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Richard C. Reuben
University of Missouri School of Law, reubenr@missouri.edu

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Search and seizure on the docket amid tensions over police conduct

BY RICHARD C. REUBEN

Somewhere, Justice William O. Douglas must be feeling vindicated.

Back in 1968, after all, the irascible liberal who served on the Court more than 35 years before his death in 1980 had warned in a dissenting opinion in *Terry v. Ohio,* 392 U.S. 1, that the Court was opening a Pandora's box by eschewing the traditional "probable cause" standard for Fourth Amendment search and seizures in traffic stop cases, and permitting warrantless detentions based merely on "reasonable suspicion."

"To allow less [than probable cause] would be to leave law-abiding citizens at the mercy of the officers' whim or caprice," the great dissenter insisted.

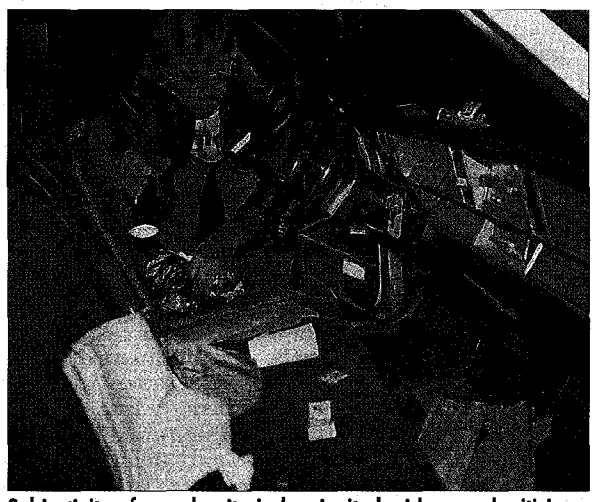
More than a quarter-century later, the confusion over the "reasonable suspicion" approach is still commanding the Supreme Court's attention. A pair of cases on the justices' argument calendar this spring address the tension between legitimate traffic stops and those based on pretext.

Whren v. United States, No. 95-5841, argued April 17, addresses a split in the federal circuit courts over the very meaning of reasonable suspicion. *Whren* arises from a drug arrest of a black man following an initial stop—purportedly for obstructing traffic and turning without signaling—in an area known for drug sales. His lawyers argued unsuccessfully in the lower courts that the traffic stop was just an excuse to determine whether he was involved in illegal drug sales.

Several circuits have upheld such stops as long as any reasonable police officer "would have" made them. Several others, including the District of Columbia Circuit in *Whren,* have taken a more permissive approach, upholding stops if a reasonable police officer "could have" made them.

The other case, argued March 26, tests whether appellate courts should defer to trial court rulings on these issues or review them de novo. *Ornelas v. United States,* No. 95-5257, stems from the search of a car's door panel for drugs. The 7th Circuit at Chicago ruled in favor of deferential review.

"There is a great deal of confusion," says Professor Yale Kamisar of the University of Michigan Law School in Ann Arbor. "Probable cause has been diluted to the point where the police can detain if there is less than a 50 percent chance that crime is afoot, and reasonable suspicion means something less than that, but more than a mere hunch. Well, what does that mean?"



Subjectivity of search criteria has invited widespread criticism.

This term's cases give the justices an opportunity to clear up that disarray.

Ordinarily, this should be easy work for the conservative Rehnquist Court, which has been very cool to the claims of criminal defendants over the years. Indeed, the government won both cases, meaning the justices didn't have to take them to reach a pro-government result. So why bother?

A Pressure Point for Tensions

The answer may lie as much in the times as it does in the law. Tensions between police departments and the communities they serve have been high since the Rodney King case in Los Angeles captured national headlines five years ago. (See "When Good Cops Go Bad," May 1996 *ABA Journal,* page 62.)

"I don't think that the tension we're seeing is of recent origin," says Charles Thomas, a criminologist at the University of Florida in Gainesville, but the King case "blew the lid off" concerns and anxieties that previously had been muted, and made police-community relations a public issue.

Routine traffic stops are a likely point for these pressures to erupt because they are so common, so dangerous for police, and often are the most significant contact that many Americans have with law enforcement. And minorities may well be more inclined to view these stops as reminders of the general distrust with which they are too frequently viewed by white society.

"The reason this is so controversial is because police often use traffic stops as a pretext for stopping someone who may be 'in the wrong neighborhood,' driving 'too fancy' of a car, or who may just 'look suspicious,' " says Carol Watson of Manes & Watson in Los Angeles, who represents civilians in police misconduct claims.

Thomas says, "The ability of police to do their jobs efficiently and effectively presupposes a high level of community support and cooperation. If everyone becomes distrustful of the police, or worse yet, fearful of them, you create a dangerous vacuum in between law enforcement and the public in which everyone loses."

Watson and other critics say the Supreme Court has played a central role in encouraging such activities by giving too much deference to police. Perhaps the Court will use this term's cases to reconsider the outer boundaries of that deference. ■

Richard C. Reuben, a lawyer, is a reporter for the ABA Journal.

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