# Chapter 20 - The Fourth Amendment and National Security

## 4th Amendment Primer

### Bans unreasonable searches and requires warrants to issue only with probable cause, describing the premises to be searched and the persons or things to be seized.

### Passed in reaction to the old British general warrants, which had just been abolished by Parliament.

### What searches does this apply to?

### Remember administrative searches?

### If you need to review administrative searches, see: <http://biotech.law.lsu.edu/cases/searches/index.htm>

### Until the late 1960s, there was no warrant requirement for administrative searches.

### Even then, the court only require an area warrant.

### Is this only because they cannot be used for criminal prosecution, or is it because they are used for prevention?

### Is national security prevention?

### What if they are not prosecuting you - how do you have to contest a search?

### How do you even know they are watching you?.

## Wire taps

### What sort of searches did the founders have in mind when they drafted the 4th amendment?

### Why do you think the courts initially excluded wiretaps from the 4th amendment?

### When did Congress restrict wiretaps?

### How did the DOJ interpret this law? Did it see it as ending wiretaps without a warrant?

### What case found that wiretaps were an unconstitutional search unless the police met the 4th amendment criminal warrant requirements?

### What created the expectation of privacy that made this a constitutional right?

### Did the case address national security?

### What restrictions did the Omnibus Crime Control Bill of 1968 set on wiretapping?

### What provision of the Act sets out the warrant procedures?

### Did the Act address national security?

### What if the phone company hears a suspicious conversation as part of routine monitoring?

## US v US District Court (Keith), 407 US 297 (1972)

### What is the underlying crime?

### What was a CIA office doing in Ann Arbor, MI?

### Was there foreign involvement?

### What was the nature of the evidence gathering?

### Was there a court approved warrant?

### How were they authorized?

### Did the Omnibus Crime Control Bill control?

### What language excluded this sort of crime?

### What is government arguing that this clause means?

### Does the court buy this?

### Where do they look for guidance?

### What is the real question before the court? Hint - it is not the reasonableness of the actual search or whether they could have gotten a warrant.

### What are the general exceptions in criminal cases?

### What is the treat to political dissent that the court is worried about?

### How is this especially relevant in the post-9/11 world?

### What does the court see as the historical judgment behind the 4th Amendment?

### How many exceptions to the 4th Amendment does this court see?

### Has that changed since this decision?

### What was the government's claim that this surveillance did not need a specific warrant?

### What is wrong with that argument?

### Why does the government say it does not think it should have to get a judge to approve a warrant?

### What does the court say about potential differences between constitutionals standards for criminal and national security investigations that prompts FISA?

### What does the court rule?

## Title III

### What are the specific requirements of Title III for electronic communications?

### Why are these problematic for national security surveillance?

## Does this extend to other forms of electronic communication?

### How have wire taps changed?

### What does a wiretap mean with VIOP?

### What about cell phones?

### Cordless phones?

### Baby monitors?

### Email?

### Congress has protected email and cell phones by statute from use without warrants in criminal investigations

### Does this affect surveillance that is not used in prosecutions?

### What about the NSA?

## How do the courts deal with changing technology?

### Are airplane flyovers searches?

### What about satellites and spy planes?

### Thermal imaging?

### How about bouncing lasers off windows to eavesdrop by reading the sounds off the vibrating windows?

### What about radiation scanners in residential neighborhoods?

## Foreign Intelligence Exceptions?

### What does United States v. Brown, 484 F.2d 418 (5th Cir. 1973) tell us?

### What is the primary purpose doctrine?

### Domestic organizations with foreign objectives - Zweibon v.Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976)

#### What is the group?

#### What foreign policy problems where they causing?

#### Did the DC court require a warrant?

#### What about for wiretapping American citizens living in Berlin?

### Black bag jobs

#### Warrantless break-ins

#### No records were kept, evidence was not admissible but was useful

#### Widely used prior to their being banned by the FBI in 1966

## US v. Ehrlichman, 376 F Supp 910 (1974), affirmed 546 F2d 910 (1976)

### Whose office did they break into?

### Why?

### Was there any urgency in this break in, i.e., did they have time to get a warrant?

### What is the reason the defendants gave the court for not getting a warrant?

### Defendants cite the wiretapping cases for foreign intelligence as precedent

#### How is this different?

#### Does it also matter that he is a psychiatrist?

#### What other persons' privacy is at stake?

### Does the court decide whether the president could have ordered the break-in?

### Why?

## US v. Truong Dinh Hung, 629 F2d 908 (1982) - 633

### Why wasn’t this covered by FISA?

### What was Truong doing that lead to this case?

### How was he caught?

### Why didn't the government arrest him at once?

### How did they conduct the investigation?

### How as this authorized?

### Who do they catch as the source?

### How is this case distinguished from *Keith*?

### What factors did the court base this finding on?

### Why do Defendants say the evidence should not be admitted?

### What does the district court rule?

### What test do the Defendants want for national security surveillance?

### What did the circuit court order?

## Notes

### What is the primary purpose test?

### At what point does an investigation change from ‘‘primarily’’ foreign intelligence collection to ‘‘primarily’’ law enforcement?

### Does the ‘‘primary purpose’’ rule adequately accommodate the competing interests?

### If defendant gives a package to a third party to carry to someone, is there an expectation of privacy in that package?

#### Why is this different from giving the package to the post office?

#### Is there an exception for the post office if it is a national security matter?

### If the United States Supreme Court’s test for a constitutional right of privacy is a reasonable expectation of privacy, how will this change in the modern connected world?

#### If a significant segment of the population gives away their expectation of privacy, does this destroy the right for all us?

#### Is the expectation of privacy personal or societal?