

Stanford Technology Law Review

Symposium: Beyond a Physical Conception of the Fourth Amendment:
Search and Seizure in the Digital Age

Professor Susan Freiwald
University of San Francisco Law School

Title: A First Principles Approach to Communications' Privacy

Under current Fourth Amendment doctrine, parties to a communication enjoy constitutional protection against government surveillance only when they have a reasonable expectation of privacy in those communications. This paper discusses the insufficiency of the reasonable expectation of privacy test in the context of modern communications. Significantly, courts have required that communications media be virtually invulnerable before affording them Fourth Amendment protection.

That approach not only misses the point of the *Katz* case, which established the reasonable expectations of privacy test, but also dramatically under protects privacy, with pernicious results. This paper articulates a first principles approach to constitutional protection that focuses on the reasons electronic surveillance requires significant judicial oversight. In particular, it argues that electronic surveillance that is intrusive, continuous, indiscriminate, and hidden should be subject to the heightened procedural requirements imposed on government wiretappers. Because much of modern online surveillance shares those characteristics, it should be subject to the highest level of constitutional regulation.