

The Continuing Saga: Police and Qualified Immunity

By Lisa Soronen

The Supreme Court decided numerous Fourth Amendment and qualified immunity cases involving police officers during its 2013-2014 term.

Fourth Amendment Cases

In *Riley v. California*, No. 13-132 (U.S. June 25, 2014) the Court held unanimously that generally police must first obtain a warrant before searching an arrested person's cellphone. The Fourth Amendment requires police to obtain a warrant before they conduct a search unless an exception applies. The exception at issue in this case is a search incident to a lawful arrest. In *Chimel v. California* 395 U.S. 752 (1969) the Court identified two factors that justify an officer searching an arrested person: officer safety and preventing the destruction of evidence. Four years later in *United States v. Robinson*,414 U.S. 218 (1973) the Court held that police could search a cigarette pack found on Robinson's person despite the absence of these two factors. The Court declined to extend *Robinson* to searches of data on cell phones. Applying the first *Chimel* factor the Court observed that "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." The Court also was not convinced that destruction of data through remote wiping (third party deletion of all data) or data encryption (an unbreakable password) were prevalent problems. The Court readily admitted that its decision will impact law enforcement's ability to combat crime. But privacy comes at a cost and warrants are faster and easier to obtain now than ever before. http://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf

In *Fernandez v. California*, 134 S. Ct. 1126 (1984), the Court held that if a defendant objects to the search of his or her home that objection may be overridden by a co-tenant after the defendant is no longer present. Walter Fernandez told police they could not search his home. But after he was arrested and removed from the premises for suspected domestic violence, the woman he was living with consented to a search. In *Georgia v. Randolph* , 547 U.S. 103 (2006) the Court held that if a defendant is physically present and objects to a warrantless search, a co-tenant cannot override that objection. The Court refused to extend *Georgia v. Randolph* when the objecting defendant is no longer present. While the defendant pointed out the police were responsible for his absence, the Court noted that his removal was objectively reasonable. The Court also rejected Fernandez's argument that his objection should remain effective until he changed his mind. *Georgia v. Randolph* was based on the "widely shared social expectation" that if you call on someone and one of the tenants says you are not welcome, you would not enter. The "calculus of this hypothetical caller would likely be quite different if the objecting tenant was not standing at the door." Police have been waiting since 2006 to find out if the Court would extend *Georgia v. Randolph*. http://www.supremecourt.gov/opinions/13pdf/12-7822_he4l.pdf

In *Navarette v. California*, No. 12-9490 (Apr. 22, 2014), an anonymous 911 caller reported that a vehicle had run her off the road. The Court held 5-4 that a police stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated. The tip of dangerous driving was sufficiently reliable because by identifying specific details about the vehicle the caller necessarily claimed eyewitness knowledge of what happened, police located the vehicle where the caller indicated it would be, and the caller used the 911 system, which readily identifies callers and therefore discourages them from lying. Driving someone off the road creates reasonable suspicion of drunk driving because "[t]hat conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness." While the officer didn't observe additional suspicious conduct after watching it for five minutes, police do not have to give suspected drunk drivers a "second chance for dangerous conduct [that] could have disastrous consequences." This case is noteworthy because the Court departed from the normal Fourth Amendment requirement that anonymous tips be corroborated. http://www.supremecourt.gov/opinions/13pdf/12-9490_3fb4.pdf

(Editor's Note—see a longer discussion of *Navarette* in the *Cases* section of the May-June ML).

In *Plumhoff v. Rickard*, 572 U.S. __ (2014) the Court held 7-2 that police officers didn't violate the Fourth Amendment when they shot and killed the driver of a fleeing vehicle to end a dangerous car chase. Alternatively, the Court unanimously held the officers were entitled to qualified immunity. Donald Rickard was pulled over because his vehicle had only one operating headlight. He drove away and was pursued by police. He drove over 100 miles an hour and passed more than two dozen vehicles before exiting the highway where he made contact with three police cars. Rickard's tires were spinning and his car was rocking back and forth

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nate officers. As to when the government as employer may act to avoid disruption of the workplace, the Court specifically cited U.S. Supreme Court case law for proposition that there is no need "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."

Although Nord's statements were made during a campaign and were putatively a matter of public concern, the Circuit Court noted that Wild challenged them as untrue. And even if the statements were matters of public concern they were not so weighty as to override the sheriff's substantial interest in maintaining the efficacy and reputation of his workplace. In sum, Wild was granted qualified immunity given that at least some of Nord's speech was not protected by the First Amendment, that it was not valuable enough to outweigh the sheriff's interest in the workplace, and because Wild had a reasonable belief that firing Nord was within his rights as a public official under North Dakota law and federal jurisprudence.

DISSENT: The dissent differed from the majority in its application of *Pickering/Connick*. It Given that Wild had conceded that Nord's speech was protected, the only issue was whether Nord's right to engage in protected speech was clearly established at the time of the firing. The dissent would have found Nord's right was clearly established, given it was political speech made during a campaign, and would have affirmed the lower court.

***Nord v. Walsh County*, No. 12-3249 (8th Cir. June 26, 2014).** ML

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when Officer Plumhoff fired three shots into his car. Rickard then reversed his car, nearly hitting an officer on foot, and again fled. Officers fired 12 shots more killing Rickard and his passenger. Rickard's surviving daughter argued that the Fourth Amendment did not allow the police to use deadly force to end the chase and that even if police were permitted to fire their weapons, they fired too many shots. The Court disagreed concluding the use of deadly force was reasonable because "[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." The number of shots wasn't unreasonable because "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." Finally, the Court concluded that even if the use of deadly force violated the Fourth Amendment the officers would be entitled to qualified immunity. The Supreme Court decision most on point at the time of this case granted qualified immunity where the facts were less favorable to the officer than the facts here. So it was not clearly established that force in this case was unreasonable. http://www.supremecourt.gov/opinions/13pdf/12-1117_1bn5.pdf

Qualified Immunity Cases

In *Wood v. Moss,* No. 13-115 (May 27, 2014) the Court unanimously granted qualified immunity to two Secret Service agents who moved anti-Bush protesters a block further from the President than pro-Bush supporters. Pro- and anti-President Bush demonstrators had assembled in Jacksonville, Oregon on opposite sides of the street on which President Bush's motorcade was supposed to travel. After the President made a last-minute decision to have dinner at the outdoor patio dining area of the Jacksonville Inn, the protesters moved down the street in front of the Inn. Secret Service agents moved them two blocks down the street, about a block further away from the Inn than the supporters. The anti-Bush protesters sued claiming the agents violated their First Amendment right to be free from viewpoint discrimination. The Court had little trouble concluding the agents were entitled to qualified immunity: "No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President." The agents acknowledged that they could not disadvantage one group of speakers without an objective security rationale. Here, pro-Bush demonstrators had no direct access to the Inn because the side of the Inn they faced was totally blocked by another building. But the anti-Bush protesters would have been in weapons range of the President had they not been moved two blocks because only a parking lot separated them from the patio. http://www.supremecourt.gov/opinions/13pdf/13-115_gdil.pdf

In an unauthored opinion in *Stanton v. Sims,* 571 U.S. __ (2013), the Court reversed the Ninth Circuit's refusal to grant qualified immunity to a police officer who kicked open a gate hitting the homeowner while in "hot pursuit" of someone the officer thought committed a misdemeanor. The Ninth Circuit concluded that it was clearly established that a police officer may not enter someone's property without a warrant while in "hot pursuit" of someone suspected only of a misdemeanor. The Supreme Court disagreed "summariz[ing] the law at the time [the officer] made his split-second decision to enter [the homeowner's] yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeals affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided." It seems likely that the Court will decide the underlying Fourth Amendment issue in this case soon. http://www.supremecourt.gov/opinions/13pdf/12-1217_bpmc.pdf

In *Tolan v. Cotton,* No. 13-551 (U.S. May 5, 2014), the Court sent a qualified immunity claim back to the Fifth Circuit concluding that it failed to view the evidence most favorably to the non-moving party, here, a person shot by police. A police officer ordered Robert Tolan to the ground after mistakenly accusing him of having a stolen car. After his mother, who repeatedly explained the car wasn't stolen, protested to standing against her garage door, a police officer, according to Tolan, slammed her against the garage door causing her to fall. Officer Cotton shot Tolan three times after he then rose to his knees and exclaimed "[G]et your f***ing hands off my mom." The Fifth Circuit granted Officer Cotton qualified immunity concluding that it wasn't clearly established that he used excessive force. In an unauthored opinion the Court concluded that the Fifth Circuit "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case," and should have credited Tolan with regards to "lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting." http://www.supremecourt.gov/opinions/13pdf/13-551_ihdk.pdf ML