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Supreme Court OK's DNA samples for arrestees

Privacy advocates troubled by the court's ruling

By: Jon Hood – June 5, 2013

In a ruling that could have far-ranging implications for the criminal justice system, the Supreme Court on Mondaygave its approval to taking DNA samples from individuals under arrest but not yet convicted of a criminal offense.

The majority held that a suspect held "for a serious offense," who is brought "to the station to be detained in custody," is not protected by the Fourth Amendment's ban on unreasonable searches.

Rather, the court ruled that "taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."

The court's holding overruled a previous decision by the Maryland Court of Appeals.

Strange bedfellows

The court was closely divided, with the majority a patchwork of strange bedfellows. Clinton appointee Stephen Breyer joined conservatives Samuel Alito, Clarence Thomas, and Chief Justice John Roberts, as did Anthony Kennedy, a Reagan appointee who is often considered the court's "swing vote."

Arch-conservative Antonin Scalia joined the more liberal Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor in dissent.

"I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection," Scalia wrote.

He also warned that "because of today's decision, your DNA can be taken and entered into a national database if you are ever arrested, rightly or wrongly, and for whatever reason."

This isn't Scalia's first rodeo on the left side of the civil liberties spectrum. In 2012, he joined the majority in U.S. v. Jones in holding that placing a GPS tracking device on an individual's car constitutes a search under the Fourth Amendment. And as far back as 2001, Time Magazine published an articlehailing Scalia as a "Civil Libertarian."

Privacy concerns

The dissenting justices aren't alone in their concern about the ruling. The decision has many privacy experts worried about its potentially far-reaching implications.

Julian Sanchez, a fellow at the CATO institute, told U.S. News that the ruling paints a broad swath that could lead to frightening scenarios.

"If police want to do a warrantless search of someone to do a DNA sample, and they don't actually have probable cause, in principle they can arrest you for jaywalking or not signaling when you turn, and then that is enough to get your warrantless search of your DNA," Sanchez told U.S. News. "If you're arrested for speeding on the GW Parkway, DNA can be collected and put in a federal database."

Richard Kling, an attorney and professor at the Chicago-Kent College of Law, told CBS's Chicago affiliatethat "[w]ith no probable cause and with no warrant and no consent, you can now be forced to give a DNA swab which can be used to investigate you for anything and everything — regardless of whether you're under suspicion."