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The Fourth Frontier: With No Clear Path Prepared, Court Takes on Two More Police Powers Cases

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The Fourth Frontier

With no clear path prepared, Court takes on two more police powers cases

BY KATHRYN R. URBONYA

The U.S. Supreme Court roamed its newest frontier—the Fourth Amendment—during the 2000-2001 term. After deciding the reasonableness of seven police practices, it will consider another two search-and-seizure cases next term.

The recent policing decisions reveal no clear path in this new frontier. The destination reached was determined by the majority's characterization of the case and the sources cited. Because of the contrasting sources, the majority often saw a different scene than did the dissent.

These sources included 13th century English statutes, American history, modern policing practices, and records as to the purpose of a police practice. In the end, no one source trumped another, but the sources did take the justices in different directions.

Last term, the Court ruled four times for the government.

The justices upheld officers' authority to arrest a soccer mom for not buckling up her children, to inventory a car after arresting the driver for traffic offenses, and to impound a house while waiting for a warrant. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536; *Arkansas v. Sullivan*, 121 S. Ct. 1876; *Illinois v. McArthur*, 121 S. Ct. 946. It also expanded officers' qualified immunity shield against claims of unreasonable force during arrests. *Saucier v. Katz*, 121 S. Ct. 2151.

The Court ruled against the government three times. It held unconstitutional roadblocks established to detect drugs, a heat scan of a house to detect lights for growing marijuana, and drug tests of pregnant women for criminal prosecution done in conjunction with

medical care. *City of Indianapolis v. Edmond*, 121 S. Ct. 447; *Kyllo v. United States*, 121 S. Ct. 2038; *Ferguson v. City of Charleston*, 121 S. Ct. 1281.

Fourth Amendment issues will be back before the Court this term, when it considers the constitutionality of a car stop near the Mexican border and a search of a probationer's home.

Two of last term's decisions—*Atwater* and *Kyllo*—stand out because one broadly expanded arrest powers at traffic stops and the other sharply limited police officers' use of thermal scans without a warrant. In both these 5-4 decisions, the justices broke from their typical alliances.

Justice David H. Souter wrote the majority opinion in the seat-belt case, joined by

Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. Scalia wrote the thermal imaging opinion, joined by Justices Souter, Thomas, Ruth Bader Ginsburg and Stephen Breyer.

Cops and Stops

The justices interpreted the Fourth Amendment as giving officers broad powers at traffic stops.

In *Atwater*, the Court found that an officer reasonably decided to arrest a driver, even though fines were the penalty for her infractions. Souter's majority opinion pointed to the history of Old England and the American colonies for the principle that constables had broad power to stop and arrest those who committed even minor offenses in their presence.

Having approved of the officer's arrest power, the Court later decided per curiam that officers could inventory a car after arresting the driver for speeding and having a tinted windshield. *Arkansas v. Sullivan*.

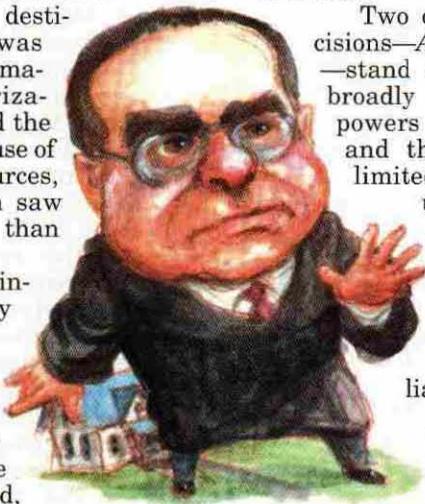
In contrast, Indianapolis' decision to establish roadblocks with the explicit purpose of looking for drugs was unconstitutional. What made this roadblock unreasonable was the city's actual purpose of looking for drugs. The roadblock would have passed muster with a "regulatory" purpose associated with alcohol detection and safety inspections.

More important, the Court stated in dicta that a dog sniffing a car is not a search under the Fourth Amendment. Thus, even though the government lost in *City of Indianapolis*, the Court's declaration that a roadblock sniff is not a search may permit the use of drug-detecting dogs at other kinds of roadblocks. The Court specifically left undecided whether police may use a "license or sobriety checkpoint seizure" to detect drugs in a car.

Determining the roadblock's purpose in *Indianapolis* was easy for the Court because the city admitted that it was for drug detection. In future cases, the purpose of a roadblock will likely be vehemently litigated.

For example, in *Ferguson v. City of Charleston*, the majority held that the actual purpose of drug-testing pregnant women was "to generate evidence for law enforcement purposes," not to safeguard maternal and fetal health. Three justices in dissent relied on the District Court's finding that the testing was for medical, not criminal, purposes.

These cases reaffirm the Court's increased willingness to allow officers broad authority at traffic stops and roadblocks. But as the four dissenters in *Atwater* noted, the majority relied on the absence of evidence that officers routinely arrest



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individuals for minor offenses. The *Atwater* dissenters spoke again in *Arkansas v. Sullivan*, when an officer inventoried a car after arresting the driver. They questioned whether arrests for minor offenses would in fact become a common police practice after *Atwater*.

Home, Private Home

In contrast to the cop-stop decisions, *Kyllo* limited police powers with its holding that scanning the heat emissions from a home was a search. Thus, scanning without a warrant violated the homeowner's reasonable expectation of privacy.

Scalia's majority opinion in *Kyllo* was remarkable for its breadth. He stated, "In the home, our cases show, all details are intimate details because the entire area is held safe from prying government eyes."

The dissent viewed heat emissions as waste, but the majority feared that even this crude technology may lead to a parade of horribly invasive practices. Thus, in *Atwater* the Court lacked evidence of a problem on the streets, but in

Kyllo the Court easily imagined technology creeping in and invading our privacy.

The Court will take on two more Fourth Amendment cases this term that raise constitutional questions about car stops, home searches and police purpose.

In *United States v. Arvizu*, No. 00-1519, a border police officer in Douglas, Ariz., 30 miles north of the Mexican border, stopped a minivan containing driver Ralph Arvizu and his family. The officer believed he had reasonable suspicion of drug smuggling.

The 9th U.S. Circuit Court of Appeals based in San Francisco disagreed. It attached little or no significance to the facts upon which the officer relied. Among them were that Arvizu was driving a minivan, that he failed to acknowledge an officer's presence, and that the children in the backseat had their feet resting on something. The court suppressed the marijuana found during the illegal stop.

United States v. Knights, No. 00-1260, invites the Court to examine the protections a probationer

has in his home and what consent to probation means, as well as the need to examine the government's purpose in searching a home.

Police officers searched the Napa County, Calif., home of Mark Knights, who was on probation for a misdemeanor drug offense. The officers believed Knights had vandalized the facilities of Pacific Gas and Electric Cos. Without a warrant, officers broke into his home, believing Knights' consent to probation allowed this surprise search.

The 9th Circuit disagreed. It held that the purpose of the search must relate to probation, and that Knights' consent to probation did not constitute a waiver of his Fourth Amendment rights.

Despite the lack of clarity in the Fourth Amendment jurisprudence, police departments and state legislatures will ponder these cases as they enact new policies and laws. These arms of the government will probably re-examine police powers during traffic stops and how to construct policies with a purpose that meets the Court's scrutiny. ■



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