Not Your Scalia's Textualism

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Jeffrey Bellin, *Fourth Amendment Textualism*, __ **Mich. L. Rev.** __ (forthcoming 2019), available at SSRN.

In Fourth Amendment Textualism, Professor Bellin tackles an age-old question: what is a search? His article takes a deep dive into the text of the Fourth Amendment, how the Supreme Court has interpreted it, and how he would like the Court to return back to the original meaning.

While this paper brings forward a thought-provoking analysis of the Fourth Amendment, it also has the ability to teach the reader about current search and seizure jurisprudence. The article provides students of the constitution familiarity with what a search is and how the Supreme Court has arrived at its current thinking, while at the same time, opening up a slight rift in the common and unshakeable understanding of that familiar terrain.

Bellin's main contention is that the reasonable expectation of privacy test created in Katz is far too attenuated from the text of the Fourth Amendment and carries too much indeterminacy. This test requires a person to have both an actual and reasonable expectation of privacy in the thing searched. Bellin also attempts to nip in the bud the newly created "trespassory" test from Jones and Jardines. He describes this trespass analysis as in its "infancy" and more "as a complement to, rather than a replacement for, the *Katz* test [.]" (P. 10 n.49.)

He argues that it is time for interpreters of this Amendment to come back to a simpler understanding and proposes a new test for courts to determine if a search occurred. This textualist interpretation would replace *Katz*, trespassory searches, third party doctrine, and standing. His test is basically two steps: was there an actual search and was the search of the individual's person, house, paper, or effect. While this test at first blush appears to follow Justice Scalia's thinking, in actuality Professor Bellin seems to have combined both textualism and legal realism (i.e., Posner).

In order for a person to have standing in an unlawful search, they must have had both an actual expectation of privacy (subjective) and a reasonable expectation of privacy (objective). This new test, according to the author, was a radical departure from previous understandings of the Fourth Amendment, which generally hinged around the actual words in the amendment and particularly focused on the term "search." The author believes that this test is "abstracting to a principle underlying the Fourth Amendment (privacy) and then applying that principle rather than the amendment's text." (P. 23.) He further argues that the *Katz* test and its reasonable expectation of privacy requirement is a circular argument because the "privacy we can reasonably expect depends on the privacy the Supreme Court tells us we have." (P. 24.)

So what is one to do about this allegedly circular reasoning and ambiguous test? The author proposes a simple two (or three?) step process of simplifying what a search is. First, while he appreciates the pre-*Katz* era for focusing on actual searches and not privacy, he makes it known that those cases never succinctly defined what a search actually was. This could be beneficial because now the author is able to not only define it carte blanch, but also mold it with our technological advances in mind. Essentially, the author believes a search is an examination of an object or space in an attempt to uncover information. His definition is comprehensive yet straightforward. In this paper he parses through these key words – to provide the reader a clear guide as to what a search is. (P. 30.)

The second step is critical. It is not enough that the government committed a search – it is what they searched that matters. Professor Bellin states that the Fourth Amendment is only triggered if "the item searched can fairly be characterized as a person, house, paper or effect. This reflects the text and history of the Fourth Amendment." (P. 34.)

Each of these "things" are defined both by their history and also in a modern view. The author makes an important distinction that "[t]he terms 'persons, houses, papers, and effects' are listed in the Fourth Amendment as potential objects of searches: things the police might search. These terms are not search outcomes: things police might find." (P. 35.) This second step focuses on the actual thing searched and determines if it belonged to the person.

An example that he highlights is that public surveillance cameras are not a search of a person because they have not searched that person but rather have searched the public area and located them. On the other hand, using an infrared camera to look for illicit objects would be a search of that person. The more difficult to interpret term is "effects." But again, the author uses both the Framer's understanding of that word (personal objects during that time) with a modern twist (computers, cell phones). Thus effects are all movable, personal property. What are not effects? Intangible objects such as cell phone signals.

The one area where the author and current Fourth Amendment law seem to agree is the third-party doctrine and standing; the author agrees with the Court's conclusion that these are personal rights. However, they diverge in the analysis. In current Fourth Amendment jurisprudence, a person has standing if they have that reasonable expectation of privacy. This analysis is derived from *Katz*. On the other hand, the textualist believes that standing comes from the actual words of the Amendment, specifically the phrase the "right of the people to be secure in **their**…" Under the textualist analysis, the court need not focus on whether or not the person had a reasonable expectation of privacy in the thing searched, but rather was the thing searched his person, paper, house or effect? While this seems to present a clear and straightforward question for a court, it begs the question, how does a court determine if that thing is the person's? Does the court ask if that person had a reasonable expectation of privacy?

The textualist would also apply this reasoning to Carpenter. In this case, the Court narrowly held that a person has a reasonable expectation of privacy in the data transmitted to a third party (cell phone carrier) and thus a warrant is needed to search that information. However, under a textualist perspective, the reasoning would be different – yes there was a search, and yes these were papers, but unfortunately for the defendant, these were not his papers and thus no standing is granted to him. The author seems to make the distinction between information and papers. Carpenter's cell phone was data (information) within the carrier's papers, so it was not protected. However, if a court were to consider his cell phone data not as information but more concretely as "papers" then it would have been protected even though a third party possessed those papers. (A question that will surely be begged: what is the difference between a text message and other cell phone data?)

Thus, the third party doctrine of any Fourth Amendment analysis should not focus on a reasonable expectation of privacy by the person, but solely on whether or not the object/thing was "theirs."

The paper also goes through several examples to illustrate how a textualist interpretation would apply to modern day scenarios. The author acknowledges that these are only a limited number of examples, as well as that there is never going to be an easy, all-encompassing interpretation of the Fourth Amendment that foresees every situation that could arise.

When a reader hears the word textualism, the late Supreme Court Justice Antonin Scalia quickly comes to mind. However, this textualist idea seems to be influenced in part by Judge Richard Posner – look to the text, follow the original meaning, yet provide for flexibility and practicality. Whether you agree or disagree with the new test that Professor Bellin puts forward, this paper provides the reader with a strong understanding of where our current Fourth Amendment jurisprudence stands. It is also evident that the reasonable expectation of privacy test created in *Katz* is likely on life support. A quick perusal of the dissenting opinions in *Carpenter* illustrate some justice's disdain and dissatisfaction with the test and their desire to follow a textualist approach. A flip in the Court might finally pull the plug.

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