Newsweek

New Order in the Court

When it comes to the Fourth Amendment, some surprises.

By: Walter Olson, Senior Fellow at the Cato Institute's Center for Constitutional Studies
June 5, 2013

AGAIN AND again this term, in shifting 5–4 and 6–3 configurations, the U.S. Supreme Court has shown itself profoundly divided in parsing one of the core provisions of the Bill of Rights, the Fourth Amendment's ban on unreasonable search and seizure. In two of the four cases, the criminal defendants—arguing for the right to privacy—have prevailed: *Florida v. Jardines* (is a dog sniff a search?) and *Bailey v. United States* (can police on a lawful property search detain someone who isn't immediately nearby?). The prosecution/police side won in this week's *Maryland v. King* (can arrested persons be made to submit to DNA testing?). And the fourth case, *Missouri v. McNeely* (can drivers stopped on suspicion of DUI be made to submit to blood testing?), resulted in a set of split opinions.

There were a couple of surprises in this string of opinions. It's true most justices followed familiar ideological leanings, with Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan voting consistently for the liberal side, conservatives John Roberts, Clarence Thomas, and (especially) Samuel Alito siding almost as consistently with the police, and Justice Anthony Kennedy teetering somewhere in the middle. But two justices ditched their usual alliances—and in opposite directions, like trains passing in the night. Outspoken conservative Justice Antonin Scalia in each of the four cases sided with the liberal privacy advocates, while his generally liberal counterpart Justice Stephen Breyer in each case sided with the government prosecutors.

This isn't an entirely new pattern. In some earlier cases, including 2009's *Arizona v. Gant* (when can police search an arrestee's car?), Scalia also joined the left and Breyer the right. But Prof. Orin Kerr of George Washington University, a Fourth Amendment specialist, writes on the Volokh Conspiracy blog that he's never seen such a consistent streak of Fourth Amendment cases where both Scalia and Breyer switched. Quite possibly it's the difference in each justice's philosophy: "What would the Founders have thought about this?" is a question to catch Scalia's attention, while Breyer is more likely to be swayed by arguments about the practical needs of modern government.
Scalia, for his part, told a recent audience that he "ought to be the pinup of the criminal defense bar." Not yet.

WALTER OLSON is senior fellow at the Cato Institute's Center for Constitutional Studies. His books include *The Litigation Explosion and The Rule of Lawyers*.