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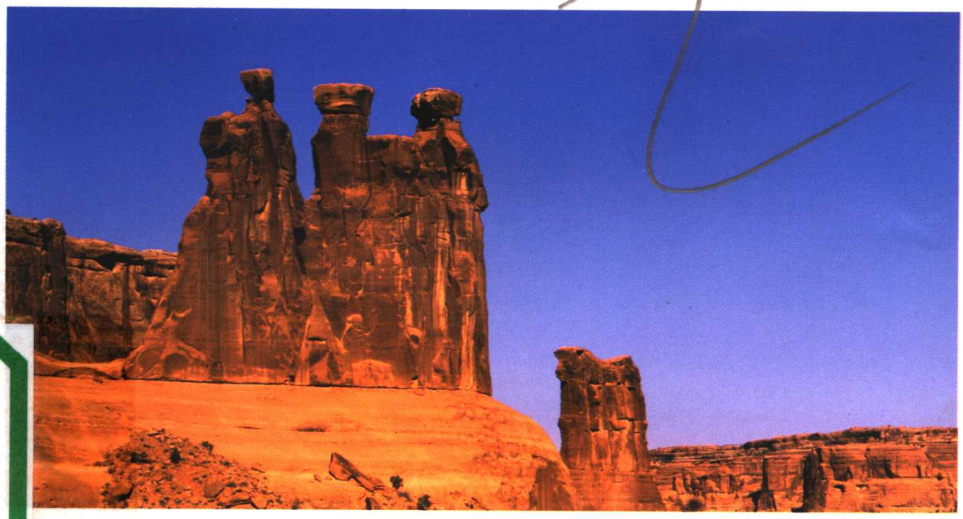

美国刑事诉讼法

中国民主法制出版社

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写在前面

所谓英美法系，其法律渊源主要以判例为主，美国、英国、加拿大等国家为主要代表。判例在这些国家的历史和现在一直表演着重要角色，产生着重大影响，决定着本国政治、文化、经济的走向，有的判例甚至对世界法律文化的发展也起到了重要作用。

不可否认，当今社会中以英美法为代表的西方国家，相比发展中国家，其法律体系已臻完备，各部门法理论也已相当成熟。如何将西方经典判例原汁原味地引入进来为我所借鉴，是我们策划本套丛书的初衷。

关于本套丛书的设计，我们首先在作者队伍上进行了精心的选择，聘请国内著名高校，如清华大学、中国政法大学、西南政法大学、华东政法学院等精通法律英语的教授及相关专家、学者亲力亲为，保证了本套丛书内容上的高质量；其次在本套丛书内容的设计上，先将该部门法的内容进行概括性介绍，然后对每个经典判例给出精彩导读，再附英美原版判例（或精选部分），并对其中生涩难懂的词汇进行注解，使读者不但对该法有总体认识，尽快了解该部门法，而且中英文结合的方式省却了阅读的劳累，兼顾了学习性和趣味性，保证了裁减有度、难易结合。

由于英美法国家在援引法律、判例时有其特殊性，因此，对本套丛书的使用，特作如下说明：

1. 人名、地名

案件背景中涉及的人名、地名在一般状况下都不翻译，如《美国宪法》册中 McCulloch v. State of Maryland 案，McCulloch 这一人名没有通用译法；Dred Scott, Plaintiff In Error, v. John F. A. Sandford 案中，Rock Island 这一地名没有通用译法，都不再翻译。但若该人是名人或者是某领域中的重要人物，或者该地已经有通用译名，才使用通译名，如

Marbury v. Madison 在大陆一般通译为马伯里诉麦迪逊案。

2. 判例

案件名后通常有脚注，如 Brown Et Al. v. Board Of Education Of Topeka Et Al 案的脚注为 347 U.S. 483; 74 S. Ct. 686; 98 L. Ed. 873 (1954)。其中，347 U.S. 483 是指《美国判例汇编》(United States Reports) 第 347 卷第 483 页(始)；74 S. Ct. 686 是指《最高法院判例汇编》(Supreme Court Reporter) 第 74 卷第 686 页(始)；98 L. Ed. 873 是指《律师版》(Lawyer's Edition) 第 98 卷第 873 页(始)；(1954) 表示判决作出时的年份。《美国判例汇编》由联邦政府出版，《最高法院判例汇编》和《律师版》由出版社等非官方机构或个人出版。

3. 法令

美国案例涉及到的法令通常的出处如下：U.S.C.(United States Code)《美国法典》；U.S.C.A. (United States Code Annotated)《美国法典注释》；C.F.R.(Code of Federal Regulations)《联邦法规汇编》。

我们第一批推出的七本图书主要以美国法律为主，分别是《美国宪法》、《美国刑法》、《美国刑事诉讼法》、《美国财产法》、《美国证券法》、《美国专利法》和《契约法》。该套丛书的出版集聚了众多学者的智慧，对于他们孜孜以求、一丝不苟的治学精神和对我们编辑不吝赐教并表现出的极大耐心表示衷心的感谢。同时，对于欣赏并认可我们策划该套丛书的读者致以深深的敬意，我们将以不懈的努力将本套丛书继续延展下去，以飨读者。

由于时间仓促，以及编辑水平所限，难免有舛误之处，敬请广大读者批评指正。

编　者

2006 年 7 月

〖目　　录〗

美国刑事诉讼法简介

一、刑事诉讼制度

美国的刑事诉讼制度是多元的。美国有 52 个独立的司法管辖区，即联邦、50 个州和华盛顿特区司法管辖区。在美国无论是联邦政府还是任何一个州政府都有制定其刑事法典的权力，也有权根据自己的刑事司法制度来执行法律。他们有自己的刑事司法机构和法律实施程序。美国的 52 个刑事诉讼制度在基本问题上拥有共同的特点。因为它们的法律渊源是共同的，如联邦宪法、普通法和特定的具有高度影响力的法律，如《联邦刑事诉讼规则》、《联邦证据规则》、《美国律师协会刑事诉讼标准》等。

二、宪法保障

在美国刑事诉讼制度中，直接涉及公民权利的诉讼行为被上升到了宪法的高度。在刑事诉讼中，公民权利的宪法性保障集中体现在宪法前十条修正案，即“权利法案”之中。如：第四修正案规定了人民不受无理搜查和扣押的权利；第五修正案规定了对所有不名誉罪由大陪审团起诉，禁止双重危险，反对自我归罪；第六修正案规定了迅速审判权、公开审判权、公正的陪审团审判权、被告知指控性质和理由的权利、对质权、获得有利于自己的证据的权利、律师帮助权；第八修正案规定禁止过多收取保释金，共计 12 项宪法权利。另外，第五修正案还规定了正当程序条款。1868 年宪法第十四修正案通过后，最高法院通过判例，得以将“权利法案”中涉及生命、自由、财产的基本权利保障适用于州司法系统的刑事诉讼。

三、刑事诉讼程序

（1）报告犯罪（Reported Crime）。警察获得犯罪发生的信息渠道有

市民报警、巡逻、侦查及情报工作等。

（2）逮捕前侦查（Prearrest Investigation）。警察对已知犯罪、正在进行的犯罪或即将发生的犯罪进行侦查，检察官或其他人员也有权通过行使传票权进行调查。

（3）逮捕（Arrest）。当警察有足够的信息，如合理根据（probable cause）就可以逮捕嫌疑人。此处“逮捕”的含义是限制嫌疑人的人身自由，将其带往警察机关以待起诉。

（4）登记（Booking）。将嫌疑人带到警察局后，登记嫌疑人的姓名、到达时间、所犯的罪。还要给嫌疑人拍照和留下其指纹。涉嫌低级别犯罪的嫌疑人在交纳保释金后可被释放，涉嫌实施较重犯罪的嫌疑人，在没交保释金的情况下，则留在警察局。

（5）捕后侦查（Post-Arrest Investigation）。在逮捕嫌疑人之后，警察往往要进一步侦查，如会见证人、搜查嫌疑人住处、让目击证人进行指认等。

（6）决定指控（The Decision to Charge）。嫌疑人被抓获之后的24小时或48小时之内，要将其送到地方法院。在送到法院之前要作出是否指控的决定。指控决定由执行逮捕的警察作出。警察官和检察官都要审查执行警察的指控决定。

（7）控告（Filing the Complaint）。指控文件有三种，递交给治安法院（Magistrate Court）的称为控告书（Complaint），提交人可以是受害人，也可以是警察。对于重罪，递交到普通初审法院的起诉书分别为Information和Indictment。Information由检察官提交，而Indictment由大陪审团签发。

（8）初次到庭（The First Appearance）。在该程序中，治安法官首先确认被带到法庭的人是起诉书中的被起诉人，然后，告知他被指控的罪名、他在后续诉讼程序中的权利，一般来讲，也告知其享有沉默权等。该程序最重要的一个作用就是决定保释问题。

（9）预审（Preliminary Hearing）。要进行大陪审团审查、中立的治安法官审查起诉决定等。如果治安法官认为有合理根据，则将案子移交给普通初审法院。如果认为合理根据只支持轻罪，即驳回重罪起诉并让检察官按轻罪重新起诉，然后在治安法院进行审理。

（10）大陪审团审查（Grand Jury Review）。该程序与治安法官所进行的预审相似，但不同之处是：大陪审团只听取控方的证据，而被告人无权出示证据或出席该程序。如果大陪审团认为控方证据充足，则根据检察官的请求签发起诉书（Indictment）。如果认为控方证据不足，则驳回指控。

（11）根据起诉书传讯（Arraignment on the Information or Indictment）。被起诉后，重罪被告人被带到初审法院，被告知对其的指控，并作有罪答辩、无罪答辩或无罪申诉。

（12）审前动议（Pretrial Motions）。在审判前可以就起诉时间、地点、范围、证据排除、证据展示等向法院提出异议。

（13）审判（The Trial）。分为法官审判（Bench Trial）和陪审团审判（Jury Trial）。

以陪审团审判为例，其中包括下列程序：开场陈述（Opening Statement）；提交证据（Presentation of Evidence）；终结辩论（Closing Arguments）；指示陪审团（Jury Instruction）；陪审团评议和裁决（Deliberation and Verdict）；审判后动议（Post-trial Motions）。

（14）量刑（Sentencing）。一般有三种有罪判决结果：财政制裁（罚金、返还）；释放到社区（缓刑、无监督释放、软禁即 house arrest）；监禁。

（15）上诉（Appeals）。如果被告人不服一审判决可以上诉至中级上诉法院，

如该州无中级上诉法院，即可上诉至终审法院。

（16）定罪后的救济（Postconviction Remedies）。被告人被定罪后可

以对定罪提出抗辩。无论是州法院定罪的犯人还是联邦法院定罪的犯人都可以以联邦宪法为根据在联邦法院提出抗辩。

在美国刑事诉讼过程中，无罪推定、排除合理怀疑、非法证据排除等原则体现了美国刑事诉讼法的重要特点。

Exclusionary Rule

排除规则（Exclusionary Rule）：是指非法证据排除规则，对于违法搜查、扣押而获得的证据应当排除而不得作为证据在审判中采用。1886年 Boyd v. United States 一案中，联邦最高法院首次采用排除规则。由于该案中证据的取得违反美国联邦宪法第四修正案，所以最高法院认定其为非法证据，从而予以排除。但是，随着时间的推移，非法证据排除规则被不断发展，1914 年 Weeks v. United States 一案所采用的排除规则只适用于联邦法院的案件，而不适用于州法院的案件。直到 1961 年 Mapp v. Ohio 一案，排除规则在美国联邦和各州最终得以确立。

Mapp v. Ohio

367 U.S. 643(1961)

案情简介：马普（Mapp）太太和她女儿住在俄亥俄州的克利夫兰。当地警察得到情报说，马普家藏有炸弹，就前去敲门要求进入住宅。马普太太于是给她的律师打了电话，并且拒绝警察进屋，因为警察没有搜查证。经过几个小时的监视，有更多的警察到场，并再次要求进屋，但遭到拒绝。警察破门而入，马普太太要求他们出示搜查证，其中一个警察拿出一张纸声称那就是搜查证，马普太太抢过那张纸要看，又被抢回，因为她的反抗，她被戴上手铐。警察把她带到楼上，随即开始搜查她的房间、她女儿的房间、厨房、客厅、地下室等处。在地下室发现淫秽的书籍、图片和照片。马普太太因违反俄亥俄州刑法禁止持有淫秽物品而被捕。经过审判，法院认定马普太太有罪。其律师当庭要求警察出示搜查证，警察没有出示，所以马普太太不服一审判决，提起上诉。俄亥俄州最高法院认为，尽管证据是通过非法搜查获得的，但是马普太太违反了州刑法，是有罪的。马普太太之后又上诉至美国联邦最高法院，该法院认为所有违反联邦宪法而非法获取的证据都不可采信，即排除规则应当适用于所有非法获得的证据。该规则不仅适用于联邦案件，也适用于州的案件。

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted[1] of knowingly having had in her possession

[1] 上诉人被判有罪。

and under her control certain lewd and lascivious books[2], pictures, and photographs in violation of 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid[3] though "based primarily upon the introduction in evidence[4] of lewd and lascivious books and pictures unlawfully seized[5] during an unlawful search of defendant's home . . . " 170 Ohio St. 427-428, 166 N. E. 2d 387, 388. [367 U.S. 643, 644]

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant[6]. They advised their headquarters of the situation and undertook a surveillance[7] of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene[8]. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss

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[2] 淫秽、黄色书籍。
[3] 有效的。
[4] 提交证据。
[5] 非法扣押。
[6] 搜查证。
[7] 进行监控。
[8] 到达现场。

Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" [367 U.S. 643, 645] in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." 170 Ohio St., at 430, 166 N. E. 2d, at 389. The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to 'offend "a sense of justice,"" but the

court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." 170 Ohio St., at 431, 166 N. E. 2d, at 389-390.

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally[9] seized evidence at trial, citing Wolf v. Colorado, 338 U.S. 25 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment [367 U.S. 643, 646] does not forbid the admission of evidence[10] obtained by an unreasonable search and seizure." At p 33. On this appeal, of which we have noted probable jurisdiction, 364 U.S. 868 , it is urged once again that we review that holding.

I.

Seventy-five years ago, in Boyd v. United States, 116 U.S. 616, 630 (1886), considering the Fourth and Fifth Amendments as running "almost into each other" on the facts before it, this Court held that the doctrines of those Amendments

> "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, [367 U.S. 643, 647] that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation[11]; but any forcible and

[9] 违反宪法地。
[10] 证据的采信。
[11] 加重情节。

compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

The Court noted that

"constitutional provisions for the security of person and property should be liberally construed. . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." At p. 635.

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice[12] . . . will be naturally led to resist every encroachment upon rights expressly stipulated[13] for in the Constitution by the declaration of rights." I Annals of Cong. 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." At p. 638.

Less than 30 years after Boyd, this Court, in Weeks v. United States, 232 U.S. 383 (1914), stated that

"the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." At pp. 391-392. [367 U.S. 643, 648]

Specifically dealing with the use of the evidence unconstitutionally

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[12] 独立的法庭。

[13] 明确规定。