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The Sacred Fourth Amendment Text

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THE SACRED FOURTH AMENDMENT TEXT

*Christopher Slobogin**

Review of Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233 (2019).

The Supreme Court’s jurisprudence governing the Fourth Amendment’s “threshold”—a word meant to refer to the types of police actions that trigger the amendment’s warrant and reasonableness requirements—has confounded scholars and students alike since *Katz v. United States*.¹ Before that 1967 decision, the Court’s decisions on the topic were fairly straightforward, based primarily on whether the police trespassed on the target’s property or property over which the target had control.² After that decision—which has come to stand for the proposition that a Fourth Amendment search occurs if police infringe an expectation of privacy that society is prepared to recognize as reasonable³—scholars have attempted to define the Amendment’s threshold by reference to history, philosophy, linguistics, empirical surveys, and positive law.⁴ With the advent of technology that more easily records, aggregates, and accesses public activities and everyday transactions, the cacophony on the threshold issue has grown deafening—especially so after the Supreme Court’s decisions in *United States v. Jones*⁵ and *Carpenter v. United States*.⁶ In these decisions, the Court seemed to backtrack from its previously established notions that public travels and personal information held by

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1. 389 U.S. 347 (1967).

2. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

3. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

4. See, e.g., Clark D. Cunningham, *A Linguistic Analysis of the Meanings of “Search” in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988); David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 15 (2017), http://michiganlawreview.org/wp-content/uploads/2017/10/116MichLRevOnline14_Gray.pdf [<https://perma.cc/3GN8-NXAR>]; Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1601–07 (2010); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016).

5. 565 U.S. 400 (2012).

6. 138 S. Ct. 2206 (2018).

third parties are not reasonably perceived as private and are therefore not protected by the Fourth Amendment.⁷

Enter Jeffrey Bellin who, in *Fourth Amendment Textualism*, attempts to simplify and rationalize the law governing when the Fourth Amendment is implicated by looking closely at the amendment's language.⁸ Professor Bellin is not the first author to parse the text of the Fourth Amendment, of course.⁹ But his effort is both more detailed and more comprehensive than most, and it produces results that, while perhaps not satisfying to everyone, are reasonable interpretations of both text and history, avoid the morass created by the expectation-of-privacy test, and help answer the multiple conundrums that have arisen in connection with technologically driven law enforcement investigations.

Bellin's breakdown of the Fourth Amendment's text comes in three parts. First, he tackles the word "search."¹⁰ Like other scholars (and as suggested by Justice Scalia in *Kyllo v. United States*¹¹), he opts for the commonsense definition of that word—that is, "an examination of an object or space to uncover information."¹² That definition covers all of the situations the Court has denominated as searches. But it does not include casual glances (no "examination"); interviews of suspects by police or informants (no examination of "an object or space"); accidental intrusions (no attempt to obtain "information"); or intentional examinations of something—such as the outside of a house or the public travels of a car—that "is already apparent through standard visual and audio observation" (i.e., no attempt to "uncover" information).¹³

The second component of Bellin's textual analysis is the Fourth Amendment's reference to "persons, houses, papers, and effects."¹⁴ The word "person" is self-defining, but unless police "search" the person (e.g., by going through pockets or obtaining a DNA sample), the Fourth Amendment is not triggered. To Bellin, observing a person in public is not a search of that person but only a search of a public space.¹⁵ Houses include curtilage but not barns outside the curtilage.¹⁶ Papers must be conscious, written communications; while that includes electronic as well as paper documents, it excludes

7. See, e.g., *United States v. Knotts*, 460 U.S. 276, 282 (1983) (holding that use of a beeper to track a car is not a search); *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that requisitioning Miller's bank records is not a search).

8. Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233 (2019).

9. See, e.g., Cunningham, *supra* note 4; Gray, *supra* note 4.

10. Bellin, *supra* note 8, at 254–60.

11. 533 U.S. 27, 32 n.1 (2001).

12. Bellin, *supra* note 8, at 257 (emphasis omitted).

13. *Id.* at 257–58.

14. *Id.* at 260–66 (quoting U.S. CONST. amend. IV).

15. *Id.* at 260–61.

16. *Id.* at 262, 265.

oral communications and the pings associated with emails and texts.¹⁷ With respect to effects, Bellin concludes—here based as much on a review of colonial history as on text—that while all moveable private property is encompassed by the term, tangible public property, as well as one’s voice, wireless signals, and other intangibles, is not.¹⁸ Thus, according to Bellin, *Katz* (which involved bugging a public phone booth) was wrongly decided and Title III (the federal electronic-surveillance statute) is not constitutionally required, although Bellin notes that the existence of that statute “render[s] this gap a theoretical rather than a practical concern.”¹⁹

The final textual element is the word “their” that appears in the Fourth Amendment before persons, houses, papers, and effects.²⁰ Consistent with the Supreme Court’s third-party doctrine (and in contrast to *Carpenter*²¹), Bellin concludes that searching for a person’s information in papers possessed by another—whether a company, friend, or doctor—usually does not implicate the Fourth Amendment.²² However, as might have been the case in *United States v. Miller*²³ (which involved government accessing Miller’s checks and deposit slips from his bank) and is clearly the case with respect to personal documents maintained in the Cloud (whether linked through computers, iPhones, or Fitbit watches), sometimes papers in the possession of third parties remain the target’s papers.²⁴

By now, despite this last caveat, the reader may be thinking, “This textualism approach will seriously reduce the scope of the Fourth Amendment, beyond even the grudging stance taken by the current Court!” That assumption is probably correct, although one should not overlook arguments in favor of a more expansive threshold even if one accepts Bellin’s general approach. For instance, if a person fills out a form (in writing or electronically) and transmits it to a third party so that the third party can use it for mutual gain, one could argue that the form and any derivative document are still the person’s “papers” on a bailment theory. If an informant not only talks to a suspect but examines the contents of his or her home, a search of the suspect’s house would seem to have occurred, contrary to the holding in *Lewis v. United States*²⁵ and various other “false friend” cases. If the outside of a house, the location of a car, or the location of a person is only “readily apparent” to police through the use of technology rather than via “standard visual . . . observation,” once again, a search could be said to occur at least

17. *Id.* at 261–62.

18. *Id.* at 262–65.

19. *Id.* at 265.

20. *Id.* at 266.

21. *Carpenter v. United States*, 138 S. Ct. 2206, 2216–21 (2018).

22. Bellin, *supra* note 8, at 269–74.

23. 425 U.S. 435 (1976).

24. Bellin, *supra* note 8, at 271–72.

25. 385 U.S. 206 (1966).

when the police use that technology with the intention of uncovering information about those items (a result Bellin himself seems to endorse).²⁶

I do not like many of the outcomes that Bellin's textualism reaches. And, as Professor Caminker ably demonstrates in his insightful essay for *Michigan Law Review Online*,²⁷ both Professor Bellin's definition of "search" and his focus on searches *of* rather than *for* the four items mentioned in the Fourth Amendment come with their own ambiguities. However, Bellin's stance hews more closely to constitutional language and is more manageable than the *Katz* reasonable-expectation-of-privacy test. I have defended that test in part because "privacy is a capacious enough concept to accommodate virtually all of the values commentators have said [the Fourth Amendment] does not encompass."²⁸ Nonetheless, it must be admitted that privacy *is* a capacious concept and thus subject to multiple interpretations; as Bellin notes, "[c]onsistency and predictability are important features of Fourth Amendment doctrine which seeks to guide not just court decisions but police investigative activity as well."²⁹ In defining the Fourth Amendment's threshold, it may make sense to cede authority to a more textual, commonsense interpretation of the word "search."

At the same time, I don't think that agreeing with all or most of what Bellin says about that threshold means that societal expectations of privacy have no relevance to Fourth Amendment jurisprudence or other laws regulating police intrusions. Figuring out the Fourth Amendment's coverage is only half of the battle over regulation of searches and seizures; there is also the task of determining when a search or seizure is "reasonable." That word does not have a textual or commonsense meaning and in fact is *intentionally* capacious. For this second stage of Fourth Amendment analysis—which involves figuring out whether a warrant, probable cause, or something less (or more) is required—privacy and its associated values can more easily become the focal point of analysis as a textual matter. Indeed, I have argued, on proportionality grounds, that assessments of intrusiveness are crucial in deciding the "reasonableness" of a search; for instance, short-term tracking and obtaining a single personal datapoint, although searches, might be permissible on something short of probable cause because they are not very privacy-invasive.³⁰ And even if the Constitution does not apply at all—as Bellin con-

26. See Bellin, *supra* note 8, at 258.

27. Evan H. Caminker, *How Definitive is Fourth Amendment Textualism?*, 119 MICH. L. REV. ONLINE 22 (2020).

28. Christopher Slobogin, *A Defense of Privacy as the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEX. TECH. L. REV. 143, 152 (2015).

29. Bellin, *supra* note 8, at 281.

30. Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 1 (2012). The general proportionality theory is laid out in CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 21–47 (2007).

cludes is the case with certain instances of electronic surveillance and searches of third-party papers, for example³¹—legislators and agencies surely will be driven by privacy concerns in devising subconstitutional rules, as Title III illustrates. So even if Bellin’s textualism reigns on the threshold issue, *Katz*’s expectations of privacy rubric remains very relevant to regulation of police investigation.

31. Bellin, *supra* note 8, at 273, 276.