Roberts at 10:

Roberts and the Fourth Amendment: A Mostly Pro-Government Vote with Some Important Exceptions

By Brianne Gorod

I. Overview

Some of the snapshots in our yearlong look at John Roberts's first decade as Chief Justice have focused on areas of the law, such as federal power and race, in which Roberts has written a number of significant opinions himself. But when it comes to the subject of this snapshot—the Fourth Amendment—Roberts has far more often than not joined the opinions of others, although he did write one very significant Fourth Amendment opinion just last year. Nonetheless, examining where Chief Justice Roberts stands on the Fourth Amendment is an important undertaking, not only because of the sheer number of Fourth Amendment cases the Court considers, and not only because of the potential impact those cases can have on the lives of individual Americans, but also because this is an area of the law in which one can never assume that votes will break down along the Roberts Court's 5-4 ideological axis. To be sure, such 5-4 decisions certainly exist in this context, but there have also been surprises: cross-ideological votes in some divided cases, not to mention two significant decisions that were decided unanimously (at least as to the proper result).

This is also an area of the law in which John Roberts himself has occasionally been surprising. At Roberts's confirmation hearing, there was relatively little discussion of his views on the Fourth Amendment, but during his short tenure on the D.C. Circuit, Roberts had established a record of consistently siding with the police over privacy. While Roberts's votes as Chief Justice have largely followed the same pattern (by our count, Roberts has voted for the government in just under 85% of the Fourth Amendment cases the Court has decided[1]), there have been exceptions. In a couple of cases, his votes, while still cast in favor of law enforcement, have reflected a more nuanced position than that of one or more of his colleagues. Moreover, he has on several occasions voted in favor of more robust Fourth Amendment protections, including in two recent cases involving new technologies; in one of those, he wrote a powerful tribute to the Fourth Amendment's role in protecting personal information. Given that new technologies will likely be involved in a significant number of Fourth Amendment questions in the years to come, these decisions are especially significant.[2]

[1] We have looked at 37 Fourth Amendment cases that were decided by the Roberts Court prior to the publication of this snapshot. Roberts voted in favor of the government in 31 of those cases.

[2] This snapshot will not discuss all of the few dozen Fourth Amendment cases decided during Roberts's first decade on the Court, but it does discuss virtually every case that was sharply divided (*i.e.*, 5-4 and 6-3 votes). All of the cases not discussed in this snapshot were decided in favor of the government, except for *Brendlin v. California*, 551

Thus, while John Roberts is surely no Fourth Amendment champion—far more often than not, he has voted for crabbed interpretations of the Fourth Amendment and in favor of deference to law enforcement—his votes in recent cases provide reason to hope that when it comes to the Fourth Amendment, John Roberts's vote is not a foregone conclusion. They suggest that, at least occasionally, Chief Justice Roberts will recognize and respect the important role that the Fourth Amendment, properly understood, plays in protecting the privacy of the American people.

II. Confirmation Hearing

When then-Judge John Roberts was nominated to the high court, there was significant discussion of his record and views on many issues. Relatively little attention, however, was paid to his views on the Fourth Amendment. To be sure, one study looked at Roberts's votes in Fourth Amendment cases while serving on the D.C. Circuit and concluded that "[i]n each case, Judge Roberts sided with the government."[3] The author of that study credited Roberts with generally following established Supreme Court precedent, but also observed that "Judge Roberts's record discloses a willingness—perhaps even an eagerness—to depart from the reasoning of the lower courts to uphold the governmental actions."[4]

In addition, one Fourth Amendment opinion that Roberts authored while on the D.C. Circuit engendered considerable controversy: *Hedgepeth v. Washington Metropolitan Area Transit Authority*, more colloquially known as the French Fry case.[5] In that case, then-Judge Roberts held that the arrest and search of a twelve-year-old girl, "all for eating a single french fry in a Metrorail station," did not violate the Fourth Amendment.[6] In what would become a familiar Roberts approach, Roberts wrote that "[n]o one is very happy about the events that led to this litigation," but the "question before [the court] . . . is not whether [the Metro policies that led to the girl's arrest] were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution."[7] Roberts concluded that they did not, noting in part that the arrest was "supported by probable cause" and therefore the court could not "inquire

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U.S. 249 (2007), a 9-0 ruling in which the Court held that when the police make a stop, a passenger in the car, just like the driver, is "seized" within the meaning of the Fourth Amendment, and *Grady v. North Carolina*, 135 S. Ct. 1368 (per curiam), a 9-0 ruling in which the Court held that a state conducts a search when it attaches a tracking device to a person's body. Among the cases not discussed, Roberts wrote opinions for the Court in two of them: *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), in which the Court held, 9-0, that regardless of their subjective motivations, the police were justified in entering a home without a warrant under the exigent circumstances exception to the warrant requirement, and *Heien v. North Carolina*, 135 S. Ct. 530 (2014), in which the Court held, 8-1, that the reasonable suspicion required for a traffic stop can rest on a reasonable mistake of law.

[3] Thomas K. Clancy, *Hints of the Future?: John Roberts, Jr.'s Fourth Amendment Cases as an Appellate Judge*, 35 U. BALT. L. REV. 185, 214 (2005).

[4] *Id.*

[5] 386 F.3d 1148 (D.C. Cir. 2004).

[6] *Id.* at 1150.

[7] *Id.*

further into the reasonableness of a decision to arrest."[8] To some observers, Roberts's opinion in that case was evidence of a "strict constructionism" that did not permit the application of "common sense."[9] To others, it was a decision that required "'some explanation.'"[10]

But despite the interest in the French Fry case, Judge Roberts's views on the Fourth Amendment engendered little discussion at his confirmation hearing, and the Amendment came up only a couple of times. First, when asked whether the right to privacy exists in the Constitution, Roberts said that it does, noting that "[t]he right to privacy is protected under the Constitution in various ways. It's protected by the Fourth Amendment, which provides that the right of people to be secure in their persons, houses, effects and papers is protected."[11] Second, and subsequently, Roberts was asked about a statement in an opinion by Justice Brandeis that described "'the right to be left alone'" as "'the most comprehensive of rights and the right most valued by civilized men.'"[12] In response, Roberts said he "agree[d] with [Brandeis's] expression that it's a basic right to be left alone" and that "that animating principle is a very important one," but he declined to comment on the specific legal issue Brandeis was discussing in the opinion.[13]

In short, unlike many of the topics that have been the subjects of prior snapshots, there was little substantive discussion of the Fourth Amendment at John Roberts's confirmation hearing. That said, his limited record on the Court of Appeals gave little reason to think that as Chief Justice he would often vote for a robust interpretation of the Fourth Amendment and the privacy protections that it provides. As the next section discusses, that has been largely—but not entirely—true.

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[8] *Id.* at 1159.

[9] Kim Lane Scheppele, *Ansche Hedgepeth's French Fry*, BALKINIZATION (July 20, 2005), http://balkin.blogspot.com/2005/07/ansche-hedgepeths-french-fry.html.

[10] Nat Hentoff, *John Roberts v. One French Fry*, THE VILLAGE VOICE NEWS (Sept. 6, 2005), http://www.villagevoice.com/2005-09-06/news/john-roberts-v-one-french-fry/ (quoting Harvard Law Professor Laurence Tribe).

[11] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 146 (2005), available at http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html [hereinafter *Confirmation Hearing*].

[12] *Id.* at 227-28. As quoted at the hearing, Brandeis also stated that "'[t]o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.'" *Id.* at 228.

[13] *Id.* Roberts was also asked about a memo he wrote in the early 1980s while serving as a White House lawyer in which he suggested that a "cure" to the Supreme Court being "overworked" might be, among other things, to "giv[e] coherence to Fourth Amendment jurisprudence by adopting the good-faith standard." But the question did not ask —and Roberts did not indicate—whether the memo accurately reflected his views on then-current Fourth Amendment doctrine. *Id.* at 309.

III. Fourth Amendment Cases During Roberts's First Decade on the Court

A. Pro-Government Votes

In the context of the Fourth Amendment, Chief Justice Roberts has, far more often than not, cast votes in favor of the government and limited Fourth Amendment protections. Indeed, that record began not just in Roberts's first Term on the Court, but in one of his very first opinions. In *Georgia v. Randolph*, Roberts chose to write his first dissent as Chief Justice, bemoaning the Court's 5-3 decision (Justice Alito did not participate) that a warrantless search of a home is not reasonable as to a co-occupant who is physically present and refuses to permit entry.[14]

In the Court's opinion, authored by Justice Souter and joined by Justices Kennedy, Stevens, Ginsburg, and Breyer, Justice Souter wrote that "[s]ince the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."[15] As noted, Roberts dissented and, in an opinion joined by Justice Scalia, accused the Court of "creat[ing] constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation."[16] According to Roberts, "[t]he rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis,"[17] and thus would "result [in] a complete lack of practical guidance for the police in the field."[18] In Roberts's view, "[t]he Fourth Amendment protects privacy," which means that "[i]f an individual shares . . . *places* with another, he assumes the risk that the other person will in turn share access to . . . [those] *places* with the government."[19] Roberts expressed particular concern about how the Court's rule would operate in "domestic abuse situations, a context in which the . . . question [addressed by the Court] often arises,"[20] but the majority responded that its decision would have "no bearing on the capacity of the police to protect domestic victims" because "[n]o question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence."[21]

Later that same year, the Court decided two more Fourth Amendment cases by divided votes. In both, the Court ruled in favor of the government, and in both, Chief Justice Roberts joined the majority opinion. In *Hudson v. Michigan*, the Court held, in a 5-4 decision that broke

[14] 547 U.S. 103 (2006).
[15] *Id.* at 114.
[16] *Id.* at 127 (Roberts, C.J., dissenting). Justice Thomas also dissented. *Id.* at 145 (Thomas, J., dissenting).
[17] *Id.* (Roberts, C.J., dissenting).
[18] *Id.* at 142.
[19] *Id.* at 128.
[20] *Id.* at 139.
[21] *Id.* at 118 (majority opinion).

down along predictable ideological lines, that the failure by police to follow the "ancient" principle that "law enforcement officers must announce their presence and provide residents an opportunity to open the door" does not require suppression of all evidence found in the search.[22] Writing for the majority, Justice Scalia concluded that exclusion of evidence was not appropriate for two reasons, including that "the exclusionary rule has never been applied except 'where its deterrence benefits outweigh its "substantial social costs,"'" and "[t]he costs here are considerable."[23] In dissent, Justice Breyer faulted the majority's opinion because, in his view, it "represent[ed] a significant departure from the Court's precedents," and it "weaken[ed], perhaps destroy[ed], much of the practical value of the Constitution's knock-and-announce protection."[24]

In the second case, *Samson v. California*, the Court held, 6-3, that suspicionless searches of parolees did not violate the Constitution when parolees were required by state law to "'agree in writing to be subject to search or seizure by a parole officer . . . with or without cause.'"[25] In the majority opinion, Justice Thomas wrote that the parolee "did not have an expectation of privacy that society would recognize as legitimate," and that the state's interest in being able to conduct such searches was "substantial."[26] In dissent, Justice Stevens (joined by Souter and Breyer) declared that "[w]hat the Court sanction[ed] . . . is an unprecedented curtailment of liberty,"[27] and that "[t]he suspicionless search is the very evil the Fourth Amendment was intended to stamp out."[28]

In the years to come, the Court would continue its pattern of issuing a mix of pro-government and pro-defendant Fourth Amendment rulings, with the Chief Justice almost invariably on the side of the government. There was, however, one notable change: by 2009 the vote breakdown on the Court was not as predictable as it had been earlier in Roberts's tenure on the Court. In 2009, for example, the Court held, 5-4, in *Arizona v. Grant*, that the warrantless search of a defendant's vehicle while the defendant was handcuffed in the patrol car was unconstitutional.[29] Writing for the Court, Justice Stevens (in an opinion joined by Scalia, Thomas, Souter, and Ginsburg) explained that the Court's prior cases "authorize[d] police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the

[22] 547 U.S. 586, 589 (2006) (quoting Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 363 (1998) (quoting United States v. Leaon, 468 U.S. 897, 907 (1984))).
[23] *Id.* at 594-95.
[24] *Id.* at 605 (Breyer, J., dissenting).
[25] 547 U.S. 843, 846 (2006) (quoting Cal. Penal Code § 3067(a) (West 2000)).
[26] *Id.* at 852-53.
[27] *Id.* at 857 (Stevens, J., dissenting).
[28] *Id.* at 858.
[29] 556 U.S. 332 (2009).

search."[30] In dissent, Justice Alito (in an opinion joined by Roberts) faulted the Court's decision because, in his view, it would "cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law."[31]

That same year, in *Herring v. United States*, the Court also considered the scope of the exclusionary rule, though this time its 5-4 opinion broke down along ideological lines.[32] In an opinion for the Court, Roberts wrote that the exclusionary rule did not require suppression of evidence found during a search incident to an unlawful arrest that was caused by the negligence of another police employee. Roberts explained that "[o]ur cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation," and "the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."[33] To Roberts, the fact that the error was caused by "negligen[ce]" and was not "reckless or deliberate" was "crucial" to concluding that "'the extreme sanction of exclusion'" was not warranted.[34] In dissent, Justice Ginsburg noted the important role the exclusionary rule is supposed to play in deterring unlawful police conduct, describing it as an "essential auxiliary to the Amendment" that "earlier inclined the Court to hold the two inseparable,"[35] and noted that the Court's suggestion that the rule could not deter negligence "runs counter to a foundational premise of tort law."[36]

In 2012, in *Messerschmidt v. Millender*, the Court held, 6-3, that police officers who executed an exceedingly broad search warrant were entitled to immunity from personal liability even if that warrant was invalid.[37] In an opinion for the Court, Roberts acknowledged that the Court has "recognized an exception allowing suit when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue,'" but he noted that "the threshold for establishing this exception is a high one, and it should be."[38] According to Roberts, "[t]he occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions."[39] In dissent, Justice Sotomayor wrote that the kind of "general warrant" at issue in the case was "antithetical to the Fourth Amendment," and "[t]he

[30] *Id.* at 343. The Court also concluded that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).
[31] *Id.* at 356 (Alito, J., dissenting).
[32] 555 U.S. 135, 137 (2009).
[33] *Id.*
[34] *Id.* at 140 (quoting United States v. Leon, 468 U.S. 897, 916 (1984)).
[35] *Id.* at 152 (Ginsburg, J., dissenting).
[36] *Id.* at 153.
[37] 132 S. Ct. 1235 (2012). The warrant "authorized a search for all guns and gang-related material." *Id.* at 1241.
[38] *Id.* at 1245.
[39] *Id.* at 1250.

Court's analysis bears little relationship to the record in this case, our precedents, or the purposes underlying qualified immunity analysis."[40]

In 2013, in *Florida v. Jardines*, the Court held, 5-4, that law enforcement officers' use of a drug-sniffing dog on a front porch to investigate an unverified tip that marijuana was being grown in the home violated the Fourth Amendment.[41] Writing for the Court, Justice Scalia (in an opinion joined by Thomas, Ginsburg, Kagan, and Sotomayor) observed that the "home is first among equals," and that the Fourth Amendment's protection of the right to be free from unreasonable governmental intrusion in the home would "be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity."[42] In dissent, Justice Alito (in an opinion joined by Roberts) accused the Court of making up its new rule: "While the Court claims that its reasoning has 'ancient and durable roots,' its trespass rule is really a newly struck counterfeit."[43]

That same year, in *Maryland v. King*, the Court held that using a cheek swab to obtain a person's DNA sample after his arrest for a serious offense was a reasonable search under the Fourth Amendment.[44] In an opinion authored by Justice Kennedy (and joined by Roberts), the Court explained that the search was reasonable because "[t]he legitimate government interest served by [the statute providing for DNA collection] is well established," and "[b]y comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one."[45] In dissent, Justice Scalia wrote a powerful tribute to the Fourth Amendment, explaining that it "forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment."[46] Thus, Justice Scalia explained that "[w]henever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime," and "[i]t is obvious that no such noninvestigative motive exists in this case."[47]

The next year, the Court decided two more significant Fourth Amendment cases. In *Fernandez v. California*, the Court held, 6-3, that the police could conduct a warrantless search of a defendant's apartment following the defendant's arrest based on consent to the search by

[40] *Id.* at 1253 (Sotomayor, J., dissenting). Justice Kagan concurred in part and dissented in part, writing that "I think the right answer lies in between [the majority and the dissent], although the Court makes the more far-reaching error." *Id.* at 1251 (Kagan, J., concurring in part and dissenting in part).
[41] 133 S. Ct. 1409 (2013).
[42] *Id.* at 1414.
[43] *Id.* at 1424 (Alito, J., dissenting) (citation omitted).
[44] 133 S. Ct. 1958 (2013).
[45] *Id.* at 1971, 1977.
[46] *Id.* at 1980 (Scalia, J., dissenting).
[47] *Id.*

a co-occupant.[48] In an opinion by Justice Alito (and joined by Roberts), the Court explained that its "opinion in *Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present" and therefore should not be extended to the situation where "consent was provided by an abused woman well after her male partner had been removed from the apartment they shared."[49] In dissent, Justice Ginsburg (joined by Sotomayor and Kagan) faulted the Court for "shrink[ing] to petite size [its] holding" in *Randolph*[50] and for "overlook[ing] the warrant requirement's venerable role as the 'bulwark of Fourth Amendment protection.'"[51]

In *Navarette v. California*, the Court held, 5-4, that an anonymous 911 tip that a pickup truck had driven off the road was sufficiently reliable to provide reasonable suspicion to justify a stop of that truck.[52] In an opinion by Justice Thomas (joined by Roberts), the Court concluded that the stop was reasonable under the "totality of the circumstances."[53] This time, Justice Scalia was in dissent (along with Ginsburg, Sotomayor, and Kagan). He again wrote a powerful opinion, noting that the Court's new rule that "[s]o long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop" was "not [his] concept, and . . . would not be the Framers', of a people secure from unreasonable searches and seizures."[54]

As the above cases illustrate, during John Roberts's first decade on the Supreme Court, the Court's rulings on the Fourth Amendment have been mixed, but Roberts's votes, for the most part, have not been. Rather, he has been, for the most part, a reliable vote for the government and more limited Fourth Amendment protections. There are, however, exceptions, as the next two sections discuss.

B. More Moderate Pro-Government Votes

In two cases, Chief Justice Roberts voted for the government, but arguably adopted a more moderate position than did one or more of his colleagues who also voted for the government. In *Florence v. Board of Chosen Freeholders of the County of Burlington*, the Court held, in a 5-4 decision that broke down along ideological lines, that an invasive search of an individual who had been arrested on an outstanding bench warrant and was to be held in jail while his case was processed did not violate the Fourth Amendment.[55] Writing for the Court (in an opinion joined by Roberts), Justice Kennedy stated that "deference must be given to the

[48] 134 S. Ct. 1126 (2014).
[49] *Id.* at 1130.
[50] *Id.* at 1139 (Ginsburg, J., dissenting).
[51] *Id.* at 1141 (quoting Franks v. Delaware, 438 U.S. 154, 164 (1978)).
[52] 134 S. Ct. 1683 (2014).
[53] *Id.* at 1692.
[54] *Id.* (Scalia, J., dissenting).
[55] 132 S. Ct. 1510 (2012).

officials in charge of the jail unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated," and that standard was not met in the case.[56] In dissent, Justice Breyer wrote, "I have found no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further . . . penal interests."[57] Roberts wrote separately to emphasize that he found it "important . . . that the Court does not foreclose the possibility of an exception to the rule it announces."[58] He explained that there was no possibility to consider such an exception in that case because of its particular circumstances, i.e., "the facts that [the defendant] was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if [the defendant] were to be detained, to holding him in the general jail population."[59]

In *Missouri v. McNeely*, the Court held, again 5-4 but this time with Justices Scalia joining Justices Kennedy, Ginsburg, Sotomayor, and Kagan in the majority, that the "natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."[60] Instead, the Court concluded that "exigency in this context must be determined case by case based on the totality of the circumstances."[61] Justice Thomas issued a solo dissent, writing that "[b]ecause the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance."[62] In an opinion concurring in part and dissenting in part, Roberts (joined by Breyer and Alito) expressed concern that "[a] police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him."[63] He agreed with the "Court's 'totality of the circumstances' approach as a general matter," but said the "Court should be able to offer guidance on how police should handle cases like the one before [the Court]."[64] To Roberts, "the proper rule is straightforward. . . . If there is [time to secure a warrant before blood can be drawn], an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant."[65]

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[56] *Id.* at 1518.
[57] *Id.* at 1528 (Breyer, J., dissenting).
[58] *Id.* at 1523 (Roberts, C.J., concurring).
[59] *Id.* ("The Court makes a persuasive case for the general applicability of the rule it announces. The Court is nonetheless wise to leave open the possibility of exceptions, to ensure that we 'not embarrass the future.'" (quoting Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944) (Frankfurter, J.)).
[60] 133 S. Ct. 1552, 1556 (2013).
[61] *Id.*
[62] *Id.* at 1574 (Thomas, J., dissenting).
[63] *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part).
[64] *Id.*
[65] *Id.*

C. Pro-Defendant Votes

More significant than Roberts's arguably more moderate pro-government votes are his pro-defendant ones. To start, in *Bailey v. United States*, the Court held, 6-3, that a 1981 case that permitted "officers executing a search warrant 'to detain the occupants of the premises while a proper search is conducted'" did not permit the seizure of a person who "was stopped and detained at some distance away from the premises . . . when the only justification for the detention was to ensure the safety and efficacy of the search."[66] In an opinion authored by Justice Kennedy (and joined by Roberts), the Court explained that none of the interests identified in the 1981 case "applies with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched."[67] The Court further explained that allowing the detention of a former occupant "wherever he may be found away from the scene of the search" would "give officers too much discretion."[68] Justice Breyer (joined by Thomas and Alito) dissented and argued in favor of an approach that would consider the interests in support of detention.[69]

And this Term, in *Rodriguez v. United States*, Roberts joined Justice Scalia and the Court's more liberal members to hold, 6-3, that absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Fourth Amendment. As Justice Ginsburg wrote for the Court, "[t]he Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation."[70] But that is not how the Fourth Amendment works, Ginsburg further explained: "As we said in [an earlier case] and reiterate today, a traffic stop 'prolonged beyond' [the point reasonably required to complete the stop's mission] is 'unlawful.'"[71] In dissent, Justice Thomas took the position that the "majority's logic would produce . . . arbitrary results,"[72] and Justice Alito wrote that the Court's decision was "unnecessary, impractical, and arbitrary."[73]

Other than *Bailey* and *Rodriguez*, Roberts has cast only two additional votes in favor of the defendant in Fourth Amendment cases, but these two votes are significant. While they came in unanimous decisions, they involve the application of the Fourth Amendment to new technologies and thus may be of special relevance to many cases the Roberts Court is likely to consider in the near future. In the first, *United States v. Jones*, the Court in 2012 considered whether attachment of a GPS tracking device to a vehicle, and the subsequent use of that

[66] 133 S. Ct. 1031, 1037, 1035 (2013) (quoting Michigan v. Summers, 452 U.S. 692, 705 (1981)).
[67] *Id.* at 1041.
[68] *Id.*
[69] *Id.* at 1045 (Breyer, J., dissenting).
[70] Rodriguez v. United States, --- S. Ct. ---, 2015 WL 1780927, at *7 (2015).
[71] *Id.* (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).
[72] *Id.* at *10 (Thomas, J., dissenting).
[73] *Id.* at *15 (Alito, J., dissenting) (footnote omitted).

device to monitor a vehicle's movements on public streets, was a search within the meaning of the Fourth Amendment.[74] The Court unanimously held that it was, although there was significant disagreement as to why. Roberts joined Justice Scalia's opinion for the Court, which held that there was "no doubt" that the government's "physical[] occup[ation]" of "private property for the purpose of obtaining information" would "have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[75] It faulted the concurring Justices for "apply[ing] *exclusively*" a "reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed."[76]

Two years later, in *Riley v. California*, the Court was once again confronted with the application of the Fourth Amendment to a new technology, and the Court again unanimously ruled for the defendant and in favor of a robust interpretation of the Fourth Amendment.[77] In that case, Roberts himself wrote the opinion and included strong language about the importance of the Fourth Amendment and the privacy protections that it provides. At issue in *Riley* was whether the police may generally engage in a warrantless search of the digital contents of an arrestee's cell phone after a lawful arrest. The Court's answer was simple: no. As Roberts explained, "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,'" and "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."[78] Roberts acknowledged that the Court's decision would "have an impact on the ability of law enforcement to combat crime," but as he explained, "[p]rivacy comes at a cost."[79]

Given that cases involving the intersection of the Fourth Amendment and new technologies will likely continue to populate the Court's docket,[80] Roberts's recognition that the broad privacy protections adopted in the Fourth Amendment have application in the context of technologies that the Framers could not have envisioned may be significant in many cases yet to come.

IV. Conclusion

John Roberts was no Fourth Amendment champion when he was on the Court of Appeals for the D.C. Circuit, and he hasn't been one in his first decade on the Supreme Court either. To the contrary, in cases raising Fourth Amendment questions, he has almost always

[74] 132 S. Ct. 945 (2012).
[75] *Id.* at 949.
[76] *Id.* at 953.
[77] 134 S. Ct. 2473 (2014).
[78] *Id.* at 2494-95 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
[79] *Id.* at 2493.
[80] *See* Brianne J. Gorod, *Agreement at the Supreme Court: The Three Important Principles Underlying* Riley v. California, 9 N.Y.U. J. L. & LIBERTY 70, 80 (2015) (noting that "other cases involving the application of the Fourth Amendment to new technologies are rapidly working their way through the lower courts").

ruled for the government and for a crabbed understanding of the scope of the protections the Fourth Amendment provides. But there have been exceptions, and two of them are especially significant. Notably, Roberts voted in favor of robust Fourth Amendment protection in two recent cases involving the application of the Amendment to new technologies; in one, he wrote a powerful opinion celebrating the importance the nation's Framers attached to the privacy protections adopted in the Amendment. While it seems likely that Roberts will generally continue to privilege the police over the privacy right enshrined in the Fourth Amendment, his decisions in these two recent cases show that his vote is sometimes in play, including in one important context that will likely give rise to many Fourth Amendment cases in the years ahead.