

**2005 Supplement to**

# **CRIMINAL PROCEDURE**

**PRINCIPLES, POLICIES AND  
PERSPECTIVES**

**Criminal Procedure: Investigating Crime  
Criminal Procedure: Prosecuting Crime**

**Second Edition**

**Joshua Dressler  
George C. Thomas III**

**American  
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**Criminal Procedure: Investigating Crime**

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**Second Edition**

**By**

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## Preface

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This supplement contains significant United States Supreme Court and lower court cases decided since the publication of the casebook. It also includes a Table providing information regarding each member of the United States Supreme Court from 1789 to the present date; selected provisions of the United States Constitution (Appendix A); selected federal statutes (Appendix B); and the Federal Rules of Criminal Procedure (Appendix C).

JOSHUA DRESSLER  
GEORGE C. THOMAS III

July, 2005

\*

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Justice	Appointed By	State	To Replace	Judicial Oath Taken	Date Service Terminated
Jay Chief Justice	Washington	NY	New Seat	10/19/1789	6/29/1795
Cushing	Washington	MA	New Seat	2/2/1790	9/13/1810
Rutledge J. <sup>1</sup>	Washington	SC	New Seat	2/15/1790	3/5/1791
Rutledge, Chief Justice	Washington		Jay	8/12/1795	12/15/1795
Wilson	Washington	PA	New Seat	10/5/1789	8/21/1798
Blair	Washington	VA	New Seat	2/2/1790	10/25/1795
Iredell	Washington	NC	New Seat	5/12/1790	10/20/1799
Johnson, T.	Washington	MD	Rutledge, J./Jay	8/6/1792	1/16/1793
Paterson	Washington	NJ	Johnson, T.	3/11/1793	9/9/1806
Chase, S.	Washington	MD	Blair	2/4/1796	6/19/1811
Ellsworth, Chief Justice	Washington	CT	Rutledge, J.	3/8/1796	12/15/1800
Washington	Adams, J.	VA	Wilson	2/4/1799	11/26/1829
Moore	Adams, J.	NC	Iredell	4/21/1800	1/26/1804
Marshall, J., Chief Justice	Adams, J.	VA	Ellsworth	2/4/1801	7/6/1835
Johnson, W.	Jefferson	SC	Moore	5/7/1804	8/4/1834
Livingston	Jefferson	NY	Paterson	1/20/1807	3/18/1823
Todd	Jefferson	KY	New Seat	5/4/1807	2/7/1826
Duvall	Madison	MD	Chase, S.	11/23/1811	1/14/1835
Story	Madison	MA	Cushing	2/3/1812	9/10/1845
Thompson	Monroe	NY	Livingston	9/1/1823	12/18/1843
Trimble	Adams, J.Q.	KY	Todd	6/16/1826	8/25/1828
McLean	Jackson	OH	Trimble	1/11/1830	4/4/1861
Baldwin	Jackson	PA	Washington	1/18/1830	4/21/1844
Wayne	Jackson	GA	Johnson, W.	1/14/1835	7/5/1867
Taney, Chief Justice	Jackson	MD	Marshall, J.	3/28/1836	10/12/1864
Barbour	Jackson	VA	Duvall	5/12/1836	2/25/1841
Catron	Van Buren	TN	New Seat	5/1/1837	5/30/1865

<sup>1</sup> Recess appointment; nominated 7/1/1795; rejected by Senate 12/15/1795.

Justice	Appointed By	State	To Replace	Judicial Oath Taken	Date Service Terminated
McKinley	Van Buren	AL	New Seat	1/9/1838	7/19/1852
Daniel	Van Buren	VA	Barbour	1/10/1842	5/31/1860
Nelson	Tyler	NY	Thompson	2/27/1845	11/28/1872
Woodbury	Polk	NH	Story	9/23/1845	9/4/1851
Grier	Polk	PA	Baldwin	8/10/1846	1/31/1870
Curtis	Fillmore	MA	Woodbury	10/10/1851	9/30/1857
Campbell	Pierce	AL	McKinley	4/11/1853	4/30/1861
Clifford	Buchanan	ME	Curtis	1/21/1858	7/25/1881
Swayne	Lincoln	OH	McLean	1/27/1862	1/24/1881
Miller	Lincoln	IA	Daniel	7/21/1862	10/13/1890
Davis	Lincoln	IL	Campbell	12/10/1862	3/4/1877
Field <sup>2</sup>	Lincoln	CA	New Seat	5/20/1863	12/1/1897
Chase, S.P., Chief Justice	Lincoln	OH	Taney	12/15/1864	5/7/1873
Strong	Grant	PA	Grier	3/14/1870	12/14/1880
Bradley	Grant	NJ	New Seat	3/23/1870	1/22/1892
Hunt	Grant	NY	Nelson	1/9/1873	1/27/1882
Waite, Chief Justice	Grant	OH	Chase, S.P.	3/4/1874	3/23/1888
Harlan I	Hayes	KY	Davis	12/10/1877	10/14/1911
Woods	Hayes	GA	Strong	1/5/1881	5/14/1887
Matthews	Garfield	OH	Swayne	5/17/1881	3/22/1889
Gray	Arthur	MA	Clifford	1/9/1882	9/15/1902
Blatchford	Arthur	NY	Hunt	4/3/1882	7/7/1893
Lamar. L.	Cleveland	MS	Woods	1/18/1888	1/23/1893
Fuller, Chief Justice	Cleveland	IL	Waite	10/8/1888	7/4/1910
Brewer	Harrison. B.	KS	Matthews	1/6/1890	3/28/1910
Brown	Harrison. B.	MI	Miller	1/5/1891	5/28/1906
Shiras	Harrison. B.	PA	Bradley	10/10/1892	2/23/1903
Jackson. H.	Harrison. B.	TN	Lamar. L.	3/4/1893	8/8/1895

<sup>2</sup> Longest-serving member until Douglas; apparently he was intent on remaining on the Court longer than the record held by John Marshall and he refused to step down even when asked to do so by the other Justices; he did increasingly less Court work through the 1890s, and by the time of his retirement he was practically useless to his colleagues. See, e.g., CARL BRENT SWISHES, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1930); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION (1976).

Justice	Appointed By	State	To Replace	Judicial Oath Taken	Date Service Terminated
White E.	Cleveland	LA	Blatchford	3/12/1894	12/18/1910
White, E., Chief Justice	Taft	Fuller		12/19/1910	5/19/1921
Peckham	Cleveland	NY	Jackson, H	1/6/1896	10/24/1909
McKenna	McKinley	CA	Filed	1/26/1898	1/5/1925
Holmes	Roosevelt, T.	MA	Gray	12/8/1902	1/12/1932
Day	Roosevelt, T.	OH	Shiras	3/2/1903	11/13/1922
Moody	Roosevelt, T.	MA	Brown	12/17/1906	11/20/1910
Lurton	Taft	TN	Peckham	1/3/1910	7/12/1914
Hughes	Taft	NY	Brewer	10/10/1910	6/10/1916
Hughes, Chief Justice	Hoover		Taft	2/24/1930	6/30/1941
Van Devanter	Taft	WY	White, E.	1/3/1911	6/2/1937
Lamar, J	Taft	GA	Moody	1/3/1911	1/2/1916
Pitney	Taft	NJ	Harlan I	3/18/1912	12/31/1922
McReynolds	Wilson	TN	Lurton	10/12/1914	1/31/1941
Brandeis	Wilson	MA	Lamar, J.	6/5/1916	2/13/1939
Clarke	Wilson	OH	Hughes	10/9/1916	9/18/1922
Taft, Chief Justice	Harding	CT	White, E	7/11/1921	2/3/1930
Sutherland	Harding	UT	Clarke	10/2/1922	1/17/1938
Butler	Harding	MN	Day	1/2/1923	11/16/1939
Sanford	Harding	TN	Pitney	2/19/1923	3/8/1930
Stone	Coolidge	NY	McKenna	3/2/1925	7/2/1941
Stone, Chief Justice	Roosevelt, F.		Hughes	7/3/1941	4/22/1946
Roberts	Hoover	PA	Sanford	6/2/1930	7/31/1945
Cardozo	Hoover	NY	Holmes	3/14/1932	7/9/1938
Black	Roosevelt, F.	AL	Van Devanter	8/19/1937	9/17/1971
Reed	Roosevelt, F.	KY	Sutherland	1/31/1938	2/25/1957
Frankfurter	Roosevelt, F.	MA	Cardozo	1/30/1939	8/28/1962
Douglas <sup>3</sup>	Roosevelt, F.	CT	Brandeis	4/17/1939	11/12/1975
Murphy	Roosevelt, F.	MI	Butler	2/5/1940	7/19/1949
Byrnes	Roosevelt, F.	SC	McReynolds	7/8/1941	10/3/1942
Jackson, R.	Roosevelt, F.	NY	Stone/Hughes	7/11/1941	10/9/1954
Rutledge, W.	Roosevelt, F.	IA	Byrnes	2/15/1943	9/10/1949
Burton	Truman	OH	Roberts	10/1/1945	10/13/1958

<sup>3</sup> Longest serving member to date.

Justice	Appointed By	State	To Replace	Judicial Oath Taken	Date Service Terminated
Vinson, Chief Justice	Truman	KY	Stone	6/24/1946	9/8/1953 (died)
Clark	Truman	TX	Murphy	8/24/1949	6/12/1967
Minton	Truman	IN	Rutledge, W.	10/12/1949	10/15/1956
Warren, <sup>4</sup> Chief Justice	Eisenhower	CA	Vinson	10/5/1953	6/23/1969
Harlan II	Eisenhower	NY	Jackson, R	3/28/1955	9/23/1971
Brennan	Eisenhower	NJ	Minton	10/16/1956	7/20/1990
Whittaker	Eisenhower	MO	Reed	3/25/1957	3/31/1962
Stewart	Eisenhower	OH	Burton	10/14/1958	7/3/198
White, B.	Kennedy	CO	Whittaker	4/16/1962	6/28/1993
Goldberg	Kennedy	IL	Frankfurter	10/1/1962	7/25/1965
Fortas	Johnson, L.	TN	Goldberg	10/4/1965	5/14/1969
Marshall, T.	Johnson, L.	NY	Clark	10/2/1967	10/1/1991
Burger, Chief Justice	Nixon	VA	Warren	6/23/1969	9/26/1986
Blackmun	Nixon	MN	Forks	6/9/1970	8/3/1994
Powell	Nixon	VA	Black	1/7/1972	6/26/1987
Rehnquist	Nixon	AZ	Harlan II	1/7/1972	9/26/1986
Rehnquist, Chief Justice	Reagan		Burger	9/26/1986	
Stevens	Ford	IL	Douglas	12/19/1975	
O'Connor	Reagan	AZ	Stewart	9/25/1981	
Scalia	Reagan	VA	Rehnquist /Burger	9/26/1986	
Kennedy	Reagan	CA	Powell	2/18/1988	
Souter	Bush	NH	Brennan	10/9/1990	
Thomas	Bush	GA	Marshall, T	10/23/1991	
Ginsburg	Clinton	NY	White, B.	8/10/1993	
Breyer	Clinton	MA	Blackmun	8/3/1994	

<sup>4</sup> Joined the Court as a recess appointment on opening day of the 1953 term, shortly after Chief Justice Fred Vinson died unexpectedly; appointment was not confirmed by the Senate until March 1, 1954.

## Chapter 3

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# PASSING THE THRESHOLD OF THE FOURTH AMENDMENT

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### A. WHAT IS A “SEARCH”?

#### 1. GENERAL PRINCIPLES

**P. 93, add new Note 7A:**

7A. *FISA after September 11.* A 2003 report of the Justice Department delivered to the House Judiciary Committee indicates that there has been a substantial increase in the use of FISA to obtain emergency surveillance orders in the post-September 11 era. According to the report, in the 23 years between FISA’s enactment and the September 11 attacks, 47 emergency authorizations were obtained, whereas in just one year following the statutory expansion of the FISA regulations, 113 new surveillance orders were issued. The report states that FISA is “the critical investigative tool” in the investigation of terrorism. The report may be read at <<http://www.house.gov/judiciary/patriotlet051303.pdf>>.

#### 2. THE KATZ DOCTRINE IN APPLICATION

**P. 114, add at the end of Note 5:**

See also *Illinois v. Caballes*, 543 U.S. \_\_\_, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), in which the Court held, 6–2, that “use of a well-trained narcotics-detection dog” to sniff the trunk of an automobile lawfully stopped on the highway for a traffic ticket does not constitute a search. According to the Court, “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess”—namely, contraband—“does not violate the Fourth Amendment.” In dissent, Justice Souter would have overruled *Place* because of the lack of reliability of many narcotics-detection dogs. (See page 7 of this Supplement.)

**P. 138, add new Note 8A:**

8A. *Is the Court faced with an untenable and incoherent Katz doctrine?* Professor Sherry Colb has analyzed the “logical ‘moves’ that unify almost all of the Court’s cases defining the meaning of a Fourth Amendment ‘search.’ ”

Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 Stan. L. Rev. 119 (2002). She concludes that these moves

have steadily eroded privacy in specific cases, and conceptually promise to eliminate it altogether, because they do not admit of any logical stopping point. The Court has therefore brought itself to a doctrinal position that is untenable, even for the most tough-on-crime Justices. In some recent decisions that recognize and leave open the possibility of broader Fourth Amendment protection, the Court displays ambivalence about the moves it has repeatedly employed and thereby calls into question the logical moves and doctrinal conclusions embraced by the earlier precedents. Unfortunately, both the moves and their occasional disavowal occur beneath the surface, rendering the doctrine, and privacy itself, unstable.

*Id.* at 121–22.

And the costs of the *Katz* test, as it has been applied by later Courts, are not merely that it creates an untenable doctrine. Professor Colb concludes:

One problem I identify in the current doctrine is that the threshold for search is set too high; much conduct that ought to be entitled to privacy, in other words, is subject to intrusion without even triggering the Fourth Amendment's requirements. \* \* \*

But the Court's failure to give adequate protection to privacy is not the only problem I identify in current doctrine. The other problem is incoherence, the fact that the very tests that the Court announces and applies in some contexts are contradicted and undermined in others.

*Id.* at 189.



## Chapter 4

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# THE SUBSTANCE OF THE FOURTH AMENDMENT

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### A. PROBABLE CAUSE

**P. 151, add new Note 7A:**

7A. *More thoughts on the Bobos of this world.* Bobo, the less-than-entirely-reliable canine mentioned in Note 7, is not all that unusual. As Justice David Souter stated in a dissenting opinion, “[t]he infallible dog \* \* \* is a creature of legal fiction. \* \* \* [T]heir supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy \* \* \*.” As Souter noted, one study have shown “that dogs in artificial testing situations return false positives anywhere from 12.5 to 60% of the time, depending on the length of the search.” *Illinois v. Caballes*, 543 U.S. \_\_\_, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005).

To Justice Souter, the fallibility of canines not only bears on probable-cause determinations, but leads him to believe that the Court should overrule *United State v. Place* (casebook, p. 113, Note 5), which held that use of a dog to sniff out contraband in a suitcase found in a public place does not constitute a Fourth Amendment search.

**P. 168, add new Note 8A:**

8A. *The triplets hypothetical redux.* In the last Note, we asked whether the police have probable cause, and therefore may arrest, triplets for a crime when the police are nearly certain that one, but only one, of the three committed a particular offense.

Now consider the facts in *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). A police officer lawfully stopped, for speeding, a passenger car occupied by three men. When the officer requested the vehicle registration, the driver (who was the owner of the car) opened the glove compartment. The officer observed a large amount of rolled-up money in the compartment. The driver consented to a full search of the car, which resulted in discovery of five baggies of cocaine hidden in the back-seat armrest and elsewhere in the back seat. The officer questioned the men about the ownership of the drugs and money (\$763), but nobody claimed