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NEWSLETTER

This Year's Election Could Alter the Supreme Court's Privacy Balance

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Several recent privacy decisions indicate that there now is a rough 5-4 division among the Supreme Court Justices, where the slim majority favors narrowly construing both constitutional and statutory provisions in the face of citizen privacy claims. Those tending to construe privacy rights narrowly include Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas and Alito. Supporting more expansive views are Associate Justices Ginsberg, Breyer, Sotomayor and Kagan. Because this division runs along party lines of the nominating President, this year's election could affect the Court's future inclination on privacy matters.

Strip-Search Case

The Court's April 2, 2012 decision in *Florence v. Board of Chosen Freeholders* (No. 10-945) resolved an arrestee's challenge under the Fourth and Fourteenth Amendments to Burlington County jail rules mandating that "every detainee who will be admitted to the general population" of the jail be "required to undergo a close visual inspection while undressed," a form of strip search. The stated purpose of the search was to detect diseases, indications of gang membership or contraband. The plaintiff had been subjected to such a search, incident to an arrest based on what turned out to be a computer record error. He, and supporting *amici*, argued that such searches were constitutionally unreasonable as applied to minor offenders.

Justice Kennedy, writing for the five-Justice majority, applied the principle that "deference must be given to the officials in charge of the jail unless there is 'substantial evidence' demonstrating the response to the situation is exaggerated." The majority found no such

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substantial evidence had been presented and, therefore, the search policy must be upheld.

Justice Breyer, writing for the four dissenters, began with the premise that the strip search constituted a "serious affront to human dignity and to individual privacy" and argued that the proponents of the policy must show it "necessary in order to further the penal interests mentioned." Because the record demonstrated "the lack of justification," the dissenters would have found the policy unconstitutional. The difference in analysis and outcome turned on the side to which the Justices assigned the burden of providing justification (the majority assigning it to the challenger and the dissenters to the penal authorities, with neither found being able to carry the proof burden assigned).

GPS Tracking Case

The Court's January 23 decision in *United States v. Jones* (No. 10-1259) also involved application of the Fourth Amendment. There the question was whether the FBI and police violated the prohibition against unreasonable searches by tracking the accused's "movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep without a valid warrant." All nine Justices found a constitutional violation, but they differed as to the approach.

Justice Scalia's majority opinion examined what constituted a search "within the meaning of the Fourth Amendment when it was adopted" and found a search then was recognized to occur when the "Government physically occupied private property for the purpose of obtaining information." That standard was met here because of the government's installing the GPS and using it to gather information. Three Justices (Ginsberg, Breyer and Kagan) joined Justice Alito's concurring opinion in which he questioned use of "the old approach" based on trespass. While not comfortable with the available standards, he favored asking "whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated" and felt "the line was surely crossed before the 4-week mark."

While joining the majority, Justice Sotomayor wrote separately, expressing broader concerns about government use of GPS monitoring and suggesting that it even "may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," while finding that "unnecessary" in the case itself.

Privacy Act Remedy

The Supreme Court's March 28 decision in *Federal Aviation Administration v. Cooper* (No. 10-1024) addressed whether an individual who had suffered "mental or emotional distress" caused by the government's "intentional or willful" violation of the Privacy Act could recover damages. Here the FAA had deliberately obtained access to health information maintained in Social Security benefits claims files that showed the plaintiff was disqualified from holding a pilot's license. The Court assumed that was an intentional agency violation; the question was whether mental or emotional distress constituted "actual damages" as used in the Privacy Act.

The majority (Justices Alito, Roberts, Scalia, Kennedy and Thomas) held that mental or emotional distress did not constitute actual damages, so the plaintiff had no civil remedy. Justice Alito's majority opinion analyzed the issue based on the principle that "waiver of sovereign immunity must be 'unequivocally expressed' in statutory text" and any "ambiguities in the statutory language are to be construed in favor of immunity." The Privacy Act itself did not define "actual damages" and, after considering various arguments based on dictionary meanings, usage in other statutes and legislative history, the majority concluded that it was ambiguous whether "actual damages" includes mental or emotional distress as well as pecuniary loss. Consequently, sovereign immunity had not been waived.

Justice Kagan did not participate. Justice Sotomayor (joined by Justices Ginsburg and Breyer) dissented, contending that the ruling "cripples the Act's core purpose of redressing and deterring violations of privacy interests." They argued that the majority analysis places too much weight on the "sovereign immunity canon." The dissenters would apply a construction that "best effectuates the statute's basic purpose." They reasoned that the Act's basic purpose, reflected in its substantive conduct requirements, was "to prevent agency conduct resulting in intangible harms to the individual," and a narrow interpretation of actual damages "creates a disconnect between the Act's substantive and remedial provisions" that allows a "swath of government violations to go unremedied."

Implications for the Future

These recent decisions illustrate that there is one group of Justices who tend to adopt narrow privacy rights decisions or to select tests or frameworks of analysis that lead to narrowing citizen privacy rights and a second group who would apply broader analytical approaches apparently intended to lead to expanded constitutional and statutory privacy rights.

Presently the narrow-rights group frequently controls the outcome by a 5-4 majority. Considering the lineup by the political party of the President who nominated them, it seems clear that the results of this year's presidential election could make a significant difference.

Privacy Narrowers BornAssumed OfficeNominated By Roberts19552005G.W. BushScalia19361986ReaganKennedy19361988ReaganThomas19481991G.H.W. BushAlito19502006G.W. Bush

Privacy Expanders BornAssumed OfficeNominated By Ginsberg19331993ClintonBreyer19381994ClintonSotomayor19542009ObamaKagan19602010Obama

All of the "privacy narrowers" were appointed by Republican Presidents and all the "privacy expanders" by Democratic Presidents (including two by President Obama). If the Republican nominee should win, it seems likely that the current majority of Justices, who tend toward narrower privacy rulings, would continue, or be strengthened. If President Obama is re-elected, there certainly is a possibility that he will not have an

opportunity to replace any of the five Republican-nominated Justices, but if he does, then the Court could become more expansive in finding privacy rights. Time will tell.