



Written by [Bob Adelman](#) on February 27, 2014

## Supreme Court Expands Police Power at Expense of 4th Amendment

On Tuesday the Supreme Court ruled in *Fernandez v. California* that when a resident who objects to the search of his residence is removed through a lawful arrest, the remaining resident may give police consent to search without first demanding a warrant.

While the back story is much more complicated than the above summary, the ruling diminishes Fourth Amendment protections from unreasonable searches and seizures. In this case, it was the three dissenting liberal judges on the court who gave the majority a lesson in how the Fourth Amendment is designed to restrain police power. In previous decisions, the court has ruled that anyone objecting to a warrantless search provides sufficient deterrent to such searches. This would apply even in cases where other residents approve such a search. In a word, it just takes one who knows his rights to be able effectively to defend them. Following Tuesday's decision, that is no longer the case.



Fernandez attacked an innocent on the streets of Los Angeles back in 2009, and then ran back to his apartment to hide. When police arrived at the apartment his wife opened the door. When Fernandez heard the commotion at the door, [he shouted](#): "You don't have right to come in here! I know my rights!" The police, noting that his wife was bleeding, arrested Fernandez on suspicion of domestic violence but returned an hour later to search his apartment for evidence linking him to the street attack. His wife consented both verbally and in writing to the warrantless search. The search turned up enough evidence to convict Fernandez and send him to prison for fourteen years.

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During his trial, Fernandez tried to quash the evidence gained from that search claiming that his Fourth Amendment rights had been violated, notwithstanding his wife's assent an hour after his arrest. The courts ruled in favor of the police and against Fernandez all the way up to the Supreme Court, which affirmed those previous decisions. Police powers were expanded at the expense of the Fourth Amendment.

Here is how Justice Samuel Alito, writing for the 6-3 majority in the case, explained the court's reasoning:

Our [previous decisions] firmly establish that police officers may search jointly-occupied premises if



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one of the occupants consents. [But] our opinion in *Georgia v. Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present....

While consent by one resident of joint-occupied premises is generally sufficient to justify a warrantless search, we recognized a narrow exception to this rule in *Georgia v. Randolph*....

[In that case] the Court held that “a physically present inhabitant’s express refusal of consent to a police search [of his home] is dispositive [translation: resolves the issue in his favor] as to him, regardless of the consent of a fellow occupant.

In simple English, up until Tuesday, an objection to a warrantless search of a residence by police by anyone inside was sufficient to turn away the police unless and until such time as they were able to secure a proper warrant signed by a disinterested third-party judge. On Tuesday, that decision was voided.

After dismissing all arguments Fernandez presented, including the fact that he hadn’t changed his mind regarding his refusal to permit a search following his arrest and that his mere absence (due to his arrest) from his residence didn’t change the law, the court then overreached by explaining that applying *Randolph* in this specific case would have worked an excessive burden on the police investigating the robbery and besides,

The lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent.

The five so-called conservatives on the court joined with liberal Justice Stephen Breyer in that opinion. The three remaining justices joined in a single voice to protest the decision of the majority, and in the process gave them a lesson in Constitutional Law 101. Starting by quoting the Fourth Amendment, Justice Ruth Bader Ginsburg noted that, in the past, the court has applied the language strictly to mean exactly what it says:

That whenever practical [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure.... The warrant requirement, Justice [Robert] Jackson observed [in the 1948 decision *Johnson v. United States*], ranks among the “fundamental distinctions between our form of government, where officers are under the law, and the police state, where they are the law.”...

The Court [in the past] has accordingly declared warrantless searches, in the main, “per se unreasonable.”...

If this main rule is to remain hardy, the Court has explained, exceptions to the warrant requirement must be “few in number and carefully delineated.”

But now, with the removal of the restriction noted in *Randolph*, the police are free to search without warrants as long as someone present in the residence agrees, regardless of how another resident who is absent at the moment, feels or has objected in the past. Here’s Ginsburg’s complaint:

Instead of adhering to the warrant requirement [in the Fourth Amendment], today’s decision tells the police they may dodge it.... Suppressing the warrant requirement, the Court shrinks to petite size our holding in *Georgia v. Randolph*.

In a footnote to her dissent, Ginsburg expanded on her concerns over the blatant increase in police



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power provided in the *Fernandez* decision: “Today’s decision ... provides police with ready means to nullify a co-tenant’s objection.” When Ginsburg asked rhetorically “Why should the law insist on the formality of a warrant?” her answer could have come directly out of the Federalist Papers:

Because the Framers saw the neutral magistrate as an essential part of the criminal process shielding all of us, good or bad, saint or sinner, from unchecked police activity.

In her conclusion, Ginsburg criticized the new expansion of police power under the Fourth Amendment:

Reducing Randolph to a “narrow exception,” the Court [now] declares the main rule to be that “consent by one resident of jointly-occupied premises is generally sufficient to justify a warrantless search.”...

For the reasons stated, I would honor the Fourth Amendment’s warrant requirement and hold that Fernandez’ objection to the search did not become null upon his arrest and removal from the scene.

For the first time in recent memory those in the freedom fight wish that the conservative majority would listen more closely to the liberal minority before deciding to emasculate precious rights.

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