

# Making Sense of Search and Seizure Law



# Making Sense of Search and Seizure Law

*A Fourth Amendment Handbook*

SECOND EDITION

Phillip A. Hubbart



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# Foreword

The fifty-four words of the Fourth Amendment have “both the virtue of brevity and the vice of ambiguity.”<sup>1</sup> This combination results in a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often infuriatingly perverse. This Amendment is one of the most controversial in the Bill of Rights, and among the most frequently adjudicated.

While Fourth Amendment jurisprudence has evolved over two centuries, the avalanche began when *Mapp v. Ohio* applied the exclusionary rule to the states. It is a daunting task for the trial or appellate lawyer—or even a trial or appellate judge—to master the history and scope of this body of law. Yet it falls to the busy lawyer and judge to make sense of seemingly inconsistent and irreconcilable cases in their daily work—whether in a persuasive trial memo, brief, or legal opinion. Rarely do they have either the time or the patience to struggle through a vast library of cases, treatises, and law review articles.

Phillip Hubbart designed *Making Sense* for the overworked and overwhelmed lawyer and judge. We need a trustworthy guide to navigate this maze and Hubbart has the broad experience necessary to write this book. He has studied the Fourth Amendment from different points of view as a defense lawyer, public defender, appellate court judge and law school professor. He has carefully crafted this book, however, not through the lens of an advocate, but rather in a clear-eyed, neutral, non-argumentative exposition of what the Fourth Amendment law is, not what he thinks it should be.

This book organizes the material in an efficient way that makes it is easy to follow and keeps it to one volume rather than in an unwieldy multi-volume encyclopedia. Yet in this one volume Hubbart manages to cover every Fourth Amendment decision decided by the Supreme Court, over 430 such decisions, and puts useable quotations from the opinions in footnotes.

The book is divided into two parts: first the historical background and then the substantive law. Hubbart advises lawyers that they can skip over the detailed history behind the Amendment in Part I, Chapters 2 to 5, and go directly to Chapter 6 and then on to the modern cases. But if you do, you will miss a great read.

Part I, which is divided into 6 chapters, provides an in-depth, deeply contextual reading of the history of the Amendment and demonstrates how it has heavily influenced the development of search and seizure law. Most treatises give short shrift with a couple of paragraphs while *Making Sense* gives the full history down to the judicial roots from the English cases. I am a legal history buff yet I discovered numerous new gems in this part.

The exclusionary rule was once considered the seminal bright-line rule in Fourth Amendment jurisprudence, but alas no longer. It is slowly being eroded, perhaps into ir-

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1. Jacob W. Landynski, Search and Seizure and the Supreme Court 43–44 (1966).

relevance. The limitation of *Mapp* by the good faith exception from *United States v. Leon* is by far the most important issue covered by the book but not the only one. The book also covers the lesser exceptions such as the independent source doctrine, the inevitable discovery rule, impeachment of the testifying defendant and others.

The upgrade to this new edition focuses on this frightening trend. Chapter 17 covers the historical development, purpose, and substantive law of the judge-made exclusionary rule. Importantly, Hubbard demonstrates that the framers never thought the Amendment was just an admonition or aspiration but rather that it would be enforced by judges.

The Court has complicated the application of the good faith exception by developing a balancing test to determine whether the rule or the exception is applicable in a given case. This “case by case” analysis requires mastery of all the cases. Fortunately Hubbard has done the work for us—and it is not simple, as he describes the Court’s cases at times as following a “zig-zag course.”

The lodestar of all Fourth Amendment litigation, including the exclusionary rule, is the unreasonableness requirement for a violation. A great constitutional right is written in principled terms that are not self-executing and are open to intense debate. The Amendment purposefully doesn’t define “unreasonable,” so it is up to judges and lawyers to put a gloss on it.

But is it reasonable for a law enforcement officer to be mistaken about facts of the case and ignorant of the law? So long as the police act with an objectively “reasonable good-faith belief” that their conduct is lawful the Court is willing to excuse them. *Making Sense* analyzes in detail, with copious illustration, the theories and canons of construction used by the Supreme Court to decide these thorny issues. It is crucial for the litigator to have command of them.

The value of any book is determined by the benefit we get from it. By that standard, it is hard to find one as useful as *Making Sense of Search and Seizure Law*. This is a volume I will turn to over and over again in my professional practice. But it is more than that—it is also a joy to read.

Roy Black  
March 30, 2015

# Preface to the Second Edition

A decade has passed since the first edition of this book was published in 2005. During this period, some significant changes in Fourth Amendment law have occurred. Annual supplements to the book have grown to over 100 pages.

Among other things, the Fourth Amendment exclusionary rule, covered in Chapter 17, has undergone some remarkable revisions that have further constricted the reach of the rule. Indeed, liberal critics of the Roberts Court have charged that the Court has pushed the exclusionary rule to the brink of extinction—a view that I have some sympathy with, but ultimately do not share.

To accommodate all the Court's Fourth Amendment decisions in the past ten years, a second edition of the book has been published.

The book's overall purpose, however, remains unchanged: to restate existing Fourth Amendment law, as announced by the U.S. Supreme Court's 430-plus decisions on the subject, in an organized and lucid fashion, true to its historical origins—so that the entire structure hangs together and makes sense.

I have poured a great deal of my 50-year professional career into this endeavor—as an appellate judge, public defender, adjunct law professor, and legal writer.

Some critics may say that I have embarked on an impossible task, that Fourth Amendment law is a crazy-quilt of conflicting principles and holdings that cannot possibly be reconciled. They argue that Fourth Amendment decisions are entirely dependent on the judicial philosophy of the individual justices on the Court, who can manipulate the law any way they please—so that the end result is a bundle of confusing contradictions.

Not only do I disagree, but practicing lawyers and judges can hardly afford the luxury of this academic point of view. They are required to look up the applicable law on a search-and-seizure point when the issue arises and to apply it in a given case. The judicial philosophy of the Court that rendered a particular decision is irrelevant to this very practical endeavor.

Moreover, the public has a right to expect that the Supreme Court is a court of law that follows its past precedents while adapting the law's basic principles to the rapidly changing country in which we live. Indeed, the Court's credibility depends entirely on its ability to do just that. Cynical views that the Court is really a political institution like the Congress or the presidency undermines the Court's otherwise fragile authority in our constitutional system—something, I think, the Court is painfully well aware of.

Thus, the reason for this book—to make sense of Fourth Amendment law by discovering its controlling rules and principles as an organized whole, true to its historical roots.

To accomplish this purpose, I have, among other things, provided relevant quotations from the Court's decisions to support both the organizational structure and the statements of law in the text. Given the complexity of this law, readers, in my view, are entitled to

an accurate, yet clear hornbook on the subject—not my subjective views. I hope this volume satisfies that requirement.

As for lower federal and state court cases on search and seizure, I have supplied frequent references to Professor Wayne LaFare's magisterial six-volume work on the subject, *Search and Seizure: A Treatise on the Fourth Amendment* (5th ed., 2012)—as well as relevant West Digest key numbers that collect the cases on point.

Moreover, the historical background that led to the Fourth Amendment, and the theories of constitutional construction followed by the Court in interpreting the Amendment, have been augmented in this edition with more recent authorities and works.

And, as with the first edition, this work will be annually supplemented with the most recent U.S. Supreme Court decisions.

A variety of professionals should find this book useful: prosecutors, private criminal defense lawyers, public defenders, judges, law professors and their students—as well as political science and criminal justice professors and their students.

Also American history buffs may find particularly interesting Chapters 2–6 of the book which covers the stirring historical background that led to the Fourth Amendment (1761–1791).

I thank my friend Judge Charles Edelstein for reviewing and proofreading this second edition of the book, as he did the first edition—and for offering many valuable suggestions that have helped improve the text.

My thanks also go to Keith Sipe and Linda Lacy, the publisher and senior editor, respectively, at Carolina Academic Press, for agreeing to publish a second edition of this book. I will always be indebted to the fine people at this marvelous publishing house for all their encouragement and support over the years.

Phillip A. Hubbart  
Miami, Florida  
March 30, 2015

# Preface to the First Edition

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 LaFave'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 LaFave, *Search and Seizure* (5th ed. 2012).

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.

Phillip A. Hubbart  
Miami, Florida  
June 30, 2005

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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).

# First Edition Acknowledgments

I am indebted to many people for helping me complete this book.

In particular, I thank my close friends and current law partners Gerald Wetherington [former Chief Judge of the Eleventh Judicial Circuit in Miami, Florida], and Herbert Klein [former Associate Chief Judge in the same court] for their constant encouragement, helpful advice, and understanding nature on my long journey to complete this book. Judge Wetherington, in particular, has been of invaluable assistance in helping me sort out difficult Fourth Amendment issues relating to the exclusionary rule, as well as many other aspects of search and seizure law.

Fred Lewis [a good friend and former Dean of the University of Miami Law School] gave me some critical advice in the late 1970s 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.

Judge Edelstein, in particular, was kind enough to read my initial draft manuscripts and offered invaluable comments for improvement of the text.

Roy Black, Jack Denaro and Stephen Lipton—all distinguished Florida attorneys—were also kind enough to read my initial manuscript and offer valuable advice as to suggestions for change. All three worked for me as assistant public defenders in the 1970s when I was the Public Defender in Miami-Dade County, and have since gone on to successful legal careers.

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 1950s and early 60s 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.

My special thanks also go to Robert Conrow and the other editors at Carolina Academic Press for agreeing to publish this work and for their unfailing efforts in putting the final manuscript together. I will always be grateful to them.

My brother, Judge Gerald Hubbart, a former assistant state attorney, assistant public defender and current circuit judge in Miami, was always there when I needed him to share my dreams for this work and my disappointments at its glacial progress. My son Ted Hubbart also offered his brand of confidence and humor as I slogged through this project. And my many law students over the years have helped me to better organize and simplify the basic principles of Fourth Amendment law.

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.

Phillip A. Hubbart  
Miami, Florida  
June 30, 2005



# 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 a seminar on the Fourth Amendment. For over fifteen years, he has practiced appellate law as 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 life member of the American Law Institute.



# Plan of the Book

Here, in brief, is how the book organizes the vast legal materials on Fourth Amendment law.

- **Introduction.** The first chapter comments on the importance and limit of Fourth Amendment freedom, outlines the three distinctive parts of Fourth Amendment law, surveys the growth of Fourth Amendment decisions, 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, examine 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 has been influenced by and is based on the original understanding of the Framers.

- **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: an historical approach, a balancing approach, and a common law reasoning approach.

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 constitutional requirement that there must be a “search” or “seizure” of the complaining party’s “person, house, papers [or] effects.” There can be no Fourth Amendment violation unless this requirement is met. This requirement 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 be “unreasonable.” There can be no Fourth Amendment violation unless this requirement is also met.

- **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 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 searches of real and personal property [such as a home, business, or motor vehicle], as well as searches of persons.

- ◆ **Searches with a search warrant.** Chapter 13 deals searches conducted *with a search warrant*

- ◆ **Searches without a warrant.** Chapters 14–15 cover 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 substantive law of the exclusionary rule, and ends with a treatment of miscellaneous procedural and appellate considerations.

# List of Abbreviations

R. Brown	Richard Brown, <i>Revolutionary Politics in Massachusetts</i> (1970)
W. Cuddihy	William Cuddihy, <i>The Fourth Amendment: Origins and Original Meaning 602–1790</i> , Oxford University Press (2009)
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,” <i>30 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)



# The Fourth Amendment

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 persons or things to be seized.

