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Supreme Court to Rule on Warrantless Sobriety Tests

May citizens legally refuse to take a chemical sobriety test when stopped by the police?

This is the question to be decided by the Supreme Court in a trio of cases — *Birchfield v. North Dakota*, *Beylund v. Levi*, *and Bernard v. Minnesota* — that have been consolidated.

Precisely, the high court will rule on the following issue of Fourth Amendment interpretation: "Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood."

Some states have enacted laws allowing criminal charges to be filed against anyone who refuses to submit to this type of sobriety test. Others, however, disagree, considering such compulsion to violate the right to be free from searches and seizures *without a warrant.*

Reason magazine reported on the pending cases, pointing out the distinct views of the scope of the Fourth Amendment:

> The arrested parties in these cases offer a different view. Danny Birchfield, for example, is a North Dakota man arrested on suspicion of drunk driving who refused to submit to a warrantless chemical test. He was charged for his refusal and sentenced under the refusal statute. Birchfield maintains that the state law imposed an unconstitutional condition upon him, forcing him to either sacrifice his constitutional right to be free from a warrantless search under the Fourth Amendment or else face criminal sanctions. Birchfield and his lawyers therefore urge the Supreme Court to reject "the extraordinary proposition that persons may be subjected to criminal penalties for asserting their constitutional right to resist a search that is not supported by a warrant or an exception to the warrant requirement."

In another analysis of the case published by Learn Liberty, a blog managed by the Institute for Humane Studies, their shot at constitutional scholarship fell well wide of the mark.

Learn Liberty summed up the issue before the court this way: "The question, then, would be: where do we draw the line between citizens' Fourth Amendment rights and the rights of the government to conduct warrantless searches?"

Constitutionalists will instantly notice the error in that assessment.

Governments do not have any rights at all. In fact, even the powers exercised by government are given by people, who in order to establish justice, provisionally endow government with a part of their natural sovereignty.

People are possessed of rights as an inheritance from their Creator. He alone gives rights and He alone

may revoke them. Government is the creature, not the creator.

The defendants in these three cases each attack their subjection to these warrantless chemical sobriety tests in different ways, although each insists that the exceptions to the rule requiring warrants for searches and seizures are not applicable in these cases.

As explained in the *Reason* article regarding the *Bernard v. Minnesota* case,

> As Bernard and his lawyers point out, the classic justifications for the search incident to arrest doctrine center on officer safety and preventing the destruction of evidence. This stems from the idea that the police need to secure the scene for weapons and evidence and can't always wait around safely for a warrant before doing so. "Because a breath test is not administered to further officer safety or to preserve evidence," Bernard and his lawyers point out, "it is not a valid search incident to arrest."

In other words, it has been argued that the police should be able to search and seize evidence without a warrant if there is a reasonable belief that the evidence would be compromised or the police would be in danger. In these cases, those procedural hurdles were not cleared by the states whose statutes are being challenged.

There are two other considerations at work here that went unmentioned in both the Learn Liberty and *Reason* articles.

First, Thomas Jefferson had something to say in the matter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional the acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

In this Mexican standoff of states, Supreme Court, and federal government, the last man standing is the people acting in their collective political capacity as states.

Abraham Lincoln recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution. Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."

In his 1887 book *The Constitutional Law of the United States of America*, renowned German-American constitutional scholar Hermann Von Holst explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity.

"Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way," he wrote.

He continued, regarding this "aristocracy of the robe," "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

How can anyone read these statements and honestly conclude that any branch of the federal government is intended to be the surveyor of the boundaries of its own power?

Every department of the federal government was created by the Constitution — therefore, by the

states — and has no natural sovereignty. No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of popular sovereignty ever proposed. If courts, Congress, or presidents had such power, it would make them judge, jury, and executioner in every case in which their own act exceeding constitutional authority is at bar.

Aristocracy is not exactly the name of the form of government created by judges usurping authority. Technically such a scheme is called *kritarchy*, from a Greek word meaning "rule by judges." This includes both those societies where such an establishment is approved by the people, and those where judges are not constitutionally empowered to exercise legislative and executive powers, but act in those areas nonetheless, such as the United States of America.

We seem every year to be running headlong toward inclusion in the list of contemporary kritarchies, which includes, among others, Somalia.

Next is the historical analysis.

While Americans should be concerned with consolidation of immense power in the hands of eight unaccountable, unelected judges, the historical fact is that our Founders intended to shield the citizens of their new union from deprivations of the fundamental right to be free from warrantless general writs.

The Founders abhorred this practice, believing that "papers are often the dearest property a man can have" and that permitting the government to "sweep away all papers whatsoever," without any legal justification, "would destroy all the comforts of society."

In 1776, George Mason, the principal author of the Virginia Declaration of Rights — a document of profound influence on the construction of the federal Bill of Rights — upheld the right to be free from such searches, as well: "That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence [sic] is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

Thus, the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The rights guaranteed by the Fourth Amendment are under nearly constant assault by the forces of the federal government. From NSA surveillance to IRS use of tax records as a political tool to the practice being considered by the cases currently pending before the Supreme Court regarding the criminalization of refusal to submit to warrantless chemical sobriety tests, Americans are now denied the protections our Founders held so dear.

The undeniable truth is that not a single one of our Founding Fathers, not even the most ardent advocate of a powerful central government, would have remained even one day at the Philadelphia Convention if he had believed that the government they were creating would become the instrument of tyranny that it has become.

Finally, the cases whose oral arguments were heard before the eight justices on April 20 — *Birchfield v. North Dakota, Beylund v. Levi,* and *Bernard v. Minnesota* — will be regarded as bellwethers of the increasingly invasive practices of the police, in addition to the Fourth Amendment focus being given by most news and legal outlets.