The Washington Post

More on extreme arguments and unanimous Supreme Court defeats – a reply to Orin Kerr

By Ilya Somin

June 26, 2014

In his response to my post criticizing the Obama administration's series of unanimous Supreme Court defeats in major constitutional cases, co-blogger Orin Kerr argues that a unanimous defeat doesn't necessarily mean that the administration's position was extreme. Much of Orin's post deals with the recently decided *Riley* cell phone search case. This narrow focus fails to address the broader pattern unanimous setbacks of which Riley is just one example. One unanimous defeat – even in an important case – may not in itself be particularly telling. But a long series of such setbacks -each involve serious overreaching on issues of federal power – is far more significant. The fact that the administration failed to get the support even of ideologically sympathetic justices (including its own appointees) is telling.

Orin also claims that the administration as such does not deserve blame for arguments advanced in Supreme Court cases, because "the arguments likely were crafted mostly by career lawyers who have been in the government for a long time." This may well have been true of arguments presented to lower courts, especially in the early stages of a case. But as I pointed out in my original post, arguments presented to the Supreme Court – especially in important constitutional cases – are generally approved by high-ranking officials in the Justice Department, the White House, or both. These officials often choose to cast aside arguments that were advanced by lower-level lawyers earlier in the case if those arguments do not reflect the administration's position.

Orin is on firmer ground in claiming that some of the Obama administration's dubious arguments were also advanced by the Bush administration. But that is no justification of them. It merely shows, as I noted in my earlier post, that the pattern of severe administration overreaching on issues of federal power is not unique to the current administration. It is part of a broader flaw in our political culture. Contra Orin's assertion that my argument fits a "political narrative," I have emphasized that the underlying problem here predates Obama, and is one for which Republicans – especially the Bush administration – deserve some of the blame. Last year, I had an exchange with former Bush Attorney General Alberto Gonzales on the subject.

Even with respect to the *Riley* case specifically, I don't find Orin's argument very persuasive (though I acknowledge that Orin has far greater expertise than I do on this particular subject, so it's possible I am missing something that is obvious to Fourth Amendment specialists). Orin is correct that the administration based its position on the 1973 *Robinson* case, which held that the police are allowed to do a complete search of property found on a suspect when he or she is

arrested. But, as the Court pointed out in *Riley*, smart "phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided."

As Ilya Shapiro (no relation) notes, "[u]nlike the satchels and billfolds of yore, people now carry essentially all their private documents with them at all times [in their smart phones]: address books, financial and medical records, photo albums, diaries, correspondence, and more." *Robinson* simply did not address a situation like that, as the *Riley* Chief Justice Roberts recognized in *Riley* when he described the administration's position as trying to "extend" the 1973 case to cover a new situation that "bears little resemblance to the type of brief physical search considered in *Robinson*." Using *Robinson* to argue that the government has automatic power to search all the information on your cell phone any time they arrest you for, say, speeding, is indeed an "extreme" position; extreme both in the sense that the 1973 Court did not envision any such thing, and in the sense that most jurists across the political spectrum would reject such a conclusion today.

Finally, Orin is correct that, in *Riley*, the state of California adopted the same position as the Obama administration. State officials deserve serious criticism for that. But that in no way diminishes the blame due to the administration.

UPDATE: I would add that, even if "career lawyers" really were solely responsible for all the extreme arguments made by the Obama administration in its series of unanimous Supreme Court defeats, that would still be extremely troubling. It would mean that the president and his high-level appointees are ignoring their obligation to supervise career officials and prevent them from undermining important constitutional limits on government power.

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