Written by **Thomas R. Eddlem** on November 28, 2009

Fourth Amendment Under Seige (Again)

The Obama administration's Solicitor General Elena Kagan has called for all 27 judges of the U.S. Ninth Circuit of Appealsa to rehear the seven-year-old baseball-steroid case, after an 11-judge "limited en banc" panel of the Ninth Circuit of Appeals, in a ruling on the case, adopted sweeping new rules for the employment of search warrants. It's a case where both the executive branch and the judicial branch exceeeded their constitutional authority.

The case began in 2002 when the U.S. government sought a subpoena for all 104 urine tests of baseball players in an investigation of the private drug testing company that had conducted the tests, the same company federal officials had suspected of supplying steriods to players. Courts steadfastly issued a warrant to seize only the test results for 10 players against whom federal officials had probable cause to believe had tested positive. However, federal officials seized all 104 urine test results, and both the players and the company — Comprehensive Testing Services, Inc. — have sued to keep the test results private. The press has revealed that four of those tested positive included Alex Rodrigues, Sammy Sosa, David Ortiz, and Manny Ramirez, though their test results were not released. The courts have consistently ruled in favor of CTS, Inc. and the players, but the government under two presidential administrations has obstinately refused to return the test results.

The November 23 U.S. government appeal by Kagan and 22 other federal attorneys followed a special "limited en banc" appellate court rehearing where judges ruled by a 9-2 vote that "the government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents." In that sense, the court rightly censured the Bush-era Justice Department that brazenly ignored the legal limits of the searches courts authorized them to conduct.

But the Ninth Circuit Court "limited en banc" ruling also set out new sweeping new rules for the

conduct of searches of electronic devices in the Internet age that clearly exceeded its authority under Article III of the U.S. Constitution. The Ninth Circuit has traditionally been perceived as the most activist appellate court in the nation, and the ruling called for judges to require prosecutors to sign a waiver to prevent the use of evidence found in plain sight that comes from a search warrant that is not related to the search target. "Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases," the court charged.

The "plain sight" search doctrine is an ancient one in Anglo-American jurisprudence, where police officers are not required to get a search warrant when incriminating evidence is viewable in plain sight by a law enforcement officer performing legal duties. (An example of when the "plain sight" doctrine comes into play would be when a police officer pulls a driver over for speeding and he sees a large bag of drugs propped up in the back seat.) But the application of the doctrine has been complicated by the electronic age, where computers contain all sorts of private information about people's lives. Prosecutors who seize computers with a warrant have recently believed that they are at liberty to search the entire hard drives of computers for any incriminating activity, even if it didn't relate to the subject of the warrant.

The Fourth Amendment to the U.S. Constitution requires that warrants specifically mention what is to be searched, and what is being searched for:

> 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The court's ruling was perhaps — as it claims — a sincere attempt "to strike a proper balance between the government's legitimate interest in law enforcement and the people's right to privacy and property in their papers and effects, as guaranteed by the Fourth Amendment." But the Constitutional role of courts is not to draw up broad-based rules. Rather, it is to simply decide controversies under rules already passed into law by the legislature under the U.S. Constitution.

And that is how Kagan is nominally attacking the decision. She has argued that the "the en banc panel reached well beyond the issues before it and purported to establish binding new procedures for the issuance and execution of warrants in future cases involving computer searches…. The seminal issues surrounding computer searches should be resolved in actual controversies — not through 'guidance' that 'magistrate judges must be vigilant in observing.'" The decision by Chief Judge Alex Kozinski proposes a solution that would ordinarily be handled through the legislative process, rather than through a heavy-handed judicial edict. Kagan rightly argues that the Kozinski decision goes far beyond the issues at hand, which simply involves the executive branch brazenly ignoring a clearly written and limited court warrant.

But Kagan's real complaint is that "sweeping new rules for warrants to search computers that are having an immediate and detrimental effect on law enforcement efforts." She wants no court supervision over warrants — often used as investigative dragnets — concluding that "for courts to supervise the execution of warrants raises serious constitutional concerns." And she makes this absurd argument despite the Fourth Amendment prohibition against issuing a warrant except "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Not surprisingly, Kagan and the rest of the executive branch apparatus view a court warrant as an invitation to seize whatever it wants under any circumstances. Kagan claims that "the Supreme Court has made clear that, subject to the Fourth Amendment's general protection against unreasonable searches, 'it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant.'" Kagan is partly right when she claims that "the detailed protocols announced by the en banc panel conflict with Supreme Court decisions interpreting the Fourth Amendment." But "interpretation" is just the problem, as only people interested in ignoring the requirements of the U.S. Constitution need an interpreter to read the plain-English sentences comprising that document. The Fourth Amendment is not unclear in what the four requirements for a "reasonable" search are for anyone with a high school-level reading ability.

Kagan complains that "In some districts, computer searches have ground to a complete halt, and, throughout the Circuit, investigations have been delayed or impeded." That's entirely possible with the requirement that prosecutors swear off the "plain sight" rule. "Federal agents received information from their counterparts in San Diego that two individuals had filmed themselves raping a 4-year-old girl and traded the images via the Internet," Kagan wrote. "The agents did not obtain a warrant to search the suspects' computers, however, because of concerns that any evidence discovered about other potential victims could not be disclosed by the filter team. The agents therefore referred the case to state authorities."

To the extent that the Ninth Circuit ruling cuts out the legitimate "plain sight" doctrine and allows criminals to go free from overuse of the "exclusionary rule" throwing out illegally obtained evidence, the Ninth Circuit decision needs to be revised. But the Ninth Circuit decision should also be correctly taken as a rightful rebuke of executive branch overreaching on searches. Rules deliniating the difference between legitimate plain-sight cases and an unconstitutional electronic investigative dragnet need to be drawn up. The legislative process could very well act to eliminate the "dragnet" approach applied to search warrants for electronics practiced by law enforcement in recent years, a practice that is clearly eroding the significance of the Fourth Amendment protection of citizens' privacy.