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U.S. Supreme Court upholds warrantless breath tests but limits warrantless blood tests.

In July, the United States Supreme Court ruled on a group of three consolidated drunk driving cases. The *Birchfield v. North Dakota* decision held that law enforcement is permitted to conduct warrantless blood alcohol content (BAC) tests, if administered as *breath tests*, on suspected drunk drivers, and to criminalize the refusal to submit to such a test. In contrast, the court ruled that the Fourth Amendment prohibits law enforcement from requiring suspected drunk drivers to submit to a *blood test* under similar circumstances without first obtaining a warrant. The effect of the latter ruling is that states' "implied consent" laws, which make it a crime to refuse a blood test for suspected drunk driving, are now invalid.

This trio of cases revolve around implementation of "implied consent" laws. Federal and state governments, the court explained, have taken steps to prevent drunk drivers by passing "implied consent" laws. Originally, these implied consent laws only resulted in the suspension of a person's driver's license as a consequence of refusing to submit to a BAC test. In more recent times, implied consent laws were changed to command more severe criminal penalties.

Each individual involved in the *Birchfield* cases had been arrested for drunk driving. Two of those individuals were informed that it was a crime to refuse to submit to a BAC test. They nonetheless refused and were criminally prosecuted. In one case, the individual refused to submit to a breath test; in the other, the defendant refused a blood test. The third individual submitted to a blood test after being told it was a crime to refuse the test.

All three individuals argued that the state actions against them were unconstitutional violations of their rights under the Fourth Amendment of the U.S. Constitution. Specifically, they argued that the Fourth Amendment prohibits criminalization of a person's refusal to submit to a BAC test, whether it be a blood or a breath test.

The Fourth Amendment to the U.S. Constitution protects U.S. citizens from unreasonable search and seizure by the government. However, the court has noted in previous cases that there are exceptions to the rights provided by the Fourth Amendment, including the "search-incident-to-arrest" exception. This exception generally allows law enforcement to categorically search individuals subject to a lawful arrest as well as the "area within the control of the arrestee" without first obtaining a warrant.

The test that the court uses to determine whether a search is "incident-to-arrest," and therefore exempt from the general requirement for a warrant, is the following:

> "We generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which it his needed for the promotion of legitimate governmental interests.'"

In other words, the court implements a balancing test by weighing an individual's privacy rights against the state's interest in preventing drunk driving.

Applying the above test to the cases at hand, the court first considered the impact of breath and blood tests on individual privacy interests. The court held that breath tests do not "implicate significant privacy concerns" because those tests are just a slight inconvenience (i.e., they merely require the individual to exhale) and the degree of physical intrusion is negligible (i.e., they do not require piercing of the skin). Furthermore, the information obtained from a breath test is minimal. In comparison to obtaining a DNA sample through a cheek swab – a type of warrantless search the court previously upheld as valid, even though it may give law enforcement authorities a "wealth" of additional and highly personal information – a breath test is "capable of only revealing one bit of information": the BAC of the individual.

Blood tests, however, are "a different matter," the court stated. The tests involve piercing the skin to remove a "part of the subject's body." While breathing and exhaling air is a natural condition of humans, bleeding continuously is neither natural nor desirable. Additionally, a blood test "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading."

The legitimate governmental interests in obtaining BAC readings for persons arrested for drunk driving, the court said, is of "paramount" interest because it keeps public highways safe. The court declared the sheer number of casualties resulting from car accidents, including the "carnage" and "slaughter" caused specifically by drunk drivers, as "staggering." Conclusively, the court found that the implied consent laws serve a "very important function."

The court discussed many other related issues: the purpose of warrants, the need for Fourth Amendment exceptions (one of which is to prevent the destruction of evidence), and the burden on law enforcement to require a warrant for every single suspected drunk driving arrest. Ultimately, though, the court made its ruling by comparing the effect of the BAC tests on individual privacy rights against the asserted governmental interests of abating drunk driving. Based on this analysis, the court held that warrantless breath tests for suspected drunk drivers are constitutional under the Fourth Amendment because their effect on individual privacy rights is relatively insignificant compared to the government's interest in public highway safety. However, the same cannot be said of blood tests, where the effect on individual privacy interests is so great that such a test necessitates a warrant. With regard to the implied consent laws, the court held that, while it generally approves of implied-consent laws which impose civil and evidentiary penalties, "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." It is noteworthy to mention that the court specifically did not address which side of the analysis urine BAC tests fall under.

Vermont, like every other state in the nation, has an implied consent law. Vermont law imposes civil penalties if a person refuses to submit to a BAC test (whether blood or breath). The penalty is that a person's "privilege to operate" a motor vehicle is suspended for 90 days and the refusal may be offered into evidence against the person at trial. This provision is probably still valid under *Birchfield* because it imposes a civil rather than criminal penalty for refusal. On the other hand, the *Birchfield* decision may invalidate the Vermont law that states that if a person refuses to submit to a BAC test, and that person has also previously been convicted of drunk driving, that person may be charged with criminal refusal.

The entire decision is archived at https://www.supremecourt.gov/opinions/15pdf/14-1468_8n59.pdf.

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