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STOP-AND-FRISK UNDER PRESIDENT-ELECT DONALD TRUMP'S ADMINISTRATION

*Manny Arora**

INTRODUCTION

First, this Article will discuss President-elect Trump's controversial comments regarding the "Stop-and-Frisk" jurisprudence in criminal law. Second, this article will elaborate on the history of the jurisprudence surrounding the Stop-and-Frisk case law by summarizing four cornerstone Supreme Court holdings, which have molded the Stop-and-Frisk law today. Lastly, this article will conclude that President-elect Trump's ability to elect Supreme Court justices in the future raises legitimate concerns that the Stop-and-Frisk law will be expanded, which may infringe on our constitutional rights as American citizens.

I. STOP-AND-FRISK UNDER THE TRUMP ADMINISTRATION

In the wake of Americans selecting Donald Trump to be the forty-fifth president of the United States, we are faced with many questions regarding the sanctity of our constitutional rights. While the 2016 election results would indicate our desire to have less government intervention in our lives, Trump's campaign rhetoric makes plausible that law enforcement will become more intrusive than ever before. One area of considerable concern is the president elect's controversial opinion to reinstate the policing tactic known as "stop-and-frisk."

Trump has publicly praised New York City's prior use of "stop-and-frisk" policing tactics and has expressed a desire to begin implementing it elsewhere.¹ For example, Trump has stated, "I see what's going on here, I see what's going on in Chicago, I think stop-and-frisk. In New York City it was so

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¹ See Rudolph L. Giuliani, *Trump Is Right About 'Stop and Frisk,'* WALL ST. J. (Sept. 27, 2016, 7:15 PM), <http://www.wsj.com/articles/trump-is-right-about-stop-and-frisk-1475018152>.

incredible, the way it worked.”² While a “stop-and-frisk” procedure that is narrowly tailored, limited in scope, and based on a reasonable articulable suspicion is constitutional³, the more expansive application of “stop-and-frisk” utilized in New York City was ruled to be unconstitutional in 2013.

II. AN OVERVIEW OF STOP-AND-FRISK LAW UNDER THREE SUPREME COURT CASES

A. *Supreme Court Holding in Terry*

In *Terry v. Ohio*, the Supreme Court stated what constitutes a valid “stop-and-frisk” and when police officers can frisk a suspect in order to protect themselves from danger.⁴ First, for a stop to comply with the Fourth Amendment and not violate an individual’s right to be free from unreasonable search and seizure, it must be based on a “reasonable articulable suspicion” that criminal activity is in progress or about to happen.⁵ Police officers may make a stop when the facts available at the time would “warrant a man of reasonable caution in the belief” that the action taken was appropriate.”⁶

Second, *Terry* also noted that there is a legitimate interest for an officer “in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”⁷ Therefore, if an officer has made a valid stop and reasonably believes that she is dealing with an armed person, it is permissible to frisk that person for weapons.⁸

All *Terry* stops must be based on reasonable articulable suspicion, and such stops must be conducted in a racially neutral manner. These standards were not met by the NYPD’s “stop-and-frisk” practices praised by Trump. In *Floyd v. City of New York*, the district court reviewed the NYPD’s practices and found that the tactics employed violated people’s Fourth and Fourteenth Amendment rights. Further, it found that the policy was implemented in a racially

² Emily Flitter, *Trump Praises ‘Stop-and-Frisk’ Police Tactic*, REUTERS (Sept. 22, 2016, 7:37 PM), <http://www.reuters.com/article/us-usa-election-trump-idUSKCN11R2NZ>.

³ See *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

⁴ *Terry v. Ohio*

⁵ See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

⁶ *Id.* at 22.

⁷ *Id.* at 23.

⁸ *Id.* at 27.

discriminatory manner, which disproportionately affected minorities.⁹ The policy was found to have violated the Equal Protection Clause because the “policy of indirect racial profiling cannot withstand strict scrutiny” analysis.¹⁰

As a whole, the policy of “targeting ‘the right people’” focuses on targeting entire racial classifications of people rather focusing on specific wrongdoers.¹¹ Further, this policy resulted in substantially more minorities being stopped-and-frisked than whites. Also, minorities were also more likely to face a use of force from police officers.¹² In reaching its holding, *Floyd* noted that the tactics being implemented violated the “bedrock principles of equality” by “targeting young black and Hispanic men for stops based on the alleged criminal conduct of other young black or Hispanic men.”¹³

B. Supreme Court Holding in *Wardlow*

The Supreme Court examined some of the data generated from the NYPD’s tactics in *Illinois v. Wardlow*. The concurrence referenced the “stop-and-frisk” procedures employed during Rudy Giuliani’s term as mayor in the late 1990s.¹⁴ The Court stated, “many stops never lead to an arrest, which further exacerbates the perceptions of discrimination felt by racial minorities and people living in high crime areas.”¹⁵

The Supreme Court opined that *even if* the data yielded from New York City’s “stop-and-frisks” were not racially discriminatory, “they would still indicate that society as a whole is paying a significant cost in infringement on liberty by these virtually random stops.”¹⁶ Safety comes at a price. This price is appropriately paid on the battlefield, not while pedestrians are minding their own business walking down the streets of their neighborhoods.

This is especially apparent when reviewing Justice Scalia’s recent opinions while serving on the Supreme Court.

⁹ *Floyd v. City of N.Y.*, 959 F.Supp.2d 540, 590 (S.D.N.Y. 2013).

¹⁰ *Id.* at 663.

¹¹ *Id.*

¹² *Id.* at 661.

¹³ *Id.* at 664.

¹⁴ *Illinois v. Wardlow*, 528 U.S. 119,132–33 (2000).

¹⁵ *Illinois v. Wardlow*, 528 U.S. 119, 133 n.8 (2000).

¹⁶ *Id.*

C. *Supreme Court Holding in Kyllo*

Justice Scalia, who Trump says that he admires, and who was a zealous protector of the Fourth Amendment, would never have tolerated this version of “stop-and-frisk”. In *Kyllo v. United States*, the Supreme Court evaluated what constitutes a “search” under the Fourth Amendment when law enforcement used infrared technology to gather information about the interior of a home that could not otherwise have been obtained without physical entry via a search warrant.

In *Kyllo*, agents were suspicious that a man was growing marijuana inside his home.¹⁷ The agents then used a thermal-imaging device to determine if there was the same type of heat that is emitted from lamps that are often used to grow marijuana indoors.¹⁸ After determining that the heat was typical for indoor marijuana horticulture, the agents obtained a search warrant for the petitioner’s home.¹⁹ Justice Scalia wrote for the majority that to not “leave the homeowner at the mercy of advancing technology . . . the rule we adopt must take account of more sophisticated systems that are already in use or in development.”²⁰ The Court held that the act of using thermal imaging technology was itself a “search” for Fourth Amendment purposes.

D. *Supreme Court Holding in King*

More recently, the majority in *Maryland v. King* held that a search using a Defendant’s cheek swab to obtain her DNA after arrest for a serious offense was reasonable under Fourth Amendment.²¹ In contrast, Justice Scalia dissented and opined that:

Today’s judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the “identity” of the flying public), applies for a driver’s license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise.

¹⁷ *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 35–36.

²¹ *Maryland v. King*, 133 S.Ct. 1958, 1980 (2013).

But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.²²

CONCLUSION

Trump's advocacy of this unconstitutional "stop-and-frisk" procedure, coupled with his ability to nominate Supreme Court Justices who may be called upon to determine whether such policies pass constitutional muster raise legitimate concerns that our liberty, may be further infringed. While Trump says he wants justices in Justice Scalia's mold to be appointed, perhaps he should actually read an opinion penned by Justice Scalia before advocating for police tactics that violate our freedoms and stand in stark contrast to Justice Scalia's core beliefs.

²² *Id.*