of intelligence practice, students will hopefully begin to understand the legal framework within which these agencies operate and the myriad questions of legality which surround every aspect of their operations.

Several general themes run through this course, and when preparing for class students should attempt to conceptualize the issues that likely arise at each step

of the intelligence cycle with these recurring concerns in mind. In particular, students should be able to identify aspects of four thematic questions in most of the course materials covered this semester:

1) *Intelligence Agency Oversight and Accountability* – How effective are the mechanisms used to ensure that these clandestine organizations operate within the rule of law? What additional safeguards could be implemented to improve accountability within these agencies without unduly hindering operational effectiveness?

2) *Constitutional Compatibility* – Do the various methods discussed at each stage raise any constitutional concerns? What constitutional rights may be negatively affected by operations undertaken at the stage in question? What safeguards exist to reduce these risks? How effective are these safeguards likely to be in actuality? How could the current oversight framework be enhanced to better ensure compliance?

3) *Utilitarianism v. Deontology* – Which theoretical perspective seems to be reflected most often in the legal provisions controlling each of the operational subsets of intelligence practice? Do you believe the appropriate balance has been achieved? How would you structure things differently? What would be the benefits and consequences of the changes you propose? Keeping in mind the principles of game theory, how are your proposals likely to affect the balance of power in the perpetual state of competition between U.S. intelligence agencies and their foreign counterparts? Given the shifts you foresee in this competitive environment, what are the realistic consequences of the proposals you suggest?

4) *The Limits of International Law* - How might the various activities conducted at each stage of the intelligence cycle raise concerns under the law of nations? What is your assessment of the principles of international law which might bear on the legality of certain operational methods? Have the drafters of internal agency directives included adequate safeguards to ensure intelligence agency operations are conducted in accordance with the international obligations of the United States? If deficiencies do exist are they isolated or do they appear to be systemic based on your evaluation of similar directives in other agencies? What does this review suggest about the efficacy of international law to control state actions within the national security sphere?

When preparing for class each week, students should attempt to analyze the materials keeping these broad themes in mind, and should come prepared to offer suggestions and criticisms beyond those already contained in the readings.

E. Required Texts and Materials

1. *DAVID ALAN JORDAN, U.S. INTELLIGENCE LAW COURSE MATERIALS (*available on L:Drive)
2. MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY (4th Ed. 2008).
3. HANS BORN, LOCH K. JOHNSON, & IAN LEIGH, WHO'S WATCHING THE SPIES?: ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY (2005).

II. STUDENT EVALUATION

A. Grading Summary

1) 20-Page Paper & 5-Minute Paper Presentation (75%)

2) 15-Minute Daily Reading Presentation (25%)

B. 20-Page Paper & 5-Minute Paper Presentation Details

1st Draft* due November 20th (i.e. the day before Thanksgiving Break)

*Note: This Draft is only required for students taking the course to fulfill the upper-level writing requirement.

5-Minute Presentations will take place in alphabetical order during the last week.

C. 15-Minute Daily Reading Presentation Details

In addition to general class participation, each student will be required to lead the discussion for one class meeting during the semester. Days will be assigned in alphabetical order starting with week 2 (Day 3). Two people will present each day. Any extra students will present on Day 25 or 26. At a minimum, each day's discussion leaders will be expected to brief the class on the substance of all of the assigned reading for that day.

III. READING ASSIGNMENTS

INTRODUCTION	
<u>DAY 1</u>	
1 August 20	<p style="text-align: center;">Day 1 (Aug 20): Introduction to Course Themes and the U.S. Intelligence Community</p> <hr/> <p style="text-align: center;"><u>Thursday, August 20</u></p> <p style="text-align: center;"><u>Readings</u></p> <p>No Reading</p>
<u>DAY 2</u>	
2 August 21	<p style="text-align: center;">Day 2 (Aug 21): Working Inside the Intelligence Community: Security Clearances, Counterintelligence, and Employee Rights</p> <hr/> <p style="text-align: center;"><u>Friday, August 21</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>Assigned Texts:</u> <i>Skim:</i> Chapters 1-3, & 7 in Mark M. Lowenthal, Intelligence: From Secrets to Policy (3rd Ed. 2006). <u>Chapter 1</u> – What is “Intelligence” <u>Chapter 2</u> – The Development of U.S. Intelligence <u>Chapter 3</u> – The U.S. Intelligence Community</p>

	<p style="text-align: center;"><u>Chapter 7 – Counterintelligence</u></p> <p><u>L:Drive:</u> <i>Skim:</i> Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995) (familiarize yourself with the order and its provisions). <i>Read:</i> Dept. of Navy v. Egan, 484 U.S. 518 (1988).</p> <p><u>Optional Further Reading:</u> High Tech Gays v. Def. Ind. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990). Dubbs v. CIA, 866 F.2d 1114 (9th Cir. 1989).</p>
<u>DAY 3</u>	
3 August 27	<p style="text-align: center;">Day 3 (Aug 27): Restrictions on Former Employees</p> <p style="text-align: center;"><u>Thursday, August 27</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> Nondisclosure and the First Amendment + Penalties for Breach of Employment Contract – <i>Read:</i> Snepp v. United States, 444 U.S. 507 (1980). Passports, the Right to Travel and Administrative Due Process – <i>Read:</i> Haig v. Agee, 453 U.S. 280 (1981).</p> <p><u>Optional Further Reading – Miscellaneous Issues:</u> <u>Freedom of Association</u> – United States v. Robel, 389 U.S. 258 (1967). <u>Confrontation Clause</u> – United States v. Marzook, 412 F. Supp. 2d 913 (N.D. Ill. 2006). Tax Exemption for Certain Clandestine Agents – 50 U.S.C. § 403w(h)(1)(A).</p>

STEP I: PLANNING AND DIRECTION

<u>DAY 4</u>	
4 August 28	Day 4 (Aug 28): Command and Control of Intelligence Operations
	<u>Friday, August 28</u> <u>Readings</u> <u>Assigned Texts:</u> Chapter 4 in Mark M. Lowenthal, Intelligence: From Secrets to Policy (3rd Ed. 2006). <u>Chapter 4</u> – The Intelligence Process – A Macro Look: Who Does What for Whom? <u>L:Drive:</u> <i>Read:</i> U.S. Constitution Article II § 2 <i>Compare with:</i> U.S. Constitution Article I § 8 Executive Order 12333, § 1.8 (1981) (paying particular attention to Section 1.8(e) which vests the CIA with the power to conduct “special activities” pursuant to Presidential authorization).
<u>DAY 5</u>	
5 September 3	Day 5 (Sept 3): Executive and Legislative Oversight
	<u>Thursday, September 3</u> <u>Readings</u> <u>Assigned Texts:</u> 1. <i>Read:</i> Chapter 10 in Mark M. Lowenthal, Intelligence: From Secrets to Policy (3rd Ed. 2006). <u>Chapter 10</u> – Oversight and Accountability 2. <i>Skim:</i> Chapters 1, 4, 5, 6, and 7 in Hans Born, Loch K. Johnson, &

	<p>Ian Leigh, <i>Who’s Watching the Spies?: Establishing Intelligence Service Accountability</i> (2005). <u>Chapter 1</u> – More Closely Watching the Spies: Three Decades of Experiences (by Ian Leigh) <u>Chapter 4</u> – Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States (by Loch K. Johnson)</p> <p><u>Optional Further Reading:</u> 1. Chapters 5, 6, and 7 in Hans Born, Loch K. Johnson, & Ian Leigh, <i>Who’s Watching the Spies?: Establishing Intelligence Service Accountability</i> (2005). <u>Chapter 5</u> – Accountability of Security and Intelligence in the United Kingdom (by Ian Leigh) <u>Chapter 6</u> – Canada’s Long Road from Model Law to Effective Oversight of Security and Intelligence (by Stuart Farson). <u>Chapter 7</u> – Intelligence and Accountability in a State without Enemies: The Case of Norway (by Fredrik Sejersted)</p>
<p><u>DAY 6</u></p>	
<p>6 September 4</p>	<p style="text-align: center;">Day 6 (Sept 4): Judicial Oversight</p> <p style="text-align: center;"><u>Friday, September 4</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> <u>The Totten Rule</u> – <i>Read:</i> Tenet v. Doe, 544 U.S. 1 (2005). Review of CIA Director Decisions – <i>Read:</i> National Security Act of 1947, § 102(c), 50 U.S.C. § 403-4a (e)(1). (“vesting the Director of the CIA with broad discretion to fire employees of the Agency”) <i>Skim:</i> Webster v. Doe, 486 U.S. 592 (1988) (generally, there is no judicial review of a CIA Director’s decision to terminate an employee under Section 102(c) of the National Security Act of 1947, however courts may still consider any constitutional questions raised).</p> <p><u>Online Material</u> (*These materials are not on the L:Drive because they are copyrighted. Please find them online): Jack L. Goldsmith & Neal Katyal, <i>The Terrorists’ Court</i>, NY Times, July 11, 2007, at A19 available at</p>

	<p>http://www.nytimes.com/2007/07/11/opinion/11katyal.htm (last visited Aug. 15, 2007).</p> <p><u>Optional Additional Reading:</u> Chapter 3 in Hans Born, Loch K. Johnson, & Ian Leigh, Who's Watching the Spies?: Establishing Intelligence Service Accountability (2005). <u>Chapter 3</u> – Beyond the Nation State: The Influence of the European Court of Human Rights on Intelligence Accountability (by Iain Cameron)</p>
<p><u>DAYS</u> 7 & 8</p>	
<p>7 & 8 September 10 & 11</p>	<p>Days 7 & 8 (Sept 10 & 11): No Class</p> <hr/> <p><u>Thursday-Friday, September 10 & 11</u></p> <p><u>No Class/No Readings</u></p>

STEP II: INTELLIGENCE GATHERING

DAY 9	
9 September 17	Day 9 (Sept 17): Introduction to Domestic Electronic Surveillance
	<p style="text-align: center;"><u>Thursday, September 17</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>Assigned Texts:</u> Chapter 5 in Mark M. Lowenthal, Intelligence: From Secrets to Policy (3rd Ed. 2006). <u>Chapter 5</u> – Collection and the Collection Disciplines</p> <p><u>L:Drive:</u> The Fourth Amendment Katz v. United States, 389 U.S. 347 (1967). United States v. U.S. District Court, 407 U.S. 297 (1972) (This case is also known as “The Keith Case”). Kyllo v. United States, 533 U.S. 27, 35 (2001).</p>
DAY 10	
10 September 18	Day 10 (Sept 18): The Foreign Intelligence Surveillance Act of 1978
	<p style="text-align: center;"><u>Friday, September 18</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> <u>The Foreign Intelligence Surveillance Act of 1978</u>, Pub. L. No. 95-511, 92 Stat. 1783 - Read the original text of FISA from when it was passed in 1978. Study the text carefully and come prepared to discuss its provisions and apply them to hypothetical examples. Optional Additional Reading: United States v. Cavanaugh, 807 F.2d 787 (9th Cir. 1987) (upholding</p>

	the constitutionality of the composition of the Foreign Intelligence Surveillance Court).
<u>DAY 11</u>	
11 September 24	Day 11 (Sept 24): The Terrorist Surveillance Program
	<p style="text-align: center;"><u>Thursday, September 24</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> <i>Read:</i> ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mi. 2006).</p> <p><u>Online Materials (Optional Documentary):</u> PBS Frontline Documentary: Spying on the Home Front (May 15, 2007) <i>available at</i> http://www.pbs.org/wgbh/pages/frontline/homefront/view/ (discussing preemptive domestic surveillance operations, the Terrorist Surveillance Program, NSA surveillance at AT&T, National Security Letters, and Data Mining).</p> <p><u>Optional Additional Reading:</u> In re Sealed Case No. 02-001, 310 F.3d 717 (FISCR 2002). ACLU v. NSA, 2007 FED App. 0253P (6th Cir. 2007).</p>
<u>DAY 12</u>	
12 September 25	Day 12 (Sept 25): Domestic Internet Surveillance and Data Mining
	<p style="text-align: center;"><u>Friday, September 25</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> <i>Read:</i> Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Ca. 2006).</p>

<u>DAY 13</u>	
13 October 1	<p style="text-align: center;">Day 13 (Oct 1): National Security Letters</p> <hr/> <p style="text-align: center;"><u>Friday, October 1</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> <i>Read: Doe v. Gonzales, 449 F.3d 415 (2nd Cir. 2006).</i></p>
<u>DAY 14</u>	
14 October 2	<p style="text-align: center;">Day 14 (Oct 2): New Amendments to FISA</p> <hr/> <p style="text-align: center;"><u>Thursday, October 2</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> <i>Skim <u>Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008</u> - Read the text of the most recent amendments to FISA recently passed in July of 2008. Study the changes carefully and come prepared to discuss them and apply the new provisions to hypothetical examples.</i></p>
<p>*Fall Break: No Class (Oct 8 & Oct 9)</p>	

<u>DAY 15</u>	
15 October 15	<p align="center">Day 15 (Oct 15): International Surveillance: Geospatial & Military Reconnaissance</p> <hr/> <p align="center"><u>Thursday, October 15</u></p> <p align="center"><u>Readings</u></p> <p><u>L:Drive:</u> Statute of the International Court of Justice, Article 38(1) United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (1982) – Read articles 32, 87, 88, and 95. <i>Skim:</i> Articles 3, 4, 17, 18, 19, 20, 21, 24, 25, 29, 30, 31, 33, 89, 90, 94, 96, 97, 98, 109, 300, and 301.</p> <p><u>Online Material:</u></p> <ol style="list-style-type: none"> 1. Consider the international legal provisions above in the context of the recent Hainan Island Incident (i.e. the U.S. “spy plane” collision with a PRC fighter aircraft while conducting signals collection in the South China Sea on April 1, 2001). Briefly familiarize yourself with the facts online and come prepared to discuss. 2. Consider also the Korean assault on the USS Pueblo in 1968.
<u>DAY 16</u>	
16 October 16	<p align="center">Day 16 (Oct 16): International Surveillance (Continued): Diplomatic Surveillance</p> <hr/> <p align="center"><u>Friday, October 16</u></p> <p align="center"><u>Readings</u></p> <p><u>L:Drive:</u> United Nations Charter, Articles 2(5), 100(2), 103, and 105(1). Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, February 13, 1946, Articles 2(3), 3(10), and 5(19). United Nations Headquarters Agreement, Article III, Section 9(a).</p>

	<p>United Nations Headquarters Agreement Act § 6, August 4, 1947, Pub. L. No. 80-357; 61 Stat. 756. The Vienna Convention on Diplomatic Relations, Articles 22(1), 27(1), 27(2), 27(3), and 31(1).</p> <p><u>Factual Background to Consider:</u> 1. In January of 2003, a Mandarin language translator working at the Government Communications Headquarters (“GCHQ”) – Britain’s counterpart to the U.S. National Security Agency – leaked a classified memorandum revealing a coordinated effort by British and American signals intelligence agencies to monitor the communications of several U.N. Security Council delegations prior to an anticipated vote regarding the use of military force against Iraq. One year later, Clare Short – the former British Secretary of State for International Development – made an appearance on the radio show <i>BBC Today</i> and alleged that British intelligence agencies routinely monitor the telephone conversations of UN diplomats and staff. She claimed to have read transcripts of telephone calls made by then Secretary-General Kofi Annan. Later than year, a sophisticated covert listening device was discovered constructed into the wall of a conference room in the United Nations European Headquarters in Geneva.</p>
<p><u>DAY 17</u></p>	
<p>17 October 22</p>	<p style="text-align: center;">Day 17 (Oct 22): Foreign Cyber-Espionage</p> <hr/> <p style="text-align: center;"><u>Thursday, October 22</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> 1. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).</p> <p><u>Online Materials:</u> <i>Consider:</i> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432, comment b (1987) (stating that “[i]t is universally recognized, as a corollary of state sovereignty, that officials in one state may not exercise their functions in the territory</p>

	<p>of another state without the latter's consent").</p> <p>2. <i>Compare with:</i> United States Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section, <i>Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations</i>, Part I(C)(7) (2002) available at http://www.cybercrime.gov/s&smanual2002.htm#_IC7.</p> <p>3. <i>Consider also:</i> Jack L. Goldsmith, <i>The Internet and the Legitimacy of Remote Cross-Border Searches</i>, 2001 U. CHI. LEGAL F. 103 (2001) available at http://www7.nationalacademies.org/CSTB/wp_cip_goldsmith.pdf (last visited Aug. 15, 2007).</p>
<p><u>DAY 18</u></p>	
<p>18 October 23</p>	<p style="text-align: center;">Day 18 (Oct 23): Interrogation</p> <hr/> <p style="text-align: center;"><u>Friday, October 23</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> Common Article 3 of the Geneva Conventions The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) - Articles. 1, 2, 3, 4, and 16. Executive Order 13440 of July 20, 2007, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 72 Fed. Reg. 40707 (July 20, 2007). <i>Skim:</i> FM 2-22-3 (FM 34-52), Human Intelligence Collector Operations (Sept. 2006).</p> <p><u>Internet Materials:</u> Alan M. Dershowitz, <i>Want to Torture? Get a Warrant</i>, SAN FRANCISCO CHRONICLE, Jan. 22, 2002, A19</p> <p>Online Materials (Optional Documentary): PBS Frontline Documentary: The Torture Question (October 18, 2005) <i>available at</i></p>

	<p>http://www.pbs.org/wgbh/pages/frontline/torture/view/ (discussing how policy decisions in Washington led to tough interrogation practices and instances of prisoner abuse in Afghanistan, Guantanamo Bay, and Iraq).</p>
<p><u>DAY 19</u></p>	
<p>19 October 29</p>	<p style="text-align: center;">Day 19 (Oct 29): Extraordinary Rendition</p> <hr/> <p style="text-align: center;"><u>Thursday, October 29</u></p> <p style="text-align: center;"><u>Readings</u></p> <p>I. Kidnapping (i.e. forcible capture and rendition where no prior agreement exists between the nation conducting the seizure and the nation where the seizure takes place)</p> <p style="padding-left: 40px;">A. <u>Legality of Covert Kidnapping under International Law</u></p> <ol style="list-style-type: none"> 1. Security Council Resolution 138 (June 23, 1960) (the U.N. Security Council’s ruling on the legality of the Israeli capture and transfer of Adolf Eichmann from Argentina). <p style="padding-left: 40px;">B. <u>Effect of Illicit Kidnapping and Transfer</u></p> <ol style="list-style-type: none"> 2. <u>Eichmann v. Attorney General of Israel</u>, 136 I.L.R. 277 (Supreme Court of Israel 1962) <i>available at</i> http://www.gwu.edu/~jaysmith/Eichmann.html. 3. <u>U.S. Federal Kidnapping Statute</u> - 18 U.S.C. § 1201 4. <u>United States v. Alvarez-Machain</u>, 504 U.S. 655 (1992). <p>II. Covert Judicial Transfer (i.e. the seizure in one country of a criminal defendant by officials of another country outside of traditional extradition procedures but where a covert agreement between the two countries exists)</p> <ol style="list-style-type: none"> 5. <u>Case of Öcalan v. Turkey</u>, App. No. 46221/99 (Judgment) (E.C.H.R. 12 May 2005) (involving the surreptitious seizure and rendition of a terror suspect in Kenya by Turkish intelligence)

officials who brought the subject to Turkey to face trial).

III. Extraordinary Rendition (i.e. the seizure and forcible transfer of an individual to a foreign nation where no criminal charges against that individual are pending)

6. United Nations Convention Against Torture, Article 3

Online Materials:

The Abu Omar Allegations

Craig Whitlock, *Prosecutors: Italian Agency Helped CIA Seize Cleric*, WASH. POST, July 6, 2006, at A15.

Craig Whitlock, *Italy Seeks Extradition of 22 CIA Operatives*, WASH. POST, Nov. 12, 2005, at A19.

STEP III: INTELLIGENCE PROCESSING, COLLATION, AND STORAGE

DAY 20

20

October
30

Day 20 (Oct 30): Data Processing, Collation, and Storage

Friday, October 30

Readings

L:Drive:

Nat'l Sec. Agency/Cent. Sec. Serv., United States Signals Intelligence Directive (USSID) 18, Legal Compliance and Minimization Procedures, §§ 5 and 6, (July 27, 1993).

- a. Section 5 - Processing
- b. Section 6 - Retention

The Privacy Act of 1974 - Familiarize yourself with the Act's requirements. Pay particular attention to 5 U.S.C. § 522a(e)(7).
Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980).
Bassiouni v. CIA, 392 F.3d 244 (7th Cir. 2004).

STEP IV: ANALYSIS AND PRODUCTION

<u>DAY 21</u>	
21	Day 21 (Nov 5): Protection of U.S. Identities in Intelligence Reports
November 5	<p><u>Thursday, November 5</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>Assigned Texts:</u></p> <ol style="list-style-type: none"> 1. Chapter 6 in Mark M. Lowenthal, <i>Intelligence: From Secrets to Policy</i> (3rd Ed. 2006). <u>Chapter 6</u> – Analysis 2. Chapter 2 in Hans Born, Loch K. Johnson, & Ian Leigh, <i>Who’s Watching the Spies?: Establishing Intelligence Service Accountability</i> (2005). <u>Chapter 2</u> – The Politicization of Intelligence: Lessons from the Invasion of Iraq (by Peter Gill) <p><u>L:Drive:</u></p> <ol style="list-style-type: none"> 1. Nat’l Sec. Agency/Cent. Sec. Serv., United States Signals Intelligence Directive (USSID) 18, Legal Compliance and Minimization Procedures, § 7, (July 27, 1993). a. <u>Section 7</u> - Dissemination 2. Nat’l Sec. Agency/Cent. Sec. Serv., U.S. Identities in SIGINT, (March 1994). 3. NSA Memo, <i>USSID 18: Dissemination of U.S. Government Organizations and Officials – Information Memorandum</i>, (February 4, 1993). 4. NSA Memo, <i>Understanding USSID 18 and Contextual Identifications – Information Memorandum</i>, (September 30, 1997). 5. Nat’l Sec. Agency/Cent. Sec. Serv., USSID 18 Guide, (February 1998). 6. NSA Memo, <i>USSID 18: Reporting Guidance on References to the First Lady – Information Memorandum</i>, (July 8, 1993). 7. NSA Memo, <i>USSID 18: Reporting Guidance on Former President Carter’s Involvement in the Bosnian Peace Process – Information Memorandum</i>, (December 15, 1994).

STEP V: DISSEMINATION

DAY 22

22

November
6

Day 22 (Nov 6): Information Classification and Information Sharing

Friday, November 6

Readings

L:Drive:

1. 18 U.S.C. § 798 (a) (detailing the penalties for disclosure of classified information).
2. See 50 USC § 404g (discussing restrictions on intelligence sharing with the United Nations).

Online Materials:

1. Simon Chesterman, *Shared Secrets: Intelligence and Collective Security* (Lowy Institute Paper No. 10, 2005) available at http://ilj.org/research/documents/chesterman_shared_secrets_2006.pdf.

Additional Reading:

1. Luppe B. Luppen, *Just When I Thought I Was Out, They Pull Me Back In: Executive Power and the Novel Reclassification Authority*, 64 WASH. & LEE. L. REV. 1115 (2007).

Question for Discussion:

1. Should there be an independent U.N. intelligence agency?

UN Operations often suffer as a result of the lack of an independent intelligence collection and assessment capacity. In the limited instances where intelligence collection and dissemination have been permitted during UN operations, the scope of such activities has generally been so restricted that they have served little purpose in practice. This has hindered the organization's ability to anticipate future threats and take preventative measures before emerging threats to international peace have materialized.

For example, from 1988-1990 the UN had stationed observers at strategic locations along the Iraqi border to monitor the ceasefire between Iraq and Iran. Their mandate was so restricted, however, that when Iraq began massive troop movements toward its southern border with Kuwait, the U.N.'s forward observers were not permitted to file a report on the activity because the troops had made no movement toward the nation's eastern border with Iran. The observers' hands were tied by their limited mandate, and as a result the U.N. was unaware of the troop movements until Iraq invaded Kuwait the following month.

The lack of an independent intelligence capability has also forced the UN to rely solely on the intelligence products provided to it by member states. This has created opportunities for mistakes and placed the organization at risk of overt attempts to manipulate its operations.

Despite the apparent need for at least some limited intelligence capacity, all proposals for creating a UN intelligence agency have consistently been rejected. In 1960, Secretary-General Dag Hammarskjöld rejected a proposal for the creation of a permanent UN intelligence agency. Since then, other attempts have been made which were also unsuccessful.

Class discussion could focus on the propriety of creating a UN intelligence agency and the political obstacles which make such a move highly unlikely.

VI. "THE SIXTH STEP": INTELLIGENCE EXPLOITATION: PROACTIVE INTERVENTION & COVERT ACTION

DAY 23

23

November
12

**Day 23 (Nov 12): Introduction to the Regulation of Covert
Action**

Thursday, November 12

Readings

Assigned Texts:

Chapter 8 in Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (3rd Ed. 2006).

Chapter 8 – Covert Action

L:Drive:

I. Domestic Law

50 U.S.C. § 413b (governing presidential authorization and reporting requirements related to covert actions).

II. International Law

1. International Legal Provisions to Consider

a. The United Nations Charter

i. Article 2(4)

ii. Article 51

b. Additional Protocol I to the Geneva Conventions

i. Article 46

c. The Charter of the Organization of American States

i. Article 19

ii. Article 20

iii. Article 21

iv. Article 22

v. Article 23

Online Materials:

David Ensor, *New U.S. Spy Service Created: National Clandestine Service to Coordinate all Human Intelligence*, CNN.com, Oct. 13, 2005, available at

	<p>http://www.cnn.com/2005/POLITICS/10/13/goss.spies/index.html (last visited Aug. 15, 2007). Simon Chesterman, <i>The Spy Who Came in From the Cold War: Intelligence and International Law</i>, 27 MICH. J. INT’L. L. 1071 (2006) (available on Lexis, Westlaw, and through the SSRN).</p>
<p>DAY 24</p>	
<p>24 November 13</p>	<p>Day 24 (Nov 13): PSYOP and Ethereal Forms of Low-Intensity Conflict</p> <p><u>Friday, November 13</u></p> <p><u>Readings</u></p> <p>I. Definitions</p> <ul style="list-style-type: none"> i. <u>Low-Intensity Conflict</u> - Definition from Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, page 432, 12 April 2001 (As Amended Through 13 June 2007) – A limited politico-military struggle to achieve political, social, economic, or psychological objectives. It is often protracted and rages from diplomatic, economic and psychological pressures through terrorism and insurgency. Low-intensity is generally confined to a geographic area and is often characterized by constraints on the weaponry, tactics, and the level of violence.” ii. <u>Psychological Operations (Psyop)</u> - Definition from Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, page 432, 12 April 2001 (As Amended Through 13 June 2007) - “Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals. The purpose of psychological operations is to induce or reinforce foreign attitudes and behavior favorable to the originator’s objectives.” <p>II. Military Use of Hostile Propaganda in Armed Conflicts</p> <ul style="list-style-type: none"> a. 1-Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 16 I.L.M. 1391 (1977).

- a. Article 37.2 (misleading propaganda is explicitly permitted during times of armed conflict)

III. Peacetime Use

- a. Charter of the Organization of American States, 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3
 - a. Article 19 – No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.
- b. General Assembly Resolution 110(II) (1947) “condemns all forms of propaganda ... which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression.”
 - a. Consider timing, communist propaganda fears, etc.
- c. International Convention Concerning the Use of Broadcasting in the Cause of Peace (1936), 186 U.N.T.S. 201, 32 A.J.I.L. Supp. 113 (US is not a signatory)
 - a. Prohibits the use of broadcasting to “incite the population of any territory to acts incompatible with the internal order or the security of a ... contracting party ... and the use of broadcasting as an incitement to war.”
- d. Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, II(j);
- e. General Assembly Resolution 2625 (Declaration on Friendly Relations) (look for provision outlawing “warmongering” or “hostile propaganda”)
- f. 2-1982 United Nations Convention on the Law of the Sea (Goes beyond the 1958 Convention on the Law of the Sea in terms of broadcasting from the high seas)
 - a. Article 109 – forbidding unauthorized broadcasting from the high seas
- g. The International Covenant on Civil and Political Rights – free exchange of information
 - a. Look for national security exception
- h. General Assembly Resolution 37/92, Principles Governing the Use by States of Artificial Earth Satellites for

International Direct Television Broadcasting”

- a. Paragraph 13 – “A State which intends to establish or authorize the establishment of an international direct television broadcasting satellite service shall without delay notify the ... receiving State ... and shall promptly enter into consultation with any of those States which so requests.”
- i. The European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (Tried to outlaw “illegal broadcasting from floating or airborne stations outside of national territories”).
- j. Examples of Propaganda
 - a. Voice of America
 - b. Radio Free Europe
 - c. Radio Marti

IV. PSYOPs and Humanitarian Law - Questions for Discussion

1. PSYOPs, Sticks and Stones, and the Geneva Conventions: Can religious taunts directed at enemy combatants during wartime rise to the level of a violation of international humanitarian law?

The use of religious incitement as a tool in military psychological operations has recently come under scrutiny. A high profile incident occurred in Afghanistan where members of the Army PSYOPs team attached to the 173rd Airborne Brigade burned the bodies of dead Taliban soldiers and broadcast religious taunts to opposition forces that were in hiding. PSYOPs soldiers are reported to have shouted various slurs including:

“Attention Taliban, you are all cowardly dogs. You allowed your fighters to be laid down facing west and burned. You are too scared to retrieve their bodies. This just proves you are the lady boys we always believed you to be.”

and

“You attack and run away like women. You call yourself Talibs but you are a disgrace to the Muslim religion and you bring shame upon your family. Come and fight like men instead of the cowardly dogs you are.”

The investigation after the fact showed that the soldiers’ burning of enemy corpses during the operation was actually for legitimate hygienic reasons; however the acts coupled with these taunts clearly were intended to serve the dual purpose of conveying religious

animus in a way particularly offensive and degrading to those of the Muslim faith. After examining the relevant provisions from the Hague and Geneva Conventions, do you believe this crossed the line? Is there a point at which name calling and taunts can rise to the level of a violation of international humanitarian law?

Consider Geneva Convention I - Review the language of Article 17 of Geneva Convention (I), which states in relevant part:

“Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased.”

and

“They shall further ensure that the dead are honorably interred, if possible, according to the rites of the religion to which they belonged.”

This would open up the class discussion to questions about lawful combatancy and who is protected by international humanitarian law. Through manipulation of the facts, I could also have the class delve into the vagaries of psychological operations that use alleged violations of the Geneva Conventions to incite or encourage reprisals which are contrary to international humanitarian law. The principle inquiry would be: Do intelligence units operating in armed conflict have a duty to conduct operations in a way that fosters respect for international humanitarian law? For example, students may be asked to consider a hypothetical based on the above fact pattern but containing important factual variations.

Hypothetical - For example, assume the Taliban government was recognized by the United States and there was no issue about whether Taliban fighters were lawful combatants entitled to protection under the Geneva Conventions. Assume further that no actual violations of the Geneva Conventions had been performed by the U.S. soldiers in the Afghanistan situation. What if the U.S. soldiers had actually buried the enemy corpses correctly according to the requirements of the Muslim faith, but the PSYOPs unit broadcast false accounts of degrading treatment simply as a tool to incite the opposition or bolster U.S. troop morale? If the PSYOPs unit’s tactics resulted in the incitement of Taliban fighters to commit belligerent reprisals and disregard humanitarian law based on the false impression that the U.S. was already disregarding it, could the U.S. be found to be partially responsible for the resulting humanitarian law violations committed by Taliban fighters?

Background Information: Bradley Graham, *U.S. to Probe Treatment*

	<i>of Dead Taliban Fighters</i> , WASH. POST, Oct. 20, 2005, at A16.
<u>DAY 25</u>	
25 November 19	<p style="text-align: center;">Day 25 (Nov 19): Paramilitary Activities</p> <p style="text-align: center;"><u>Thursday, November 19</u></p> <p style="text-align: center;"><u>Readings</u></p> <p><u>L:Drive:</u> 9/11 Commission Report Chapter 13.2 Paramilitary Operations Recommendation</p> <ol style="list-style-type: none"> 2. <i>Skim:</i> General Assembly Resolution 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). 3. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 1. <p><u>Online Materials:</u> Jules Lobel, <i>Covert War and Congressional Authority: Hidden War and Forgotten Power</i>, 134 U. PA. L. REV. 1035 (1986) (available on Lexis and Westlaw).</p>

<p><u>DAY 26</u></p>	<p>Day 26 (Nov 20): Assassination & Targeted Killings</p>
<p>26 November 20</p>	<p>*1st Drafts of Paper Due (Nov 20) (*upper-level writing requirement students only)</p> <p style="text-align: center;"><u>Friday, November 20</u></p> <p style="text-align: center;"><u>Assassinations Readings</u></p> <p><u>L:Drive:</u></p> <ol style="list-style-type: none"> 1. Church Committee Recommendations Regarding Assassination 2. Executive Order 12333 §§ 2.11-2.12 (1981). 3. W. Hays Parks, <i>Memorandum of Law: Executive Order 12333 and Assassination</i> (Dec. 1989). 4. Elizabeth B. Bazan, <i>Assassination Ban and E.O. 12333: A Brief Summary</i>, CRS REPORT FOR CONGRESS, Order Code RS21037 (Jan. 4, 2002). 5. <i>Skim</i>: Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005) (a.k.a. The Mehlis Report), 6. Security Council Resolution 1664 (2006). <p style="text-align: center;"><u>Targeted Killings Readings</u></p> <p><u>L:Drive:</u></p> <ol style="list-style-type: none"> 1. Geneva Convention (III) <ol style="list-style-type: none"> a. <i>Read</i>: Articles 3, 4, and 5 2. Additional Protocol I to the Geneva Conventions <ol style="list-style-type: none"> a. <i>Skim</i>: Articles 1, 35-41, 43-45, 48-60 3. Geneva Convention (IV) <ol style="list-style-type: none"> a. <i>Read</i>: Articles 4 and 5 4. <i>Read</i>: Antonio Cassese, <i>Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law</i>. 5. David Kretzmer, <i>Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?</i>, 16 Eur. J. Int'l L. N. 2, pgs 171-212.
<p>*Thanksgiving Break Begins: No Class (Nov 26 & Nov 27)</p>	

5-MINUTE PAPER PRESENTATIONS

<u>DAY 27</u>	
27 December 3	Day 27 (Dec 3): 5-Minute Paper Presentations Part 1
	<u>Thursday, December 3</u> *3-Hour Class
<u>DAY 28</u>	
28 December 4	Day 28 (Dec 4): 5-Minute Paper Presentations Part 2 & Course Wrap-Up
	<u>Friday, December 4</u> *3-Hour Class