A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense

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I. Introduction

This article offers a new technique for analyzing and evaluating competing interpretations of a legal text and applies that technique to one of the most debated questions of modern constitutional interpretation: the meaning of "searches" in the first clause of the fourth amend-

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Before moving on to make use of this semantic analysis, it will be helpful to include in our kit of linguistic tools four terms that parse out different aspects of what is loosely called "meaning." Three of these terms describe different ways in which an expression can lack meaning: ambiguity, vagueness, and incoherence. An expression is ambiguous if it uses a word with one or more senses without identifying which sense is meant.[44] A word is vague if it fails to contribute a sufficiently detailed sense to make an expression meaningful.[45] An incoherent expression is caused by the combination of words with incompatible senses.[46] The words may be meaningful in isolation, but the expression does not make sense. The expressions marked with a "(?)" above are incoherent.

The final term is "connotation," which indicates a concept that is not part of the sense of a word, but frequently is associated with its use. Words often acquire new senses when connotations become sufficiently strong to create a distinct, new meaning. "Search of" carries a connotation of forcible entry or invasion, which has contributed to a specialized sense in fourth amendment vocabulary,[47] as has the connotation that the object of searching out is not only hard to find but deliberately secret.[48]

III. The Ambiguity of the Text

The word "search" appears in two different places in the text of the fourth amendment. It first appears in the first clause's familiar "unreasonable searches and seizures" phrase, which has been the focus of so much attention and controversy: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and seizures, shall not be violated . . . ."[49] It also appears in the second clause, usually called the warrant clause: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing *the place to be searched*, and the person or things to be seized."[50]

In the warrant clause, "search" appears in the verbal form without the preposition "out" or "for." This syntactic structure clearly indicates that "search of" is the sense of search in "place to be searched." The kind of

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44. The example used previously about a file, *see supra* note 19, shows ambiguity at work. Often the semantic features of other words in an expression remove potential ambiguity, as in the following examples using "file":

Please smooth the plank with the file. Please read the file carefully.

45. A classic example of a vague word is "thing." The following expression does not convey much information standing alone: "I dislike that thing." As in the case of ambiguity, the semantic features of other words in an expression can help cure vagueness: "I dislike the odor of that red thing." In this expression we at least know that "thing" is an object which can project both color and odor.

46. "Incoherent" is not, strictly speaking, a semantic term of art, but I have adopted it instead of graceless phrases like "selectional restriction violation" or "anomalous," which more commonly are used in linguistics. *See* G. Dillon, *supra* note 28, at 2, 123, 128; J. Katz, *supra* note 31, at 49. It is the absence or conflict of angled (< >) semantic features that make an expression incoherent.

47. *See infra* text accompanying notes 71-74.

48. *See infra* text accompanying notes 83-87.

49. U.S. Const. amend. IV (emphasis added).

50. *Id.* (emphasis added).

warrant described by the text typically would authorize the government to conduct a *search of* a particular place *for* particular persons or things, which then would be seized. In light of the kind of warrants that concerned the framers,[51] it is not surprising that the warrant clause addressed warrants authorizing searches of places for persons or things.

The first clause contains fewer contextual clues. "Search" appears in a nominal form without even a suggested object within the phrase in which it is used. The modifier "unreasonable" contains no semantic features that would select out one from the three possible senses. Syntactically, the first and the second clauses are independent; they could have been written as separate sentences. Still, the limitation of "search" in the second clause to "search of" might be more suggestive of the meaning of "search" in the first clause if not for the little history we do know about the drafting of the amendment. The Congressional sponsor of the fourth amendment, James Madison, introduced the amendment in the form of this single clause:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[52]

Madison's version would have equated the right to be secure against unreasonable searches and seizures solely with a prohibition of warrants issued without probable cause or particular description, thereby making what is now the first clause little more than a rhetorical preamble to the substantive warrant clause.[53] When Madison's version was introduced on the floor of the House of Representatives, Representative Benson moved to replace the phrase "by warrants issuing" with the phrase "and no warrant shall issue."[54] The House Journal records as Benson's only explanation that Madison's "declaratory provision was good as far as it went, but he thought it was not sufficient."[55] Benson's motion lost on the floor, but Benson had the last word. He chaired a committee of three that was charged with preparing for the House a final draft of the Bill of Rights. The draft reported out by the committee contained Benson's previously unsuccessful proposal.[56] That revised version of two independent clauses passed the House apparently without comment[57] and eventually became the fourth amendment.

Benson's admittedly brief recorded comment is consistent with the obvious effect of his revision. By splitting Madison's sentence into two

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51. *See infra* text accompanying notes 60-74.

52. 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1834), *quoted in* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100 n.77 (1937).

53. *Cf.* N. LASSON, *supra* note 52, at 100 n.77 ("The observation may be made that the language of [Madison's] proposal did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed.").

54. *See* 1 ANNALS OF CONG., *supra* note 52, at 754.

55. *See id.*; N. LASSON, *supra* note 52, at 101.

56. *See* N. LASSON, *supra* note 52, at 101.

57. *See id.* at 101-02.

independent clauses, he created two constitutional mandates where only one had existed before. Not only would the fourth amendment ban certain types of warrants, but it also would *generally* prohibit unreasonable searches and seizures that violated the right of the people to be secure. Benson took Madison's insufficient "declaratory" statement about a right to be secure and made it "go far enough" by transforming it into a statement of positive constitutional law. His revision thus would seem to exemplify a famous view of the role of constitutional law: "a principle to be vital must be capable of wider application than the mischief which gave it birth."[58] If abuse of warrants was the mischief that gave birth to the fourth amendment, Representative Benson succeeded in transforming that impetus into a principle capable of wider application.

If we therefore assume that the text as revised frees the first clause from the more narrow scope of the warrant clause, we must be cautious about limiting "searches" in the first clause to the meaning of "to be searched" in the warrant clause.[59] Of course the list of "persons, houses, papers, and effects" in the clause still seems to parallel the respective objects of search and seize in the warrant clause. But the first clause does not allocate the items in its list between "search" and "seize" as does the warrant clause. Although the framers probably were not concerned about protecting the people against the government searching for or searching out their houses, if the first clause is read in isolation, "unreasonable searches" could include searching for or searching out persons, papers, and effects.

The first clause does contain, however, a strong indication that "unreasonable searches" does *not* include merely searches for. Even after Benson's revision, the fourth amendment is not a direct prohibition of unreasonable searches. Rather, the first clause describes a "right of the people" that shall not be violated. This right has two limiting modifiers: (1) it is a right "to be secure in . . . persons, houses, papers, and effects," and (2) it is a right "against unreasonable searches and seizures." "Search" thus appears literally as a partial description of a kind of right, not as a prohibited practice per se. Therefore, one of the features of an unreasonable search is that it must be capable of affecting the people's right to be secure in their persons, houses, papers, and effects.

Both search of and search out have among their semantic features an <affected object>, although each affects its object differently. Search for, on the other hand, is an intransitive verb that neither achieves a goal nor affects an object. Search for merely describes the activity of the subject, the searcher. It cannot function semantically to affect an object such as a house, person, paper, or effect. As usual, our semantic common sense corresponds with our pragmatic common sense. Mere curiosity or inquiry by a governmental official does not seem to pose a substantial threat to our security in

58. Weems v. United States, 217 U.S. 349, 373 (1910), *quoted with approval in* Olmstead v. United States, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting).

59. At least one modern scholar maintains that the phrase "unreasonable searches" in the first clause should be understood as referring explicitly and solely to searches conducted pursuant to warrants not complying with the procedural requirements of the warrant clause. *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41-44 (1969).

ourselves, our homes, papers, and effects, nor does it seem reasonable to think that the framers intended the fourth amendment to regulate every governmental effort to find a person, place, paper, or effect.

Having come this far, we seem to have exhausted the potential of the text, standing alone, to indicate either search of or search out, or both, as the appropriate sense for "unreasonable searches." The next step is to turn to the larger historical context of the Bill of Rights for some clues to resolve this ambiguity.

IV. Looking to History to Help Resolve Ambiguity

Most scholars agree that the fourth amendment grew directly out of specific historical events preceding the American Revolution: the colonial struggle against writs of assistance and the contemporaneous British protests against general warrants.[60] Writs of assistance were judicial orders empowering customs officers of the Crown to summon peace officers to protect and assist them while they entered and searched buildings for smuggled goods.[61] The general warrant was used primarily to enforce seditious libel laws by authorizing royal officers to search out and seize publications critical of the Crown.[62] Both the writs of assistance and general warrants failed to describe particularly the places to be searched and the items to be seized.[63]

A. To Be Secure in One's House: The Writs of Assistance

In 1761 the Superior Court of Massachusetts heard arguments on the petition of Thomas Lechmere, Surveyor General of Customs, for the granting of writs of assistance.[64] The case created great controversy and, according to no less an authority than John Adams, sowed the seeds of the Revolution.[65] James Otis, opposing the writs, argued in a famous passage:

> Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he

60. *See, e.g.*, J. Landynski, Search and Seizure and the Supreme Court 19-20 (1966).

61. *See id.* at 31-32.

62. *See id.* at 20-30.

63. *See id.* at 31.

64. The case sometimes is referred to as *Paxton's Case* because the surveyor of the Port of Boston, Charles Paxton, was the initial petitioner. Lechmere later intervened on behalf of the Crown. *See* 2 Legal Papers of John Adams 113 (L. Wroth & H. Zobel ed. 1965).

65. In a letter to William Tudor, Adams wrote: "Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born. In fifteen years, *i.e.*, in 1776, he grew up to manhood, declared himself free." Letter from John Adams to William Tudor (March 29, 1817), *quoted in id.* at 107. On the morning of July 3, 1776, John Adams wrote to his wife:

> When I look back to the year 1761 and recollect the argument concerning writs of assistance, in the superior court, which I have hitherto considered as the commencement of the controversy between Great Britain and America, and recollect the series of political events, the chain of causes and events, I am surprised by the suddenness of the revolution.

Letter from John Adams to Abigail Adams (July 3, 1776), *quoted in* N. Lasson, *supra* note 52, at 61.

> is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.[66]

Otis's language was echoed ten years later in the Boston "Declaration of the Rights of Colonists," which included among its lists of grievances against the Crown that "our Houses and even our Bed-Chambers are exposed to be ransacked . . . by Wretches, whom no prudent Man would venture to employ even as Menial Servants."[67]

Powerful memories of the writs of assistance influenced events when opponents of the proposed constitution expressed fears of a strong federal government unrestrained by a Bill of Rights. At the Virginia convention, Patrick Henry rose to oppose a resolution to ratify the proposed constitution, saying:

> The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. . . . They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink, and wear.[68]

As a result of the arguments of Henry and others, the influential Virginia convention agreed to ratify only on condition that a proposed Bill of Rights be forwarded to the first Congress for addition to the Constitution by amendment.[69] One of the proposed provisions in the Virginia bill of rights was a longer version of Madison's draft of the fourth amendment.[70]

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66. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 64, at 142. We have no transcript of the argument and must rely on Adams' account, based on notes he took in the courtroom.

67. J. LANDYNSKI, *supra* note 60, at 38 n.90.

68. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448-49 (J. Elliot 2d ed. 1881). Similar statements were made by Henry at other times during the Virginia convention. *See id.* at 588.

69. New York and North Carolina followed Virginia's lead and recommended similar bills of rights when they ratified. 13 JOURNAL OF CONGRESS 173-84 (1801); *see also* Stengel, *The Background of the Fourth Amendment to the Constitution of the United States: Part Two*, 4 U. RICH. L. REV. 60, 70 n.37 (1969) (discussing conditional ratification of the Constitution).

70. The Virginia proposal stated:

> That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous, and ought not to be granted.

3 DEBATES, *supra* note 68, at 658. It is interesting to note that the Virginia proposal, like Benson's, and unlike Madison's, version of the amendment, stated the right to be secure in a separate independent clause from the prohibition on general warrants. Madison, of course, was a representative from Virginia in the first Congress.

Obviously, the hated writs of assistance were examples of warrants prohibited by the warrant clause: warrants issued without probable cause and particular description that authorized entry of private homes to search for and seize persons, papers, and effects. This historical background also provides insight into the relationship between the right to be secure and the semantic features of search of. Henry's speech at the Virginia convention of course involved the feature [movement through an area] ("go into your cellars and rooms"), but added the connotation of forceful intrusion: "fortified with the terrors of paramount federal authority . . . [they will] search [and] ransack."[71]

At another point during the Virginia convention Henry again paired "search" with "ransack": "Every thing the most sacred may be searched and ransacked by the strong hand of power."[72] In this context of protecting domestic life, "sacred" did not mean holy, but rather "[s]ecured by religious sentiment, reverence, sense of justice, or the like, against violation, infringement, or encroachment."[73] The forced entry and subsequent ransacking affected one's home particularly because a house that could be so searched had lost to a degree its sacred character.[74]

These connotations of forcible intrusion and violation of a sacred place have had a powerful influence on the Court's interpretation of search, as will be seen below. At this point, though, it is important to remember that the background context of the controversy over writs of assistance is helpful, but not decisive, in interpreting the ambiguous first clause of the fourth amendment. Benson's revision to Madison's version of the amendment had the effect of making such abuses of the warrant procedure an important *example*, rather than the definition, of unreasonable searches. In addition, the fourth amendment may well have at least one other parent—the British controversy over general warrants, the history of which suggests a "right to be secure" that is distinct from protection against forcible invasion of sacred places.

B. To Be Secure in One's Papers: General Warrants

The language of the first clause of the fourth amendment suggests that there may be a difference between the right to be secure in papers and the right to be secure in effects, since both are listed separately.[75] "Effects"

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71. *Id.* at 448. *See supra* text accompanying note 68.

72. 3 DEBATES, *supra* note 68, at 588.

73. IX OXFORD ENGLISH DICTIONARY 16 (2d printing 1961).

74. The point is clearly made in a passage from Blackstone no doubt familiar to the framers:

> Burglary . . . has always been looked upon as a very heinous offense; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature. . . . And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully: ["For what is more sacred, more inviolate than the house of every citizen."]

4 W. BLACKSTONE, COMMENTARIES 223.

75. *See supra* text accompanying note 49. The warrant clause merges the two together by referring to "things to be seized." *See infra* text accompanying note 76.

appears to refer to personal property, in contrast to real property.[76] If so, "papers" might seem redundant, since one's papers would be included in one's effects. If we pause, however, to consider the famous general warrants litigation that occurred in England at about the same time as the writs of assistance controversy began in the colonies, the historical context may reveal why security in papers was considered different than security in effects generally.

In 1762 John Wilkes, an obstreperous member of the British House of Commons, began publishing a series of anonymous pamphlets criticizing government policies.[77] The following year one of these pamphlets particularly offended the Secretary of State, Lord Halifax, who issued a general warrant to four of his messengers " 'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper . . . and them, or any of them, having found, to apprehend and seize, together with their papers.' "[78] In three days these messengers arrested forty-nine persons as they searched for the pamphlet's publisher. Finally discovering that Wilkes was the author, they seized him and all his private papers. Wilkes spent several days in the Tower of London before being released under his privilege as a member of Parliament.[79]

A barrage of litigation ensued as Wilkes and a number of the printers subjected to the search filed trespass and false imprisonment actions.[80] The plaintiffs won substantial damages, as the courts held that the general warrants were illegal and refused to overturn the awards as excessive.[81] Another pamphleteer, John Entick, who earlier had been subjected to a Lord Halifax general warrant, was emboldened by Wilkes's success and filed what became the most famous case of the lot, *Entick v. Carrington*.[82]

Although the restrictive forms of pleading forced Entick to file an action in trespass, the heart of his complaint was the allegation that "the secret affairs, & c. of the plaintiff became wrongfully discovered and made public."[83] In opening argument his counsel compared the execution of the general warrant to the techniques of the Spanish Inquisition:

> ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts.

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76. The Supreme Court takes this view: "The Framers would have understood 'effects' to be limited to personal, rather than real, property." Oliver v. United States, 466 U.S. 170, 177 n.7 (1984). Madison's draft used "other property" where "effects" now appears. *See* ANNALS OF CONG., *supra* note 52, at 434-35; *see also supra* text accompanying note 52.

77. *See* N. LASSON, *supra* note 52, at 43.

78. *Id.*. Ironically, one of the pamphlet's criticisms was that the excise collectors had unbridled power to search private homes. *See id.* at 43 n.108.

79. *See id.* at 43-44.

80. *See id.* at 44-46.

81. *See* Leach v. Money, 19 Howell's State Trials 1002, 1023, 96 Eng. Rep. 320, 323 (1765); Huckle v. Money, 2 Wilson's King's Bench 205, 206, 95 Eng. Rep. 768, 769 (1763); Wilkes v. Woods, 19 Howell's State Trials 1153, 1166, 98 Eng. Rep. 489, 498 (1763). Wilkes eventually obtained a verdict against Lord Halifax himself for 4,000 pounds. *See* Wilkes v. Halifax, 19 Howell's State Trials 1406, 1407, 95 Eng. Rep. 797, 797 (1769). The Crown bore all the expenses in the cases, which were reported to exceed 100,000 pounds. *See* N. LASSON, *supra* note 52, at 45.

82. 19 Howell's State Trials 1030, 95 Eng. Rep. 807 (1765).

83. *Id.* at 1030, 95 Eng. Rep. at 807.

> . . . Has a Secretary of State right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed; and if it were lawful, no man could endure to live in this country.[84]

Entick's arguments struck a responsive chord in the judge, Lord Camden. In his judgment for Entick, Lord Camden made it clear that the wrongful uncovering of the plaintiff's personal secrets was one of the most substantial harms caused by the use of the general warrant:

> Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they *will hardly bear an inspection*; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the *secret nature* of those goods will be an aggravation of the trespass and demand more considerable damages in that respect.[85]

We can sense Lord Camden struggling within the semantic limitations of his legal vocabulary. Entry to Entick's house was a trespass as was seizure of his personal property.[86] The agents of the Crown, however, not only *seized* Entick's papers, they *read* them. Even though the eye cannot commit a trespass, it was the peculiar character of papers that they could not "bear an inspection." Although Lord Camden could give legal significance to this loss of secrecy only by increasing the damages awarded, his common sense told him that the "secret nature" of the papers was the heart of the case. The claim vindicated was not merely that the government intruded into Entick's house and deprived him of his property; by reading his personal papers the government searched out his secrets and thus caused the greatest harm to Entick's fundamental right of security.[87]

If, as is widely assumed, the framers had the Wilkes affair and the *Entick* decision in mind when they drafted and adopted the fourth amendment,[88] the right to be secure in papers should include the right to

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84. *Id.* at 1035, 95 Eng. Rep. at 812.

85. *Id.* (emphasis added).

86. *Id.* ("every invasion of private property, be it ever so minute, is a trespass").

87. The year after Lord Camden rendered his judgment in *Entick*, Parliament demonstrated a similar understanding that papers deserved special protection distinct from the general right to preserve private property from intrusion and seizure. In 1766 the House of Commons passed *two* separate resolutions in response to the Wilkes affair. One condemned the use of general warrants in libel cases; the other declared the seizure of papers in a libel case to be illegal. Editor's note following *Entick*, 19 Howell's State Trials at 1074-75. Parliament evidently felt the need for a separate provision to protect the secrecy of personal papers, however obtained by the government.

88. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 626-27 (1886).

> As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, [*Entick*,] and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Id. Wilkes himself was a popular figure among colonists because of his outspoken criticisms of the Crown, and he maintained a considerable correspondence with such leading Americans as James Otis, Samuel Adams, John Adams, Josiah Quincy, and John Hancock. *See* N. LASSON,

protect the secret contents of private papers as well as the right to prevent intrusive rummaging and seizures. In *Boyd v. United States*,[89] the only major Supreme Court decision of the 19th century interpreting "search" in the fourth amendment, the *Entick* decision provided the basis for such an intepretation by the Court.

In 1874 Congress enacted a customs revenue act[90] that contained a provision carefully crafted in an attempt to avoid the warrant requirements of the fourth amendment. The provision authorized the U.S. Attorney to issue to a civil defendant in a forfeiture action a subpoena to produce "any business book, invoice, or paper," setting forth by allegation the facts expected to be proved by the materials. If the defendant failed to produce the materials, the allegations would be taken as true. The act carefully specified that the defendant who complied by presenting the materials to the U.S. Attorney for examination would still retain custody of them.[91] In spite of this careful drafting, the Court held in *Boyd* that the subpoena procedure violated the fourth amendment.[92]

Because the defendant retained possession of his papers at all times, he could not claim that the government had seized them. And, as the Court recognized, the government's action defied characterization as a search of: "It is true that certain aggravating incidents of *actual* search and seizure, such as *forcible entry* into a man's house and *searching amongst* his papers, are wanting. . . ."[93] What was "wanting" was the semantic feature [movement through an area], which is present in both "forcible entry" and "searching amongst." The Court noted an important semantic distinction by using the preposition "amongst." Had the procedure resulted in the production of several boxes of records that the customs officers then went through, one *could* say that the officers searched the defendant's papers, by imagining papers as a total area. In fact, though, the procedure caused the defendant to produce only the single invoice the government wanted to see.[94]

Although the *Boyd* opinion did not use search out to express the conclusion that the procedure was a search, the semantic features identified and relied upon by the Court are those belonging to search out:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment . . . because it is a material ingredient, and effects the sole

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supra note 52, at 46 n.114.

89. 116 U.S. 616 (1886).

90. Act of June 22, 1874, ch. 391, 18 Stat. 186.

91. *Id.* § 5, 18 Stat. at 187.

92. Boyd v. United States, 116 U.S. 616, 638 (1886).

93. *Id.* at 622 (emphasis added).

94. *See id.* at 619-21. The presence of [movement through an area] had enabled the Court to avoid this problem of interpretation in an earlier case involving examination of personal mail while in transit through the postal service. *See Ex Parte* Jackson, 96 U.S. 727 (1877). Because the government already had lawful custody of the letters, the Court could not say that a seizure occurred. *See id.* at 733. The *opening* of the envelopes, however, provided sufficient movement to enable a literal application of search of. The government "searched the envelopes." Nonetheless, the Court's opinion seemed to recognize that the true object of the search was not the envelopes but "the secrecy of letters." *Id.*

object and purpose of search and seizure.[95]

The object effected by the procedure directed against the papers was "obtaining the information therein contained."[96] The Court then turned to *Entick* as authority for the proposition that the right to be secure in papers extended beyond the prevention of physical acts of searching:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense [in *Entick*]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . [I]t is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.[97]

Like Entick, Boyd successfully claimed that his "secret affairs . . . became wrongfully discovered and made public."[98]

The unarticulated semantic implication of *Boyd* was that "the right to be secure in papers" could be protected to the full extent contemplated by the framers only if search out as well as search of was a possible sense of "unreasonable searches." *Boyd* stood as evidence that a search out interpretation was sufficiently plausible to potentially command a majority on the Supreme Court. Thus, as the nation entered the 20th century, a latent ambiguity lurked in the fourth amendment, waiting for the problem of the "just listening" cases, which tortured and ultimately altered the shape of fourth amendment law.

V. Four Interpretations of "Search": The Just Listening Cases

For almost forty years, from 1928-1967, the Supreme Court struggled with cases involving various kinds of technologically aided listening—wiretapping,[99] hidden microphones,[100] and ultra-sensitive listening devices.[101] In each case the government took the position that no search had occurred because its agents were "just listening."[102] These cases brought to the surface the latent ambiguity of "search" in the first clause of the fourth amendment. Any conversion of a sentence using "listen" into one using "search of" was incoherent because listen does not contain the key semantic feature, [movement through an area], required for search of:

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95. *Boyd*, 116 U.S. at 622.
96. *Id.* at 624.
97. *Id.* at 630.
98. Entick v. Carrington, 19 Howell's State Trials 1029-30, 95 Eng. Rep. 807, 807 (1765).
99. *See* Olmstead v. United States, 277 U.S. 438, 444-45 (1928).
100. *See* Katz v. United States, 389 U.S. 347, 348 (1967); On Lee v. United States, 343 U.S. 747, 749 (1952).
101. *See* Silverman v. United States, 365 U.S. 505, 506 (1961); Goldman v. United States, 316 U.S. 129, 131-32 (1942).
102. *See Katz*, 389 U.S. at 352; *Silverman*, 365 U.S. at 511; *On Lee*, 343 U.S. at 751; *Goldman*, 316 U.S. at 135; *Olmstead*, 277 U.S. at 464-65.