

Counterterrorism Law - Spring 2020 – Richards

Exam Submission: You will email your exam to my administrative assistant, Cia Fox, at cindrafox1@lsu.edu, by 4PM, Sunday, May 10. Submit it as a Microsoft Word or PDF file with only your exam number on the document to identify it. Name the file *Law 5414 Exam – [your exam number]*—for example, **Law 5414 Exam – 4677**. Please remove identifying metadata from your file; refer to the following link if you need assistance: <https://www.webucator.com/how-to/how-remove-metadata-from-microsoft-word-files.cfm>.

Ms. Fox will email me the exams to allow for anonymous grading. She will reply to you by Monday morning to acknowledge that she has received your exam. If you do not get a reply, check with her to make sure the exam was received.

Exam Mechanics: Write your answers in 12pt Times New Roman/Times Roman font, single-spaced, with a blank line between paragraphs (like this exam). The exam is open book under the general rules for all exams this term. What you turn in must be your own work. Do not confer with others. Attribute any outside work you quote.

The exam questions require you to think about the current law and make your own informed projection of the best legal strategy going forward. There is no single right answer—I am looking for your ability to explain your position. As necessary, tie your answer to the cases and regs. You do not need to use Bluebook form, just use enough information to identify the reference. Put the cite info in parenthesis (*Mass v EPA*) in the text; do not use footnotes. You may use graphics and illustrations if you choose.

Review and edit your answers for clarity and brevity. The word limits are there to force you to present your analysis succinctly and clearly.

Question 1

The COVID-19 Pandemic of 2020 - ?? has occasioned levels of domestic civilian restrictions in the U.S. that have not been seen since World War II. Review the President's powers to respond to the pandemic, including both statutory and Article 2 powers. Discuss the President's power and existing statutory tools (and their limitations) to open up the U.S. economy by limiting stay-at-home orders by state and local officials. (2000 words)

Question 2

One of the most controversial questions in the law of war and IHL is the use of autonomous, self-targeting bots (ASTBs). ASTBs can exist in many forms, including small drones, ground-based forms which resemble a skeletal robotic greyhound, and models which can transform between flying and ground movement. ASTBs get as close as feasible to the target, then kill with high-velocity fragmentation ammunition. This ammunition does massive damage to the target but does not penetrate walls or endanger persons other than the target. Collateral damage is limited to misidentified targets.

There are two options for managing targeting. In the fixed target mode (FTM), the ASTB is given data on one or more specific individuals to target. This includes facial recognition data, gait data, voice data, phone data, and other information which can be used to identify a specific individual. The ASTB seeks the target on its own and can kill it without human confirmation when the bot's internal computer reaches a 95% certainty that it has correctly identified the target.

In the general target mode (GTM), the ASTB is given general data that correlates with enemy combatants, terrorists, or other targets. This data can include insignias, uniform styles and colors, other

distinctive dress information, facial recognition data specific to the racial or ethnic background of the targets, data to recognize weapons, physical data such as height and weight to identify adults, and other data specific to the assignment. In general use, the ASTB must have a 95% match to authorize its own kills. In a firefight situation, ASTBs can authorize kills on an 80% match, which has been determined to approximate the accuracy of a human soldier or police officer in the same situation. You have been asked to write a memo for the DOJ analyzing the legal issues in the use of ASTBs under U.S. and international law. Analyze how the legal issues differ between international use and domestic use (in the U.S.). Specifically address what types of domestic situations might justify the use of ASTBs. (2000 words)

Question 3

The Pentagon Papers case begins the modern story of the cat-and-mouse game between the news media and intelligence officials. The roles were simple in that case—the government worker/contractor with authorized access to secrets who gave those secrets to a newspaper for publication. While the Pentagon Papers case did resolve the issue of prior restraint, it left other critical issues open. With the Internet and social media, the lines between leakers, reporters, and publishers has blurred from the simple leaker-publisher model.

The Obama administration was enraged over Wikileaks and Snowden and ramped up efforts to identify leakers. The Trump administration is the most leak-prone administration in modern times and is also the most upset by leaks and leakers. This concern will increase as the election approaches. The Pentagon Papers case gives some guidance for traditional media, but what about bloggers like *The Drudge Report* or the *Daily Kos*? What about Wikileaks types of operations? How does Rosen expand our understanding of the limits of the Pentagon Papers case? (Ignore private law issues such as libel and intellectual property.) Assume the DOJ wants to increase prosecutions before the election. How might it try to limit the 1st Amendment claims of new media? Does the Pentagon Papers case protect any media against prosecution for publishing classified information?

You have been asked by the DOJ to write an objective analysis of what can it legitimately do to prosecute members of the new media who participate in leaking or otherwise, in the DOJ's view, compromise national security? What are the best defenses that should be anticipated to these charges? (1500 words)

Question 4

Assume we are now a month into the reopening of America. COVID-19 cases are increasing dramatically. The governors and mayors of most states are reinstituting the lockdown orders. There is a growing anti-lockdown movement which has been staging mass gatherings as protests. Increasing numbers of cases are being identified among the protestors, but the groups deny this, claiming that it is "fake news." These cases are undermining efforts to control the spread of COVID-19. There are calls in the press and in Congress to treat these protest groups as domestic terrorists. You have been asked to write a memo explaining whether, and under what circumstances, FISA and other national security surveillance legal tools could be used against these groups. (1500 words)