DPCC Special Report:

A Weakened Supreme Court Hurts Law Enforcement

We need a Supreme Court operating at full strength so that our police, prosecutors, and law enforcement professionals have clear guidance to keep Americans safe and Americans have a strong shield for their civil rights and liberties. But Republicans are threatening to put politics first by listening to the most extreme, right wing voices and leaving a vacancy on the Supreme Court open for over a year.

With only eight justices, the Court could deadlock on critical issues relating to law enforcement and individual rights, creating uncertainty and even making it possible that people in different parts of the country have different rights and liberties. If a deadlock occurs, then an important, national issue would remain undecided until the Court was able to rehear that case or until another case raising the same issue came before it. The Supreme Court often considers cases that involve disagreements between the Circuit Courts. Thus, a divided Court could very well also result in different laws in different parts of the country.

A divided Court could result in inconsistent law enforcement practices and protections for Americans in different parts of the country. Such a confusing, divided outcome would do little to make us safer or safeguard our freedoms. It's time for Senate Republicans to put the Constitution above politics and do their job by holding a hearing and a vote on Judge Merrick Garland's nomination to the Supreme Court.

The following report highlights some of the ways that unprecedented Republican obstruction weakens the Court, could create confusion for law enforcement, and threatens to compromise Americans' rights.

1. Weak Signal on Cell Phone Tracking

The Issue: Do law enforcement professionals need to obtain a warrant in order to get records from cell phone companies that will allow them to track past locations of Americans' cell phones?

The Background: Last year, a panel of judges in the Fourth Circuit (which covers the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia) ruled in *United States v. Graham* that obtaining historical cell phone location information for an extended period of time

can provide the government with a "comprehensive view" of the private details of an individual's life, including where they worship and the individuals they know. The judges concluded that the government was therefore required under the Constitution's Fourth Amendment to obtain a warrant before obtaining the past location information of a cell phone over an extended period of time from a cell phone company's records. The case is currently under review by all of the circuit's judges.

The Fifth and Eleventh Circuit Courts (which cover the states of Louisiana, Mississippi, and Texas and Alabama, Florida, and Georgia), however, have issued a conflicting ruling that states a search warrant is not required to obtain this information.

2. **Disagreement Over Encryption of Consumer Devices**

The Issue: Can the government compel a private company to decrypt a consumer device?

The Background: Over the past few months, two courts on opposite sides of the country have ruled differently on whether the government can compel a private company to decrypt a consumer device, such as a cell phone. In a high-profile battle earlier this year, Apple fought a magistrate judge's order that would have compelled Apple to unlock the encrypted iPhone of one of the shooters in last December's terrorist attack in San Bernardino, California. Apple refused to comply with the court order, arguing that the government did not have legal authority to compel Apple to create new software to bypass the encryption security features, and that creating such software would compromise the security of millions of iPhone users.

While this legal dispute was pending, a judge in New York issued a decision in a different case agreeing with Apple that the government did not have legal authority to compel Apple to decrypt a phone in that case. The government ultimately was able to access the San Bernardino shooter's phone without Apple's assistance. However, the legal question remains unresolved and could have widespread ramifications for law enforcement, the technology industry, and American consumers.

3. **Sixth Amendment Constitutional Right to a Jury Trial Limited**

The Issue: Can a federal appellate court affirm the lawfulness of an enhanced prison sentence that is based largely upon a judge's disputed factual finding that a defendant committed a murder, even though the defendant had not been charged with murder?

The Background: *Hebert v. U.S.* concerns the actions of a Louisiana Sheriff's Deputy, Mark Hebert. In 2007, while responding to a single-car accident, Hebert stole the wallet of Albert Bloch, the unconscious victim of that accident. Hebert then used the contents of Bloch's wallet to make over $15,000 in fraudulent transactions. Hebert pled guilty to stealing Bloch's wallet and to the fraudulent transactions at issue.

Based on his admissions and criminal history, his initial recommended sentence was calculated to be between 46 and 57 months' imprisonment. Before imposing a sentence on Hebert, however, the lower court judge held a special hearing to address the allegation that Hebert had also murdered Bloch. Although, the prosecution had never charged Hebert with murder, the lower court judge used this special hearing to conclude that Hebert had murdered Bloch. Based largely on this murder finding, the lower court judge sentenced Hebert to 92 years' imprisonment.

Hebert argued that his sentence, because it was based on a fact that was found by a judge rather than by a jury beyond a reasonable doubt, violated his Sixth Amendment constitutional right to a jury trial and that, but for the judge's murder finding, his sentence would be unreasonable and therefore unlawful. The lower court, however, rejected his argument, and, a federal appellate court affirmed the lower court's decision sentencing Hebert to 92 years' imprisonment.

A resolution in *Hebert v. U.S.* would provide guidance to circuit courts regarding the interaction between one's Sixth Amendment constitutional right to a jury trial and a court's reasonableness review of a prison sentence. Until the Supreme Court further clarifies whether one's constitutional right to a jury trial should constrain judicial review of the reasonableness of a prison sentence, people charged with the same crime in different parts of the country could face greater prison sentences because of differing conclusions reached by the courts as to whether an enhanced prison sentence, that turns on a fact found by a judge, rather than a fact found by a jury beyond a reasonable doubt, is reasonable and therefore lawful.

Conclusion

These are just some of the critical issues that the United States Supreme Court may confront in the near future. As a group of former federal prosecutors noted in their op-ed:

> For federal prosecutors, federal agents and criminal investigations, a year is a lifetime. We have seen real threats, from within and without, facing the people in our communities each day. Whether it is the heroin epidemic or the threat of terrorist recruitment, there are daily dangers facing real people. While law enforcement stands ready and able to protect the public from those threats, they need to know the rules of the road. Uncertainty about those rules impedes those efforts. The courts are the place where those rules are decided, and the Supreme Court is the ultimate arbiter of the hardest and most important questions facing law enforcement and our nation. [Seattle Times, 2/27/16]

It is time for the U.S. Senate to do its job by fully and fairly considering the nomination of Merrick Garland to the United States Supreme Court. Deliberately blocking any nomination to the Court until next year will mean that the Court will be undermined from serving as the nation's final arbiter of law for not only the current Supreme Court term but also for the next term that begins in October. The American people deserve to have a fully functioning federal government. Under our Constitution, that includes a Supreme Court which can serve as the final arbiter of law.

Law Enforcement Professionals and Judges Agree We Need Nine on the Supreme Court

- **Former U.S. Attorneys:** "Unsettled legal questions regarding search and seizure, digital privacy and federal sentencing are either pending before the Supreme Court or headed there. It is unfair and unsafe to expect good federal agents, police and prosecutors to spend more than a year guessing whether or not their actions will hold up in court. It is unfair to expect citizens whose rights and liberties are at stake to wait for answers while their homes, emails, cellphones, records and activities are investigated." [Seattle Times, 2/27/16]

- **Former Supreme Court Justice Sandra Day O'Connor:** "I think we need somebody there now to do the job, and let's get on with it." [Politico, 2/18/16]

- **Former Appeals Court Chief Judges Patricia M. Wald and John J. Gibbons:** "[W]e urge you as leaders of the Senate conscientiously to fulfill your 'advise and consent' role on any forthcoming nominations by the President to fill Justice Scalia's seat on the Supreme Court." [Letter to Senate Leaders, 3/10/16]

- **Former DC Appeals Court Chief Judge Abner Mikva**: "Justice Scalia would insist on fulfilling these plain words of the Constitution and the duties imposed by the Constitution for the president to nominate and the Senate to approve or disapprove the nominee." [Chicago Tribune, 3/7/16]

- **Former Ohio Court of Appeals Judge Mark Painter:** "The U.S. Senate has a constitutional obligation to act on nominees and ensure our courts function as intended." [Cincinnati Enquirer, 3/1/16]

- **Former George W. Bush Attorney General Alberto Gonzales:** "[T] here's just no question in my mind that as president of the United States, you have an obligation to fill a vacancy." [Huffington Post, 2/16/16]

- **Former Obama Attorney General Eric Holder:** "The notion that the Majority Leader Senator McConnell, without knowing who the nominee was going to be pronounced the nomination dead even before [its] arrival is in some ways the height of arrogance…But also I think it's irresponsible." [BuzzFeed, 3/14/16]

- **21 State Attorneys General:** "We urge the Senate to carry out its responsibilities by allowing for full consideration of a qualified nominee to the Supreme Court by holding a hearing and a vote without unnecessary delay." [Letter to Senate, 3/10/16]

- **Former Prosecutors, Law Enforcement Agents, and Advocates:** "Twenty years ago, the nation could not find a better lawyer to manage the investigation and prosecution of what was then the worst crime ever committed on American soil. Today, our nation could not find a better judge, nor a more honorable man, to join its highest court." [Letter to Senate, 4/19/16]