# Chapter 12 - Preventive Detention by Civil Authorities

## A. CONSTITUTIONAL BASIS FOR PREVENTIVE DETENTION

## Notes and Questions - 349

### What is the Terry v. Ohio standard for a police stop?

### How long can a person be held on a Terry stop?

### What is the rule for an INS stop?

### Can aliens be arrested and held while the INS sorts out their status?

### Can they be held indefinitely before being deported?

### What about the period between a detention and the order to remove?

### What is there is no place to send them to?

### Does Zadvydas set the standard for detention of an alien can change in a terrorist investigation?

### Does this suggest that there might be a national security exception to the limitations on detentions?

### What standard of proof did the FBI want in detention cases?

### What are the standards for justifying a preventive detention in Denmore v. Hyung Joon Kim, 538 U.S. 510 (2003)?

### What about the "breaking windows" theory - people who commit one crime are more likely to commit others?

### Is it alright to round up the usual suspects?

### What are the standards for detention from United States v. Salerno, 481 U.S. 739 (1987)?

### How did the court classify the detention in United States v. Salerno?

### Does the Bail Reform Act at issue in US v. Salerno preempt other standards for the detention of terrorist subjects?

### What did the Emergency Detention Act. of 1950 authorize?

### What did the justice department do to implement the act?

### Are these still operational? Has the government built more?

### What is the text of the Non-Detention Act that repealed the Emergency Detention Act?

### Does this really provide much protection?

### Who can be held as a material witness?

### What alternative to incarceration does the statute provide?

### What does the statute provide about delay in releasing the witness?

### How did the government abuse this in the PENTTBOM investigations?

### What did Mary Jo White, former U.S. Attorney for the Southern District of New York, say about preventive detentions?

## C. DETENTION OF ‘‘HIGH INTEREST’’ OR ‘‘SPECIAL INTEREST’’ IMMIGRANTS

### Iqbal v. Hasty

#### Facts

#### This is a Bivens Action

##### Talk about Bivens

##### What is the standard for qualified immunity?

##### What rights are not diminished by exigent circumstances?

#### How do you tell if conditions are punitive - Bell v. Wolfish, 441 U.S. 520 (1979)?

##### NB - Bell v. Wolfish, 441 U.S. 520 (1979), found that material witnesses could be held and treated the same as regular inmates, rejecting the notion that because they were not accused of crimes they were entitled to more humane treatment.

##### Applying Wolfish, Judge Gleeson found these allegations sufficient to state a substantive due process claim, observing that whether the conditions were reasonably related to legitimate government objectives could not be determined on a motion to dismiss. . . .

##### What about the claim of religious discrimination?

### Ashcroft v. Iqbal

#### Did Ashcroft or Mueler directly participate in the detention of Iqbal?

#### Was there evidence that they had knowledge of the conditions of confinement?

#### Could plaintiff show that they Ashcroft specifically and personally ordered detention based on unconstitutional grounds?

#### What sort of liability is being asserted?

#### This does not work for Bivens

### PENTTBOM

#### How are the legal rights of non-citizens different from citizens?

#### How do the legal rights of non-citizens change when their visa expires or they otherwise violate the terms of their stay in the US?

#### Can non-citizens be deported for low level crimes?

#### How was this used in the PENTTBOM investigations?

#### What is a material witness?

#### Can they be held in the same way as criminals?

#### How was this used in the PENTTBOM investigations?

#### Who did the ‘‘Absconder Apprehension Initiative’’ target?

#### Why isn't this unconstitutional as profiling by national origin?

#### What was the worry about crop dusters?

#### Was the FBI careful to distinguish between actual terrorist subjects and persons only incidentally picked up as part of the ‘‘Absconder Apprehension Initiative’’ and other programs?

#### Did the INS properly notify the detainees of the charges against them?

#### Why is this a problem?

#### What was the ‘hold until cleared’’ policy and what did it result in?

#### How were detainees treated at the MDC facility?

#### What was the communications blackout?

#### How often were they allowed to call a lawyer?

#### Did the government hide where they were kept?

#### Was this allowed by government policy?

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### In Turkmen v. Ashcroft, 2006 WL 1662663 (E.D.N.Y. June 14, 2006), a group of post-9/11 immigration detainees, all but one of whom were Muslims of Middle Eastern origin, challenged their detention in part on the Fourth Amendment ground that they were really detained for criminal investigation without probable cause.

### How did the court rule on their claims that the immigration charges were pretextual?

### What was their equal protection claim?

### How did the court rule on their equal protection claim?

### Why isn't this ethnic profiling?

### What detention powers does the Patriot Act provide?

### What is the standard for opposing bond for immigration cases?

### How were INS lawyers put in an ethical bind on this?

### What does Denmore v. Hyung Joon Kim, 538 U.S. 510 (2003), tell us about the due process standards for detention of criminal aliens?

### How does the right of immigration detainees to counsel differ from that of criminal defendants?

### What did the court rule on the request by third party organizations to information about the identity and status of detainees to assure that they had access to counsel?

### What right does the Vienna Convention on Consular Relations give a foreign arrestee?

### Was this complied with?

### Since this is a reciprocal agreement, why should the US care about whether foreign countries abide by it?

### What did Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006), say about whether failure to comply with this treaty was grounds for invoking the exclusionary rule?

### What are the rights of detainees under the International Covenant on Civil and Political Rights?

### What does the Military Order on detention direct the Secretary of Defense to do?

### How would you analyze whether this overrides the detention provisions in the Patriot Act?