

# **Making Sense of Search and Seizure Law**



# Making Sense of Search and Seizure Law

*A Fourth Amendment Handbook*

**Phillip A. Hubbart**

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# Preface

Fourth Amendment law is both fascinating and inspiring—dealing, as it does, with a fundamental human right, the denial of which was one of the leading causes of the American Revolution. I greatly admire this body of law, and I hope the reader shares my enthusiasm.

But this law can also be extremely confusing. Indeed, the Fourth Amendment is easily the most complicated, sprawling and misunderstood of all the freedoms guaranteed by the Bill of Rights. Perhaps this has made the subject all the more challenging, as it cannot be easily mastered.

Accordingly, the purpose of this book is to make sense of this subject. The work tries to organize and explain Fourth Amendment law, as announced by U.S. Supreme Court decisions, so that it is understandable and coherent. In particular, it concentrates on U.S. Supreme Court case law, relies heavily on the historical background of the Fourth Amendment upon which much of this law is based, and cites to the relevant treatises and West key numbers when dealing with the leading decisions of the lower federal courts and state courts.

A thorough understanding of this law and its historical roots is especially timely today—as we approach the many constitutional issues raised by the USA Patriot Act and the country's other efforts to track down and punish terrorists.

Although of interest to the country as a whole, the book is written primarily for the criminal justice community, namely:

- Judges, prosecutors, public defenders, and private criminal defense lawyers as they confront Fourth Amendment issues at the trial and appellate levels;
- Law enforcement personnel, police legal advisors, and academy instructors as they confront the same issues in the field and in the classroom;
- Law professors and law students in their study of criminal constitutional law, of which the Fourth Amendment is a vital part; and
- Professors and students at the undergraduate level in various criminal justice courses that cover the law of arrest and search and seizure.

The book, however, is not slanted in anyone's favor. Its sole purpose is to re-state Fourth Amendment law as objectively as I am able.

I am not, of course, the first to try to fathom this daunting subject. There are other splendid treatises that have been written in the field, principally Professor Wayne LaFare's magisterial work on the subject<sup>1</sup>—and a treasure trove of law review articles. Many of these works are cited in this book and are well worth consulting.

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1. 1–6 Wayne LaFare, *Search and Seizure* (4th ed. 2004).

The treatises, however, tend to be encyclopedic reference works—valuable, but covering many volumes, with innumerable cases discussed at the federal and state levels. Something most professionals do not have the time to read in depth. They are also highly critical on occasion [often brilliantly so] of the existing law, sometimes endorsing the views of dissenting Justices—again valuable and fascinating, but not terribly helpful to the busy professional seeking to understand the law as it is. And finally these works do not appear to organize the law around a principled or historical basis—understandably so, given the apparent crazy-quilt of decisions in this field. Enter the avalanche of law review commentary which, in part, attempts to supply this perceived vacuum with various theories that the Court is urged to adopt.

By way of contrast, I have tried in a *single volume* to restate the mass of Fourth Amendment law in a way that makes sense, has practical application, and is readable. I have not tried, however, to advocate alternative theories, criticize decisions as erroneous, or impose a new order on this body of law. That effort has an esteemed place in our legal literature, but that has not been my task.

Instead, I have tried to restate the content, order and principled basis of Fourth Amendment law that are found in the myriad of U.S. Supreme Court decisions on the subject—a painstaking operation that requires infinite time and patience in order to plumb the depths of these decisions. Something most busy judges, prosecutors, public defenders, private defense lawyers, law enforcement officials, and even some law or undergraduate professors do not have the luxury to do. I can assure the reader that I have done just that. Indeed, it has taken me twenty-five years to complete this work.

Justice Holmes once described the “ocean of law” as laden with “a thick fog of details” engulfed by “a black and frozen night,” but nonetheless “human . . . a part of man, and of one world with all the rest.” “There must be a drift to it,” he said, “if one will go prepared and have patience which will bring one out to daylight and a worthy end.”<sup>2</sup> Likewise, I think there is a certain drift to Fourth Amendment law with all its complexities—which, if a person perseveres, will also bring one out to daylight and a worthy end. This work is dedicated to that proposition.

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2. The Mind and Faith of Justice Holmes 36 (Max Lerner ed. 1943) (speech by Justice Oliver Wendell Holmes at Brown University Commencement 1897).

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Fred Lewis [a good friend and former Dean of the University of Miami Law School] gave me some critical advice in the late 1970's when he encouraged me to write a national work on the Fourth Amendment, rather than continue my then limited project on Florida search and seizure law.

My close friends Judge Charles Edelstein [former prosecutor and former county judge in Miami], Judge Arthur Rothenberg [former assistant public defender and current circuit court judge in Miami], and Michael Genden [former practicing lawyer and current circuit judge in Miami] have long encouraged me to continue this work. Judge Daniel Pearson [my good friend and former appellate court colleague in Miami] did the same with his constant encouragement and wry humor—but unfortunately passed away before the book was accepted for publication.

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Professor Michael Graham of the University of Miami Law School—himself an accomplished author on the Federal Rules of Evidence as well as many other evidence treatises—was instrumental in helping me focus my work, secure a suitable title, put the final manuscript into understandable form, and find a publisher. Moreover, Professor Norman Lefstein of the University of Indiana Law School and my former college debate partner, suggested that I contact Carolina Academic Press which, fortunately for me, ultimately became the publisher of this work.

My thanks also go to my professors at Duke University Law School, Robinson Everett and Francis Paschal, who in the late 1950's and early 60's kindled a life-long fascination with Fourth Amendment law. And while I was serving as an appellate court judge in Miami 1977–96, Judge Charles Moylan of the Maryland Court of Appeals particularly

inspired me to learn this daunting subject with his insightful and sparkling lectures on the Fourth Amendment to judges and police.

Hugo Black, Jr. [son of the great Supreme Court Justice and a highly accomplished trial lawyer in Miami], Gerald Kogan [former Chief Justice of the Florida Supreme Court and of counsel to my law firm]; and Myles Tralins [a prominent trial lawyer in Miami]—were all very supportive in my efforts to complete this work. Mr. Tralins unfortunately was killed in a tragic automobile accident before the book was published.

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Of course, I take full responsibility for what is ultimately written in this work. The many people who have helped and encouraged me played an important role in the development of this book, but I alone take responsibility for the material I have placed in it.

Finally, I cannot put into words how much I owe my devoted and talented wife Martha. So I will not try—except to thank her for her expert proofreading work on this book, and for enriching my life for over forty years.

## About the Author

Phillip A. Hubbart holds a Juris Doctor from Duke University Law School and a LL.M. from Georgetown University Law School. He is a member of the Florida Bar and the District of Columbia Bar.

He served for nineteen years as a judge on the Third District Court of Appeal in Miami, Florida (1977–96), including two and a half years as Chief Judge of that Court (1980–83). Before that, he served six years as the elected Public Defender of Miami-Dade County, Florida (1971–76); five years as an assistant defender in the same office (1965–69); two years in private practice in Miami, Florida (1964–65, 1969–70); and two years in public defender work in Washington, D.C. (1961–63) as a lawyer for the Legal Aid Agency for the District of Columbia (now the Public Defender Service), and as an E. Barrett Prettyman Fellow at Georgetown Law School. He has also taught criminal law related courses as an adjunct law professor for nearly thirty years—including, at present, a seminar on the Fourth Amendment. He currently is a member of the law firm of Wetherington, Klein and Hubbart in Miami, Florida.

He is a joint author of *Florida Evidentiary Foundations* (Michie 2d ed. 1997), and a joint author of the practice commentaries to *Florida Criminal Practice Service*, vols. 1–5 (Lawyers Coop. 1993). He is also a member of the American Law Institute.



# Plan of the Book

Here is how the book organizes the vast legal materials on Fourth Amendment law in an effort to make sense of this complex subject.

- **Introduction.** The first chapter comments on the importance and limit of Fourth Amendment freedom, a critical consideration in deciding search and seizure issues. Thereafter, the chapter outlines the three distinctive parts of Fourth Amendment law, surveys the growth of Fourth Amendment decisions since the early nineteenth century, notes other sources of search and seizure law besides the Fourth Amendment, and ends with a short framework for analyzing a Fourth Amendment question on a motion to suppress in a criminal case.

- **Historical background and purpose.** Part I, Chapters 2–6, examines in depth the historical background and purpose of the Fourth Amendment, covering the formative Revolutionary Period of American history (1761–91). This is done because much of Fourth Amendment law, as announced by the U.S. Supreme Court, has been influenced by and is based on the original understanding of the Framers. For those readers, however, who wish to skip much of the detail of this history, Chapter 6 serves as a summary of Chapters 2–5, as it moves into the two historical purposes of the Fourth Amendment.

- **Substantive Law.** Part II, the balance of the book, examines the *substantive law* of the Fourth Amendment. As a preface to this analysis, Chapter 7 surveys the three basic approaches that the U.S. Supreme Court has employed in interpreting the Fourth Amendment to produce this body of law. Thereafter, Part II divides into three Subparts, which discuss the three distinct divisions of Fourth Amendment law: (1) the “Standing Requirement,” (2) the “Unreasonableness Requirement,” and (3) the Exclusionary Rule.

1. **The “Standing Requirement.”** Subpart A analyzes the “Standing Requirement” of Fourth Amendment law: the constitutional requirement that there must be, in the language of the Fourth Amendment, a “search” or “seizure” of the complaining party’s “person, house, papers [or] effects.” There can be no Fourth Amendment violation unless this threshold requirement is met—a requirement that, in turn, has three elements:

- **A Personal Standing Element**, discussed in Chapter 8;
- **A Governmental Action Element**, also discussed in Chapter 8; and
- **A Search or Seizure Element**, discussed in Chapters 9 and 10.

2. **The “Unreasonableness Requirement.”** Subpart B analyzes the “Unreasonableness Requirement” of Fourth Amendment law: the constitutional requirement that the search or seizure in question must, in the language of the Fourth Amendment, be “unreasonable.” There can be no Fourth Amendment violation unless this requirement is also met. Indeed, this fundamental prerequisite is the heart of

Fourth Amendment law and tends to be quite complex; hence the need for a careful organizational structure.

- **General rules and principles.** Chapter 11 initially surveys the *general rules and principles* of Fourth Amendment unreasonableness, including the general rule that a search of private premises [particularly the home] must be conducted with a search warrant.

- **Unreasonable seizures and searches.** The balance of this Subpart deals first with *unreasonable seizures*, and second with *unreasonable searches*, each of which is analyzed separately by U.S. Supreme Court decisions.

- **Unreasonable seizures.** Chapter 12 covers the unreasonableness rules governing *seizures* of persons and private property. This branch of Fourth Amendment law governs arrests and temporary detentions of persons, as well as full-blown and temporary seizures of personal and real property.

- **Unreasonable searches.** Chapter 13–15 examines the unreasonableness rules governing *searches* of private property and persons. This branch of Fourth Amendment law governs searches of real and personal property [such as a home, business, or motor vehicle], as well as searches of persons.

- ◆ **Searches with a warrant.** Chapter 13 deals with the unreasonableness rules governing searches conducted *with a search warrant*, rules that largely emanate from the Warrants Clause of the Fourth Amendment.

- ◆ **Searches without a warrant.** Chapters 14–15 probe the unreasonableness rules governing searches conducted *without a search warrant*, concentrating on the many *exceptions* to the search warrant requirement rule.

- \* **Criminal exceptions.** Chapter 14 covers the *criminal exceptions* to the search warrant requirement rule—i.e. search incident to a lawful arrest, stop-and-frisk search, moving vehicle search, consent search, and exigent circumstances search.

- \* **Civil or special needs exceptions.** Chapter 15 deals with the *civil or special needs exceptions* to the search warrant requirement rule—i.e. inventory search, border search, administrative inspection search, probationer home search, public student search, drug testing search, airport or public building electronic search, and others.

- **Special Problems.** Chapter 16 examines special “Unreasonableness Requirement” problems, so that the reader can see how the various strands of Fourth Amendment law apply in concrete and often recurring factual scenarios.

**3. The Exclusionary Rule.** Finally, Subpart C reviews the *Weeks-Mapp exclusionary rule* adopted by the U.S. Supreme Court to enforce the Fourth Amendment. The applicability of this rule has long been treated as a separate issue apart from whether there has been a Fourth Amendment violation. Chapter 17 discusses the historical development and rationale for the exclusionary rule, covers the substan-

tive law of the exclusionary rule, and ends with a treatment of miscellaneous procedural and appellate considerations. Although this rule applies in most cases at the criminal trial level whenever there has been a violation of the defendant's Fourth Amendment's rights, this is not always the case. There are important limitations and exceptions that stay the impact of the rule, even though the Fourth Amendment may have been violated in a given case.



# List of Abbreviations

R. Brown	Richard Brown, <i>Revolutionary Politics in Massachusetts</i> (1970)
W. Cuddihy	William Cuddihy, "The Fourth Amendment: Origins and Original Meaning 602–1790" (Claremont Graduate School Doctoral Dissertation 1990)
H. Gray	Horace Gray Jr., <i>Quincy's Massachusetts Reports 1761–72</i> , Appendix I (1865)
O.M. Dickerson	O.M. Dickerson, "Writs of Assistance as a Cause of the Revolution," <i>The Era of the American Revolution</i> (Richard Morris ed. 1939)
J.R. Frese	Joseph R. Frese, "Writs of Assistance in the American Colonies 1660–1776" (Harvard Univ. Doctoral Dissertation 1951)
J.R. Frese, N.Eng.Q.	Joseph R. Frese, "James Otis and the Writs of Assistance," 30 <i>New England Quarterly</i> 498 (1957)
J. Landynski	Jacob Landynski, <i>Search and Seizure and the Supreme Court</i> (1966)
N. Lasson	Nelson Lasson, <i>The History and Development of the Fourth Amendment to the United States Constitution</i> (1937)
L. Levy	Leonard Levy, <i>Original Intent and the Framers' Constitution</i> (1988)
Perry and Cooper	Richard L. Perry and John C. Cooper, <i>Sources of Our Liberties</i> (ABA 1959)
Quincy	<i>Quincy's Massachusetts Reports 1761–72</i> (1865)
M.H. Smith	M.H. Smith, <i>The Writs of Assistance Case</i> (1978)
C. Rossiter	Clinton Rossiter, <i>1787 The Grand Convention</i> (1966)
R. Rutland	Robert Rutland, <i>The Birth of the Bill of Rights</i> (rev. ed. Northeastern paperback 1983)
B. Schwartz	Bernard Schwartz, <i>The Bill of Rights: A Documentary History</i> (1971) vols. I & II
F. Siebert	Fredrick S. Siebert, <i>Freedom of the Press in England 1476–1776</i> ch. 18 (1952)
T. Taylor	Telford Taylor, <i>Two Studies in Constitutional Interpretation</i> (1969)
C. Van Doren	Carl Van Doren, <i>The Great Rehearsal</i> (1948)
Wroth and Zobel	L. Kinvin Wroth and Hiller B. Zobel, <i>2 Legal Papers of John Adams</i> (1965)

