

National Security Law  
Fall 2012 – Richards  
Study Questions

1. The OLC wants a brief on the role of courts in reviewing military actions. Think about *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (DCC 2010), *Curtiss-Wright, Dames & Moore, Little v. Barreme, Bas v. Tingy*, and other relevant cases. When will the court review a military action and when will the court decline to review the action, and why?
2. The DOJ wants a brief on the use of secret information (classified, state secrets, etc.) in litigation. When is it available, what are the restrictions on its use, and what happens when the government is unwilling to release the information in different types of cases?
3. How do the United States courts deal with customary international law (CIL) and *jus cogens*? Think about the Alien Tort Statute (*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)) and other cases where courts have wrestled with their use.
4. Explain International Humanitarian Law (*jus in bello*). Discuss the special problems it poses in non-state and asymmetric warfare such as Afghanistan. How did it affect our actions in Libya, for example?
5. The OLC wants a brief on targeted killings under applicable U.S. law, CIL, and International Human Rights Law. Assume that while we do not submit to the jurisdiction of the International Court of Criminal Justice, the president wants the strongest arguments supporting our use of targeted killings, and whether those arguments comport with appropriate precedent. Mention any special issues surrounding the killing of Bin Laden.
6. Discuss the attempts by Congress to rein in the president's ability to wage war without Congressional approval, the constitutional issues they pose, and their effectiveness.
7. After 9/11, we "tore down the wall" and knocked down the "silos" between national security and policing, and between federal, state, and local political boundaries. Explain what this means, using cases and/or statutory examples. What are the pros and cons to the changes?
8. The move from analog data to the TCP/IP world has dramatically reduced the cost of surveillance and has brought us the world of data mining. Based on the statutes and cases discussed in the book, discuss the current state of the legal protections on electronic communications (cell phones, email, social media, the Internet) and what, if any, are reasonable expectations of privacy in electronic communications.
9. DOJ has asked you to write a memo explaining how to use FISA for lawyers who are new to national security law. Since they will be using this as a reference brief, be sure to be specific about statutory provisions and case law.

10. The CIA has asked you to prepare a brief on the application of the United States Constitution outside of the United States, both to U.S. and non-U.S. persons. It is concerned about limitations on covert actions and surveillance, including the possible exclusion of evidence in U.S. courts.
11. Publication by a Seal Team Six member of *THE FINISH: THE KILLING OF OSAMA BIN LADEN*, without prior approval, has raised difficult issues about the control of classified information. Assume that the author was bound by the most restrictive national security agreements discussed in the book. What is the applicable law? What are all the administration's legal options? What is the tension, if any, with the 1<sup>st</sup> Amendment?
12. Blogging often merges the role of publisher and reporter, while our precedent cases on dealing with the publication of classified information are based on these being legally separate functions. Even the *Pentagon Papers* case is not clear precedent against criminal prosecution, as opposed to prior restraint. This has become a critical national security law issue after Wikileaks. Write a brief for journalism students on the legal issues facing bloggers writing about and publishing classified information. (Assume that while they may have possession of classified information, they are not government employees or others who legally had the information and then released it. For example, they may have received the classified information as an email from an anonymous source.)