

# PUBLICATION

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## Wait, You're Not Housekeeping!

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A dozen police SWAT team members in full body armor, with weapons at the ready, stampede into a hotel guest room with hotel management's assistance in opening the door. They find a cache of guns and drugs, and arrest the occupants. However, the officers lack a warrant, probable cause or even exigent circumstances. Under longstanding Fourth Amendment protection against unreasonable search and seizure, evidence obtained through an unlawful search is most often excluded from admission to prove the guilt of the person from whom it was unlawfully obtained, effectively dismissing the charges. Whether the search was illegal under the Fourth Amendment, and whether the hotel could incur liability due to the search, depends on the occupants' expectation of privacy in the room.

Courts have examined similar situations where rooms were registered under an alias, registered to a third party, procured by an agent and obtained with a fraudulent credit card. Other cases have involved lengthy stays, stays a few minutes or hours past checkout time, and hotels with lax or poorly enforced checkout policies. These cases have resulted in unpredictable holdings, leaving hotel management guessing as to how to cooperate with police investigations.

The U.S. Supreme Court has held that the "Fourth Amendment protects people, not places," but has modified this statement by stating that "the extent to which the Fourth Amendment protects people may depend upon where those people are." For example, "an overnight guest in a home may claim the protection of the Fourth Amendment," but those "essentially present for a business transaction" may not. The court's Fourth Amendment jurisprudence has also been guided by societal expectations and what is "permitted by society." Lower courts' disagreement and resulting legal unpredictability has been based on what courts decide society expects or allows.

With this baseline of Supreme Court precedent and varying lower court attitudes as to societal expectations in mind, a circuit split has evolved on the issue of whether a guest must be a registered guest who has not overstayed a checkout time to enjoy Fourth Amendment protection. A recent Eleventh Circuit case, *Mays v. Davenport*, widened this divide by holding that a hotel room occupant who was not a registered guest and was present to engage in a purely commercial transaction did not have a reasonable expectation of privacy while in a hotel guest room after consensual admission by the registered guest, thereby not implicating the protection of the Fourth Amendment.

The *Mays* court examined three factors in reaching its decision:

- whether the subject of the search had a preexisting relationship with the registered occupant;
- whether the subject of the search was present for the accepted social purpose of staying the night or solely for the purpose of engaging in a commercial transaction; and
- whether the search subject was a registered guest.

Answering all three of these questions in the negative, the court easily resolved the case in favor of the government. The court did not discuss whether any one factor was dispositive, but focused on the commercial nature of the transaction and the status of the search subject as a non-registered business invitee.

What does this holding mean for hoteliers seeking to avoid liability for assisting in police searches? Law enforcement frequently relies upon hotel management consent and assistance to enter hotel rooms without warrants and with less resistance, in order to avoid Fourth Amendment problems in certain cases. Hoteliers do not want to obstruct a law enforcement investigation or stand in the way of a lawful search as a matter of possible criminal liability for obstruction and negative local public relations. Unfortunately, hoteliers are forced to weigh the risk of civil action from the offended guest whose privacy is violated by the search, or worse if the guest is injured by the police entry. The sovereign immunity for police action does not typically extend to the cooperating hotelier.

In order to avoid such liability, as a general rule, hoteliers would be advised to facilitate police entry to a hotel room if a valid warrant is presented or hotel management is aware of occupants violating the law or a published hotel policy that would warrant eviction. While certain jurisdictions tolerate more expansive searches if, for example, a hotel guest has overstayed checkout time, the unpredictability of court resolution on that issue make the requirement of a warrant or a known hotel policy violation advisable.