US Supreme Court undermines constitutional protection against unreasonable searches and seizures

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With decisions in two key cases last month, the Supreme Court continued its decades-long offensive against the Bill of Rights. The court poked more gaping holes into established precedents that recognize and enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures" by barring the use of illegally obtained evidence in court and allowing victims of police misconduct to prosecute federal civil rights lawsuits for money damages.

The British government's arbitrary deprivations of liberty and invasions of personal privacy are well established to be among the primary causes of the American Revolution. The founders' objections to them are embodied in the Fourth Amendment's injunction that, "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."

The primary judicial mechanism enforcing the Fourth Amendment is the "exclusionary rule," the constitutional doctrine requiring judges to bar evidence seized without warrant or probable cause. The Supreme Court first applied the exclusionary rule in federal criminal prosecutions almost 100 years ago. About fifty years later, while under the leadership of Chief Justice Earl Warren (1953-1969), the Supreme Court decided *Mapp v. Ohio*, holding that state courts, like federal courts, must exclude evidence seized illegally.

In the half-century since *Mapp*, there have been thousands of court decisions on motions by criminal defendants to suppress evidence obtained by police officers in violation of the Constitution. The result is an extensive body of state and federal legal precedents that set various limits on the power of police to arrest people and search their homes, business and automobiles.

Because of its prominent role in expanding individual privacy, however, the exclusionary rule has been under relentless attack by those who seek to minimize or remove altogether such legal restrictions in order to increase the repressive apparatus of federal, state and local government.

Among them is the current Chief Justice of the United States, John G. Roberts, Jr. While an associate counsel to President Ronald Reagan in 1983, Roberts lobbied for a "campaign to amend or abolish the exclusionary rule." Despite his authoritarian positions on this and other fundamental constitutional issues, Roberts was confirmed in 2005 with key support from Senate Democrats to head the Supreme Court for the rest of his life. Then age 50, Roberts became the youngest chief justice since John Marshall took the bench in 1801 at the age of 45.

Roberts joined right-wing Associate Justices Antonin Scalia and Clarence Thomas, who had expressed their opposition to the exclusionary rule in several dissents. Joining this reactionary bloc in 2006 was Associate Justice Samuel A. Alito, Jr. During his confirmation hearings, a 1985 job application to the Reagan administration's Department of Justice surfaced in which Alito claimed his legal career was "motivated in large part by disagreement with Warren Court decisions, particularly in the area of criminal procedure," i.e., the exclusionary rule. Alito, then 55, too, was confirmed to a lifetime appointment despite the Senate Democrats having sufficient numbers to block the nomination with a filibuster.

In one of his first decisions as a Supreme Court justice, Alito joined with Roberts, Scalia, Thomas and Associate Justice Anthony Kennedy to form a majority in *Hudson v. Michigan*, a case that ruled by a 5 to 4 vote that the exclusionary rule does not apply to evidence seized when police ignore the constitutionally required "knock notice" when serving a search warrant on someone's home.

Scalia's majority opinion expressly rejected the *Mapp* precedent that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible" and articulated a rationale that would eliminate the exclusionary rule altogether.

"We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. 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," Scalia wrote. He claimed that "the increasing professionalism of police forces," along with the "the slow but steady expansion of private federal civil rights cases arising from alleged police misconduct" has made the exclusionary rule no longer necessary to enforce constitutional rights.

It does not take a constitutional scholar to point out the obvious, that any "increasing professionalism of police forces" over the last fifty years was due to *Mapp* and other Warren-era court decisions "in the area of criminal procedure" such as *Miranda v. Arizona*.

The first of the two decisions last month was *Herring v. United States*. The Supreme Court ruled 5 to 4 that under certain circumstances evidence seized illegally by police can nevertheless be used in criminal prosecutions if the police department was merely "negligent" in violating the Constitution and its unconstitutional conduct "attenuated" from the seizure itself.

The *Herring* decision arose from the 2004 arrest of Bennie Dean Herring for possession of drugs and a weapon. While picking up his truck from a sheriff's impound lot, an investigator searched for outstanding warrants. The investigator was misinformed by a clerk for a neighboring county that Herring had a warrant for failing to appear in court. The warrant had been recalled five months earlier, but had been left in the county system.

Roberts, writing for the same five-justice majority that decided *Hudson*, argued that the case could be resolved simply on the basis that no Fourth Amendment violation occurred, because the arresting officer reasonably believed there to be a valid warrant. Going beyond this argument, however, Roberts assumed the Constitution was violated in order to launch a frontal assault on the exclusionary rule itself.

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies," Roberts wrote. Making up new legal principles on the spot, Roberts claimed, "The exclusionary rule is not an individual right and applies only where it results in appreciable deterrence."

Even deterring police misconduct is insufficient to invoke the exclusionary rule, at least according to Roberts. "The benefits of deterrence must outweigh the costs," so it does not "apply in every circumstance in which it might provide marginal deterrence." This is an exception broad enough to swallow the rule altogether.

Finally, Roberts derided the dissent of Associate Justice Ruth Bader Ginsburg, which was joined by Associate Justices John Paul Stevens, Stephen Breyer and David Souter. Ginsburg pointed to the Supreme Court's legacy of "a more majestic conception of the exclusionary rule" than that of the current majority.

Also last month, the Supreme Court decided *Pearson v. Callahan*, one of the "private federal civil rights cases arising from alleged police misconduct," which, at least according to Scalia's opinion in *Hudson*, are making the exclusionary rule no longer necessary for the enforcement of the Fourth Amendment.

This case involved a criminal informant allowed into a home ostensibly to purchase narcotics. Police then charged in behind him without a search warrant, making the absurd claim that the occupant's consent to the informant's entry also constituted consent to their entry.

The occupant sued for money damages, claiming the officers violated the Fourth Amendment's warrant clause.

The Supreme Court ruled unanimously that the judicial doctrine of "qualified immunity" protected the officers, regardless of whether they violated the Fourth Amendment, because, supposedly, "It was not clearly established at the time of the search that their conduct was unconstitutional."

In no other area of the law are wrongdoers entitled to so brazenly argue that they should not be held responsible for their actions because they did not know their conduct violated the law.

Underlying these profoundly anti-democratic decisions are the rapidly increasing social tensions arising from shrinking wages, plummeting employment rates, the dismantling of social services and outright looting of the public weal by the financial aristocracy. The Supreme Court is deliberately removing legal impediments to police repression to lay a ground-work for the most brutal police reactions to the rapidly approaching social explosion.