

The Fourth Amendment

The Fourth Amendment

Its History and Interpretation

THIRD EDITION

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*To my family
Sally, Kevin & Brian*

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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. Alysso 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.