The US Supreme Court's "no-knock" decision: a frontal assault on democratic rights

John Burton
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John Burton is the Socialist Equality Party's candidate for the House of Representatives from California's 29th Congressional District, which includes the suburban Los Angeles communities of Pasadena, South Pasadena, Glendale, Altadena, Alhambra, San Gabriel and part of Burbank. The incumbent is pro-war Democrat Adam Schiff, a former United States prosecutor who supported the Patriot Act and its recent extension, and has introduced legislation to permit the Bush administration police-state measures of seizing people as "enemy combatants" in the "war on terror" and defending the NSA's monitoring of telecommunications to spy on American citizens without warrants.

Because the SEP is not a recognized political party under California's reactionary election laws, Burton and his supporters are presently circulating a petition to place him on the ballot as an independent candidate, which requires 9,000 signatures from registered voters within the district.

Burton, a civil-rights lawyer, is well known throughout California for his representation of police-misconduct victims over the past 25 years.

The Supreme Court's recent decision allowing the use in criminal trials of evidence seized by police while violating the constitutional requirement that they knock and announce their presence when serving search warrants represents a frontal assault on basic democratic rights.

The June 15 decision, by a 5-4 vote, gives police a green light to break down doors at all hours of the day or night, terrorizing occupants and ransacking homes, without any meaningful legal consequences, even though the Constitution prohibits such actions.

The lead opinion, authored by Associate Justice Antonin Scalia, the ideological leader of the high court's right wing, lays the groundwork for eliminating the "exclusionary rule" altogether, rendering the Fourth Amendment's prohibition against "unreasonable searches and seizures"—a key provision of the Bill of Rights—a dead letter. Scalia was joined by Associate Justice Clarence Thomas, and both of Bush's new high court appointments, Chief Justice John G. Roberts, Jr. and Associate Justice Samuel A. Alito, Jr.

The crucial fifth vote was cast by Associate Justice Anthony M. Kennedy, a conservative presently considered the high court's only "swing vote" following the retirement earlier this term of Associate Justice Sandra Day O'Connor.

As explained by Associate Justice Stephen Breyer in a dissenting opinion joined by the other three so-called liberals—Associate Justices John Paul Stevens, Ruth Bader Ginsburg and David Souter—the ruling "destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement."

The case, *Hudson v. Michigan*, arose from a search warrant served eight years ago by Detroit police looking for drugs and weapons in the home of Booker Hudson, Jr. By their own admission, the officers entered the home only seconds after knocking and announcing their presence, rather than giving the occupants an opportunity to open the door. During the subsequent search, they recovered cocaine and a firearm, evidence Hudson sought to exclude from his criminal trial.

There was no reason for the exclusionary rule to have been addressed in the case, however. Although the constitutional requirement that police knock-and-announce when serving warrants is clearly established, there is a recognized exception when the officers have reason to believe that waiting might lead to evidence being destroyed or officers placed in jeopardy. That exception clearly could have been applied in this case, where the narcotics could have been flushed down a toilet.

Instead of applying the exception and ruling that the police actions were constitutional, however, Scalia accepted that the police tactics violated the Fourth Amendment's knock-and-announce rule. He did so solely to set up an attack on one of the Warren Court's most significant precedents, *Mapp v. Ohio* (1961), the case which established that the Fourth Amendment, and therefore the exclusionary rule, applied to state and local police as well as federal officials.

During the tenure of Chief Justice Earl Warren—1953 to 1969—and for several years thereafter, the Supreme Court handed down a series of landmark rulings to enforce constitutional guarantees of equal protection, due process, personal privacy and free speech. These historic precedents, while limited in many important respects, nevertheless are widely respected and rightly credited, along with the Voting Rights Act and other key acts of Congress, as providing a legal foundation for the expansion of basic democratic rights in the United States that accompanied the mass civil-rights struggles of the post-war years.

For this very reason, the Warren Court's legacy is despised by the reactionaries currently in control of the executive and

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legislative branches of government. The lineup in this recent decision confirms that the high court is now dominated by an extreme right-wing bloc of four justices deeply hostile to fundamental democratic rights. The stranglehold exercised by this bloc is the direct product of the cowardly capitulation of the Democratic Party, which refused to use its Senate votes to filibuster the Roberts and Alito nominations.

Roberts and Alito signed onto Scalia's lead opinion, which drips with contempt for basic constitutional rights. Scalia belittled the constitutional rule requiring "that law enforcement officers must announce their presence and provide residents an opportunity to open the door," for example, as merely establishing "the right not to be intruded upon in one's nightclothes."

In fact, the "knock-and-announce" rule dates back in Anglo-American jurisprudence at least to the thirteenth century and, as explained in earlier Supreme Court precedents, "was woven quickly into the fabric of early American law." Over 100 years ago, the Supreme Court wrote, in *Boyd v. United States* (1886), that "it is not the breaking of his doors" but the intrusion on "the sanctity of a man's home and the privacies of life" that is at stake.

The new Bush appointees also signed on to Scalia's attack on the Warren Court. "Suppression of evidence," Scalia wrote, "has always been our last resort, not our first impulse." Squarely contradicting himself, he then claimed, "We did not always speak so guardedly. . . . *Mapp*, for example, suggested wide scope for the exclusionary rule."

Here, Scalia is claiming that *Mapp*—and presumably other key Warren Court decisions—are aberrations, not part of what the Supreme Court has "always" ruled.

Scalia spends most of the opinion attacking the foundation for the exclusionary rule itself, its deterrent effect on police misconduct by prohibiting the use of illegally seized evidence.

"We cannot simply assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago," Scalia wrote. "That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."

For many, the 1960s were not so "long ago," but there is a definite section of the ruling elite determined to make the modest expansion of democratic rights associated with that decade a distant memory.

The assertion that the exclusionary rule belongs to a time "long ago," comes from someone known to argue—at least when convenient for the conclusion he wants to reach—that the Constitution must be interpreted according to the framers' "original intent," in the "context" of the late eighteenth century.

Scalia ignores, of course, the fact that the very improvements in the "legal regime" from "long ago" has resulted from the exclusionary rule itself.

Scalia claims that the exclusionary rule is no longer necessary because police agencies now face potential civil liability for their misconduct and officers are much better trained and supervised than they were during the Warren Court years.

Having spent the last 25 years suing police agencies, I know from personal experience that Scalia is wrong on both counts.

The economic realities of filing lawsuits for police misconduct are such that only a small fraction of constitutional violations—those involving substantial injuries and relatively attractive plaintiffs—can be successfully prosecuted in civil cases. Scalia knows this. He also knows that he has voted repeatedly over his more than two decades on the high court to make these cases even tougher to finance and win. Scalia supported Supreme Court rulings requiring that constitutional violations be "clearly established" by existing precedent before suits can proceed, limiting suits by prisoners, and curtailing attorneys' fees in cases where violations are proven.

Moreover, Scalia's praise for "the increasing professionalism of police forces, including a new emphasis on internal police discipline," rings hollow when set against the repeated incidents of videotaped police misconduct over the last two decades, such as the beating of Rodney King in the presence of more than a dozen Los Angeles police 15 years ago, the 2003 murder of Nathaniel Jones by six baton-wielding Cincinnati police, and last fall's post-Katrina beating of retired teacher Robert Davis by New Orleans police. In each instance, rather than disciplining the officers, the local departments jumped to their defense, blaming the victims for bringing the injuries on themselves.

Calling Scalia's decision "very disturbing," David Moran, the Wayne State University Law School professor who represented Hudson, said, "It seems to rethink the entire exclusionary rule, which is the only thing that has caused the police for the past 50 years to generally comply with the Fourth Amendment." Sunday's editorial in the *Chicago Tribune* was typical of those in many major newspapers, noting that Scalia "carved out a major exception to the [exclusionary] rule, using arguments that would serve just as well to junk the rule entirely."

There is no doubt that the Supreme Court's right-wing justices, who face no meaningful opposition from the Democratic Party, intend to do just that, eliminate the exclusionary rule and other legal restrictions on law enforcement. Their reasons are not so much ideological as practical. The continued existence of democratic rights in general, and personal privacy in particular, has become incompatible with the social realities of American society, characterized by an unprecedented polarization between a wealthy elite and working people, who make up the vast majority of the US population.

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