Overview. This class will address the law governing national security investigations and related litigation. It is divided into three main parts—an introduction to national security and the U.S. Intelligence Community; national security investigations; and national security prosecutions and alternatives. Topics will include electronic surveillance, national security letters, the handling of classified information, and the civilian and military prosecution and detention options for dealing with terrorists. National security law is often inaccessible, and can be particularly hard to follow when divorced from the context of historical tradition, governmental structures, and operational reality in which it functions. Without disclosing classified or confidential information, the class will attempt to present the law in context.

Schedule. The class will meet on Wednesdays from 3:30 to 6:20 PM in Room 441. There will be a mandatory four-hour exercise held during the examination period (December 9-14).

Reading. There is no casebook, but there will be weekly reading assignments posted on Canvas. The anticipated reading assignments appear on the next page, but are subject to change as needed. In general, the readings will be short, but dense.

Papers. There is no final paper required in this class, but during the course of the semester, each student will be expected to write three papers, of no more than 1000 words each, reacting to any three of the weekly reading assignments that the student chooses. These papers are due to be e-mailed to davidskris@aol.com and brett_gerry@yahoo.com before the start of class in which the reading is discussed. The word limit and deadline will be strictly enforced. The papers should address statutory, constitutional, and/or policy issues raised by the reading assignments, should assume familiarity with the reading assignments and prior class discussions, may (but need not) refer to materials other than the reading assignments, and should use short, informal citation forms. A sample paper will be distributed as part of the reading materials for the first class.

Exercise. During exam week (December 9-14), there will be a four-hour exercise. We will simulate a national security crisis requiring immediate investigation and response, with students playing the roles of various governmental officials. The exercise serves as the final exam.

Grading. Grading will be based on three components: class participation (25%); the three short papers (50%); and performance during the final exercise (25%).

Contact Information. Professor Kris can be reached via email at davidskris@aol.com and Professor Gerry can be reached via email at brett_gerry@yahoo.com. We will not have regular office hours, but generally will be available to meet by appointment in the 30 minutes before class, and at other times as necessary.
Anticipated Reading Assignments

(1) Wednesday, September 25: Introduction

1. List of Course Themes.

2. Sample Paper.

3. 50 U.S.C. §§ 1861, 1881a. Please read these provisions only for background to understand the policy debate over their use; you will read them again, and we will review them in more detail, later in the course.

4. Remarks by the President in a Press Conference (August 9, 2013).

5. Paul Pillar, Stop Bashing the NSA (August 1, 2013).

6. ACLU, You May Have Nothing to Hide, But You Still Have Something to Fear (August 2, 2013).

7. Stewart Baker, Congressional Testimony (July 31, 2013).


(2) Wednesday, October 2: National Security and the Constitution


3. 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.

4. 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.

5. Boumediene v. Bush, 553 U.S. 723 (2008). Please focus on the extent to which constitutional rights, including but not limited to habeas corpus, apply or should apply abroad, without getting too bogged down in the particular history of habeas corpus or the special status of the U.S. installation at Guantanamo Bay.
(3) Wednesday, October 9: The U.S. Intelligence Community and Its Regulation


2. Executive Order No. 12333, United States Intelligence Activities (as amended through July 2008). Please read the opening paragraph and Part I of the order (you will be asked to read Parts II and III below).

3. Intelligence Community Organizational Chart (modified).


7. 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), 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).

8. Executive Order No. 12333. Please read Parts II and III of the order, focusing on links between provisions in the order and the history of abuse recounted in the Church Report (you should have read the opening paragraph and Part I above).


(4) Wednesday, October 23: Overview of FISA

1. The Foreign Intelligence Surveillance Act of 1978 (FISA). Please read 50 U.S.C. §§ 1801-1805 (not including 50 U.S.C. §§ 1805A-C) and 1821-1824. 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.

2. FISA, 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.


4. Chart Summarizing FISA’s Definition of “Electronic Surveillance.”

(5) Wednesday, October 23: 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?

(6) Wednesday, October 30: FISA Modernization


2. FISA. Please read 50 U.S.C. §§ 1881-1881g.

(7) – (8) Wednesday, November 6 and 13: Other Investigative Techniques

Pen-Trap Surveillance


National Security Letters


7. Sample NSLs. This contains an old “exigent letter” of the sort that is mentioned in the Inspector General’s report, two model NSLs used by the FBI since the Inspector General’s report, and a CIA NSL issued under 12 U.S.C. § 3414.


**Compelled Production of Tangible Things (Patriot Act Section 215)**


**Grand Jury Subpoenas, Material Witness Warrants, and Search Warrants**


**(9) Wednesday, November 20: CIPA**

**Overview**


**Criminal Discovery Rules**

Please read items 2-5 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.


5. Federal Rule of Criminal Procedure 12.3.
CIPA


(10) Wednesday, November 27: FISA Litigation

1. FISA. Please read 50 U.S.C. §§ 1806, 1825, 1845, 1861(g)-(h), 1881e.

2. United States v. Badia, 827 F.2d 1458 (11th Cir. 1987).


(11) Wednesday, December 4: Prosecution and Detention (Civilian and Military)

