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Supreme Court saves our privacy while media sleeps

By: Nat Hentoff – April 25, 2013

I'd feared that, after George W. Bush and Dick Cheney and, even worse, Barack Obama, the Fourth Amendment's protection of our personal privacy had nearly vanished. But on April 17, a majority of the Supreme Court, ruling in Missouri v. McNeely, remembered a fundamental liberty we lost during the British occupation that helped ignite the American Revolution.

It should also be noted that the ruling was largely ignored by the pell-mell media in all of its forms.

As John W. Whitehead of the Charlottesville, Va.-based Rutherford Institute ("Dedicated to the defense of civil liberties and human rights") put it in the organization's news release headlining this vital decision: "Fourth Amendment Victory: Citing Bodily Integrity, U.S. Supreme Court Prohibits Police From Forcibly Taking Warrantless Blood Samples From DUI (driving under the influence) Suspects" (rutherford.org, April 18).

Whitehead had also filed an amicus brief before the court on behalf of the defendant in Missouri v. McNeely.

Here's the case: While driving erratically in October 2010, Tyler McNeely was pulled over by a Missouri state highway patrolman, who arrested him on suspicion of drunk driving and took him to a hospital to undergo a blood test for alcohol content. McNeely didn't want to subject himself to a blood test, but the officer ignored him and had his blood drawn anyhow. Based on the results of the blood test, McNeely was then charged with driving under the influence.

It's worth noting that Justice Sonia Sotomayor, writing for the majority of the court in upholding McNeely's refusal to consent, described the forced extraction of a person's blood as:

 An invasion of bodily integrity (that) implicates an individual's most personal and deep-rooted expectations of privacy."

Crucial to the outcome of this case, as Whitehead emphasizes, is "at no point did the officer attempt to obtain a warrant authorizing the extraction."

As I've previously stated, Sotomayor is a valuable addition to our highest court because of her consistent critical thinking. It is quite a contrast from the rigid, self-righteous prejudgments of Justice Samuel Alito. I have her full judgment in this case, and it is illuminating -- not only for legal scholars but also for the citizenry at large -- to see how she reached her conclusion, which differs from many drunken driving prosecutions.

The Fourth Amendment forbids "unreasonable searches and seizures," thereby first requiring a warrant from a judge to establish probable cause for a search. Sotomayor points out that there is "expeditious processing of warrant applications, particularly in

contexts like drunk-driving investigations (to quickly get a warrant) where the evidence supporting probable cause is simple."

"The law now allows a federal magistrate judge to consider 'information communicated by telephone or other reliable electronic means.'"

But there must be that judge-issued warrant to the probable cause of the search before the extraction of blood -- not just the police officer's suspicions.

Whitehead makes this crucial point concerning Missouri v. McNeely:

"While public safety is of great concern, especially when it comes to serious offenses such as driving under the influence of alcohol, Americans' constitutional rights cannot be wholly discounted and conveniently discarded.

"This case has far-reaching implications that go beyond one man's run-in with the police.

"The Supreme Court is to be commended for recognizing that if we allow the government agents broad powers to invade our bodies without consent or court order, the bodily integrity of all persons in the United States will be in serious jeopardy."

And that's why Missouri v. McNeely is so important and should've been widely covered.

So did you see anything about this case in the media you go to for information on the state of your individual constitutional liberties?

At stake here and in other government evasions of a judicial warrant in search cases is a prosecutor claiming a per se rule, which findlaw.com defines as "a generalized rule applied (by prosecutors) without consideration for specific circumstances."

In other words, what this comes down to, as Whitehead makes clear, is the Supreme Court "rejected arguments by state officials asking it to establish a per se rule that all cases of drunk driving present 'exigent circumstances' allowing police to extract blood from a suspect without a warrant."

In the amicus brief to the court, Whitehead, citing past Supreme Court rulings, writes: "Consequently, 'there remains (if it were to continue) the nagging feeling that the removal of blood from within the body of the accused by means of force in routine drunk driving cases shocks the conscience.'"

Because so few members of the media have reported on Missouri v. McNeely, it's doubtful that many American consciences have been shocked to realize how often a driver's blood is forcibly taken from him or her without consent and without any intervention by a judge-issued warrant.

We don't know how often this invasion of privacy may still occur, despite the court's ruling in Missouri v. McNeely.

Were I an assignment editor for one of the media outlets, I would ask reporters to check over a period of time how often police and prosecutors apply Missouri v. McNeely as decided by the Supreme Court to drunk-driving cases. I'd also check on how many judges actually know of this decision.

I first heard of the Supreme Court's revival of the Fourth Amendment in this case from one of John W. Whitehead's alerts, and, accordingly, I strongly suggest that any of you who would like to be in continual touch with this nonpareil news analysis pay heed to this invitation:

“Those wishing to stay informed about these ongoing threats to our freedom can sign up for the Rutherford Institute’s free weekly email alerts by visiting www.rutherford.org and clicking the orange ‘Sign Up’ button in the upper-right hand corner.”