

RELEASE IN PART B5

From: Koh, Harold Hongju <KohHH@state.gov>
Sent: Thursday, April 5, 2012 3:14 PM
To: H
Subject: Possible legislative responses to strip search decision

As we discussed, this week, in a 5-4 decision, the Supreme Court upheld the use of visual strip searches (without physical contact) for every individual who enters the general population of a detention facility. Under this rule, the Fourth Amendment does not require reasonable suspicion that the detainee is hiding contraband, or that the detainee is alleged to have committed more than a minor offense, before prison or jail officials conduct such a search. The Department of Justice had filed an amicus brief supporting this result.

As noted by the Chief Justice and Justice Alito, the Court left open the possibility of exceptions, such as where the detainee is to be segregated from the general population. Justice Kennedy's majority opinion, however, appears to rule out a test based on the seriousness of the offense. Justice Breyer, in his four-justice dissent, would have held that a strip search of an individual arrested for a minor offense that does not involve drugs or violence is "unreasonable" unless supported by reasonable suspicion. Critics of the Court's opinion have argued that it embraces a "police-state logic" that seeks to eliminate any and all security risks, without balancing that goal against other values such as privacy, liberty, and anti-discrimination.

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