Syllabus -- Law 492-001: Intelligence Law Seminar

George Mason University Law School

Patrick S. Kim and Bernard L. Seward

Brief Course Description: This practice seminar examines the unique aspects of practicing law within the U.S. Intelligence Community (IC). The seminar will provide students with an overview of the IC and its sources of legal authority and allow them to practice analyzing and addressing typical legal issues that arise for IC lawyers. Each class will involve an overview of the specific topic followed by either the drafting of a short memorandum addressing a hypothetical client question or a simulated inter-agency meeting. No security clearance is required since all materials and discussions will be at the unclassified level. Although this seminar is focused on issues most relevant to IC agencies, each week’s practical exercise will focus on drafting and/or negotiating skills useful and relevant to any government attorney.

Class Format: Seminar of 8-16 students; two credits; one two-hour class per week. Each week’s seminar will focus on a practical simulation moderated by the instructors, based on that week’s topic and reading assignments. Each simulation will either require a written product drafted in class (e.g., a memorandum of law or legal opinion based on the student’s assigned role as counsel for an IC agency) or ACTIVE oral participation (e.g., by acting the part of agency counsel in a Deputies meeting of the National Security Counsel). Students MUST BE FULLY PREPARED for each class session.

Course Grading: Grades will be based on class participation (30%), written exercises from the seminar sessions (30%), and a final, 10-15 page paper, double spaced (40%).

Office Hours: By appointment.

Faculty Contact Information:

Patrick Kim: peyjkim@gmail.com, 571-331-7629

Bernard Seward: blsewardjr@verizon.net, 703-323-0181

Course Materials: The bulk of the course materials are cases or articles available on Westlaw or Lexis-Nexis or materials posted on TWEN. Materials posted on TWEN are indicated below.
The only book required for purchase is James E. Baker’s IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES. Please purchase this book as soon as possible as it will be needed for Week 3.

Syllabus:

Week 1: Overview of the U.S. Intelligence Community. Introduction to the departments and agencies that make up the U.S. Intelligence Community and related military intelligence organizations, their unique missions and capabilities, and coordination mechanisms among the departments and agencies.

Readings: Handout, “Overview of the intelligence Community”


Week 2: Introduction to Intelligence Community Law. Overview and history of the National Security Act of 1947, Goldwater-Nichols, IRTPA, FISA, etc., and the legal differences between civilian and defense intelligence agencies. Discussion of the sources of law for an intelligence lawyer, with an emphasis on “extrajudicial” authorities, such as executive orders, departmental/agency directives, and opinions of key executive branch legal offices (e.g., DOJ’s Office of Legal Counsel, Office of the Legal Advisor to the Secretary of State).

Readings: Selected readings from the National Security Act of 1947, IRTPA, FISA, E.O. 12333, etc. in Intelligence Community Legal Reference Book (Office of the Director of National Intelligence, Office of General Counsel, ed., 2012).

Week 3: Lawyering Outside the Normal Legal System. Examination of the unique legal roles of IC agency counsel, including, e.g., advocacy, providing legal advice, and suggesting policy solutions, in an environment with few detailed laws and regulations and minimal judicial and Congressional review, but significant public interest and consequences.


Week 4: Intelligence Oversight (Part I). Overview and history of Executive Order 12333 and agency implementing guidance (Attorney General guidelines) and
Congressional oversight. Issues related to the definition of “U.S. person information,” and the associated restrictions on the collection, retention, and dissemination of such information. Balancing the “need to know” against the “duty to share” in the wake of IRTPA. Determining when a sufficient nexus to foreign intelligence or other permissible collection categories exists.

Readings: Executive Order 12333, as amended (2008)

DoD 5240.1-R, “Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons.”

Selected readings from IRTPA, other statutes (Intelligence Community Legal Reference Book)

**Week 5: Intelligence Oversight (Part II).** Discussion of special topics related to intelligence oversight rules, including rules against undisclosed participation in organizations, cooperation with law enforcement, etc.

Readings: Executive Order 12333, as amended (2008)

DoD 5240.1-R, “Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons.”

Selected readings from IRTPA, other statutes (Intelligence Community Legal Reference Book)

**Week 6: Constitutional Issues Related to Intelligence Gathering.** Discussion of Fourth Amendment, FISA, USA PATRIOT Act and related legislation and regulations. Examination of the constitutional limits of the President’s power to conduct foreign intelligence inside the United States, including a discussion of the judicial precedents leading to the passage of FISA (e.g., United States v. Keith, and its progeny) as well as publicly issued opinions by the FISA Court of Appeals (In re Directives, etc.). Review of the extraterritorial applicability of the Fourth, Fifth and Sixth Amendments in relevant contexts.

Selected readings from FISA, other statutes (Intelligence Community Legal Reference Book)


**Week 7:** **Functional Management by IC Agencies and Departments.** Discussion of Executive Order 12333 and related DNI and DoD Directives with regard to management of the three basic intelligence collection activities (HUMINT, SIGINT and GEOINT). Examination of the contours and limits of the Functional Manager’s authority over other departments/agency’s’ intelligence activities within the function.

Readings: Selected readings from E.O. 12333 (Intelligence Community Legal Reference Book)

**Week 8:** **Protection of Information.** Discussion of issues related to agency counsel’s role in using legal means to protect sensitive/classified sources and methods, including issues related to the Freedom of Information Act, the Classified Information Procedures Act, preventing and responding to “gray mail” in litigation, etc.

Readings: Selected readings from FOIA, CIPA, other statutes (Intelligence Community Legal Reference Book)


**Week 9:** **Cyber Issues.** Discussion of legal issues related to use of information systems for intelligence collection and protection of intelligence information, e.g., prevention/detection of “insider threats” through monitoring of government information systems, including First Amendment/whistleblower protection issues.


**Week 10: Legal Issues Related to Operational and Military Support.** Discussion of legal issues related to application of the Law of Armed Conflict to intelligence activities conducted in support of military operations, as well as support by civilians to the Armed Forces and their presence in war zones.

Readings: Selected readings from the Geneva Conventions, etc. in Law of War Deskbook (International and Operational Law Department, U.S. Army Judge Advocate General's Legal Center and School, ed., 2012)

**Week 11: Social Media and Other Open Sources in Intelligence Gathering.** Discussion of the unique legal aspects of using various forms of open sources such as Facebook, Twitter, etc to obtain intelligence information.

Readings: Executive Order 12333, as amended (2008)

DoD 5240.1-R, “ Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons.”

Selected readings from IRTPA, other statutes (Intelligence Community Legal Reference Book)

**Week 12: Unique NGA Legal Issues.** Discussion of support to criminal prosecutions (U.S. Department of Justice, international tribunals) in domestic courts and international criminal tribunals, international agreements with foreign partners for exchange of geospatial information, commercial imagery, support to disaster relief organizations, etc.


**Week 13: Future Challenges.** Miscellaneous emerging topics in intelligence law and counseling intelligence agencies, including use of mobile devices, analysis of “big data,” etc.

**Week 14: Review.** Review and/or reserved for topics unable to be covered in previous weeks.
Scalia Law faculty’s output is among the most downloaded on the Social Science Research Network. George Mason University, Antonin Scalia Law School, is a close-knit community, offering hands-on instruction from a world-class faculty. With a faculty/student ratio of 1:11.8, small class sizes allow for direct interaction with professors—an invaluable advantage when learning complex legal doctrines. Careers. The abundance of career opportunities for Scalia Law graduates stems not only from our students’ historically strong work ethic and strategic location in the Washington, DC, area, but also from their skills and experiences gained through practical legal experience.

Academics. Course Descriptions. Law 492: Intelligence Law Seminar. Intelligence Law Seminar. Credit Hours: 2. This seminar will provide students with an overview of the U.S. Intelligence Community (IC) and its sources of legal authority. Students will engage in exercises (both written and oral) to analyze and draft practical guidance on relevant legal issues for the IC. Each class will involve an overview of the specific topic followed by either the drafting of a short memorandum addressing a hypothetical client question or a simulated inter-agency meeting. No security clearance is required...