

Privacy Experts: Supreme Court Ruling on DNA Swabs Could Lead to Big Brother Scenario

Privacy advocates concerned DNA could replace social security numbers

By: Elizabeth Flock – June 4, 2013

Police making warrantless arrests are now justified in using another identification tool: the DNA swab.

That's according to a 5-to-4 decision by the U.S. Supreme Court Monday, which ruled law enforcement officers can use a buccal swab, a way of collecting DNA from the cells inside a person's cheek, as part of their standard booking procedure for inmates.

Maryland Attorney General Doug Gensler, who calls DNA collecting "the fingerprinting of the 21st century," says the ruling will help police match unresolved crimes with their perpetrators. "These are cold cases that for the most part would not be solved ever" without DNA, he says.

Despite the practice's benefits, the ruling has also drawn serious concern from privacy experts, who worry the swab could create an incentive for police to arrest more people, or lead to the use of people's DNA for non-judicial purposes, such as government tracking of individuals.

Supreme Court Justice Antonin Scalia shares privacy concerns. In an angry dissenting opinion he read aloud in court Monday, Scalia said: "Make no mistake about it: 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."

Erin Murphy, a New York University law professor and expert on issues related to technology and privacy, says her fears stem in part from vagueness in the ruling over who or who cannot get swabbed. The court ruling said DNA can be taken in case of "serious arrests," but did not say other arrests were excluded. At least 28 states currently allow DNA swabs for serious arrests, and some allow it even for misdemeanors. Murphy believes it is "totally naive" to think the law won't eventually be expanded to allow DNA collection of all arrestees.

Julian Sanchez, a research fellow at the CATO institute and expert on privacy issues, also believes the ruling was too open-ended.

"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," he says. "If you're arrested for speeding on the GW parkway, DNA can be collected and put in a federal database."

The FBI's system of DNA profiles, known as the Combined DNA Index System, (CODIS), already contains more than 10 million criminal profiles and 1.1 million profiles of

arrestees. Those profiles regularly help police match offenders to crimes. On the CODIS website, DNA swabbing is described as "such a fundamental tool for law enforcement that it's hard to believe this technique...is a fairly recent phenomenon." The system was launched in 1998, and as of April 2013, CODIS says it has assisted in nearly 200,000 investigations.

But Sanchez worries that because DNA swabs are so useful for solving crimes, they could create "an unhealthy incentive" for police to make more arrests. If Sanchez is right, that could mean a lot of swabbing. According to a 2011 study, about one third of all young Americans are arrested by the age 23.

But Gensler, the Maryland Attorney General, says those fears are unfounded. The ruling does not mean police can "just go around willy nilly arresting people," he says, and argues that "if police are genuinely interested in someone's DNA, they could just go pick up their Diet Coke can at the McDonald's."

Advocates of DNA profiling also argue that DNA swabs don't gather much information about a person. Among them is Jayann Sepich, whose daughter Katie was raped and murdered in 2003. Katie's attacker was not identified until years later, when a DNA swab for a separate crime matched his DNA. In January of 2006, after lobbying from Sepich, New Mexico passed "Katie's Law," which requires DNA for most felony arrests to go into the CODIS database.

Sepich says that the back of her business card includes her CODIS profile, to make the point that "the profile doesn't say anything about me." She points out that a DNA swab doesn't capture the entire DNA strand, but instead just a profile of 13 markers isolated from some 3 billion. "Those 13 markers were specifically selected by genetic scientists because they have no potential of revealing anything private about you," she says. "The only way anyone knows who the CODIS profile belongs to is after a match is made."

The case before the Supreme Court Monday centered on Alonzo King, a Maryland man who was arrested six years after the rape and robbery of a 53-year-old woman for another crime, a felony second-degree assault. His DNA swab matched a sample from the rape. The police were able to make the match because Maryland's law already allows for warrantless DNA tests.

At oral arguments in February, Supreme Court Justice Sonia Sotomayor sarcastically noted that if DNA swabs work so well, "why don't we do this for anybody who comes in for a driver's license?"

That sort of big brother scenario is what privacy advocates most fear: that the government would turn to DNA profiles as a tool to track citizens.

"The same way that the social security number has become a ubiquitous identifier, you could imagine using DNA. It's a lot harder to fabricate. Instead of having someone fill out forms at the doctor's office, why not swab someone's cheek," says Murphy, the NYU law professor. "I think those are real concerns."

In court, Baltimore deputy attorney general Katherine Winfree argued that the benefits of DNA swabs outweighed the risks, noting that since 2009, the year Maryland starting collecting DNA samples from people arrested for serious crimes, police had made 225 matches, 75 prosecutions and 42 convictions.

Sepich agrees with the sentiment, but her reasons are a lot less numbers-based and a lot more personal.

"Probably thousands of families in the U.S. will not go through what our family went through, now, because DNA will be used to not only solve crimes but prevent crimes," she says.