The Obama administration and the Supreme Court decision on strip searches

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The US Supreme Court's 5-4 ruling that guards can strip search and visually inspect the body cavities of people arrested for minor offenses who are admitted into a jail's general population is based largely on arguments contained in the *amicus curiae* "friend of the court" brief filed in the case on behalf of the Obama administration.

Associate Justice Anthony M. Kennedy, who wrote the majority opinion, said that *Florence v. Board of Chosen Freeholders* presented "the question of what rules, or limitations, the Constitution imposes on searches of arrested persons who are to be held in jail while their cases are being processed." Answering his own question, Kennedy found none whatsoever, because when "addressing this type of constitutional claim courts must defer to the judgment of correctional officials."

Florence upheld a jail policy requiring guards to compel everyone coming into the facility under arrest to strip naked, lift their breasts or genitals, and then bend over and spread the cheeks of their buttocks so that guards can look into their vagina and rectum. The federal district court in New Jersey had ruled that this deliberately humiliating strip-search policy violated the Fourth Amendment's prohibition against "unreasonable searches" where there was no "reasonable suspicion" to believe the person being searched was concealing contraband.

"Jails are often crowded, unsanitary, and dangerous places," Kennedy wrote in support of the majority's rejection of the district court's well established application of a key provision in the Bill of Rights. Without explaining how the Constitution's guarantee of "due process" and prohibition of "cruel and unusual punishment" could permit anyone—particularly a person arrested for (but not convicted of) a minor offense—to be caged in such an environment, Kennedy ruled that "Courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security. (See: US Supreme Court sanctions strip searches even for minor infractions).

The obvious logic of Kennedy's ruling is that when it comes to conditions of incarceration, even for people simply awaiting processing because of allegations they committed a minor offense, courts have no independent role to play in the defense of fundamental democratic rights. In so ruling, Kennedy incorporated the arguments made by the Obama administration, which voluntarily injected itself into the case on the side of giving unbridled strip search powers to jail authorities.

Solicitor General Donald B. Verrilli, Jr. filed the Obama administration's brief last summer, arguing that "In the face of ongoing security threats in prisons and jails, the Fourth Amendment does not impose an inflexible requirement of individualized suspicion. It instead affords corrections officials appropriate latitude to implement those policies and practices *they* deem necessary to preserve institutional security." (Emphasis added).

Like the Supreme Court majority, the Obama administration brief gave no weight at all to the constitutional rights of people accused of minor infractions, who might land in jail awaiting processing for all sorts of reasons. The plaintiff in *Florence*, for example, was arrested on a traffic warrant that had been recalled years before.

Instead, according to the Obama brief, "imprisonment carries with it the circumscription or loss of many significant rights," a rule "which applies equally to pretrial detainees and convicted prisoners." In other words, anyone can be searched as if he or she were a convicted felon or chronic abuser of hard narcotics.

The Obama brief asserted that all individual rights must yield to the supposed security concerns of the prison authorities. "A detainee retains only those rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Internal security is 'chief' among those objectives," according to Solicitor General Verrilli's brief.

The Obama brief belittled the impact of visual body cavity searches: "They are a step in the standard intake process and last only a few minutes… The detainee is not touched by

security personnel at any time. The… jail's policies require that the searches be conducted by officers of the same sex, in private, in a location where the search cannot be observed by persons not conducting the search, under sanitary conditions, and in a professional and dignified manner with maximum courtesy and respect for the inmate's person."

Verrilli does not explain how a guard can direct people to squat and cough, and then watch to see whether anything falls out of a body cavity, in a "dignified manner."

Anticipating Kennedy's majority opinion, the Obama administration argued that courts have no independent role to play in protecting the rights of people at any time they are in jail. "The preservation of institutional security… is central to all other corrections goals, and judgments about how to achieve that goal are peculiarly within the province and professional expertise of corrections officials," Verrilli argued.

Rather than recognizing the crucial role civil rights lawsuits have played in the protection of inmates, the Obama brief concluded that "courts should play a very limited role… in the administration of detention facilities."

Associate Justice Stephen G. Breyer, in dissent, exposed as bogus the argument that jails need to strip search all persons to prevent the smuggling of contraband. "Those arrested for minor offenses are often stopped and arrested unexpectedly. And they consequently will have had little opportunity to hide things in their body cavities," Breyer wrote.

In one lower court study that Breyer cited, of "23,000 persons admitted to the Orange County [New York] correctional facility between 1999 and 2003… the County encountered three incidents of drugs recovered from an inmate's anal cavity and two incidents of drugs falling from an inmate's underwear during the course of a strip search. The court added that in four of these five instances there may have been 'reasonable suspicion' to search, leaving only one instance in 23,000 in which the strip search policy 'arguably' detected additional contraband."

Breyer also described some of the people strip searched under blanket policies like the one upheld by the Supreme Court majority. "They include a nun, a Sister of Divine Providence for 50 years, who was arrested for trespassing during an anti-war demonstration. They include women who were strip-searched during periods of lactation or menstruation. They include victims of sexual violence. They include individuals detained for such infractions as driving with a noisy muffler, driving with an inoperable headlight, failing to use a turn signal, or riding a bicycle without an audible bell."

"I need not go on," Breyer concluded.

The real reason for blanket strip searches has nothing to do with combating the smuggling of contraband. Stripping and humiliating inmates during the jail admission process is part and parcel of exercising control. CIA interrogation manuals going back to the late 1940s stress the importance of stripping prisoners naked as part of the process of breaking down their resistance.

There were a number of *amicus curiae* briefs filed in the case. Joining with the Obama administration in support of the blanket strip search policy were the National Sheriffs' Association and the Policemen's Benevolent Association. Those opposing the strip search policy included the American Bar Association (ABA), the largest association of lawyers in the United States.

The ABA brief argued that strip searches without "individualized suspicion" are "inconsistent with the respect for the human dignity of prisoners to which the ABA is deeply committed." It referred to the prohibition against subjecting prisoners to "cruel, inhuman or degrading treatment" contained in Article 5 of the Universal Declaration of Human Rights adopted by the United Nations in 1948.

Supporting degrading and humiliating strip searches of minor offenders in the high court is not an isolated act by the Obama administration. Since the start of this Supreme Court term last October, the solicitor general has, among other things, argued for immunity for police who obtain invalid search warrants or lie to grand juries, asserted the right of the government to maintain Christian crosses on federal land, supported the dismissal of a case brought by a man who was arrested after expressing his distaste for the Iraq war to former vice-president Dick Cheney, and opposed the right of inmates to assert their Fifth-Amendment rights against self-incrimination.