

Afterword

FEBRUARY 2016

As this book was in the final stages of production, Justice Antonin Scalia suffered a heart attack and died. While we discussed in chapter 8 the possible consequences if Justice Scalia were to retire, no one expected such a sudden end to his life and judicial career. His death marks the close of almost thirty years on the Supreme Court, a time in which his Fourth Amendment decisions and approaches to the law significantly influenced case outcomes and police practices. Critics and supporters alike agree that Antonin Scalia possessed a powerful mind and was an influential justice in Fourth Amendment cases.

One area of the law shaped by Justice Scalia is the resurrection of the trespass doctrine. Justice Scalia's decisions in *United States v. Jones* (2012) and *Florida v. Jardines* (2013) relied on a narrow property-based approach to the Fourth Amendment in which the physical intrusion into a constitutionally protected area was the primary rationale for suppressing the search. It is unlikely that a Court without Justice Scalia will apply this doctrine in future cases because the other justices seem much more committed to a *Katz* reasonable expectation of privacy approach. Perhaps more significantly, Scalia's death could mark the turning point for the demise of the third party doctrine, which has come under fire in several cases in recent years. The third party doctrine is key to understanding the issues raised when the police want to use a cell phone to track the location of a suspect and to resolving issues of the constitutionality of granting law enforcement access to data stored by cell and internet service providers. Both types of cases are likely to come to the Court in the next few years.

Justice Scalia's passing brings into sharp focus the effect that presidential elections have on the Court. In the days after his death, Republican senators and candidates urged that no nominee be confirmed until after the election, but the president insisted that it is his constitutional duty to nominate a replacement and that the Senate should fully consider his choice. A third Obama appointment could potentially shift the balance of power on the Court and further limit the influence of the jurisprudence of crime control. While Justice Scalia voted for the defendant in more than half of the Fourth Amendment

cases in the last five years, another Obama justice would likely be a stronger, and less idiosyncratic, ally of the three liberals on the current Court. The addition of a justice more sympathetic to privacy issues could mean that Justice Breyer would become the swing vote with regard to search and seizure law. Justices Thomas, Alito, and Kennedy would likely remain supporters of law and order and would likely be joined by the chief justice, except in cases involving digital privacy.

Our book is titled *The Fourth Amendment in Flux*, and we have argued that many issues that were seemingly settled law under the jurisprudence of crime control are being revisited today. Justice Scalia's death only further increases the sense of flux by injecting an unknown voice into future cases and removing one of the Court's most vibrant personalities. Moreover, there are still two additional justices on the Court who are older than Scalia was at the time of his death. Even if Obama is successful in nominating a replacement for Scalia, it is very likely that the winner of the 2016 presidential election will have the opportunity to appoint at least one member of the Supreme Court. Of course, if no replacement for Scalia is confirmed prior to the inauguration of a new president, the impact of the election will be magnified. On one hand, if a Republican wins the presidency in 2016, the crime control approach to the Fourth Amendment could be strengthened and could dominate the Court in a way not seen since the Rehnquist Court. On the other hand, if a Democrat wins, at least one justice with weaker ties to the jurisprudence of crime control is likely to replace Justice Scalia. We do not possess a crystal ball that allows us to see into the future, but we do understand that the jurisprudence of crime control will not be eliminated overnight regardless of who is appointed to the Court.

All of this comes at a time when the partisan rancor in our nation seems to be at its worst and when both liberals and some conservatives are pressing for criminal justice reform. In addition, issues of digital privacy grow in importance as our society becomes ever more dependent on the use of digital devices. The political pressures on the Court are great. Justice Scalia's death not only reinforces our argument that the Fourth Amendment is in flux, but in many ways makes it even more significant, as key challenges in the law of search and seizure seem certain to come to the Court in the next several years.