

The Fourth Amendment

Its History and Interpretation

SECOND EDITION

Thomas K. Clancy

DIRECTOR, NATIONAL CENTER FOR JUSTICE AND THE RULE OF LAW
RESEARCH PROFESSOR OF LAW,
UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2014
Thomas K. Clancy
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Clancy, Thomas K.

The Fourth Amendment : its history and interpretation / Thomas K. Clancy. -- Second Edition.

pages cm

Includes bibliographical references and index.

ISBN 978-1-61163-174-6 (alk. paper)

1. United States. Constitution. 4th Amendment. 2. Searches and seizures--United States. I. Title.

KF9630.C53 2013

345.73'0522--dc23

2013020638

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*To my family
Sally, Kevin, & Brian*

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.

Summary of Contents

Preface to Second Edition	xix
Preface to First Edition	xxi
Chapter 1 Approaching the Fourth Amendment	3
Chapter 2 Historical Overview of Search and Seizure Practices	39
Chapter 3 The Right to Be “Secure”	77
Chapter 4 Objects Protected by the Amendment: People, Persons, Houses, Papers, and Effects	161
Chapter 5 “Seizure”: When Does a Seizure Occur?	201
Chapter 6 Arrests, Stops, and Other Seizures of Persons	273
Chapter 7 Defining “Search”	347
Chapter 8 Search Incident to Arrest	415
Chapter 9 Protective Weapon Searches [Frisks] and Sweeps	451
Chapter 10 Other Categories of Searches	487
Chapter 11 The Reasonableness of a Search or Seizure	565
Chapter 12 Warrant Issuance, Review, and Execution	653
Chapter 13 The Exclusionary Rule and Other Remedies	725
Table of Cases	791
Index	839

Contents

Preface to Second Edition	xix
Preface to First Edition	xxi
Chapter 1 · Approaching the Fourth Amendment	3
§ 1.1. Fourth Amendment text	3
§ 1.2. Analytical structure of all Fourth Amendment questions	3
§ 1.2.1. Applicability	4
§ 1.2.1.1. Governmental activity: searches and seizures	4
§ 1.2.1.1.1. Searches	4
§ 1.2.1.1.2. Seizures	5
§ 1.2.1.1.2.1. Seizures of persons	5
§ 1.2.1.1.2.2. Seizures of property	7
§ 1.2.1.2. Protected individual interests	7
§ 1.2.2. Satisfaction	11
§ 1.2.2.1. The reasonableness command	11
§ 1.2.2.2. Warrant issues, including issuance, review, and execution	12
§ 1.2.3. Remedies	13
§ 1.3. Tools to interpret the Amendment	14
§ 1.4. Independent state grounds	20
§ 1.5. Acquiring digital evidence (computer searches)	22
Chapter 2 · Historical Overview of Search and Seizure Practices	39
§ 2.1. Introduction	39
§ 2.2. Searches and seizures in England and its American colonies through the American Revolution	40
§ 2.2.1. Warrantless actions	40
§ 2.2.2. Warrants and writs of assistance	43
§ 2.2.3. Reaction to search and seizure practices	47
§ 2.2.3.1. The writs of assistance in America	48
§ 2.2.3.2. English cases	51
§ 2.2.3.3. State constitutions	56
§ 2.3. Constitutional Convention through drafting of the Fourth Amendment	58
§ 2.3.1. Constitutional Convention	58
§ 2.3.2. The Confederation Congress	58
§ 2.3.3. The Ratification of the Constitution by the States	59
§ 2.4. Drafting of the Fourth Amendment	69
§ 2.5. Post-drafting events to <i>Boyd</i>	74

Chapter 3 · The Right to Be “Secure”	77
§ 3.1. Introduction	78
§ 3.1.1. Overview of the current analysis	78
§ 3.1.2. Historical conception of the word “secure”	79
§ 3.1.2.1. Framing era definitions	79
§ 3.1.2.2. <i>Entick</i> and other historical background	80
§ 3.2. The origin, development, and [ostensible] demise of property analysis	83
§ 3.2.1. Hierarchy of property rights and substantive restrictions on searches and seizures	83
§ 3.2.2. Tangible objects, physical invasions, and constitutionally protected areas	85
§ 3.2.3. Demise of the property-based theories and the emergence of privacy	87
§ 3.3. The reasonable expectation of privacy test	91
§ 3.3.1. <i>Katz</i> and reasonable expectations of privacy	91
§ 3.3.2. Privacy’s relationship to the objects listed in the Amendment	93
§ 3.3.3. Creation of a hierarchy of privacy interests	94
§ 3.3.3.1. Situations where the Court has found no reasonable expectation of privacy	94
§ 3.3.3.2. Situations where the Court has found reduced expectations of privacy	96
§ 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy	97
§ 3.3.5. Critique of privacy as a centralizing principle	101
§ 3.4. The continued evolution of the protected interests framework	104
§ 3.4.1. Intimations of broader protections	104
§ 3.4.2. Liberty and related terms	105
§ 3.4.3. The home, possessory interests, and the re-emergence of property	106
§ 3.4.4. Ability to exclude as the essential component of the right to be secure	115
§ 3.5. Limitations on protection	121
§ 3.5.1. Assumption of risk, voluntary exposure, and shared privacy	121
§ 3.5.1.1. In general	121
§ 3.5.1.2. Possible restrictions on assumption of risk/voluntary exposure doctrines	132
§ 3.5.2. Standing	135
§ 3.5.2.1. Introduction	135
§ 3.5.2.2. Procedural aspects of the standing question	140
§ 3.5.2.3. Current standing doctrine	140
§ 3.5.2.4. Ramifications of standing principles	142
§ 3.5.2.5. Rejected theories seeking to establish who the “victim” is	143
§ 3.5.2.5.1. “Aggrieved by”	143
§ 3.5.2.5.2. “Automatic standing”	143
§ 3.5.2.5.3. Target theory/directed at	145
§ 3.5.2.6. Categories of persons seeking to challenge searches	146
§ 3.5.2.6.1. Coconspirators and codefendants	146
§ 3.5.2.6.2. Persons wrongfully on the premises	147
§ 3.5.2.6.3. Owners and other persons in their homes, apartments, and hotel rooms	147

§ 3.5.2.6.4. Guests and others legitimately in another's home	149
§ 3.5.2.6.5. Persons conducting business and those paying for privacy	156
Chapter 4 · Objects Protected by the Amendment: People, Persons, Houses, Papers, and Effects	161
§ 4.1. Introduction	161
§ 4.2. The “people”	162
§ 4.3. “Persons”	165
§ 4.4. “Houses”	167
§ 4.4.1. The home	167
§ 4.4.1.1. Curtilage, other buildings, and open fields doctrine	169
§ 4.4.1.2. Access ways to the home	177
§ 4.4.2. Business and commercial premises	181
§ 4.4.2.1. Business curtilage	183
§ 4.4.2.2. Closely regulated industries	185
§ 4.5. “Papers”	188
§ 4.6. “Effects”	189
§ 4.6.1. In general; types of containers	189
§ 4.6.2. Abandoned property	190
§ 4.6.2.1. In general	190
§ 4.6.2.2. Garbage	198
Chapter 5 · “Seizure”: When Does a Seizure Occur?	201
§ 5.1. Seizure of a person	202
§ 5.1.1. Introduction	202
§ 5.1.1.1. Overview of current analysis	202
§ 5.1.1.2. Nature of the interest implicated by a seizure	203
§ 5.1.1.3. The variety of encounters	204
§ 5.1.1.4. When seizures end	205
§ 5.1.2. Initial views of the concept of a seizure	207
§ 5.1.2.1. Common law background: arrests as the only type of seizure	207
§ 5.1.2.2. Division of the concept of a seizure: <i>Terry v. Ohio</i>	207
§ 5.1.3. Seizures involving physical contact	209
§ 5.1.4. Show of authority seizures	213
§ 5.1.4.1. Reasonable person test	214
§ 5.1.4.1.1. Initial development of the reasonable person test	214
§ 5.1.4.1.2. Modifying the “free to leave” language: freedom to “terminate the encounter”	217
§ 5.1.4.1.3. Supreme Court cases examining what constitutes a show of authority	218
§ 5.1.4.1.4. Lessons from the Supreme Court cases: the limited scope of what constitutes a show of authority	228
§ 5.1.4.1.5. Lower court cases on shows of authority	230
§ 5.1.4.2. Requirement of submission	233

§ 5.1.4.2.1. Creation of the need for submission	233
§ 5.1.4.2.2. What constitutes submission	237
§ 5.1.4.2.3. The point at which submission occurs	242
§ 5.1.4.2.4. Merits of the submission requirement	243
§ 5.1.4.2.5. Independent state grounds— rejecting <i>Hodari D.</i>	248
§ 5.1.5. Detainee responses to a seizure	249
§ 5.1.5.1. Abandonment and inappropriate responses	249
§ 5.1.5.2. Flight as ending an initial seizure	253
§ 5.1.6. Attempted acquisition of control: a proposed definition of a seizure	254
§ 5.2. Seizures of property	257
§ 5.2.1. Introduction	257
§ 5.2.2. Physical seizures of material property	258
§ 5.2.2.1. Seizures of homes	258
§ 5.2.2.2. Seizures of effects	259
§ 5.2.3. Tracking devices as seizures	267
§ 5.2.4. Intangible property and digital evidence	268
§ 5.2.5. Protected interests in property in addition to possession	270
Chapter 6 · Arrests, Stops, and Other Seizures of Persons	273
§ 6.1. Introduction	274
§ 6.2. Seizures in historical context	275
§ 6.3. Arrests	276
§ 6.3.1. Common law definition of arrest	278
§ 6.3.2. Supreme Court development of the concept of arrest	282
§ 6.3.2.1. Pre-1968 decisions—vision #1: consistency with the common law	283
§ 6.3.2.2. The 1968 decisions	284
§ 6.3.2.2.1. <i>Terry v. Ohio</i> —vision #2: arrest as initial stage of prosecution	284
§ 6.3.2.2.2. <i>Peters v. New York</i> —vision #3: any probable-cause based detention	285
§ 6.3.2.3. The 1968–73 decisions—vision#4: a multitude of seizures	287
§ 6.3.2.4. The 1973 decisions—vision #5: three types of seizures: stops; arrests; and formal or custodial arrests	288
§ 6.3.2.5. 1979–83—vision #6: apparent solidification into two categories	289
§ 6.3.2.6. 1980–on: the persistence of vision #4: formal and informal arrests	292
§ 6.3.2.7. Vision #7: <i>Hodari D.</i> and the common law of arrest	293
§ 6.3.2.8. <i>Knowles v. Iowa</i> : a new or revisited vision?	294
§ 6.3.3. The confusion in academia and the lower courts	295
§ 6.3.3.1. Attempts at synthesis	295
§ 6.3.3.2. Reliance on the common law	295
§ 6.3.3.3. Any detention based on probable cause to arrest	295
§ 6.3.3.4. Custodial and non-custodial arrests	296
§ 6.3.3.5. Custody—intent to release	297
§ 6.3.3.6. Formal arrests	297

§ 6.3.3.7. Reasonable person test	297
§ 6.3.3.8. Fact-specific analysis	298
§ 6.3.4. Considerations in defining arrest	298
§ 6.3.4.1. The relationship of state law to Fourth Amendment analysis	298
§ 6.3.4.2. Analysis of the various definitions of “arrest”	301
§ 6.3.5. Arrest warrants—when needed	305
§ 6.3.6. Pretrial detention after warrantless arrests; probable cause hearings	307
§ 6.4. Stops and distinguishing them from arrests	308
§ 6.4.1. Constitutional basis for limitations on the scope of stops	309
§ 6.4.2. Permissible investigative techniques—in general	310
§ 6.4.2.1. Length of detention	311
§ 6.4.2.2. Type of criminal activity being investigated	313
§ 6.4.2.3. Diligence and means used in pursuing the investigation	314
§ 6.4.2.4. Suspect’s actions contributing to delay	316
§ 6.4.2.5. Movement of the suspect	317
§ 6.4.2.6. Questions of suspect/others	318
§ 6.4.2.7. Requests for identification	320
§ 6.4.2.8. Use of force and protective actions	321
§ 6.4.2.9. Other permissible actions during a stop	322
§ 6.4.3. Traffic stops	323
§ 6.4.3.1. License, registration, computer checks, and VIN examinations	324
§ 6.4.3.2. Orders to exit the vehicle	326
§ 6.5. Roadblocks and checkpoints	326
§ 6.6. Detentions during execution of search warrants	328
§ 6.6.1. Residents, occupants, and visitors	332
§ 6.6.2. What constitutes “of the premises”?	335
§ 6.6.3. Protective actions during detention	337
§ 6.7. Detention of material witnesses	339
Chapter 7 · Defining “Search”	347
§ 7.1. Overview	348
§ 7.2. Historical context of “searches”	349
§ 7.3. Physical invasions; two-sided nature of search analysis	351
§ 7.3.1. Plain feel doctrine	357
§ 7.4. Non-tactile searches	359
§ 7.4.1. Evolution of the treatment of non-tactile searches	359
§ 7.4.1.1. <i>Boyd</i> , liberalism, and the constructive search doctrine	359
§ 7.4.1.2. <i>Olmstead</i> and the literal view	361
§ 7.4.1.3. The erosion of <i>Olmstead</i> : intangible interests and intrusions, hearing, and <i>Katz</i>	362
§ 7.4.1.4. The re-emergence of constitutionally protected areas and the impact of technology	364
§ 7.4.2. Visual inspection	373
§ 7.4.2.1. In general	373
§ 7.4.2.2. Enhancements to vision and changing position; tracking devices	373
§ 7.4.2.3. Limitations to visual inspections	377

§ 7.4.2.4. Plain view doctrine	378
§ 7.4.2.4.1. Prior valid intrusion or otherwise legitimate location	379
§ 7.4.2.4.2. Lawful position to seize the object	382
§ 7.4.2.4.3. Incriminating character of the object must be immediately apparent	383
§ 7.4.3. Sense of smell	384
§ 7.4.3.1. In general/plain smell	384
§ 7.4.3.2. Enhancement of the olfactory sense: dog sniffs	385
§ 7.5. Considerations in defining a “search”	388
§ 7.5.1. Analogy to physical invasions	388
§ 7.5.2. Purpose inquiry	390
§ 7.5.3. The nature of what is discovered and the context of discovery	394
§ 7.5.4. Sophistication of the device used and its use by the public	396
§ 7.6. Private searches and the requirement of governmental action	399
§ 7.6.1. In general	399
§ 7.6.2. Fourth Amendment applicability: who is a government agent?	400
§ 7.6.2.1. Supreme Court cases	400
§ 7.6.2.2. Lower court cases	403
§ 7.6.3. Government replication of a private search	407
§ 7.6.4. The context in which an object is found after a private search	408
Chapter 8 · Search Incident to Arrest	415
§ 8.1. General considerations and evolution of the doctrine	415
§ 8.1.1. Early practices	416
§ 8.1.2. Exigency versus categorical approach	416
§ 8.1.3. Officer safety and evidence recovery justifications	418
§ 8.2. Permissible objects sought	419
§ 8.3. Timing and location of the search	420
§ 8.4. Scope: arrestee’s body, including highly intrusive searches	427
§ 8.5. Scope: areas within the arrestee’s “control”	433
§ 8.6. Scope: vehicle searches incident to arrest	436
§ 8.7. Cell phones and other digital devices	443
§ 8.8. Critique of current doctrine	446
Chapter 9 · Protective Weapon Searches [Frisks] and Sweeps	451
§ 9.1. Protective weapons searches [frisks]	451
§ 9.1.1. Overview	451
§ 9.1.2. Justification for	453
§ 9.1.3. Scope of—in general	458
§ 9.1.4. Scope of—persons	458
§ 9.1.4.1. Supreme Court cases	458
§ 9.1.4.2. Lower court views	463
§ 9.1.4.3. The misconceived patdown limitation	466
§ 9.1.4.3.1. Least intrusive means analysis	466
§ 9.1.4.3.2. Police perjury	469
§ 9.1.4.3.3. Bright line rules	470
§ 9.1.4.4. The proper scope of a protective search	472

§ 9.1.4.4.1. The level of assurance that the police may obtain	472
§ 9.1.4.4.2. Limits based on weapons size	473
§ 9.1.5. Protective searches beyond the person: vehicles, places, and items	476
§ 9.2. Protective sweeps	480
Chapter 10 · Other Categories of Searches	487
§ 10.1. Automobile searches—probable cause based	487
§ 10.2. Border enforcement	491
§ 10.2.1. Searches at the international border	491
§ 10.2.2. Letters and data as targets; the technological border	497
§ 10.2.3. Roving patrols and checkpoints away from the border	501
§ 10.3. Community caretaking	502
§ 10.4. Consent	508
§ 10.4.1. Overview of current standard	508
§ 10.4.2. Evolution of the treatment of consent	511
§ 10.4.2.1. Waiver versus objective reasonableness	511
§ 10.4.2.2. Factors in totality test	515
§ 10.4.3. Scope of consent	519
§ 10.4.4. Third party consent	521
§ 10.4.4.1. Actual authority	521
§ 10.4.4.2. Apparent authority	528
§ 10.4.4.2.1. In general	528
§ 10.4.4.2.2. Physical locks and password protected computer files	529
§ 10.5. Entraceway screening	531
§ 10.6. Exigent circumstances	540
§ 10.7. Fire fighting and investigations	553
§ 10.8. Inventory searches	555
§ 10.9. Subpoenas duces tecum	562
Chapter 11 · The Reasonableness of a Search or Seizure	565
§ 11.1. Importance of the concept of reasonableness	566
§ 11.2. Origins of the concept of reasonableness	569
§ 11.2.1. Searches and seizures in England and in America through 1791	569
§ 11.2.2. Rise and fall of substantive restrictions on searches and seizures	569
§ 11.3. Procedural regulation of searches and seizures	571
§ 11.3.1. Model #1: the warrant requirement	571
§ 11.3.2. Model #2: individualized suspicion	573
§ 11.3.2.1. Two types of individualized suspicion	576
§ 11.3.2.1.1. Probable cause	577
§ 11.3.2.1.2. Articulable suspicion	579
§ 11.3.2.2. Types and sources of information	582
§ 11.3.2.3. Informants	583
§ 11.3.3. Model #3: case-by-case model	586
§ 11.3.3.1. Genesis of the case-by-case model	586
§ 11.3.3.2. Competition between the case-by-case and warrant preference models	587
§ 11.3.4. Model #4: the balancing test	590

§ 11.3.4.1. Genesis of balancing	590
§ 11.3.4.2. The dramatic restructuring in the 1960s and the rise of balancing	591
§ 11.3.4.3. The broad application of the balancing test	594
§ 11.3.4.4. Factors in the balancing test	596
§ 11.3.4.4.1. Individual's interest	597
§ 11.3.4.4.2. Government interests	599
§ 11.3.4.4.2.1. Identifying the government interest	599
§ 11.3.4.4.2.2. Special needs	602
§ 11.3.4.4.3. Necessity for the intrusion	603
§ 11.3.4.4.4. Nature of the intrusion/procedures utilized in planning and executing the intrusion	606
§ 11.3.5. Model #5: common law plus balancing	608
§ 11.3.6. Situations that do not fit any of the five models	610
§ 11.3.6.1. Bodily integrity	611
§ 11.3.6.2. Free speech and private conversations	613
§ 11.3.6.3. The home	614
§ 11.4. The Court's attempts to harmonize the models	614
§ 11.5. Proposed hierarchy of reasonableness	618
§ 11.5.1. Individualized suspicion	621
§ 11.5.2. The role of warrants	624
§ 11.5.3. Alternative objective criteria	627
§ 11.5.3.1. The government interest	628
§ 11.5.3.2. Necessity	628
§ 11.5.3.3. Neutral, fixed criteria	633
§ 11.5.4. A residual role for case-by-case analysis?	635
§ 11.6. Other aspects of reasonableness	637
§ 11.6.1. Two-fold nature of reasonableness—scope considerations	637
§ 11.6.1.1. In general	637
§ 11.6.1.2. Least intrusive means analysis	639
§ 11.6.2. Pretextual actions and racial discrimination	641
§ 11.6.2.1. Objective intent	641
§ 11.6.2.2. Race and ethnicity considerations	645
§ 11.6.3. Bright line rules vs. case-by-case adjudication	647
§ 11.6.4. Unreasonable or excessive force	651
Chapter 12 · Warrant Issuance, Review, and Execution	653
§ 12.1. Introduction	654
§ 12.2. Warrant issuance requirements	654
§ 12.2.1. In general	654
§ 12.2.2. Rejection of unenumerated requirements; computer search warrants	656
§ 12.2.3. Anticipatory warrants	658
§ 12.3. Review of the decision to issue a warrant	659
§ 12.3.1. Probable cause deficiencies	662
§ 12.3.2. The magistrate has abandoned his role	668
§ 12.3.3. Misrepresentations by the affiant	669
§ 12.4. Particularity requirement of the Warrant Clause	671

§ 12.4.1. In general	671
§ 12.4.2. Historical basis and function of particularity requirement	673
§ 12.4.3. Sufficiency of description	674
§ 12.4.4. Free speech and free press concerns	676
§ 12.4.5. Private conversations and electronic surveillance	677
§ 12.4.6. Electronic tracking devices	679
§ 12.4.7. Document searches	680
§ 12.4.8. Computer and digital evidence searches: varieties of computer searches	682
§ 12.4.8.1. Searches for computer equipment	683
§ 12.4.8.2. Searches for data	684
§ 12.4.8.2.1. Data are forms of records/container analogy	686
§ 12.4.8.2.2. Rejection of the document search and container analogy: a “special approach”	689
§ 12.4.8.2.3. Premises of the “special approach”	692
§ 12.4.9. Suppression and good faith	698
§ 12.5. Warrant execution	700
§ 12.5.1. Introduction	700
§ 12.5.2. Timing of execution of warrants	700
§ 12.5.2.1. Time periods for warrants to be valid	700
§ 12.5.2.2. Staleness	704
§ 12.5.3. Nighttime execution of warrants	706
§ 12.5.4. Knock and announce requirement	709
§ 12.5.5. Other rule-based execution issues	710
§ 12.5.5.1. Notice of search	710
§ 12.5.5.2. Inventory; return of warrant	713
§ 12.5.6. Executing warrants for intermingled documents/data; off-site searches	714
§ 12.5.7. Proper assistants— who can accompany the police	719
§ 12.5.8. Search of persons on premises	719
Chapter 13 · The Exclusionary Rule and Other Remedies	725
§ 13.1. Introduction	725
§ 13.2. Evolution of exclusionary rule doctrine	728
§ 13.2.1. The culpability era?	744
§ 13.3. Causation: fruit and attenuation analysis	753
§ 13.3.1. In general	753
§ 13.3.1.1. Fruit analysis	754
§ 13.3.1.2. Cost-benefit analysis	756
§ 13.3.2. Defendant’s statements	757
§ 13.3.3. Witness testimony	759
§ 13.3.4. Identification of the defendant	760
§ 13.3.5. Defendant’s presence and physical characteristics	761
§ 13.3.6. <i>Per se</i> attenuation based on the interest protected: in-home arrests; knock and announce violations	762
§ 13.4. Independent source doctrine	767
§ 13.5. Inevitable discovery	770
§ 13.6. Substantiality of the violation, culpability of the actor, and “good faith”	772

§ 13.6.1. Warrants	777
§ 13.6.2. Clerical errors by court and police personnel	778
§ 13.6.3. Statutes	779
§ 13.6.4. Warrantless actions and reliance on appellate court opinions	782
§ 13.7. Impeachment	783
§ 13.8. Other remedies	783
Table of Cases	791
Index	839

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 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

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.

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).

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 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