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## A confounding victory

*“A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment — the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.”*

— ARIZONA V. GANT, NO. 07-542

Last week, on April 21, the U.S. Supreme Court decided *Arizona v. Gant*, a decision being touted as a constitutional victory by privacy rights advocates.

The court held that arresting officers may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search, or if the officers have a reasonable belief that the vehicle contains evidence of the crime for which the person is being arrested.

The decision is both fascinating and a profound example of why Fourth Amendment jurisprudence is worth little more than the paper on which it’s written.

What is most fascinating about the decision is the unlikely judicial alliances found in the 5-4 decision. The majority opinion was authored by Justice Stevens, who was joined by the rather motley crew of Justices Scalia, Thomas, Souter and Ginsberg. Chief Justice Roberts and Justices Kennedy, Alito and Breyer dissented.

That Justice Scalia joined the majority in limiting the scope of a search incident to arrest is, in and of itself, unusual. For so-called “liberal” Fourth Amendment champions such as myself, however, Justice Scalia’s concurring opinion is all the more surreal.

First, Justice Scalia indicated that he would go further than the majority and hold that a search of a vehicle incident to arrest is reasonable only when the police have probable cause to believe the vehicle contains evidence of a crime. Justice Scalia explained that officer safety procedures dictate that the arrestee should be removed from the car prior to the arrest, therefore the

arrestee should virtually never be within reaching distance of the passenger compartment, rendering that exception unnecessary.

Even more confounding is that, when discounting that exception, Justice Scalia acknowledged that police actions do not occur in a vacuum. He explained that the exception allowing officers to search for weapons within reach of the passenger compartment “leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search.”

And, with that simple statement, Justice Scalia broke the golden rule of Fourth Amendment jurisprudence, forever changing the course of Constitutional Law classes across this great land. Hypothetical factual scenarios will necessarily have to be rooted in reality from now on.

No longer will robot-like police officers, devoid of emotion or ulterior motives star in hypothetical arrests. Rather, the factual scenarios will take into account that law enforcement officers are just as human as the rest of us and enter the field carrying their own set of psychological baggage: ripe with prejudices and under pressure, both professional and personal.

Hypothetical examples will be grounded in reality, with the full knowledge that police officers not only are tempted to, but actually do, alter the sequence of events occurring before an arrest to conform to current Fourth Amendment jurisprudence. Evidence obtained illegally ultimately is rendered admissible after creative narration in police reports.

That is the reality, rarely acknowledged, when carefully scripted, fictional scenarios reach the hallowed halls of the U.S. Supreme Court.

That Justice Scalia, of all people, acknowledged that fact, makes this particular victory all the more confounding.

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