

The Fourth Amendment

The Fourth Amendment

Its History and Interpretation

THIRD EDITION

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*To my family
Sally, Kevin & Brian*

Summary of Contents

Contents	ix
Preface to the Third Edition	xxi
Preface to the Second Edition	xxiii
Preface to the First Edition	xxv
Chapter 1 · Overview of Fourth Amendment Structure	3
§ 1.1. Fourth Amendment text	3
§ 1.2. Analytical structure of all Fourth Amendment questions	4
§ 1.3. Tools to interpret the Amendment	16
§ 1.4. Independent state grounds	23
§ 1.5. Digital and electronic evidence	25
Chapter 2 · Historical Overview of Search and Seizure Practices	59
§ 2.1. Introduction	59
§ 2.2. Searches and seizures in England and its American colonies through the American Revolution	61
§ 2.3. Constitutional Convention through drafting of the Fourth Amendment	80
§ 2.4. Drafting of the Fourth Amendment	93
§ 2.5. Post-drafting events to <i>Boyd</i>	99
Chapter 3 · The Right to Be “Secure”	101
§ 3.1. Introduction	102
§ 3.2. The origin, development, and [ostensible] demise of property analysis	108
§ 3.3. The reasonable expectation of privacy test	117
§ 3.4. The continued evolution of the protected interests framework	133
§ 3.5. Limitations on protection	152
Chapter 4 · Objects Protected by the Amendment: People, Persons, Houses, Papers, and Effects	199
§ 4.1. Introduction	199
§ 4.2. The “people”	200
§ 4.3. “Persons”	203
§ 4.4. “Houses”	206
§ 4.5. “Papers”	233
§ 4.6. “Effects”	234
Chapter 5 · “Seizure”: When Does a Seizure Occur?	249
§ 5.1. Seizure of a person	250
§ 5.2. Seizures of property	313

Chapter 6 • Arrests, Stops, and Other Seizures of Persons	333
§ 6.1. Introduction	334
§ 6.2. Seizures in historical context	335
§ 6.3. Arrests	337
§ 6.4. Stops and distinguishing them from arrests	373
§ 6.5. Roadblocks and checkpoints	397
§ 6.6. Detentions during execution of search warrants	399
§ 6.7. Detention of material witnesses	411
Chapter 7 • Defining “Search”	419
§ 7.1. Overview	420
§ 7.2. Historical context of “searches”	421
§ 7.3. Physical invasions; two-sided nature of search analysis	423
§ 7.4. Non-tactile searches	432
§ 7.5. Considerations in defining a “search”	467
§ 7.6. Private searches and the requirement of governmental action	479
Chapter 8 • Search Incident to Arrest	499
§ 8.1. General considerations and evolution of the doctrine	499
§ 8.2. Permissible objects sought	507
§ 8.3. Timing and location of the search	509
§ 8.4. Scope: arrestee’s body, including highly intrusive searches	517
§ 8.5. Scope: areas within the arrestee’s “control”	525
§ 8.6. Vehicle searches incident to arrest	528
§ 8.7. Cell phones and other digital devices	536
§ 8.8. Critique of current doctrine	538
Chapter 9 • Protective Weapon Searches [Frisks] and Sweeps	545
§ 9.1. Protective weapons searches [frisks]	545
§ 9.2. Protective sweeps	578
Chapter 10 • Other Categories of Searches	585
§ 10.1. Automobile searches — probable cause based	585
§ 10.2. Border enforcement	590
§ 10.3. Community caretaking	602
§ 10.4. Consent	609
§ 10.5. Entranceway screening	636
§ 10.6. Exigent circumstances	647
§ 10.7. Fire fighting and investigations	662
§ 10.8. Inventory searches	664
§ 10.9. Subpoenas duces tecum	672
Chapter 11 • The Reasonableness of a Search or Seizure	675
§ 11.1. Importance of the concept of reasonableness	676
§ 11.2. Origins of the concept of reasonableness	680
§ 11.3. Procedural regulation of searches and seizures	681

§ 11.4. The Court's attempts to harmonize the models	736
§ 11.5. Proposed hierarchy of reasonableness	741
§ 11.6. Other aspects of reasonableness	762
Chapter 12 · Warrant Issuance, Review, and Execution	781
§ 12.1. Introduction	782
§ 12.2. Warrant issuance requirements	782
§ 12.3. Review of the decision to issue a warrant	789
§ 12.4. Particularity requirement of the Warrant Clause	803
§ 12.5. Warrant execution	825
Chapter 13 · The Exclusionary Rule and Other Remedies	853
§ 13.1. Introduction	853
§ 13.2. Evolution of exclusionary rule doctrine	856
§ 13.3. Causation: fruit and attenuation analysis	886
§ 13.4. Independent source doctrine	904
§ 13.5. Inevitable discovery	908
§ 13.6. Substantiality of the violation, culpability of the actor, and “good faith”	911
§ 13.7. Impeachment	923
§ 13.8. Other remedies	924
Table of Cases	931
Index	983

Contents

Summary of Contents	vii
Preface to the Third Edition	xxi
Preface to the Second Edition	xxiii
Preface to the First Edition	xxv
Chapter 1 • Overview of Fourth Amendment Structure	3
§ 1.1. Fourth Amendment text	3
§ 1.2. Analytical structure of all Fourth Amendment questions	4
§ 1.2.1. Applicability	4
§ 1.2.1.1. Governmental activity: searches and seizures	4
§ 1.2.1.1.1. Searches	5
§ 1.2.1.1.2. Seizures	6
§ 1.2.1.1.2.1. Seizures of persons	6
§ 1.2.1.1.2.2. Seizures of property/information	7
§ 1.2.1.2. Protected individual interests	8
§ 1.2.2. Satisfaction	12
§ 1.2.2.1. The reasonableness command	12
§ 1.2.2.2. Warrant issues, including issuance, review, and execution	13
§ 1.2.3. Remedies	14
§ 1.3. Tools to interpret the Amendment	16
§ 1.4. Independent state grounds	23
§ 1.5. Digital and electronic evidence	25
§ 1.5.1. Fourth Amendment Applicability issues involving digital evidence	25
§ 1.5.2. Fourth Amendment satisfaction issues involving digital evidence	35
§ 1.5.3. Selected federal statutes regulating acquisition of digital evidence	48
§ 1.5.4. List of topics on digital evidence	58
Chapter 2 • Historical Overview of Search and Seizure Practices	59
§ 2.1. Introduction	59
§ 2.2. Searches and seizures in England and its American colonies through the American Revolution	61
§ 2.2.1. Warrantless actions	61
§ 2.2.2. Warrants and writs of assistance	64

§ 2.2.3. Reaction to search and seizure practices	68
§ 2.2.3.1. The writs of assistance in America	69
§ 2.2.3.2. English cases	73
§ 2.2.3.3. State constitutions	79
§ 2.3. Constitutional Convention through drafting of the Fourth Amendment	80
§ 2.3.1. Constitutional Convention	80
§ 2.3.2. The Confederation Congress	81
§ 2.3.3. The Ratification of the Constitution by the States	81
§ 2.4. Drafting of the Fourth Amendment	93
§ 2.5. Post-drafting events to <i>Boyd</i>	99
Chapter 3 · The Right to Be “Secure”	101
§ 3.1. Introduction	102
§ 3.1.1. Overview of the current analysis	103
§ 3.1.2. Historical conception of the word “secure”	104
§ 3.1.2.1. Framing era definitions	104
§ 3.1.2.2. <i>Entick</i> and other historical background	104
§ 3.2. The origin, development, and [ostensible] demise of property analysis	108
§ 3.2.1. Hierarchy of property rights and substantive restrictions on searches and seizures	108
§ 3.2.2. Tangible objects, physical invasions, and constitutionally protected areas	111
§ 3.2.3. Demise of the property-based theories and the emergence of privacy	113
§ 3.3. The reasonable expectation of privacy test	117
§ 3.3.1. <i>Katz</i> and reasonable expectations of privacy	117
§ 3.3.2. Privacy’s relationship to the objects listed in the Amendment	119
§ 3.3.3. Creation of a hierarchy of privacy interests	120
§ 3.3.3.1. Situations where the Court has found no reasonable expectation of privacy	121
§ 3.3.3.2. Situations where the Court has found reduced expectations of privacy	122
§ 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy	124
§ 3.3.5. Critique of privacy as a centralizing principle	128
§ 3.4. The continued evolution of the protected interests framework	133
§ 3.4.1. Intimations of broader protections	133
§ 3.4.2. Liberty and related terms	134
§ 3.4.3. The home, possessory interests, and the re-emergence of property	135
§ 3.4.4. Ability to exclude as the essential component of the right to be secure	145
§ 3.5. Limitations on protection	152
§ 3.5.1. Assumption of risk, voluntary exposure, and shared privacy	152

§ 3.5.1.1. In general	152
§ 3.5.1.2. Possible restrictions on assumption of risk/voluntary exposure doctrines	166
§ 3.5.2. Standing	169
§ 3.5.2.1. Introduction	169
§ 3.5.2.2. Procedural aspects of the standing question	175
§ 3.5.2.3. Current standing doctrine	176
§ 3.5.2.4. Ramifications of standing principles	177
§ 3.5.2.5. Rejected theories seeking to establish who the “victim” is	178
§ 3.5.2.5.1. “Aggrieved by”	178
§ 3.5.2.5.2. “Automatic standing”	179
§ 3.5.2.5.3. Target theory/directed at	181
§ 3.5.2.6. Categories of persons seeking to challenge searches	183
§ 3.5.2.6.1. Coconspirators and codefendants	183
§ 3.5.2.6.2. Persons wrongfully on the premises	183
§ 3.5.2.6.3. Owners and other persons in their homes, apartments, and hotels	184
§ 3.5.2.6.4. Guests and others legitimately in another’s home	186
§ 3.5.2.6.5. Persons conducting business and those paying for privacy	194
Chapter 4 • Objects Protected by the Amendment: People, Persons, Houses, Papers, and Effects	199
§ 4.1. Introduction	199
§ 4.2. The “people”	200
§ 4.3. “Persons”	203
§ 4.4. “Houses”	206
§ 4.4.1. The home	206
§ 4.4.1.1. Curtilage, other buildings, and open fields doctrine	208
§ 4.4.1.2. Access ways to the home	218
§ 4.4.2. Business and commercial premises	224
§ 4.4.2.1. Business curtilage	226
§ 4.4.2.2. Closely regulated industries	227
§ 4.5. “Papers”	233
§ 4.6. “Effects”	234
§ 4.6.1. In general; types of containers	234
§ 4.6.2. Abandoned property	237
§ 4.6.2.1. In general	237
§ 4.6.2.2. Garbage	245
Chapter 5 • “Seizure”: When Does a Seizure Occur?	249
§ 5.1. Seizure of a person	250
§ 5.1.1. Introduction	250
§ 5.1.1.1. Overview of current analysis	250
§ 5.1.1.2. Nature of the interest implicated by a seizure	252

§ 6.3.2.2. The 1968 decisions	346
§ 6.3.2.2.1. <i>Terry v. Ohio</i> —vision #2: arrest as initial stage of prosecution	346
§ 6.3.2.2.2. <i>Peters v. New York</i> —vision #3: any probable-cause based detention	347
§ 6.3.2.3. The 1968–73 decisions—vision #4: a multitude of seizures	349
§ 6.3.2.4. The 1973 decisions—vision #5: three types of seizures: stops; arrests; and formal or custodial arrests	351
§ 6.3.2.5. 1979–83—vision #6: apparent solidification into two categories	352
§ 6.3.2.6. 1980–on: the persistence of vision #4: formal and informal arrests	355
§ 6.3.2.7. Vision #7: <i>Hodari D.</i> and the common law of arrest	356
§ 6.3.2.8. <i>Knowles v. Iowa</i> : a new or revisited vision?	357
§ 6.3.3. The confusion in academia and the lower courts	358
§ 6.3.3.1. Attempts at synthesis	358
§ 6.3.3.2. Reliance on the common law	358
§ 6.3.3.3. Any detention based on probable cause to arrest	359
§ 6.3.3.4. Custodial and non-custodial arrests	359
§ 6.3.3.5. Custody—intent to release	360
§ 6.3.3.6. Formal arrests	360
§ 6.3.3.7. Reasonable person test	361
§ 6.3.3.8. Fact-specific analysis	361
§ 6.3.4. Considerations in defining arrest	362
§ 6.3.4.1. The relationship of state law to Fourth Amendment analysis	362
§ 6.3.4.2. Analysis of the various definitions of “arrest”	365
§ 6.3.5. Arrest warrants—when needed	370
§ 6.3.6. Pretrial detention after warrantless arrests; probable cause hearings	372
§ 6.4. Stops and distinguishing them from arrests	373
§ 6.4.1. Constitutional basis for limitations on the scope of stops	374
§ 6.4.2. Permissible investigative techniques—in general	376
§ 6.4.2.1. Length of detention	376
§ 6.4.2.2. Type of criminal activity being investigated	379
§ 6.4.2.3. Diligence and means used in pursuing the investigation	380
§ 6.4.2.4. Suspect’s actions contributing to delay	384
§ 6.4.2.5. Movement of the suspect	385
§ 6.4.2.6. Questions of suspect/others	386
§ 6.4.2.7. Requests for identification	389
§ 6.4.2.8. Use of force and protective actions	391
§ 6.4.2.9. Other permissible actions during a stop	392
§ 6.4.3. Traffic stops	393
§ 6.4.3.1. License, registration, computer checks, and VIN examinations	394

§6.4.3.2. Orders to exit the vehicle	396
§6.5. Roadblocks and checkpoints	397
§6.6. Detentions during execution of search warrants	399
§6.6.1. Residents, occupants, and visitors	403
§6.6.2. What constitutes “of the premises”?	406
§6.6.3. Protective actions during detention	409
§6.7. Detention of material witnesses	411
Chapter 7 • Defining “Search”	419
§7.1. Overview	420
§7.2. Historical context of “searches”	421
§7.3. Physical invasions; two-sided nature of search analysis	423
§7.3.1. Plain feel doctrine	430
§7.4. Non-tactile searches	432
§7.4.1. Evolution of the treatment of non-tactile searches	432
§7.4.1.1. <i>Boyd</i> , liberalism, and the constructive search doctrine	432
§7.4.1.2. <i>Olmstead</i> and the literal view	435
§7.4.1.3. The erosion of <i>Olmstead</i> : intangible interests and intrusions, hearing, and <i>Katz</i>	436
§7.4.1.4. The re-emergence of constitutionally protected areas and the impact of technology	438
§7.4.2. Visual inspection	449
§7.4.2.1. In general	449
§7.4.2.2. Enhancements to vision and changing position; tracking devices	449
§7.4.2.3. Limitations to visual inspections	454
§7.4.2.4. Plain view doctrine	455
§7.4.2.4.1. Prior valid intrusion or otherwise legitimate location	456
§7.4.2.4.2. Lawful position to seize the object	459
§7.4.2.4.3. Incriminating character of the object must be immediately apparent	461
§7.4.3. Sense of smell	462
§7.4.3.1. In general/plain smell	462
§7.4.3.2. Enhancement of the olfactory sense: dog sniffs	462
§7.5. Considerations in defining a “search”	467
§7.5.1. Analogy to physical invasions	467
§7.5.2. Purpose inquiry	468
§7.5.3. The nature of what is discovered and the context of discovery	474
§7.5.4. Sophistication of the device used and its use by the public	476
§7.6. Private searches and the requirement of governmental action	479
§7.6.1. In general	479
§7.6.2. Fourth Amendment applicability: who is a government agent?	480
§7.6.2.1. Supreme Court cases	480
§7.6.2.2. Lower court cases	483

§ 7.6.3. Government replication of a private search	488
§ 7.6.4. The context in which an object is found after a private search	489
Chapter 8 • Search Incident to Arrest	499
§ 8.1. General considerations and evolution of the doctrine	499
§ 8.1.1. Early practices	500
§ 8.1.2. Exigency versus categorical approach	501
§ 8.1.3. Justification: Officer safety, evidence recovery, and balancing	502
§ 8.2. Permissible objects sought	507
§ 8.3. Timing and location of the search	509
§ 8.4. Scope: arrestee’s body, including highly intrusive searches	517
§ 8.5. Scope: areas within the arrestee’s “control”	525
§ 8.6. Vehicle searches incident to arrest	528
§ 8.7. Cell phones and other digital devices	536
§ 8.8. Critique of current doctrine	538
Chapter 9 • Protective Weapon Searches [Frisks] and Sweeps	545
§ 9.1. Protective weapons searches [frisks]	545
§ 9.1.1. Overview	545
§ 9.1.2. Justification for	547
§ 9.1.3. Scope of—in general	552
§ 9.1.4. Scope of—persons	553
§ 9.1.4.1. Supreme Court cases	553
§ 9.1.4.2. Lower court views	559
§ 9.1.4.3. The misconceived patdown limitation	562
§ 9.1.4.3.1. Least intrusive means analysis	562
§ 9.1.4.3.2. Police perjury	565
§ 9.1.4.3.3. Bright line rules	567
§ 9.1.4.4. The proper scope of a protective search	568
§ 9.1.4.4.1. The level of assurance that the police may obtain	569
§ 9.1.4.4.2. Limits based on weapons size	570
§ 9.1.5. Protective searches beyond the person: vehicles, places, and items	574
§ 9.2. Protective sweeps	578
Chapter 10 • Other Categories of Searches	585
§ 10.1. Automobile searches — probable cause based	585
§ 10.2. Border enforcement	590
§ 10.2.1. Searches at the international border	590
§ 10.2.2. Letters and data as targets; the technological border	596
§ 10.2.3. Roving patrols and checkpoints away from the border	601
§ 10.3. Community caretaking	602
§ 10.4. Consent	609
§ 10.4.1. Overview of current standard	609
§ 10.4.2. Evolution of the treatment of consent	612

§ 10.4.2.1. Waiver versus objective reasonableness	612
§ 10.4.2.2. Factors in totality test	617
§ 10.4.3. Scope of consent	622
§ 10.4.4. Third party consent	624
§ 10.4.4.1. Actual authority	624
§ 10.4.4.2. Apparent authority	633
§ 10.4.4.2.1. In general	633
§ 10.4.4.2.2. Physical locks and password protected computer files	634
§ 10.5. Entranceway screening	636
§ 10.6. Exigent circumstances	647
§ 10.7. Fire fighting and investigations	662
§ 10.8. Inventory searches	664
§ 10.9. Subpoenas duces tecum	672
Chapter 11 • The Reasonableness of a Search or Seizure	675
§ 11.1. Importance of the concept of reasonableness	676
§ 11.2. Origins of the concept of reasonableness	680
§ 11.2.1. Searches and seizures in England and in America through 1791	680
§ 11.2.2. Rise and fall of substantive restrictions on searches and seizures	680
§ 11.3. Procedural regulation of searches and seizures	681
§ 11.3.1. Model #1: the warrant requirement	682
§ 11.3.2. Model #2: individualized suspicion	685
§ 11.3.2.1. Two types of individualized suspicion	688
§ 11.3.2.1.1. Probable cause	689
§ 11.3.2.1.2. Articulate suspicion	691
§ 11.3.2.2. Types and sources of information	695
§ 11.3.2.3. Informants	697
§ 11.3.3. Model #3: case-by-case model	702
§ 11.3.3.1. Genesis of the case-by-case model	702
§ 11.3.3.2. Competition between the case-by-case and warrant preference models	703
§ 11.3.4. Model #4: the balancing test	706
§ 11.3.4.1. Genesis of balancing	706
§ 11.3.4.2. The dramatic restructuring in the 1960s and the rise of balancing	707
§ 11.3.4.3. The broad application of the balancing test	711
§ 11.3.4.4. Factors in the balancing test	713
§ 11.3.4.4.1. Individual's interest	715
§ 11.3.4.4.2. Government interests	717
§ 11.3.4.4.2.1. Identifying the government interest	718
§ 11.3.4.4.2.2. Special needs	720
§ 11.3.4.4.3. Necessity for the intrusion	723

§ 12.4.8. Computer and digital evidence searches	815
§ 12.4.9. Suppression and good faith	823
§ 12.5. Warrant execution	825
§ 12.5.1. Introduction	825
§ 12.5.2. Timing of execution of warrants	826
§ 12.5.2.1. Time periods for warrants to be valid; execution vs. forensic analysis	826
§ 12.5.2.2. Staleness	830
§ 12.5.3. Nighttime execution of warrants	833
§ 12.5.4. Knock and announce requirement	836
§ 12.5.5. Other rule-based execution issues	837
§ 12.5.5.1. Notice of search	838
§ 12.5.5.2. Inventory; return of warrant	841
§ 12.5.6. Executing warrants for intermingled documents/data; off-site searches	842
§ 12.5.7. Proper assistants — who can accompany the police	847
§ 12.5.8. Search of persons on premises	848
Chapter 13 · The Exclusionary Rule and Other Remedies	853
§ 13.1. Introduction	853
§ 13.2. Evolution of exclusionary rule doctrine	856
§ 13.2.1. The culpability era?	875
§ 13.3. Causation: fruit and attenuation analysis	886
§ 13.3.1. In general	886
§ 13.3.1.1. Fruit analysis	887
§ 13.3.1.2. Cost-benefit analysis	892
§ 13.3.2. Defendant’s statements	893
§ 13.3.3. Witness testimony	895
§ 13.3.4. Identification of the defendant	897
§ 13.3.5. Defendant’s presence and physical characteristics	898
§ 13.3.6. <i>Per se</i> attenuation based on the interest protected: in-home arrests; knock and announce violations	899
§ 13.4. Independent source doctrine	904
§ 13.5. Inevitable discovery	908
§ 13.6. Substantiality of the violation, culpability of the actor, and “good faith”	911
§ 13.6.1. Warrants	917
§ 13.6.2. Clerical errors by court and police personnel	918
§ 13.6.3. Statutes	919
§ 13.6.4. Warrantless actions and reliance on appellate court opinions	922
§ 13.7. Impeachment	923
§ 13.8. Other remedies	924
Table of Cases	931
Index	983

Preface to Third Edition

The most important development since the publication of the second edition was the death of Justice Scalia. He had a distinctive voice and had a marked influence on the treatment of Fourth Amendment doctrine in his almost 30 years on the Supreme Court. Scalia was the only Justice for many years that attempted to rethink and restructure Fourth Amendment doctrine, albeit looking to the past for a framework. Those views at least afforded a measurable framework for protection from physical searches and their technological analogues. With his death, Justice Scalia's distinctive property-law baseline may be sapped of vitality or disappear entirely. His views, which are not easily cabined as "government-friendly," are discussed throughout many of the pages of this volume.

As emphasized in the preface to the second edition, the sheer number of reported cases on the Fourth Amendment, and the rapid explosion of cases involving technology, mandates changes throughout the treatise. It is apparent to any student of our Constitution that the Fourth Amendment is the fundamental right that makes all the others viable—by restraining governmental actions in so many aspects of life. Knowledge of its complexity and importance has been an important part of my intellectual life and I hope that readers benefit from this edition.

Thomas K. Clancy
Sandwich, MA
June 1, 2017

Preface to Second Edition

Fourth Amendment principles are not static. It is the most implicated and most litigated portion of our Constitution, generally thousands of reported cases each year. Importantly, the Supreme Court has issued numerous opinions on the Fourth Amendment since the first edition was published in 2008. Those opinions significantly influence major issues in Fourth Amendment litigation, including important decisions on the structure of what the Amendment protects, when the Amendment is satisfied, and when the exclusionary rule should offer a remedy. All of those cases, through May 1, 2013, are included in this second edition. In addition, hundreds of new lower court cases have been added. I have added a new introductory section on digital evidence in Chapter 1, highlighting the increasing importance of such evidence, and have additional treatment of digital evidence throughout this new edition. More generally, although I have retained the structure of the first edition, every section of the new edition has new material and many of them have been substantially revised.

This second edition was written while I held the John T. Copenhaver Jr. Chair of Law, at West Virginia University College of Law, which is a visiting Endowed Chair. I was extremely lucky to have the invaluable research and editorial assistance of Natalie Arvizu, a student at the law school, in preparing this edition.

Thomas K. Clancy
May 1, 2013

Preface to First Edition

This book is designed to be an accessible and authoritative resource on the Fourth Amendment. It examines current search and seizure principles and provides the historical context and development of those principles. It takes a structural approach to the Fourth Amendment, addressing foundational questions: What is a search? What is a seizure? What—and who—does the Amendment protect? When is it satisfied? When does the exclusionary rule apply? By doing so, as explained in Chapter 1, it seeks to add clarity to the understanding of Fourth Amendment principles.

This book comprehensively treats United States Supreme Court case law, setting forth that Court's development of search and seizure principles, with the goal to provide context and understanding to current doctrine. Vast amounts of litigation in the lower courts and scholarly comments are generated each year. Writing a book such as this requires sorting through this mass of material. In choosing what to cite, I have tried to include representative cases and authorities that illustrate and illuminate Fourth Amendment principles, that are on issues undecided by the Supreme Court, or that offer a different point of view. At several points in this book, I offer my own views but have attempted to do so in a manner that clearly demonstrates that it is not the view of the Court.

The Fourth Amendment protects citizens against unreasonable governmental searches and seizures. Due to the wide applicability of governmental intrusions, ranging from countless thousands of daily intrusions at airports, traffic stops, drug testing, traditional criminal law enforcement practices, regulatory intrusions to enforce health, safety, environmental, and other regulatory schemes, and many other searches and seizures, the Amendment is the most commonly implicated and litigated part of our Constitution. It is the foundation upon which other freedoms rest.¹ Its fundamental promise is that individuals will be secure against unreasonable searches and seizures. That promise, however, is only one way of approaching the Amendment. Government officials—principally law enforcement agents—are permitted to make reasonable intrusions to effectuate legitimate governmental and societal needs. The operative

1. [T]he Fourth Amendment may plausibly be viewed as the centerpiece of a free, democratic society. All other freedoms presuppose that lawless police action have been restrained. What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person's privacy and liberty when he sits in his home or drives his car or walks the streets?

Yale Kamisar, *The Fourth Amendment and Its Exclusionary Rule*, THE CHAMPION, Sept.–Oct. 1991, at 20–21.

word is “reasonable,” which is the fundamental but undefined command of the Amendment.² A central challenge for courts is to give meaning to that term so law enforcement and individuals may know what the government may permissibly do. The Court has used many tools to interpret the Fourth Amendment and, as any student of the Amendment knows, it has never been accused of being consistent over time. But perhaps its choices come down to this: is the Amendment designed primarily to protect individuals from overreaching governmental invasions or is it designed to regulate law enforcement practices? The first view would promote individual liberty and the second would offer a rule book for the police to effectuate their intrusions.

This book is the product of many influences, ranging from my own interactions with law enforcement to decades of studying the Fourth Amendment. Most immediately, I thank those who provided comments and insights on various chapters. Those individuals include Marc Harrold, Don Mason, and Jack Nowlin. I received research assistance from Michael Gorman and Jessica Rawls. Alysson Mills provided invaluable editorial assistance that significantly improved each chapter. More generally, this book is the result of several decades of writing about search and seizure, teaching search and seizure at five different law schools, lecturing to judges, attorneys, and law enforcement around the country, and litigating motions to suppress at trial and, more often, on appeal. Along the way, I have had the honor of appearing in six different appellate courts. Of particular note, I spent 10 years as an Assistant Attorney General in the State of Maryland and briefed and argued more than 750 cases before the appellate courts of that state. Both of those courts—the Court of Appeals and the Court of Special Appeals—had honorable and knowledgeable experts on the Fourth Amendment. To mention only one, Judge Charles Moylan, for decades has been an important contributor to search and seizure jurisprudence in his published opinions, lectures, and publications. Arguing a close case before him and other members of the Court of Special Appeals—with a worthy opponent knowledgeable on the Fourth Amendment, such as Jose Anderson, now a professor at the University of Baltimore—was as good as it gets in a courtroom.

More recently, I have had the privilege of serving as Director of the National Center for Justice and the Rule of Law and Research Professor at the University of Mississippi School of Law. Dean Samuel Davis provided me with the resources and ability to create several programs at the Center, including the Fourth Amendment Initiative. Through that initiative, the Center offers educational opportunities to judges, prosecutors, and law enforcement on search and seizure, including in emerging areas such as computer searches and seizures. The Center works with the National Judicial College to develop national programs for trial and appellate judges. It works with the National Association of Attorneys General on programs for assistant attorneys general and it partners with Mississippi State University on computer search and seizure programs for judges and law enforcement. The Center has a dozen conferences

2. One commentator, often quoted, has described the Amendment as having the virtue of brevity and the vice of ambiguity. JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 42 (1966).

each year, with the James Otis Lecture and the Fourth Amendment Symposium, as annual highlights. These conferences and lectures have brought many of the best minds in the country to Oxford, Mississippi to debate aspects of the Fourth Amendment—and the results have been published in special editions of the *Mississippi Law Journal*. From each of those participants I have learned much and I deeply appreciate their contributions.

Finally, I acknowledge the work of Wayne R. LaFare, the twentieth century's foremost authority on the Fourth Amendment and his decades-long effort in his treatise to advance understanding of Fourth Amendment principles.

Many have influenced this book for the better. Its faults are mine.

A note on editing

Quotations in this book are edited and many changes are made without acknowledgement of omissions of paragraph breaks, internal citations, footnotes, and similar material.

Thomas K. Clancy
March 1, 2008

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.