# Chapter 11 - Surveillance Abroad

## Ali Saleh Kahlah al-Marri

### How does his case bear on the notion of the alien with substantial connections to the US?

## Reid v. Covert, 354 US 1 (1957)

### What is procedurally unusual about Reid?

### Are there provisions of the Constitution that indicate that the drafters contemplated the application of the constitution to crimes by citizens, committed outside the US?

### Does this provision require that the trial be in the US?

### What are the ‘‘Insular Cases’’?

### Did Justice Black find that the US constitutional requirements for a jury trial applied to US citizens abroad?

### How did Justice Harlan limit his concurrence? What crimes would he agree with Black on and which did he think could be tried

## Thinking about the exclusionary rule

### What evidence does it exclude?

### Is the rule in the constitution?

### Where did it come from?

### What is the purpose of the exclusionary rule?

### Deterrence?

### What does this mean?

### What does it deter?

### How?

### Why does it not matter for foreign police?

### What about alternatives?

#### Damage claims?

#### Disciplining officers who violate rights?

#### What is wrong with these?

### Is there a good faith exception to the exclusionary rule in the US?

### When is it usually applied?

## The exclusionary rule in foreign searches - US v. Verdugo-Urquidez, (494 US 259 (1990) - 642

### What are the facts?

### What is the legal challenge?

### How does the language of the 4th amendment differ from the language of the 5th and 6th amendments?

### Why does the court say this change in language is significant?

### What does it tell us about when and who the 5th and 6th amendments apply to?

### What did Congress authorize to deal with French attacks on US vessels in 1798?

### Why does this tell us that the 1798 Congress, which had a good idea of what the founders intended, did see the 4th amendment applying outside the US to foreign nationals?

### What does Dorr v. United States, 195 U.S. 138 (1904), tell us about the application of the constitution in US held territory?

### What rights would apply in such territory?

### What are these rights?

### Was this at issue in the Guantanamo detainee cases?

### What was the issue in Johnson v. Eisentrager, 339 U.S. 763 (1950)?

### How did the court rule in Johnson?

### How does the court distinguish Reid v. Covert, 354 U.S. 1 (1957)

### How would a universal application of the US Constitution affect our ability to use the military abroad?

### Could Congress just suspend the Constitution to allow wars?

### Why did Justice Kennedy say he concurred?

### What did the dissent say?

### Justice Blackmun wrote: American agents acting abroad generally do not purport to exercise sovereign authority over the foreign nationals with whom they come in contact.

#### What does this mean?

#### Is this the key to understanding the foreign/domestic constitutional application questions?

## In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157 (Cir2 2008)

### Search of a US citizen's home and electronic communications in Africa

### Was there a warrant?

### What is the defendant asking the court to do in this appeal?

### The Physical Search

#### Was this a clandestine search?

#### Who was present?

#### Was there an inventory?

#### Was there evidence of Kenyan legal process?

### The Suppression Hearing

#### Was there a traditional suppression hearing?

#### What was the process?

##### Was it open to the public?

##### Was the defendant allowed to attend?

##### Why?

#### The court characterized the review as mostly legal, rather than factual

##### Why is this important to the courts' ruling?

### Extraterritorial Application of the Fourth Amendment

#### Had previous cases found that the 4th Amendment applied to foreign searches of US citizens?

#### The court bifurcates the 4th Amendment analysis into the reasonableness clause and the warrant clause

##### What does this mean?

##### Is this really an administrative search standard?

### The Purpose of the Warrant

#### What does it mean that the warrant is to protect separation of powers?

#### Why is this diminished for foreign searches?

#### Would a US warrant have any legal effect in Africa?

#### What are the four reasons that no warrant was necessary?

#### Are the reasons you might want a warrant for foreign search?

### The Reasonableness Inquiry - Were the Searches Reasonable?

### Search of the House

#### How was the search conducted?

#### Was there probable cause?

##### How long were they watching him?

##### Did the court say probable cause was essential?

#### What is his privacy balanced against?

### What were the challenges to the electronic surveillance?

### What were the four justifications for electronic surveillance?

### What is the standard for reasonableness for drug dealers outside the US in *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995)?

### What if the foreign courts are more flexible than the US courts?

### What if the US has signed an agreement with the foreign government to use its legal process, then fails to?

#### Should this be the basis for excluding the evidence if it would otherwise be admissible?

### Does the Silver Platter doctrine apply to foreign police or governments?

#### How would the joint venture limitation apply?

#### What is the "shocks the conscience" exception to the silver platter doctrine?

#### What was shocking about United States v. Fernandez-Caro, 677 F. Supp. 893 (S.D. Tex. 1987)?

#### Has this been accepted in many cases?

#### Is this an issue in the Guantanamo detainee trials?