

1 **Investigating Terrorism and other National Security Threats** **Weighting the Bill of Rights vs. the needs of National Security**

2 **Investigating terrorism**

- Introduction
- A look at the Fourth Amendment
 - National security exception?
 - Foreign intelligence exception?
- Investigation abroad
- The constitutionality of profiling subjects for investigation
- Suspension of the writ of *habeas corpus*
- The legal issues surrounding preventive detention

3 **Introduction**

- Differences between criminal investigations and terrorism investigations:
 - Disruption of terrorist plots
 - Prevention of terrorist acts
 - Apprehension of terrorists to prevent future attacks
- Two recent terrorist acts: World Trade Center bombings (1993) and Oklahoma City bombing (1995)

4 **Introduction**

- Similarities
 - Non-mainstream beliefs of perpetrators
 - Knowledge of and access to bomb-making material
 - Access to symbolic targets
 - Urged by others into violent acts against US Govt.
 - Investigations were successfully concluded within the existing rules of investigation
- Oklahoma City was criminal act involving no foreign actors, whereas WTC's foreign element yielded the possibility of counterintelligence guidelines being used in investigation, instead of criminal.

5 **A look at the Fourth Amendment**

- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
- Historical context: abuse of “writs of assistance” or general warrants by the Crown.

6 **What is “reasonable”?**

- US vs. Katz (1967): a warrant-less search is unreasonable with certain well-established exceptions (e.g., automobile searches, searches of vehicles entering and exiting the US, search of airplanes, etc.)
- “Reasonable” is relative – US vs. Edwards (1974): “when the risk is the jeopardy to hundreds of human lives... that danger alone meets the test of reasonableness, as long

as ...”. Grounds for a national security or public safety exception?

7 **National Security Exemption?**

- Olmstead vs. US (1928): wiretapping not protected by 4th Amendment.
- Federal Communications Act (1934): interception and divulgence of communications illegal.
- US. vs. Nardone (1937): wiretaps inadmissible
- 1940: FDR proclaims legality of wiretapping in “grave matters involving the defense of the nation”
- Katz vs. US (1967): discarded Olmstead but made explicit exception for national security matters.

8 **Congress and National Security Exemption to the 4th Amendment**

- Congressional response: Omnibus Crime Control and Safe Streets Act (1968)
- Title III sets up the now familiar judicial oversight of electronic surveillance, investigation, and prosecution. Specified a set of serious crimes for which wiretapping is allowed.
- **Disclaimed the legislation of cases involving national security explicitly.**

9 **Judicial Interpretation of Title III**

- US vs. US District Court (Keith) (1972): Title III confers no additional powers to the Executive, only recognizes that Executive has powers in cases involving national security matters (prevent subversion and overthrow) and does not legislate such cases.
- President has a role but must be exercised within 4th Amendment.
- US vs. Brown (1974): foreign intelligence gathering does not require a warrant when President exercises his power

10 **Foreign Intelligence Exception?**

- US vs. Ehrlichman (1974): national security exemption is not carte blanche; it may exist in wiretaps but does not automatically extend to trespass
- US vs. Troung Dinh Hung (1980): the investigative process involving foreign affairs and intelligence matters is to be left to the Executive, and judiciary does not enforce 4th Amendment provisions strictly.

11 **Investigations Abroad**

- Reid vs. Covert (1957): The protections of Article III §2 (trial by jury), 5th Amendment (indictment by grand jury) and 6th (right to speedy, public trial by impartial jury) extend to US Govt.’s interaction with citizens abroad.
- US vs. Verdugo-Urquidez (1990): US warrants (as per 4th Amendment) not required for search of non-US citizen’s property in foreign land.
- Johnson vs. Eisentrager (1950): 5th Amendment and habeas corpus does not extend to enemy aliens.

12 **Investigations Abroad**

- A great deal of case law (Dycus et al. pg. 645) provides constitutional rights to aliens (e.g., under Equal Protection Clause, 1st, 4th, 5th, 6th, 14th Amendments, etc.). But test is that aliens were within the territory of the US **and** developed substantial, voluntary connections with the US.
- What exactly are “substantially connected aliens” is muddled: two year illegal stay was found insufficient but illegal drug-trafficking to the US was found sufficient.

13 **US vs. Bin Laden (2000)**

- US citizen in Kenya (El-Hage). Was believed to be a foreign agent (part of Al Qaeda) involved in African embassy bombings. Residence and offices were searched and communications tapped. Govt. argues distinction from *Reid* due to collection of foreign intelligence. Court asks:
 - Is there a “foreign intelligence exemption” to 4th Amendment?
 - Does this case fall within it?

14 **US. vs. Bin Laden (contd.)**

- Court found that prior search warrants would be too cumbersome for the Executive
- Such activity must be authorized by President (or AG as agent), and must be primarily for intelligence-gathering purposes (not criminal investigation), and must target a foreign power or its agents (Al Qaeda is “foreign agent” as per FISA).
- Although AG’s authorization was not obtained, officials acted in good faith believing they did not require approval, so actions were deemed legal.

15 **Profiling Subjects for Investigation**

- Equal Protection Clause: *Korematsu vs. US*. (1944) – Japanese internment case; “all legal restrictions which curtail the rights of a single ethnic group are immediately suspect”. However, “the issue is whether the govt. can identify a sufficiently important objective for its discrimination. What is a sufficient justification depends entirely on the type of discrimination”.
- Would FISA’s discrimination between US and other citizens stand the test of Equal Protections Clause?

16 **Profiling based on Ethnicity**

- LA 8 case (1987): two resident aliens and 6 students or visitors having entered US between 1975 & 1983.
- First detained under McCarran-Walter Act for “world communism”.
- Second charges: inciting killing of govt. officials and deportation based on visa violations.
- Finally charged under “terrorist acts”.
- Claimed violation of 1st, 4th, and 5th Amendment rights.

17 **Profiling based on National Origin**

- 1995: *Wen Ho Lee*. One of 12 potential targets. FBI: If PRC is interested in the activities of Chinese-Americans, so is FBI. “Dr. Lee was more likely to have committed espionage for China ... because he was ‘overseas ethnic Chinese’.” Higher

officials denied racial profiling.

- Oklahoma City (Abraham Ahmed): detained at Chicago, arrested and held without food at London, returned to US under armed guard, questioned for hours, and finally released.

18 **Profiling and Preventive Detention**

- September 11th attacks: 1,100, mainly Middle East-origin or Muslim men detained.
- As of Nov 2001, 600+ still under custody
- Govt. aimed to interview 5,000 visitors, students, etc. of ME-origin, male, between 20 & 30, to be questioned.
- Does government have a “sufficiently important objective”?

19 **Preventive Detention**

- 4th Amendment requires probable cause to believe suspect has committed a crime.
- Terry vs. Ohio (1968) and US. vs. Place (1983): arrest on the reasonable suspicion that the subject is **about to** commit a crime can only be temporary.
- INS can hold illegal aliens when reasonable suspicion as to their nationality and immigration status exists.
- Congress authorized detention pending removal, but not indefinitely after decision of deportation (Zadvydes vs. David, 2001).

20 **Preventive Detention and National Security**

- FBI Special Agent affidavit w.r.t. person arrested after Sept 11:
 - The person is “somehow linked to, or may possess knowledge useful to the investigation of terrorist attacks on World Trade Center and Pentagon”.
 - FBI has been “unable to rule out the possibility that the respondent is somehow linked to or possesses knowledge of the terrorist attacks”.
 - FBI needs to “protect the public”.
- A national security exemption? Are 4th, 5th, or 6th Amendment rights available? What happened to the presumption of innocence and the proof of burden?

21 **Preventive Detention: Material Witnesses**

- Federal statute allows detention of a person when it “becomes impracticable for the government to secure presence of the person by subpoena”.
- Terry Nichols (Oklahoma City bombings).
- Post- Sept. 11th: INS could previously hold violators for 24 hours. First doubled to 48, then DoJ authorized AG to suspend release on bond (ordered by courts) for 10 days pending govt. review of appeal grounds.
- Indefinite holding not allowed by Congress, but Pres. Bush declared via Military Order (Nov 3 2001).
- PATRIOT Act: Hold for 7 days, then if AG certifies every 6 months that release is threat to national security.

22 **Suspension of habeas corpus**

- Article I, §9: “The privilege of the Writ of Habeas Corpus shall not be suspended

unless when in cases of Rebellion or Invasion the public Safety may require it.”