US Supreme Court gives green light to warrant-less searches of homes

By Tom Carter
19 May 2011

A decision Monday by the US Supreme Court represents a further major step in abolishing the basic civil liberties protections in the Bill of Rights and enhancing the arbitrary powers of the police. The decision permits police to conduct searches of private homes without a warrant under a mundane pretext.

The issue in the case, *Kentucky v. King*, decided 8-1, was whether the police should have obtained a search warrant before they kicked in the door of Hollis Deshaun King's apartment, conducted a search, and found marijuana. King was sentenced to 11 years in prison.

The Fourth Amendment to the US Constitution, enacted in 1791 in the aftermath of the American Revolution, guarantees to the people "[t]he right … to be secure in their houses… against unreasonable searches and seizures." The Fourth Amendment also requires that police seek the authorization of a neutral judge, in the form of a warrant, before undertaking a search or seizure. To obtain the warrant, the police are required to demonstrate "probable cause."

The Fourth Amendment, together with the Third Amendment, which prohibits the government from quartering soldiers in private homes, arose out of a profound hatred and resentment towards arbitrary government intrusions into the home, as well as an understanding that protection of the privacy of the home is necessary to political freedom.

The US Supreme Court Justice Robert H. Jackson wrote in 1948 that the Fourth Amendment requirement that the government obtain a warrant to conduct a search is among the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

In King's case, no warrant was ever issued. The police, including an undercover officer, followed a person they believed was carrying drugs to King's apartment complex, where one officer said he "smelled marijuana" outside King's home. The officers, who had no warrant to search King's apartment, decided not to seek a warrant and instead pounded loudly on the door, shouting "This is the police! Police! Police! Police!"

After not receiving an answer and hearing vaguely described "noises" coming from inside, the officers broke the door down, searched the apartment, and arrested King, his girlfriend, and a guest. As it turned out, the person the police had been following never entered King's home.

Over the past several decades, the US Supreme Court has made Swiss cheese out of the Fourth Amendment's warrant requirement, inventing myriad exceptions that together nearly swallow the rule. These exceptions cover a wide range of scenarios. Warrant-less searches of automobiles and warrant-less "frisks" of suspects, for example, have been tolerated for decades.

A number of "exigent circumstances" have already been found to justify a warrant-less search of a home. For example, police in "hot pursuit" may follow a suspect into his home, and police may also enter if they believe they can prevent "imminent injury." Even so, the home remained one of the last places where the Fourth Amendment's warrant requirement had any practical force. As recently as 2006, the Supreme Court wrote that "searches and seizures inside a home without a warrant are presumptively unreasonable."

At his trial, King argued that the evidence discovered during the search of his apartment should be suppressed because the entry by police into his home was warrant-less and illegal. The trial court and the Kentucky Court of Appeals found that the search was legal despite the absence of a warrant, citing the "need to prevent destruction of evidence" as an "exigent circumstance" justifying the absence of a warrant.

The Kentucky Supreme Court reversed, suggesting that the officers "deliberately created the exigent

circumstances with bad faith intent to avoid the warrant requirement." The Kentucky Supreme Court further declared that the police could not rely on an exigency if "it was reasonably foreseeable that [police] investigative tactics … would create exigent circumstances."

The "police-created exigency" doctrine, developed by the Kentucky Supreme Court as well as a number of other courts around the country, prevented police from deliberately manufacturing circumstances that would justify a warrant-less search, where the police could just have easily have obtained a warrant.

All but one justice on the US Supreme Court, including the erstwhile "liberal" Obama appointees Elena Kagan and Sonia Sotomayor, joined in the decision to eviscerate the "police-created exigency" doctrine.

The majority decision, authored by Samuel Alito, drips with dishonesty. For example, according to Alito, the police officers were not necessarily demanding entry into King's apartment, in violation of the Fourth Amendment, when they pounded on the door without a warrant. "There is no evidence of a 'demand' of any sort," Alito wrote. Perhaps, Alito suggests, the police merely wished "to speak with the occupants … before deciding whether it [was] worthwhile to seek authorization for a search." Or perhaps, wrote Alito, the police wanted to ask King whether he would consent to a search.

Ruth Bader Ginsburg, in her brief dissent, makes clear that this decision will have devastating immediate consequences. "The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases," she wrote."In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant."

In other words, for all practical purposes, all a police officer has to do in order to search a person's house without a warrant is approach the front door, knock, listen, and then announce, "I think evidence is being destroyed!" Then the police may break down the door and search the house.

To anyone who has a brain and who is not one of the eight Supreme Court justices who joined the majority opinion, Alito's reasoning will not pass the laugh test. Everyone knows that that a police officer is "demanding" entry when he, as the police officer did in this case, starts pounding "as loud as [he] could" on the front door and yelling, "This is the police! Police! Police! Police!"

Further, how could the police, standing outside, possibly know that "evidence" was being destroyed inside the apartment? At King's trial, asked how he knew evidence was being destroyed, one officer responded, "It sounded as [though] things were being moved inside the apartment."

Finally, it is obvious that the police could easily have sought a warrant before approaching King's apartment. As Ginsburg observes sardonically, quoting past Supreme Court opinions, "[p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police."

But there is more to the *Kentucky v. King* decision than the patently ludicrous arguments of Alito and company. A central role of the US judiciary historically has been to act as a check on the executive branch, ensuring that from the president down to the sheriff, the executive operates within the bounds of the law. The Fourth Amendment warrant requirement is a central feature of that framework.

In a host of recent decisions, all of which in one way or another purport to show "deference" to the executive, whether for reasons of "national security," "state secrets," or the "exigencies" of police work, the Supreme Court is abandoning any effort to restrain the exercise of executive power. These decisions, taken together, effectively relegate a US judge to the same role as a judge in a police state, who functions merely as an after-the-fact rubber stamp for executive decisions.

This ruling enhances the arbitrary powers of the police and makes the security and privacy of the home even more dependent on the subjective whims of individual police officers.

In her dissent, Ginsburg quoted at some length a warning by Justice Jackson in 1948: "The right of officers to thrust themselves into a home is … a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not a policeman …"

The disappearance of this sentiment from the pages of majority opinions of the US Supreme Court should be taken as a warning of things to come.