

NATIONAL SECURITY LAW & PUBLIC POLICY

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Office Hours: Wednesday 6:00 -7:00 p.m.

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"[W]e reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man"

..... *President Obama's Inaugural Address (January 21, 2009).*

"This country is set apart from the rest of the world because of its unparalleled commitment to personal freedom and the dignity of the individual What, then, can we do to see to it that we more reliably honor our core values?"

..... Geoffrey Stone, June 20, 2008.

"During the boom years of the 1990s, globalization emerged as the most significant development in our national life

In the seven years since 9/11, the question of how we relate to the world beyond our borders — and how we should — has become inescapable It is becoming increasingly clear that the defining constitutional problem for the present generation

will be the nature of the relationship of the United States to ... the international order."

..... Noah Feldman, September 28, 2008

This is an introductory course to the legal and policy issues concerning U.S. national security today. Its emphasis is on developments since 9/11 and the election of President Obama. It focuses on the legal rules governing the formulation and execution of U.S. national security policy. It examines U.S. and international law as well as general domestic and foreign policy considerations. In particular, the course considers the principal cases, legislation and treaties impacting U.S. national security. Special emphasis is on the interplay of national security concerns and civil liberties in this age of global and transnational terrorism. Professor Stuart Malawer is *Distinguished Service Professor of Law & International Trade* at George Mason University and a member of the Virginia State Bar. He is a former Chairman of the International Section of the Virginia State Bar and *Special Editor* of the *Virginia Lawyer*.

Three aspects of this course are the following: general context is provided by lectures, student presentations assess a range of specific issues, and guest speakers add an additional range of topics.

General topics examined in this course include: foreign relations and separation of powers; federalism and foreign affairs; the role of the Congress and the courts in oversight; customary and conventional international law; treaties and executive agreements; war powers of the Executive and Congress; treatment of prisoners and detainees; rendition; intelligence legislation; national security and economic relations / foreign investment / trade controls; civil litigation and terrorism; liability of private contractors and government officials; assessment of the Bush administration's policies; consideration of evolving policies of the Obama administration.

Specific legislation assessed include, among others: Iraq War Resolution, Iranian trade sanctions, War Crimes Act, Torture Act, Patriot Act, Foreign Intelligence Surveillance Act (FISA), Detainee Treatment Act, Military Commissions Act, Espionage & Trade Secrets Act, Foreign Investment Security Act (2007) and Protect America Act (2007).

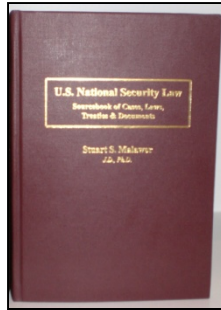
There is an assessment of the leading federal cases, federal statutes and international agreements concerning these topics. (Many of the recent Supreme Court cases and statutes are specifically edited by the instructor for this class.)

The 1990s saw the United States grappling with bringing domestic law to bear on suing foreign states and individuals for terrorism and torture committed abroad. Post- 9/11 saw the U.S. legal system grappling with formulating laws and policies concerning torture and other acts committed by Americans abroad. It often said of trade that "politics stops at the water's edge." Does the Constitution stop at the water's edge?

There are also *two team presentations* by use of PowerPoint's. They are on selected critical topics addressing specifically today's crucial issues -- one set focuses on current issues and one set assesses particular statutes. There is a midterm and a final examination (open book and laptops permitted). Each presentation is 25% of the final grade. The midterm and final exam are each 25% . They are both *open-book* and you may use your *laptops* and have *access to the Web*. The course is intended to be highly interactive. Classroom participation is critical and is considered in the final grade.

Guest speakers provide additional perspectives. Topics have included: domestic and international surveillance, litigation and terrorism, cybersecurity, economic relations and national security, and prosecution of terrorists . For example, the *Assistant Attorney General for National Security*, U.S. Department of Justice (subsequently named as the *Homeland Security Adviser*, the White House) spoke the Spring semester (2008).

Required Text -- *Stuart Malawer, U.S. National Security Law* (William S. Hein & Co. 2009). My personal website for this class is <http://www.NationalSecurityLaw.net/>. It contains links to many useful government and international organization publications, weekly assignments as well as daily updates.



The following is a statement of the official SPP Policy on Plagiarism -- The profession of scholarship and the intellectual life of a university as well as the field of public policy inquiry depend fundamentally on a foundation of trust. Thus any act of plagiarism strikes at the heart of the meaning of the university and the purpose of the School of Public Policy. It constitutes a serious breach of professional ethics and it is unacceptable. Plagiarism is the use of another's words or ideas presented as one's own. It includes, among other things, the use of specific words, ideas, or frameworks that are the product of another's work. Honesty and thoroughness in citing sources is essential to professional accountability and personal responsibility. Appropriate citation is necessary so that arguments, evidence, and claims can be critically examined. Plagiarism is wrong because of the injustice it does to the person whose ideas are stolen. But it is also wrong because it constitutes lying to one's professional colleagues. From a prudential perspective, it is shortsighted and self-defeating, and it can ruin a professional career. The faculty of the School of Public Policy takes plagiarism seriously and has adopted a zero tolerance policy. Any plagiarized assignment will receive an automatic grade of "F." This may lead to failure for the course, resulting in dismissal from the University. This dismissal will be noted on the student's transcript. For foreign students who are on a university-sponsored visa (e.g. F-1, J-1 or J-2), dismissal also results in the revocation of their visa. To help enforce the SPP policy on plagiarism, all written work submitted in partial fulfillment of course or degree requirements must be available in electronic form so that it can be compared with electronic databases, as well as submitted to commercial services to which the School subscribes. Faculty may at any time submit student's work without prior permission from the student. Individual instructors may require that written work be submitted in electronic as well as printed form. The SPP policy on plagiarism is supplementary to the George Mason University Honor Code; it is not intended to replace it or substitute for it. (<http://www.gmu.edu/facstaff/handbook/aD.html>)

If you are a student with a disability and you need academic accommodations, please see me and contact the Disability Resource Center (DRC) at 703-993-2474. All academic accommodations must be arranged through the DRC.

Revised Assignments 8.25.09

<http://www.nationalsecuritylaw.net/Assignments..htm>

ASSIGNMENTS -- CLASS SCHEDULE.

[Assignments are from Stuart Malawer, U.S. National Security Law -- Sourcebook of Cases, Laws, Treaties & Documents (Hein & Co., 2009)]

- **Class One -- Introduction to National Security Studies -- Law, Diplomacy & Foreign Policy.**

 - **Background & Overview** --

 - **National Security Speech by President Obama at the National Archives (May 21, 2009)**
 - **Hilary Clinton, Foreign Policy -- New Architecture of Cooperation (Dept. of State July 15, 2009).**
 - **Global Trends 2025 -- A Transformed World (National Intelligence Council, 2008).**
 - **"Global Trends 2025."(Executive Summary) (NIC). Malawer 933- 944.**
 - **"Goodbye to Hegemony." Malawer 1135.**
 - **Dean Rusk, "Diplomacy & Foreign Policy -- The President." (Foreign Affairs 1960).**
 - **"Summary of National Security Legislation (2008)." 108-128.**
 - **U.S. Constitution (edited) 6-10.**
 - **Project on National Security Reform (Conclusions) (2008). 925-931(Report)**
 - **"Waiving Goodbye to Hegemony." New York Times (1.28.08).**

- **Class Two -- Constitutional Framework -- Separation of Powers, Federalism & Foreign Affairs.**

 - Separation of Powers --

 - **United States v. Curtis-Wright Export Corp. (S. Ct. 1936). ("Separation of Powers ... "Delegation of Authority ... Foreign / Domestic Powers.... Role of Executive ...'One Voice' "). Malawer 10-17.**
 - **Youngstown Case (S. Ct. 1952) (delegation of authority & categories of executive action). Malawer 18-25.**
 - **Consumers Union v. Kissinger (DC. Cir. 1974). ("Separation of Powers Congressional Authority Delegation of Legislative Power.... Executive ActionVoluntary Restraint Arrangements"). Malawer 26-31.**

 - Federalism --

 - **Burma Trade Sanctions Case (S. Ct. 2000). ("Federalism ... Implied Preemption"). Malawer 32-42.**
 - **Holocaust Claims Case. (S. Ct. 2003). ("Federalism ... Implied Preemption") (Article VI "Supremacy Clause").**
 - **Wash. State Tanker Case (S. Ct. 2000). ("Federalism ... Preemption").**
 - **Japan Line, Ltd. v. County of Los Angeles (S. Ct. 1979). ("Federalism ... Foreign Commerce Clause ... County Taxation").**

- **Class Three -- Constitutional Framework -- Customary International Law, Treaties & International Law in U.S. Courts.**

 - Customary International Law --

 - **Paquette Habana 175 U.S. 677 (1900) (customary international law as law of the land). Malawer 43-54.**
 - **Filartiga v. Pena-Irala (2d Cir. 1980) (customary international law & torture). Malawer 54-59.**

-- Treaties as Supreme Law --

- Mo. v. Holland (S. Ct. 1920) (supremacy of treaties). Malawer 60-62.
 - Update -- The Supreme Court ruled that the ICJ judgment (*Avena*) under the *Statute of the ICJ* (Article 36) and Article 1 (Compulsory Jurisdiction) *Optional Protocol to the Vienna Convention on Consular Relations (1963)* did not become domestic law within the U.S. This is because the *Optional Protocol* is non-self-executing. Congress needs to enact implementing legislation. The President does not have law-making authority to declare a treaty binding on states. His actions fall within Justice Jackson's *third category* -- a Presidential action is invalid when it is contra to Congressional intent. (The intent is inferred from Congressional inaction to passage of implementing legislation.) This is the situation even though the U.S. might be in violation of its international obligations due to the operation of the principles of separation of powers and federalism. This case involves issues of foreign policy, international relations and international law. "Justices Rule Against Bush on Death Penalty Case." New York Times (March 25, 2008). Medellin v. Texas (Opinion of the S. Ct., Syllabus, March 25, 2008). Medellin v. Texas (2008) (Edited). Malawer 98-105.

-- Role of International Law in U.S. Courts --

- "International Law, Foreign Law & the Supreme Court." (Speech by Attorney General Gonzales, U.S. Dept. of Justice, November 9, 2005). Malawer 448-464.
- "Supreme Court, International Law & President Bush." Malawer 465-467.

-- President, Foreign Policy and Law --

- "Jack Goldsmith -- Conscience of a Conservative." New York Times Magazine (9.9.07) ("Commander-in-Chief" power).

Class Four -- Detainees, Torture, Counterterrorism and U.S. Law.

-- Recent Supreme Court Cases --

- "Summary of Six S. Ct. Cases." Malawer 2-5.
- "Summary of National Security Statutes." Malawer 108-128.
- Rasul v. Bush (S. Ct. June 2004). Malawer 63-67.
- Hamdi v. Rumsfeld. (S. Ct. June 2004). Malawer 68-72.
- Rumsfeld v. Padilla. (S. Ct. June 2004). Malawer 73-74.
- Hamdan v. Rumsfeld (S. Ct. 2006). Malawer 75-79.
- Boumediene v. Bush (S. Ct. 2008). [Edited case.] Malawer 80-91.
- Munaf v. Geren (S. Ct. 2008). [Edited case.] Malawer 92-97
 - Legislation --
 - War Crimes Act of 1996.
 - Torture Act (1994) (U.N. Torture Convention).
 - "Extraterritoriality & U.S. Criminal Law." (CRS 2006).
 - General --
- Mukasey, "Supreme Court & Terrorism -- Supreme Court Cases (2008). Malawer 510 - 522.
- Military Commissions Act (2006). Malawer 156-168.
- "Rendition & Law of Torture." (CRS 2005).

- "Next Supreme Court Case -- Bagram Air Base (Afghanistan)." Washington Post (6.29.08).

-- Treaties --

- Geneva Conventions. (Int'l Red Cross / Int'l Humanitarian Law). Malawer 284-318.
- "The Geneva Convention Against Torture & U.S. Implementation." (CRS 2006).
- Class Five -- Use of Force-- Law & Public Policy.
 - War Powers Resolution (1973). 218-227.
 - Tonkin Gulf Resolution (1964). 228.
 - Afghanistan Resolution (AUMF) (2001).
 - Iraq Resolution (2002). 129-134.
 - "Do New Wars Call for New Laws?" (Cornell 2005).
 - "Legal Aspects of the Use of Force." (CRS 2001).
 - "Authorization of Use of Military Force in Response to 9/11 Attacks." (CRS 2006).
 - "Declarations of War & Authorizations for the Use of Force." (CRS 2006).
 - "War Powers Issue and Presidential Compliance." (GAO 2004).
 - Some Treaties:
 - U.N. Charter. Malawer 364-373.
 - NATO. Malawer 374-379.
 - OAS Charter. Malawer 380-388.
 - Update --
 - "War Powers -- Miller Center Report (Baker & Christopher)." (2008).
 - "National War Powers Commission." (University of Virginia).

-- Homeland Security & Use of Military --

- Flynn, "Home Front Security." Foreign Affairs (Sept. / Oct. 2004).
- "Posse Comitatus Act. "Posse Comitatus Act (1878). Malawer 137.
- "Federal Stafford Act." (CRS 2005).
- "Use of Federal Troops for Disaster Assistance -- Legal Issues." (CRS Sept. 2005).
- Class Six -- Team Presentations (Selected Issue).
- Class Seven -- Team Presentations (Selected Issue).
- Class Eight -- Mid-Term.
- Class Nine -- Export Controls, Global Mergers, Trade Sanctions & Foreign Investment.
 - Direct Investment & National Security.

- Committee on Foreign Investment into the U.S. (CFIUS) & Exon-Florio (Treasury Website).
- Malawer, "National Security & Global Mergers." (VSB 2006).
- "CFIUS & National Security." (CRS 2006).
- "National Security Review & Foreign Takeovers." (GAO March 2007).
- "National Security Reviews of Foreign Acquisitions." (GAO Report 2007).
- "Foreign Investment National Security Act (2007)." Malawer 169-181.

- Trade Sanctions, Export Controls & National Security.
 - Malawer, "*U.S. Law & Global Trade.*" ("Reexports" -- Slides 12-16) (2009) (PowerPoint).
 - Malawer, "*U.S. Law & Global Trade.*" ("Trade Sanctions" -- Slides 38-44) (2009) (PowerPoint).
 - Basics of Export Controls. (BIS) (2005).
 - "U.S Export Controls Post 9/11" (GAO 2006).
 - "Trade Sanctions Reconsidered." (3d ed. Petersen Institute, 2008).
 - Economic Espionage Act (1996).
 - Iranian Trade Sanctions (GAO Report, January 2008).

 - Some Statutes:
 - International Economics Emergency Act. Malawer 188-194.
 - Trading with the Enemy Act. Malawer 195-197.
 - Exports Controls. Malawer 198-204.
 - Arms Export Control Law. Malawer 205-208.

- Economics, Espionage, Sovereign Wealth Funds & National Security.
 - "Sovereign Wealth Funds and CFIUS / FINSA." (Deputy USTR Speech 2.26.08)
 - "Espionage Plea Involving China." (USDOJ Press Release -- March 31, 2008).
 - "Chinese Economic Espionage." Washington Post (2.15.08).
 - "SWF-- Courting Wealth of Nations." New York Times (4.4.08).

- Class Ten -- National Security -- Surveillance, Financial Intelligence & Cybersecurity.
 - Institutional Structure & Organization --
 - National Security -- Title 50 U.S. Code, Ch. 15 (2005).
 - National Security Division (Dept. of Justice). Malawer 991-1000.
 - National Security Council" (White House). Malawer 1051-1066.
 - U.S. Government Links -- National Security.
 - Dept. of Justice, FBI, National Security Programs.
 - "New US Dept. of Justice FBI Guidelines." (USDOJ 10.3.08).
 - "New US Dept. of Justice FBI Guidelines -- Memo of Attorney General." (USDOJ 10.3.08).

-- FOIA & Surveillance --

- DOJ Guide to FOIA. Malawer 1001- 1029.
- Freedom of Information Act.
- "Litigation of FOIA & Patriot Act." (EPIC 2005).
- "National Security Letters." (ACLU 2005).
- "DOJ Legal Support of NSA Surveillance." (DOJ Report 1.19.06).
- "President's Authority, Wireless Wiretaps & Foreign Intelligence." (CRS 2006).
- Foreign Intelligence Surveillance Act (FISA) (1978). Malawer 208-217.
- "Foreign Intelligence Surveillance Act." (CRS 2006).

-- Financing & Terrorism --

- U.S. Government Links (Terrorism)
- U.N. Links (Terrorism).
- Terrorism & Financial Intelligence (Treasury Dept.)
- Office of Foreign Asset Control (OFAC). (Treasury Dept.).
- Terrorist Asset Report (2006). Malawer 867-887
- Office of Terrorist Financing. (Treasury Dept.)
- Money Laundering & National Strategy (GAO 2003).

-- Cybersecurity --

- Cyberattacks on Georgia. Malawer 1145
- "National Security Speech by President Obama at the National Archives (May 21, 2009)."
- Video of News Conference 5.29.2009
- Cyberspace Security Review (May 2009).
- "Securing Cyberspace for the 44th President." (Georgetown CSIS 2008).
- Malawer, Cyberwarfare -- Law & Policy," and PPT (2009).

• Class Eleven -- More on Torture, War Crimes and Counterterrorism -- Liability of Government Officials.

- "Torture Memo #2," Washington Post (4.2.08); Torture Memo (Pt. 1) (Pt.2).
- USDOJ -- Four Torture Memos (2002, 2005) (Released 2009).
- "U.N. Convention on Torture." Malawer 319-343.
- Military Jurisdiction Extraterritorial Act (2000).
- Detainee Treatment Act (2005).
- Military Commissions Act (2006).
- "Amnesty International Annual Report -- United States." (2007).
- "Terrorists & Military Commissions." (GAO 2001).
- "Broken Laws, Broken Lives." (Physicians for Human Rights 2008). (Report).
- International Criminal Court (Treaty of Rome). Malawer 394-416.
- Updates:
 - "Justice Dept. Ethic's Report -- Prisoner-Abuse Cases & CIA IG Report 2004." New York Times (August 24, 2009).

• Class Twelve -- Domestic Litigation and National Security -- Terrorism / Torture Liability. Liability of Government Contractors.

- Alien Tort Claims Act (1789). Malawer 138.
- 1996 Anti-Terrorism Amendments to the FSIA [(1605(a)(7))].
- 2002 Antiterrorism Act (2333 & 2338) Torture Victims Protection Act of 1991.

- **"State Secrets Protection Act & Law Suits."** Washington Post (May 11, 2009). Malawer 1137 (earlier Senate bill).

- **"Lawsuits Against State Supporters of Terrorism."** (CRS April 2005). Malawer 748-755.
- **"Private Security Contractors under Domestic & International Law."** (ASIL 12.26.07).
- **"Assistance for U.S. Victims of Overseas Terrorism."** (USDOJ website).
- **"New US Dept. of Justice FBI Guidelines -- Memo of Attorney General."** (USDOJ 9.29.08). Malawer 916-924.
- **"Private Contractor Liability Stripped under SOFA."** New York Times (12.01.08).

Note -- Litigation Update.

- Review of J. Moore, Civil Litigation Against Terrorism." (2004).
- "Lautenberg Amendment -- Victims & Terrorist Assets." New York Times (4.22.08).
- "Private Litigation & Torture Memos." New York Times (March 7, 2009); "Litigation -- Bush Lawyers & Terror War." New York Times (3.9.09).

Note -- Extraterritoriality & Government Contractors.

- Military Jurisdiction Extraterritorial Act (2000).
- "Private Security Contractors under Domestic & International Law." (ASIL 12.26.07).
- Private Sector Contractors -- Exemption from DOJ Reporting." New York Times (4.27.08).

Update -- Terrorism & Litigation.

- "Terrorism & National Security -- Trends & Issues." (CRS 2006).
- "Civil Suits Against Palestinian & War Against Terrorism." Washington Post (2.12.08).

- Class Thirteen -- Team Presentations (Selected Statute).
- Class Fourteen -- Team Presentations (Selected Statute).

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--- TEAM PRESENTATIONS ---

Presentation # 1 --Selected Issue in National Security.

National security from the early 1990's highlights a host of long-standing and newer legal and policy issues in the United States. Many of these issues relate to general problems that have appeared throughout American diplomatic and national history. Many of these newer issues concern terrorism and homeland security. The second team presentation focuses on various aspects of terrorism today.

The team presentation should conclude with a specific public policy proposal. Please include the following in your presentation:

- A clear *statement of the issue* you are considering.
- The *history and context* of the issue.
- Your *proposal* for resolving the issue.
- Your *analysis* of the proposal (*pros and cons*).
 - The *position* of the various parties or interest groups.
 - Domestic and international consideration.
- Summary and conclusions.

The team PowerPoint presentation should be about 25 - 30 slides and *speaker notes* should be attached to the presentation. (The *speaker notes* are required and may provide information that is not actually relied upon in the oral presentation.) The *oral presentation* with questions is scheduled for 20-30 minutes (this includes questions and answers). The electronic presentation along with a hardcopy of the presentation (with speaker's notes) is to be submitted to the instructor. Please have *only two slides per page*. *Hard copies* of the presentation (without the speaker's notes) should be given to each student. This copy may have four slides per page. Along with distribution of the PowerPoint presentations please distribute *one recent news article* that you feel is of particular importance to your topic.

Presentation # 2 -- Selected Statute & National Security.

Please choose *one statute* relating to U.S. national security. The assignment is to assess this statute in terms of *its provisions, subsequent case decisions and actual practice*. The aim is to identify *one major public policy issue* of particular concern to you and to suggest a policy and legislative solution. In particular, your presentation should follow the following format:

- Overview of the provisions of the statute.
- The legislative history of the statute as it exists currently.
- Leading cases decided under the statute.
- Overview of problems concerning the statute in light of actual practice.
- The particular issue you are assessing.
- The arguments (pros and cons) concerning that issue and indicating the position of various interest groups.
- Your *policy proposal* and suggested *legislative change*.
- Implications of your suggestions.

The team PowerPoint presentation should be about 25 - 30 slides and *speaker notes* should be attached to the presentation. (The *speaker notes* are required and may provide information that is not actually relied upon in the oral presentation.) The *oral presentation* with questions is scheduled for 20-30 minutes (this includes questions and answers). The electronic presentation along with a hardcopy of the presentation (with speaker's notes) is to be submitted to the instructor. Please have *only two slides per page*. *Hard copies* of the presentation (without the speaker's notes) should be given to each student. This copy may have four slides per page. Along with distribution of the PowerPoint presentations please distribute one recent news article that you feel is of particular importance to your topic.

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