

OPINION

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## Will Privacy Go to the Dogs?

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New Haven

THIS Halloween, the United States Supreme Court will devote its day to dogs. The court will hear [two cases](#) from Florida to test whether “police dog sniffs” violate our privacy rights under the Fourth Amendment to the Constitution. These two cases have not yet grabbed many headlines, but the court’s decisions could shape our rights to privacy in profound and surprising ways.

The [Fourth Amendment](#) protects the right of the people to be free from “unreasonable searches and seizures.” Ordinarily, unless the police trespass or otherwise intrude upon [a reasonable expectation of privacy](#), they need not have probable cause or a warrant to justify their investigative activity. For decades now, the court has struggled with what it means for a person to have a “reasonable expectation of privacy” — especially when the police investigate with sense-enhancing means or technology.

[One of the new cases](#) asks the court to clarify how accurate a dog must be in terms of its past identification of contraband — for, as Justice David H. Souter [once warned in dissent](#), “The infallible dog, however, is a creature of legal fiction.”

My wife and I learned this firsthand at the Supreme Court itself several years ago. We were visiting the court for a reunion dinner of former law clerks of Justice Harry A. Blackmun. My mistake was to drive a car in which our dog — a tennis-ball-loving Australian shepherd — often rode. As we drove up to the back gate of the court to enter its highly secure underground parking garage, an officer emerged from a guard shack with a fearsome bomb-sniffing German shepherd and circled our car. The bomb dog suddenly perked up, and the officer coldly instructed me to open the trunk of my car. I watched as the court’s canine rose up on its haunches — tail wagging — and snagged from inside one of my dog’s prized tennis balls. No bombs or contraband were found.

The [second of the court’s new dog cases](#) asks if the police may take a drug-sniffing dog to the front porch of a home to sniff for evidence of marijuana inside. The court has always accorded special privacy protection for people’s homes. In 2001, the court ruled, in [an opinion written by Justice Antonin Scalia](#), that police officers violated a homeowner’s privacy when they parked across the street from a home and, without a warrant, used a thermal imaging device to scan

the outside of the house for signs of unusual heat inside that might be caused by high-intensity lighting, which is often used to grow marijuana.

If the police can't thermal-scan your home from the street, why let them dog-scan it from your front porch? The [government argues](#) that a dog is alerted only by illegal contraband, while a thermal imager is set off more generally by "innocent" and "guilty" heat of all kinds coming from a home — whether from grow lights or from, [as Justice Scalia noted in the thermal imager case](#), "the lady of the house" as she "takes her daily sauna and bath."

But, arguably, this distinction is misplaced. If the court rules for the government in the home-sniff case, it is hard to see why the police could not station drug-sniffing dogs outside the entrances to every school, supermarket and movie theater as a routine form of drug interdiction. Dog sniffs would never involve a privacy intrusion and therefore would not trigger the requirement that the police obtain a warrant or have individual suspicion.

Moreover, today's dogs will give way to tomorrow's high-tech contraband-scanning devices that, under the reasoning pressed in the dog cases, would free the government to conduct routine scans of people's homes or their bodies for all manner of contraband (or possibly for noncontraband, like marijuana grow lights, that are most commonly associated with illegality).

In the meantime, those of us who neither live in gated communities nor build gates to keep the police from our porches will retain much less privacy protection in our homes, despite [the court's past assurance](#) that "every man's house is his castle" and even the "poorest man may in his cottage bid defiance to all forces of government." This is the danger of basing the Constitution's protection on the efficacy of a dog's nose or the latest high-tech sensing device rather than on the privacy of the intimate space that a dog or device allows the police to invade.

On Oct. 31, the court will have the chance to preserve a long-held tenet of American privacy. The right choice is to affirm our rights in our homes and our persons to be free, in the absence of emergency circumstances, from the warrantless use of dogs and sense-enhancing technology.

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