# PRIVACY, LAW ENFORCEMENT, AND NATIONAL SECURITY

#### **EDITORIAL ADVISORS**

#### Rachel E. Barkow

Vice Dean and Charles Seligson Professor of Law Faculty Director, Zimroth Center on the Administration of Criminal Law New York University School of Law

#### **Erwin Chemerinsky**

Dean and Jesse H. Choper Distinguished Professor of Law University of California, Berkeley School of Law

#### Richard A. Epstein

Laurence A. Tisch Professor of Law New York University School of Law Peter and Kirsten Bedford Senior Fellow The Hoover Institution Senior Lecturer in Law The University of Chicago

#### Ronald J. Gilson

Charles J. Meyers Professor of Law and Business Stanford University Marc and Eva Stern Professor of Law and Business Columbia Law School

#### James E. Krier

Earl Warren DeLano Professor of Law Emeritus The University of Michigan Law School

#### Tracy L. Meares

Walton Hale Hamilton Professor of Law Director, The Justice Collaboratory Yale Law School

#### Richard K. Neumann, Jr.

Alexander Bickel Professor of Law Maurice A. Deane School of Law at Hofstra University

#### Robert H. Sitkoff

Austin Wakeman Scott Professor of Law John L. Gray Professor of Law Harvard Law School

#### David Alan Sklansky

Stanley Morrison Professor of Law Faculty Co-Director, Stanford Criminal Justice Center Stanford Law School

# PRIVACY, LAW ENFORCEMENT, AND NATIONAL SECURITY

## **Fourth Edition**

### Daniel J. Solove

Eugene L. and Barbara A. Bernard Professor of Intellectual Property and Technology Law George Washington University Law School

## Paul M. Schwartz

Jefferson E. Peyser Professor of Law
U.C. Berkeley School of Law
Faculty Director, Berkeley Center for Law & Technology



Copyright © 2024 Aspen Publishing. All Rights Reserved.

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.AspenPublishing.com.

Cover image: iStock.com/gorodenkoff

To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing Attn: Order Department 1 Wall Street Burlington, MA 01803

Printed in the United States of America.

1234567890

ISBN 979-8-8861-4341-6

Library of Congress Cataloging-in-Publication Data

## **About Aspen Publishing**

Aspen Publishing is a leading provider of educational content and digital learning solutions to law schools in the U.S. and around the world. Aspen provides best-in-class solutions for legal education through authoritative textbooks, written by renowned authors, and breakthrough products such as Connected eBooks, Connected Quizzing, and PracticePerfect.

The Aspen Casebook Series (famously known among law faculty and students as the "red and black" casebooks) encompasses hundreds of highly regarded textbooks in more than eighty disciplines, from large enrollment courses, such as Torts and Contracts, to emerging electives, such as Sustainability and the Law of Policing. Study aids such as the *Examples & Explanations* and the *Emanuel Law Outlines* series, both highly popular collections, help law students master complex subject matter.

#### Major products, programs, and initiatives include:

- Connected eBooks are enhanced digital textbooks and study aids that come
  with a suite of online content and learning tools designed to maximize student
  success. Designed in collaboration with hundreds of faculty and students, the
  Connected eBook is a significant leap forward in the legal education learning
  tools available to students.
- Connected Quizzing is an easy-to-use formative assessment tool that tests law students' understanding and provides timely feedback to improve learning outcomes. Delivered through CasebookConnect.com, the learning platform already used by students to access their Aspen casebooks, Connected Quizzing is simple to implement and integrates seamlessly with law school course curricula.
- **PracticePerfect** is a visually engaging, interactive study aid to explain commonly encountered legal doctrines through easy-to-understand animated videos, illustrative examples, and numerous practice questions. Developed by a team of experts, PracticePerfect is the ideal study companion for today's law students.
- The **Aspen Learning Library** enables law schools to provide their students with access to the most popular study aids on the market across all of their courses. Available through an annual subscription, the online library consists of study aids in e-book, audio, and video formats with full text search, note-taking, and highlighting capabilities.
- Aspen's **Digital Bookshelf** is an institutional-level online education bookshelf, consolidating everything students and professors need to ensure success. This program ensures that every student has access to affordable course materials from day one.
- Leading Edge is a community centered on thinking differently about legal education and putting those thoughts into actionable strategies. At the core of the program is the Leading Edge Conference, an annual gathering of legal education thought leaders looking to pool ideas and identify promising directions of exploration.

To Pamela and Griffin—DJS

To Steffie, Clara, and Leo—PMS

# **SUMMARY OF CONTENTS**

Contents	xi
Preface	xv
Acknowledgments	xvii
<ol> <li>PRIVACY AND LAW ENFORCEMENT         <ul> <li>A. The Fourth Amendment and Emerging Technology</li> <li>B. Information Gathering About First Amendment Activities</li> <li>C. Federal Electronic Surveillance Law</li> <li>D. Digital Searches and Seizures</li> <li>E. Profiling, Algorithms, and AI in Criminal Justice</li> </ul> </li> <li>NATIONAL SECURITY AND FOREIGN INTELLIGENCE         <ul> <li>A. The Intelligence Community</li> <li>B. The Fourth Amendment Framework</li> <li>C. Foreign Intelligence Gathering</li> <li>D. NSA Surveillance</li> </ul> </li> </ol>	1 3 58 66 80 111 132 133 140 166
Appendix A ELECTRONIC COMMUNICATIONS PRIVACY ACT	185
Appendix B FOREIGN INTELLIGENCE SURVEILLANCE ACT	249
Index	355

# **CONTENTS**

Pr	eface	xv
Ас	knowledgments	xvii
1	PRIVACY AND LAW ENFORCEMENT	1
	A. THE FOURTH AMENDMENT AND EMERGING	2
	TECHNOLOGY	3
	1. How the Fourth Amendment Works	3
	(a) Applicability: Searches and Seizures	4
	(b) Reasonable Searches and Seizures	4
	(c) Enforcement: The Exclusionary Rule and Civil Remedies	6
	(d) Subpoenas and Court Orders	6
	2. Wiretapping, Bugging, and Beyond	8
	Olmstead v. United States	8
	• Lopez v. United States	14
	• Katz v. United States	15
	• United States v. White	18
	3. The Reasonable Expectation of Privacy Test	21
	(a) The Third Party Doctrine	21
	Smith v. Maryland	21
	(b) Items Abandoned or Exposed to the Public	31
	California v. Greenwood	31
	(c) Surveillance and the Use of Sense Enhancement Technologies	36
	• Florida v. Riley	36
	Dow Chemical Co. v. United States	41
	• Kyllo v. United States	43
	Carpenter v. United States	50

	CONTENTS   xiii
1. The Foreign Intelligence Surveillance Act	140
<ul> <li>Global Relief Foundation, Inc. v. O'Neil</li> </ul>	143
<ul> <li>United States v. Isa</li> </ul>	146
2. The USA PATRIOT Act	148
• The 9/11 Commission Report	148
• In re Sealed Case	152
3. National Security Letters	159
4. Oversight: Beyond the Judiciary	162
(a) The Attorney General's FBI Guidelines	162
(b) The Homeland Security Act	164
(c) The Intelligence Reform and Terrorism Prevention Act	165
D. NSA SURVEILLANCE	166
1. Standing	167
<ul> <li>Clapper v. Amnesty International USA</li> </ul>	167
2. The Snowden Revelations	173
United States v. Basaaly Saeed Moalin	176
Appendix A ELECTRONIC COMMUNICATIONS PRIVACY ACT	185
Appendix B FOREIGN INTELLIGENCE SURVEILLANCE ACT	249
Index	355