

# Whose rights are they? Debate over protections for non-citizens expected to land in high court

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By MARK CURRIDEN / The Dallas Morning News

Wong Wing. Kwong-Hai Chew. Kestutis Zadvydas.

Little-known names that may become a lot more familiar before the war on terrorism is over.

As civil liberties advocates battle the Bush administration over new national security tactics, court rulings involving each of these men are emerging as critical legal measures of just how far government can go to crack down on foreigners on U.S. soil.

Critics on both the political right and left say many law enforcement rules issued after Sept. 11 are trampling on basic American rights and freedoms.

The administration defends those policies as legal and necessary. On Thursday, Attorney General John Ashcroft told a Senate hearing that they are "crafted carefully to avoid infringing on constitutional rights while saving American lives."

The measures also have wide public support, polls show.

But with hundreds of Middle Eastern men still jailed without hearings, 5,000 more targeted for questioning, and military tribunals expected to displace civilian courts in terrorism trials, a historic courtroom showdown seems inevitable, many legal scholars say.

That's likely to land the entire question in the lap of the Supreme Court, which has the job of defining just what the Constitution means.

"We are facing a legal controversy that goes to the very soul of our constitutional principles," says John Attanasio, dean of the Dedman School of Law at Southern Methodist University. "This is one of those defining moments in our nation's legal history."

## Privileges vs. rights

The heart of the debate is whether noncitizens within U.S. borders who are suspected of being enemies of America have the basic legal protections afforded citizens.

It's not a simple issue.

"Part of the problem now is that the distinction between citizen and noncitizen rights and protections has never been fully addressed by the Supreme Court," says Irwin Schwartz, president of the National Association of Criminal Defense Lawyers. That gap is what let the Justice Department take the steps it has, he says.

There is also a popular misperception that the Constitution grants rights and protections that it simply does not grant, says Rob Scott, a Dallas lawyer who specializes in constitutional law.

"We mix privileges and rights because we think if something sounds horrible or unfair, it must be unconstitutional."

If handed the debate as predicted, the Supreme Court will have to interpret some writings of the Founding Fathers and a federal statute or two, plus several past rulings – including one from 1896.

Its job will be to balance such issues as the power of the presidency, Congress and courts in times of crisis against individual liberties such as the right to a lawyer, to challenge evidence, and to a fair trial before a citizen jury.

That's where cases such as United States vs. Wong Wing come in.

### **Case dates to 1892**

Wong Wing, a middle-age Chinese citizen living in Detroit, was arrested by a federal agent in 1892 under a statute largely used to keep cheap labor out of the country. U.S. agents suspected him of working for the Chinese government and posing a threat to national security.

He was given 60 days of hard labor, without a hearing. After that, he was supposed to be deported. He appealed and for four years sat in prison until the Supreme Court ruled that his detention was wrong.

In doing so, the justices declared that noncitizens are entitled to the full protections of the Constitution, even if they're in the country illegally. Foreigners accused of crimes also can't be held "without due process," Justice John Marshall Harlan wrote.

He said the Fourth, Fifth and Sixth Amendments protect "all persons" from illegal searches and self-incrimination and guarantee the right to be heard in a fair and open process. He said the 14th Amendment clarifies "all persons" as everyone on U.S. soil.

In 1952, the court built on the Wong Wing decision. A year earlier, a Chinese sailor named Kwong-Hai Chew had been jailed when his ship docked in San Francisco, though he was married to an American woman, was employed a U.S. company, and had permanent U.S. resident status.

The government argued it was allowed by statute to detain and deport any noncitizen considered a danger to America without disclosing why and without a hearing.

The justices agreed that Congress can write ground rules for deporting people, but said that "not even Congress may expel [an undocumented immigrant] without allowing him a fair opportunity to be heard."

Those two cases are "huge hurdles" for some of the new anti-terrorism rules, according to some legal experts. One regulation, for example, would allow the attorney general to detain a noncitizen indefinitely, without bail or a lawyer, even if an immigration judge orders the person freed.

If "Congress can't do these things without a hearing, then most certainly the president and attorney general can't either," says University of Georgia law professor Eugene Wilkes.

Adds Mr. Scott: "That pesky 14th Amendment says the rights guaranteed by our Constitution apply to those here legally and illegally. There are no acts-of-war or terrorism exceptions."

Mr. Ashcroft says those being held have violated the conditions of their entrance into the country, may have information about terrorism, or may support it. Since the country is at war with terrorists, that means they've forfeited many protections, he says.

The administration's efforts "are within the boundaries of the Constitution" and will be upheld by the courts, Mr. Ashcroft said recently.

Some recent Supreme Court decisions support his view.

In one 1990 case, the court said a Mexican drug dealer couldn't use the U.S. Constitution to suppress evidence gathered in his home country even though it was later used against him in a U.S. trial.

As part of that decision, Chief Justice William Rehnquist wrote that it also remains an "open question" as to whether undocumented immigrants are "persons" protected by the Bill of Rights – the principle that figured heavily in the Wong Wing case.

In 1999, the court ruled that federal agents can use "selective prosecution" when targeting undocumented immigrants for deportation or imprisonment for criminal activity.

Eight people from Arab countries had been scheduled for deportation because they belonged to a group that federal officials said promoted terrorism. The eight unsuccessfully claimed a First Amendment right to freedom of association.

Then, just five months ago, the court specifically suggested it might be flexible on the jailing of undocumented immigrants if terrorism or other special circumstances are involved.

On the matter before it, involving Kestutis Zadvydas, a 53-year-old German with a criminal past, the court limited the government's ability to detain undocumented immigrants. It said they can't be held for more than six months without being deported.

Justice Stephen Breyer said that time frame isn't absolute. "Special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to national security."

### **Military tribunals**

The justification for using military tribunals instead of regular courts for terrorist trials is equally controversial, legal experts say.

The special courts pick military officers as jurors, and a two-thirds vote is enough to convict and levy a death sentence. In civil courts, decisions must be unanimous.

The president alone would determine who would face a tribunal. Appeals are banned.

The executive order authorizing them in the current crisis relies heavily on Article II of the Constitution, written by James Madison. It grants the president extraordinary wartime power to protect the nation's safety.

As backup, supporters also cite a 1942 case in which the Supreme Court ruled that enemies lose their constitutional rights during war.

That decision upheld the use of a military tribunal to try eight captured Nazi saboteurs who landed from submarines off New York and Florida. Six were later executed.

Eight years later, however, the court appeared to back up.

While it denied constitutional protections to 21 captured German soldiers tried by an American tribunal outside the U.S., it said that foreign enemies arrested inside the country – who have "submitted themselves to our laws" by coming here – would have those rights.

The justice then went on: Civilian courts may intervene in military tribunals if a federal judge determines that the suspect is not an "enemy alien" or concludes that the country is not at war, they wrote.

"The problem for the Bush administration in creating and implementing a military tribunal is that we are not at war," says Mr. Wilkes.

Under the Constitution, only Congress can declare war and only against a sovereign nation, he says. "I don't think Osama bin Laden qualifies."

Courts might not fully agree with that interpretation, some other authorities say.

"The Constitution clearly gives the president considerable flexibility to take steps to protect our country from attacks," says Jay Sekulow, legal director of the American Center for Law & Justice.

The word "attack" is pivotal. Article II's exact language is that the president can invoke extraordinary powers "to defend the United States from attack."

That one word will trump all others, some experts argue. They say the definition of war changed forever on the morning of Sept. 11.