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"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure

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"DEAREST PROPERTY": DIGITAL EVIDENCE AND THE HISTORY OF PRIVATE "PAPERS" AS SPECIAL OBJECTS OF SEARCH AND SEIZURE

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Why does the Fourth Amendment distinctly refer to "papers" prior to "effects"? Why should we care?

The inquiry is interesting for the usual reasons legal history is interesting—those who look may find a compelling story that provides the surest foundation for understanding modern doctrine. In this case, however, there is an additional and urgent reason for caring about history. Modern doctrine is in deep trouble and needs all the help it can get.

For more than a century, the Supreme Court adhered to the doctrine of *Boyd v. United States*, granting private papers an extraordinary exemption from seizure, even under warrant.[1] Then, during the last quarter of the twentieth century, the Supreme Court began effectively to equate "papers" and "effects."[2] Another line of modern cases established "bright-line

[1] *See infra* text accompanying notes 257–266 (discussing Boyd v. United States, 116 U.S. 616 (1886)).

[2] United States v. Doe, 465 U.S. 605, 611–12 (1984) (holding that compelled production of preexisting documents did not violate Fifth Amendment privilege, excepting testimonial character of the act of production); Zurcher v. Stanford Daily, 436 U.S. 547, 560 (1978) (holding that search of newspaper office for photographs, under warrant, did not violate Fourth Amendment); Andresen v. Maryland, 427 U.S. 463, 477 (1976) (holding that search of law office, and seizure of documents incriminating suspect in fraud, under warrant, did not violate the Fourth Amendment); Fisher v. United States, 425 U.S. 391, 401 (1976) (holding that compelled production by accountant of client's documents entrusted to accountants did not violate Fifth Amendment).

rules"[3] that gave the same constitutional treatment to all "effects."[4]

Twenty-first century technology makes these doctrines problematic. Portable devices like cell phones and flash drives are "effects" subject to search and seizure like briefcases and backpacks. Given the enormous quantity and sensitive content of the information digital devices hold, equating them with other "effects" has troubled courts and commentators.[5]

In computer search cases, the police may have probable cause and be able to describe particularly what they are seeking. But the disturbing feature is the volume of innocent and intimate information that must be exposed before the criminal material is discovered. This pooling of small quantities of criminal evidence with large quantities of innocent and intimate information is not new. It appeared in a great controversy over general warrants, libels, and seizure of papers that erupted in England in the 1760s.

This Article argues that the history of seizing "papers" explains why the Amendment uses the term and offers the opportunity to ground special Fourth Amendment rules for digital evidence. For originalist judges the pertinence of history is obvious. History is important, however, for any theory of constitutional interpretation more formal than brazen realism.[6] In this instance, history might help to reconcile Fourth Amendment doctrine

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[3] For application of the usual arguments about rules versus standards to the Fourth Amendment context, see, e.g., Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) (arguing that Fourth Amendment cases are so various that rules are arbitrary and defending particularized rulings in the style of parables); Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127 (arguing for bright-line rules to govern recurring patterns of police behavior such as searches incident to arrest).

[4] *See* California v. Acevedo, 500 U.S. 565, 576 (1991) (holding that warrantless search of a container in the trunk of a vehicle where police officers had probable cause to believe that only the container, not the rest of the car, contained contraband, did not violate the Fourth Amendment); United States v. Ross, 456 U.S. 798, 820–21, 825 (1982) (holding that the vehicle exception to the warrant requirement permits a warrantless search of any container in the vehicle that could contain the suspected evidence or contraband); New York v. Belton, 453 U.S. 454, 460 (1981) (holding that search-incident-to-arrest power permits a warrantless search of the entire passenger compartment, including containers, of vehicle occupied by arrested suspect); Gustafson v. Florida, 414 U.S. 260, 266 (1973) (holding that search-incident power extends to all effects on the person of an arrested suspect, including containers); United States v. Robinson, 414 U.S. 218, 235 (1973) (same).

[5] *See infra* Part I.

[6] Even for pragmatists and common law constitutionalists, text and history matter—a lot. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 235 (1962) (observing that text, history, and precedent "are not irrelevant materials, not ever. They are empirical aids, being deposits of experience; they are sources of inspiration, instigators of reflection, producers of mood. In short, they are the setting for judgment and they condition it, but they are not its wellspring").

with the widespread sense that some effects are categorically more private than others.

The Fourth Amendment refers to "papers" because the Founders understood the seizure of papers to be an outrageous abuse distinct from general warrants. The English courts and resolutions of the House of Commons condemned both abuses distinctly. The controversy was closely followed in America, where colonial Whigs sympathized with, and even idolized, John Wilkes, who successfully sued for damages for the seizure of his papers. America inherited the common law ban on searches for papers, adopted constitutional provisions that mentioned papers distinctly, and refused to modify the common law ban by statute until the Civil War. The one Founding-era attempt to authorize seizing papers by statute was condemned as contrary to common law and natural right and never passed into law. Although Congress authorized seizing papers to enforce the revenue laws during the Civil War, it took until the 1880s for a challenge to reach the Supreme Court. That challenge was *Boyd*, which remained the law for another ninety years.

Boyd rightly held that "papers" deserve more constitutional protection than "effects." Special protection does not, however, ineluctably mean absolute immunity. The seizures that aroused outrage in the 1760s were indiscriminate, expropriating, unregulated, and inquisitorial. A regulated, discriminate, and nonrivalrous process for inspecting documents is different.

Indeed, the prohibition on seizing papers was never absolute. Stolen and contraband papers could be seized under warrant, and perhaps papers of only evidentiary value could be seized incident to arrest. Moreover, if the Fourth Amendment, as Story said, is "little more than the affirmance of a great constitutional doctrine of the common law,"[7] the Amendment incorporates by reference "a great constitutional doctrine" that was dynamic on its own terms, subject to judicial evolution and statutory modification.[8] The supposed choice between no special protection for private papers and complete immunity for private papers is a false dilemma.

This Article takes no position on the precise special doctrines that should be formulated to prevent promiscuous searches of digitized

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[7] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (Boston, Hilliard, Gray & Co. 1833).

[8] *See* Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1121 (2012) (arguing that the Supreme Court should overrule pre-Founding English precedents incorporated by reference into the Fourth Amendment according to the same criteria that govern overruling post-ratification Fourth Amendment precedents).

information. Those depend on costs and benefits, and on institutional competence to assess costs and benefits.[9] The Article claims only that courts interpreting the Fourth Amendment have legitimate textual and historical grounds for treating "papers" and their modern counterparts with more respect than other "effects."

Part I briefly describes the technological crisis in current Fourth Amendment doctrine. Part II reviews the history of the controversy over general warrants, libels, and the seizure of papers that raged in England early in the reign of George III. Part III turns to the American experience, beginning with American awareness of the English controversy before considering the post-Independence reception of the ban on seizing papers, the adoption of constitutional provisions referring specially to "papers," and Founding-era practices. Part IV tells the still largely unsuspected story of *Boyd v. United States.* Part V weighs the accumulated evidence and suggests that *Boyd*'s inflexible ban on seizing private papers, while more defensible than modern doctrine's excision of a word from the constitutional text, was not the only legitimate doctrinal way to honor the constitutional preference for "papers" over "effects." Once we understand the special evils the Founders saw in seizing papers, we may conclude that searches carefully structured to minimize those evils are not "unreasonable."

I. THE TECHNOLOGICAL CRISIS IN MODERN DOCTRINE

The Supreme Court's case law permits the search for and seizure of evidence, including documentary evidence, (a) by warrants meeting the criteria of the Warrant Clause; (b) without warrants when the police have probable cause to believe evidence or contraband may be inside a vehicle;[10] and (c) incident to a lawful arrest based on probable cause, even without particularized suspicion to believe the suspect might destroy evidence or reach for a weapon.[11] When an arrest takes place in public, the police may thoroughly search the suspect's person, including personal items such as wallets and notebooks, and may open containers such as briefcases and backpacks.[12] When the arrest takes place indoors, the police, under *Chimel v. California*, may also search areas within the immediate "grabbing range"

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[9] *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 857 (2004) (arguing against judicial, as opposed to legislative, regulation); Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL'Y 281, 322–27 (arguing for judicial regulation).

[10] Carroll v. United States, 267 U.S. 132 (1925).

[11] *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2 (4th ed. 2004).

[12] *See id.*

of the suspect.[13] When the arrest takes place in a vehicle, the recent decision in *Arizona v. Gant* directs that police "may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[14]

As Orin Kerr forcefully pointed out, these physical-evidence rules are incongruous when applied to digital evidence.[15] The physical-evidence rules permit the police to carry off the suspect's computer drives and peruse *every* file if they have probable cause to believe such a search will yield a single incriminating file. And when the suspect is arrested while carrying a cell phone or thumb drive, a literal application of the predigital search-incident-to-arrest rules permits the police to read *every* contact and file *without* probable cause.

A warrant to search the garage of a suspect's home for a stolen pickup truck does not authorize the police to search the garage of another home owned by the same suspect. That would be a general warrant, which is anathema to the Constitution. Yet while one warrant will not permit law enforcement to search two premises for physical evidence, one warrant will suffice to read all the files on a personal computer, so long as it particularly describes the incriminating files to be seized. Yet the intrusion on privacy from opening the door of the second unit's garage seems dramatically less than that attending the search, file by file, of the family desktop. Current doctrine has gone badly awry in the digital-evidence context.

A. SEARCHES FOR DIGITAL EVIDENCE PURSUANT TO WARRANT OR THE VEHICLE EXCEPTION TO THE WARRANT REQUIREMENT

Once law enforcement agents have built a record of probable cause to suspect that incriminating files are present on a suspect's computer, the standard practice is to obtain a warrant to enter the suspect's premises and remove digital storage devices for subsequent search at police headquarters.[16] The practice extends beyond the investigation of crimes committed by digital communications. Given probable cause to suspect

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[13] *See id.* § 6.3(b).

[14] Arizona v. Gant, 556 U.S. 332, 343 (2009) (footnote omitted); *see* 3 LAFAVE, *supra* note 11, § 7.1(c).

[15] *See* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279 (2005).

[16] *See id.* at 288.

that a target committed an offense, general information that similar offenders sometimes document crimes on their technology can support a search warrant.

For example, in *United States v. Burgess*, police lawfully stopped the suspect's motor home on the road for the ostensible purpose of traffic enforcement.[17] During the stop a drug-sniffing dog alerted to the vehicle, establishing probable cause to search the mobile home for drugs.[18] The police found marijuana in the mobile home, arrested Burgess, and impounded the vehicle.[19] Inside the vehicle the police also found a laptop computer and two hard drives.[20]

The police then sought a warrant, representing that drug dealers often keep "trophy photos" of large quantities of drugs or cash to celebrate successful transactions.[21] The judge issued a warrant to search the motor home for "evidence to show the transportation and delivery of controlled substances," including "computer records" and "pay-owe sheets, address books, rolodexes, pagers, firearms and monies."[22] The warrant imposed no special limits on the computer searches.

An investigator copied all three drives using a program that permitted the officer to view the files as they were copied.[23] The officer saw an image of "child sexual exploitation," turned off the view function, and sought another warrant authorizing a search of the drives for child pornography.[24] That warrant was issued and the police subsequently found thousands of child-pornographic images.[25]

Burgess moved to suppress, arguing that the initial warrant was general and so the plain-view discovery of the child pornography was fruit of the poisonous tree.[26] The government defended the warrant as adequately particularized and also claimed that, even if the warrant were void, the police could search the computer drives under the vehicle exception because the drives were analogous to containers that had been found in a vehicle.[27] The district court accepted both government

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[17] United States v. Burgess, 576 F.3d 1078, 1082 (10th Cir. 2009).

[18] *Id.*

[19] *Id.* at 1083.

[20] *Id.*

[21] *Id.* at 1083–84.

[22] *Id.* at 1083.

[23] *Id.* at 1084.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

arguments.[28] On appeal the Tenth Circuit upheld the initial warrant and declined to rule on the defendant's argument that the vehicle search exception should not extend to digital evidence.[29]

By its literal terms the warrant authorized the police to search all the suspect's computer files for anything at all.[30] The supporting affidavit indicated that the police were looking for photographic evidence of drug dealing, although the warrant did not say this.[31] The *Burgess* court rescued the warrant by imputing the affidavit's mention of "trophy photos" to the warrant.[32] On the authority of this generic warrant, even as narrowed by construction, the police undertook the process of copying and viewing *all the files* on the three drives.[33]

The court's evasive passage rejecting the defendant's particularity argument betrayed considerable ambivalence: While "[o]fficers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant,"[34] "a computer search may be as extensive as reasonably required to locate the items described in the warrant"[35] based on probable cause. And "[t]his Court has never required warrants to contain a particularized computer search strategy."[36] Recognizing with regret the global search power conferred on police by a warrant authorizing a search of computer files, the Tenth Circuit weighed the evils and concluded that "it is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives."[37] "[I]n the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents

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[28] *Id.*

[29] *Id.* at 1090 ("In spite of clear language in *Acevedo*, one might speculate whether the Supreme Court would treat laptop computers, hard drives, flash drives or even cell phones as it has a briefcase or give those types of devices preferred status because of their unique ability to hold vast amounts of diverse personal information. Interesting as the issue may be, we need not now resolve it because the search of Burgess' hard drives was authorized by a warrant.").

[30] *Id.* at 1094.

[31] *Id.* at 1091–92.

[32] *Id.* at 1091 (citation omitted).

[33] *Id.* at 1091–92.

[34] *Id.* at 1092 (quoting United States v. Walser, 275 F.3d 981, 986 (10th Cir. 2001)).

[35] *Id.* (quoting United States v. Grimmett, 439 F.3d 1263, 1270 (10th Cir. 2006)).

[36] *Id.* (quoting United States v. Brooks, 427 F.3d 1246, 1251 (10th Cir. 2005) (internal quotation marks omitted)).

[37] *Id.* at 1094.

contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files."[38]

The Ninth Circuit has weighed the evils rather differently. In *United States v. Comprehensive Drug Testing*, the en banc court's opinion upheld two lower court rulings ordering the government to return computer records seized in violation of warrants that *did* impose limits on the search of computer files.[39] Neither Federal Rule of Criminal Procedure 41 nor any Supreme Court case interpreting the Fourth Amendment requires special procedures for computer searches.[40] The issue was whether, where district courts included safeguards in the search warrants, plaintiffs were entitled to the return of their records when the government failed to abide by the terms of the warrants.[41]

The court's per curiam opinion did not expressly say that a warrant that failed to include special particularity guarantees, like the one in *Burgess*, would be unconstitutional, but that message was at least arguably implied. Chief Judge Kozinski, joined by four other judges, went further in a concurring opinion. In the interests of guiding lower courts, prosecutors, and agents, the concurring opinion described a constitutional "safe harbor" for warrants to search computer files. The (rather *strongly*) suggested warrant structure is as follows:

> 1. Magistrate judges should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.
>
> 2. Segregation and redaction of electronic data must be done either by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, the government must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.
>
> 3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.
>
> 4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.

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[38] *Id.* If image files are not Fourth Amendment "papers," a point on which I here express no view, they would just be "effects" and the *Burgess* holding would be unproblematic from a historical perspective.

[39] 621 F.3d 1162, 1167–75 (9th Cir. 2010) (en banc) (per curiam).

[40] The majority and the concurrence rely on dicta in *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), directing magistrates to regulate and monitor large-scale seizures of paper documents.

[41] *Comprehensive Drug Testing*, 621 F.3d at 1165–66.

> 5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.[42]

The suggested approach is structurally similar to the special rules for digital searches adopted in the United Kingdom.[43]

Chief Judge Kozinski supported the recommended guidelines by citations suggesting they were implicit in the majority opinion. Judge Bea, however, characterized Judge Kozinksi's opinion as "advisory,"[44] while Judge Callahan, joined by Judge Ikuta, agreed that the concurrence was advisory but also criticized the suggested guidelines.[45] Judge Callahan made the forceful points that the concurrence would effectively eliminate

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[42] *Id.* at 1180 (Kozinski, C.J., concurring) (citations omitted).

[43] The Police and Criminal Evidence Act (PACE), 1984, c. 60 § 8 (U.K.), abrogated the common law prohibition of warrants for papers insofar as PACE authorizes warrants to enter private premises to search for "material" that may be evidence or have substantial value in the investigation. POLICE AND CRIMINAL EVIDENCE ACT 1984 CODE B: CODE OF PRACTICE FOR SEARCHES OF PREMISES BY POLICE OFFICERS AND THE SEIZURE OF PROPERTY FOUND BY POLICE OFFICERS ON PERSONS OR PREMISES, § 7.1 (2010), *available at* http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-b-2011?view=Binary. PACE provides that:

> Subject to paragraph 7.2, an officer who is searching any person or premises under any statutory power or with the consent of the occupier may seize anything:
>
> (a) covered by a warrant
>
> (b) the officer has reasonable grounds for believing is evidence of an offence or has been obtained in consequence of the commission of an offence but only if seizure is necessary to prevent the items being concealed, lost, disposed of, altered, damaged, destroyed or tampered with
>
> (c) covered by the powers in the Criminal Justice and Police Act 2001, Part 2 allowing an officer to seize property from persons or premises and retain it for sifting or examination elsewhere.

Id.

Code B's §§ 7.5–7.7 caution that police may seize documents or computer files only when it is impracticable to rely on printouts or photocopies, and that a resort to the "seize and sift" provisions of the Criminal Justice and Police Act 2001 is only appropriate if it is essential and police do not remove any more material than necessary. *Id.* The removal of large volumes of material, much of which may not ultimately be retainable, may have serious implications for the owners, particularly when they are involved in business or activities such as journalism or the provision of medical services. *Id.* Officers must carefully consider if removing copies or images of relevant material or data would be a satisfactory alternative to removing originals. *Id.* When originals are taken, officers must be prepared to facilitate the provision of copies or images for the owners when reasonably practicable. *Id.*

[44] *Comprehensive Drug Testing*, 621 F.3d at 1182 (Bea, J., concurring in part and dissenting in part).

[45] *Id.* at 1183 (Callahan, J., concurring in part and dissenting in part).

the plain-view doctrine in computer searches and that it offered "no legal authority for its proposal requiring the segregation of computer data by specialized personnel or an independent third party."[46]

In sum, *Burgess* states the orthodox view of searches of computers and other electronics, which equates digital storage devices with file cabinets.[47] Despite the dominance of rote application of the physical rules to the digital sphere, there is unquiet among judges. *Comprehensive Drug Testing* is one example. The apologetic tone in *Burgess*, itself retreating from the Tenth Circuit's former special regard for digital evidence, is another.

B. SEARCHES OF DIGITAL EVIDENCE INCIDENT TO LAWFUL ARREST

In *United States v. Robinson*, the Supreme Court upheld a "thorough" "search of respondent's person" because Robinson had been lawfully arrested.[49] No case-specific reason for a search, such as specific grounds to believe the suspect is carrying weapons or contraband, is required.[50] In *Robinson* the Court rejected the defendant's motion to suppress heroin found inside a crumpled cigarette pack located in Robinson's pocket. The lower courts have applied the automatic right to search items found on the person arrested to such personal items as wallets and purses.[51]

A cell phone seems very similar to other personal effects. Many suspects are arrested with their phones literally on their persons, inside a pocket or a purse. Professor Gershowitz estimates that in recent years police have made "thousands" of searches of cell phones incident to arrests.[52] The leading case, *United States v. Finley*,[53] simply equated

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[46] *Id.* at 1184.

[47] *See* United States v. Richards, 659 F.3d 527, 538 (6th Cir. 2011) (observing that "the majority of federal courts have eschewed the use of a specific search protocol and, instead, have employed the Fourth Amendment's bedrock principle of reasonableness on a case-by-case basis") (footnote omitted); Thomas K. Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 MISS. L.J. 193, 197–202 (2005). Indeed, as Clancy points out, the then-leading case recommending special computer-search protocols was the Tenth Circuit decision in *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), which *Burgess* distinguished as "fact intense." United States v. Burgess, 576 F.3d 1078, 1092 (10th Cir. 2009).

[49] 414 U.S. 218, 236 (1973).

[50] *Id.* at 235 (holding "that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment").

[51] 3 LAFAVE, *supra* note 11, § 5.3; *see, e.g.*, United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (upholding search of wallet and address book); People v. Harris, 164 Cal. Rptr. 296, 301–03 (Ct. App. 1980) (upholding search of purse and wallet found therein).

[52] Adam M. Gershowitz, *Can Police Search Your Cell Phone, and Even Break Your*

Finley's cell phone with Robinson's cigarette pack.[54] Yet in *Finley* the agents read the address book and text messages stored in Finley's phone,[55] an intrusion that seems dramatically more intrusive than rummaging through a cigarette pack.

Although *Finley* is still generally followed,[56] some judicial skepticism is emerging. In *State v. Smith*, the police seized Smith's cell phone from his person at the time of arrest and later searched the address book and text messages.[57] The Ohio Supreme Court rejected the analogy to "containers," reasoning that a container is one object capable of holding another object.[58] Repositories of intangible information, like Smith's phone, were different.[59] The *Smith* court then concluded that Smith had a higher expectation of privacy in his phone than in ordinary effects, and that while the warrantless *seizure* of the phone at the time of arrest was reasonable, the subsequent warrantless *search* of its contents was not.[60]

Eventually the Supreme Court will decide cases in which the government relied on traditional, rolodex-era warrants to search computer records, and defense counsel argue that digital searches without novel safeguards along the lines suggested by Chief Judge Kozinski are "unreasonable." Likewise the high Court is likely to decide cases in which the government relies on the search-incident-to-arrest exception to justify searches of cell phones, tablets, flash drives, and notebook computers without warrants or probable cause. The Court's own cases regarding physical evidence are relatively recent but disturbingly incongruent with the lived experience of modern technology.

Password, During an Arrest?, 35 CHAMPION 16, 17 (2011) ("Although it is impossible to know how many cell phone searches have been conducted incident to arrest over the last few years, the number is likely in the thousands.") (footnote omitted).

[53] United States v. Finley, 477 F.3d 250 (5th Cir. 2007).

[54] *See id.* at 259–60 ("Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial.") (citing *Robinson*, 414 U.S. at 233–34).

[55] *Finley*, 477 F.3d at 254.

[56] *See* 3 LAFAVE, *supra* note 11, § 5.2 (observing that "on the limited occasions when the issue has been reached, courts have also rather consistently found 'warrantless searches of cell phones to fall squarely within the search-incident-to-arrest exception,' so that call records and text messages found in such a search are thereby admissible in evidence") (footnote omitted).

[57] 920 N.E.2d 949, 950 (Ohio 2011).

[58] *Id.* at 953–54.

[59] *Id.* at 955.

[60] *Id.*

When these cases arise, will the Court be able to find some principled ground for recognizing the special privacy concerns raised by dense concentrations of highly personal information found in common handheld devices? History suggests that certain "effects"—private "papers"—were indeed originally understood to deserve more constitutional protection than others. If that is so, and if a cogent analogy can be drawn between eighteenth-century "papers" and modern digital storage devices, there may be neglected doctrinal opportunities for responding to the technology crisis in Fourth Amendment law.

So let us go to the past and, just perhaps, back to the future.

II. THE CONTROVERSY OVER LIBELS, GENERAL WARRANTS, AND THE SEIZURE OF PAPERS, 1763–1766

The Fourth Amendment is generally seen as a response to two protests against particular abuses, the first against Writs of Assistance in the colonies in 1761–1762 and the second against general warrants in England in 1764–1765. The inspiration for singling out "papers" in the Fourth Amendment lies in this later controversy. John Adams's report of Otis's famous argument against the Writs of Assistance makes no special mention of papers.[61] This is not surprising because the writs did not authorize seizure of papers, only of undutied goods.[62] The English courts had not yet prohibited general warrants to search for and seize libels.

But in 1762 and 1763, the King's messengers executed general warrants to seize the authors and printers of seditious libels. They were sued successfully in the courts, which distinctly condemned general warrants and warrants for papers. Leading Whig commentators and resolutions of the House of Commons condemned the distinct but related evils of general warrants and warrants for papers. American Patriots paid close attention to this political drama.

A. THE NORTH BRITON NO. 45

George III became King of England in 1760. His chief minister was a Scot, the Earl of Bute. It was an age of weekly "newspapers" (pamphlets, really), exemplified by such items as *The Tattler* and *The Rambler*. Supporters of the government—the Tories—ran a paper called *The Briton.*

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[61] *See* JOHN ADAMS, THE WORKS OF JOHN ADAMS 519–20 (1865). Otis lost his case, *see, e.g.*, M.H. SMITH, THE WRITS OF ASSISTANCE CASE 391–92 (1978), but Otis's argument inspired Adams and, presumably, others. Very few writs were ever actually issued by colonial courts.

[62] *See, e.g.*, WILLIAM MACDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1606–1898, at 108 (1908) ("THEREFORE we strictly Injoin & Command you . . . to inspect & oversee & search for the said goods wares & merchandize.").

John Wilkes, a flamboyant Member of Parliament and a leading Whig, published a weekly paper called the *North Briton*. The *North Briton*'s title was itself a dig at Bute's Scottish roots, but Wilkes went further—much further—in the famous issue *No. 45*.

In popular parlance, "the 45" referred to the last major revolt by supporters of the exiled House of Stuart (called "Jacobites" because James Francis Edward Stuart was then the heir to that house). The 1745 uprising involved a plan to join Jacobite forces from the continent with allies in Scotland. Wilkes was linking, with no great subtlety, the King's favorite minister with those who had plotted to restore the Stuart monarchy, widely unpopular on account of its political oppressiveness and its Catholic sympathies.

No. 45 was a scurrilous attack on the King's speech opening the latest session of Parliament, a speech defending the Treaty of Paris, which ended the Seven Years' War. Wilkes took the line that the British had won the war but lost the conference, the whole of Canada being regarded as insufficient booty. The shots at Bute came very close to the King: "In vain will such a minister, or the foul dregs of his power, the tools of corruption and despotism, preach up in the speech that spirit of concord, and that obedience to the laws, which is essential to good order."[63] His Majesty was incensed and Lord Halifax, the Secretary of State, wrote out a general warrant to "seize and arrest" everyone connected with No. 45 "together with their papers" (the Halifax warrant).[64] Wilkes was arrested on April 30, 1763, and all his papers carried off;[65] forty-nine others were arrested.[66]

His supporters having sued out a writ of habeas corpus, Wilkes was brought to the bar of the Court of Common Pleas on May 3. In the speech he is said to have given there, Wilkes remarked on his injuries and vowed

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[63] JOHN WILKES, THE NORTH BRITON, NO. 45, Apr. 23, 1763, *reprinted in* JOHN WILKES AN AUTHENTICK ACCOUNT OF THE PROCEEDINGS AGAINST JOHN WILKES 8, 10 (1763) [hereinafter AUTHENTICK ACCOUNT].

[64] The warrant, "directed to" Nathan Carrington, John Money, James Watson, and Robert Blackmore, "Four of his majesty's messengers in ordinary" states:

> THESE are in his Majesty's Name to authorize and require you (taking a Constable to your assistance) to make strict and diligent search for the Authors, Printers, and Publishers of a seditious and treasonable Paper, intitled, The North Briton, Number XLV . . . and them or any of them having found to apprehend and seize together with their papers and to bring in safe custody before me to be examined concerning the premises and further dealt with according to law[.]

AUTHENTICK ACCOUNT, *supra* note 63, at 12–13.

[65] *Id.* at 13.

[66] *See, e.g.*, WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 440 (2009).

revenge in the courts:

> The particular cruelties of my treatment, worse than if I had been a Scots Rebel, this court will hear, and I dare say, from your justice, in due time redress. . . . My *papers* have been seized, perhaps with a hope the better to deprive me of that proof of their meanness, and corrupt prodigality, which it may possibly, in a proper place, be yet in my power to give.[67]

Chief Justice Pratt of the Court of Common Pleas (later Lord Camden) ordered Wilkes released because libel was not a breach of the peace and therefore Wilkes, as a member of Parliament, was privileged against arrest.[68]

B. GENERAL WARRANTS AND THE SEIZURE OF PAPERS: THE HOUSE OF COMMONS TEMPORIZES

Wilkes, after recovering from a wound suffered in a duel, then fled to France and was expelled from the Commons on January 19, 1764.[69] On February 14, his supporters introduced a resolution: "That a General Warrant for apprehending and seizing the authors, printers, and publishers of a seditious libel, together with their papers, is not warranted by law."[70] A variety of amendments, apparently intended to garner as many votes as possible, resulted in this wording:

> That a General Warrant for apprehending and seizing the authors, printers, and publishers, of a seditious and treasonable libel, together with their papers, is not warranted by law; although such warrant hath been issued according to the usage of office; and hath been frequently produced to, and, so far as appears to this House, the validity thereof hath never been debated in the court of King's-bench; but the parties thereupon have been frequently bailed by the said court.[71]

There was intense debate on the measure, and many supporters of the government (now led by Grenville rather than Bute) were in favor of the motion. Confronted with his own practice of issuing general warrants when he served as prime minister, the Whig William Pitt (the elder) claimed to have issued them, knowing them to be illegal, as an act of selfless disobedience in wartime emergency.[72] The house narrowly voted (232 to

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[67] AUTHENTICK ACCOUNT, *supra* note 63, at 19.

[68] *Id.* at 25.

[69] *See* 15 THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 1393–94 (London, T.C. Hansard 1813) [hereinafter PARLIAMENTARY HISTORY]. Expulsion followed the disclosure of Wilkes's coauthorship of *An Essay on Woman*, an obscene parody of Pope's *Essay on Man*. *See, e.g.*, JOHN STEVEN WATSON & JOHN CLARK, THE REIGN OF GEORGE III, 1760–1815, at 101 (1960).

[70] 15 PARLIAMENTARY HISTORY, *supra* note 69, at 1399.

[71] *Id.* at 1401.

[72] *See, e.g.*, 5 LORD MAHON, HISTORY OF ENGLAND FROM THE PEACE OF UTRECHT TO THE PEACE OF VERSAILLES 153–54 (1853).

218) to put off debate on the resolution for four months.[73]

C. THE TORT SUITS AGAINST THE KING'S MESSENGERS AND THE SECRETARY OF STATE

Meanwhile Wilkes and others molested on the authority of the Halifax warrant were pressing tort suits against the executing officers and Halifax himself.[74] In December 1863, Pratt upheld a jury verdict for Wilkes against Wood, one of the officers who executed the Halifax warrant, holding the warrant illegal and void.[75] Pratt refused to receive Wood's bill of exceptions as untimely, but when the King's Bench heard the issue in *Money v. Leach*, all the judges opined that the Halifax warrant was illegal and void.[76]

One of Wilkes's associates was John Entick, the author of another antigovernment periodical, *The Monitor, or British Freeholder*. In November 1762, before the appearance of the fateful *North Briton No. 45*, Entick's house was raided by officers executing another warrant issued by Halifax. Encouraged by the success Wilkes and others were enjoying in the courts, Entick sued Nathan Carrington and the other officers who had ransacked his home.

The defendants pleaded two justifications for the alleged trespass. First, they claimed that Halifax had the status, and therefore the immunity, of a justice of the peace. That immunity, they argued, should extend to the officers. Second, they claimed that the warrant made forcible entry of private premises legal. The defendants' pleadings described the warrant as follows:

> [T]he earl did in the King's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled, *The Monitor or British Freeholder*, No. 357, 358, 360, 373, 376, and 380, London, printed for J. Wilson and J. Fell in Paternoster Row, containing gross and scandalous reflections and invectives upon His

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[73] 15 PARLIAMENTARY HISTORY, *supra* note 69, at 1401.

[74] Together with party sentiment, the pending litigation helps to explain the failure of the resolution condemning general warrants even though general warrants seemed to have received no defense in the Commons. *See* 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 129 (Francis Holland ed., new ed. 1912).

[75] Wilkes v. Wood, (1763) 98 Eng. Rep. 489, 499, 19 How. St. Tr. 1153, 1168 (C.P.).

[76] (1765) 97 Eng. Rep. 1075, 1088, 19 How. St. Tr. 1002, 1027 (K.B.). After Lord Mansfield, Justice Wilmot, Justice Yates, and Justice Aston agreed that the warrant was illegal, the case was reargued and the verdict upheld because the defendants had not acted in accordance with the warrant. *See* 97 Eng. Rep. at 1088–89.

> Majesty's Government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody, before the Earl of Halifax to be examined concerning the premises, and further dealt with according to law . . . .[77]

Pratt's famous opinion rejected both defenses, finding that the secretary was not entitled to immunity and that the warrant was illegal and void.[78]

There were two published reports of *Entick v. Carrington*. Serjeant Wilson's reports appeared in 1770.[79] In 1780, Francis Hargrave published a new edition of Howell's *State Trials*, in ten volumes, followed by a supplemental eleventh volume in 1781.[80] Professor Davies has argued that the American Founders would only have known Wilson's report, while *Boyd* cites only to the *State Trials* report.[81] Antebellum American references to *Entick* typically cite to Wilson's report rather than Hargrave's. There is, however, some evidence indicating that the *State Trials* edition

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[77] Entick v. Carrington, (1765) 95 Eng. Rep. 807, 808, 2 Wils. 275, 275–76, 19 How. St. Tr. 1029 (K.B.).

[78] *Entick*, 19 How. St. Tr. at 1062, 1074.

[79] *Entick* appears in 2 Wils. 275.

[80] *See* JOHN WILLIAM WALLACE, THE REPORTERS 66–67 (Boston, Soule & Bugbee, 4th rev. ed. 1882). The earliest references to the *State Trials* version cite "11 St. Tr. 313." *See* Bell v. Clapp, 10 Johns. 263, 265 (N.Y. Sup. Ct. 1813) (per curiam). Early in the nineteenth century, William Cobbett brought out a new version of the *State Trials* in thirty-four volumes, edited initially by Thomas Bayley Howell and subsequently by his son, Thomas Jones Howell. *See* WALLACE, *supra*, at 67–68. The Cobbett–Howell report is taken from Hargrave, as it begins with a note by Hargrave about why the text differs from Wilson's. *Entick*, 19 How. St. Tr. at 1029. Hargrave took the arguments of counsel straight from Wilson, but "instead of his short note of the Judgement [sic] of the Court, the Editor [Hargrave] has the pleasing satisfaction to present to the reader the Judgment itself at length, as delivered by the Lord Chief Justice of the Common-Pleas from written notes." *Id.* According to Hargrave, Pratt's original:

> [W]as not deemed worthy of preservation by its author, but was actually committed to the flames. Fortunately, the Editor remembered to have formerly seen a copy of the Judgment in the hands of a friend; and upon application to him, it was immediately obtained, with liberty to the Editor to make use of it at his discretion.

Id. After the appearance of the Cobbett–Howell volumes, the standard citation became "19 How. St. Tr. 1029."

[81] *See* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 118 (2010) ("[B]ecause it is unlikely that the later report would have been imported in significant numbers during the remainder of the framing era, it seems highly doubtful Americans would have become familiar with Camden's notion that a search warrant for papers was inherently illegal even by the time of the framing of the Fourth Amendment in 1789.").

was circulating in America as well as in England.[82]

Although Wilson's report is denser, both reports of *Entick* identify four distinct obnoxious features of the warrant to seize papers. First, not only was it *general* with respect to the premises to be entered forcibly in search of the suspected papers, but also it was totally indiscriminate about the papers to be seized and carried away.[83] Second, it *expropriated.* The plaintiff's papers were not merely read by government agents, but the plaintiff himself was deprived of their use.[84] Third, the execution of the warrant was *unregulated.* The warrant did not require the presence of the owner or any neutral witness, an inventory, or a process for disputing the seizure and recovering the papers.[85] Finally, the seizure of papers was *inquisitorial*. Unlike the seizure of other goods, the seizure of papers reveals the private workings of a person's mind to government agents

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[82] *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 41 n.260 (2009–2010) ("Moreover, the set of books containing the longer version (Hargrave's *A Complete Collection of State-Trials and Proceedings for High-Treason, and Other Crimes and Misdemeanours* (known as *State Trials*, 4th edition (1781))[)] was a fixture of late-eighteenth-century law libraries. Over a hundred of these sets survive in the rare book collections of American libraries today, and several libraries (e.g., Yale's and Harvard's) hold more than one complete set. The notion that all of these book sets, published in 1781, crossed the Atlantic only after the Fourth Amendment was proposed and ratified (between September 1787 and December 1791) seems highly unlikely.").

[83] *See Entick*, 2 Wils. at 291 (comparing *Entick* to *Wilkes,* in which "we were told by one of these messengers that he was obliged by his oath to sweep away *all papers whatsoever*; if this is law it would be found in our books, but no such law ever existed in this country"); *Entick*, 19 How. St. Tr. at 1064 ("[T]he house must be searched; the lock and doors of every room, box or trunk must be broken open; all the papers and books without exception . . . must be seized and carried away . . . ."); *id.* at 1065 ("Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it . . . .").

[84] *See Entick*, 2 Wils. at 292 ("[T]his is the first instance of an attempt to prove a modern practice . . . to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books."); *Entick*, 19 How. St. Tr. at 1066 ("[T]he party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.").

[85] *See Entick*, 2 Wils. at 291 ("[I]t was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if there so disposed; there might be nobody to detect them . . . ."); *Entick*, 19 How. St. Tr. at 1065 ("[T]he whole transaction is so guarded against discovery, that if the offer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving the taker or the thing taken.").

seeking a criminal conviction.[86]

Professor Sklansky argues that American hostility to the inquisitorial system in the original understandings of 1791, and especially 1868, has been exaggerated.[87] These points are well-taken and perhaps even understated; the Framers retained the most inquisitorial English procedure, examination following arrest.[88] Yet the evidence is unequivocal that Whig jurists condemned the seizure of papers as inquisitorial. For example, Serjeant Glynn argued in *Entick* that:

> [N]o power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the *Spanish* inquisition; for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts.[89]

If the vice in the Halifax warrant in *Entick* was not the authorization of seizing papers, what was it? The warrant might not pass modern standards of Fourth Amendment particularity, but it was far more specific than the one issued in the Wilkes case.[90] Hargrave gave titles to the cases in the *State Trials* reports. He called *Wilkes v. Wood* "the Case of General Warrants" and *Entick v. Carrington* "the case of Seizure of Papers." These were the names—one might suppose—they already had among lawyers.

Entick's respect for papers went so far as to question whether libels themselves could be seized. Pratt admitted that the practice had been to seize libels, but dated the practice only to an advisory opinion delivered by

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[86] *See Entick*, 2 Wils. at 291–92 (upholding the warrant "would destroy all the comforts of society; for papers are often the dearest property a man can have"); *id.* at 292 ("The law never forces evidence from the party in whose power it is; when an adversary has got your deeds, there is no lawful way of getting them again but by an action. Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by peers . . . .") (internal citation omitted); *Entick*, 19 How. St. Tr. at 1066 ("Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.").

[87] David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1670–77 (2009).

[88] *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1125 (1994) (describing persistence of the examination procedure in Founding-era America).

[89] 2 Wils. at 283; *see also infra* text accompanying note 110.

[90] *See* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 881 (1985) ("[T]he warrant expressly named Entick" and this "distinguished it from the general warrants at issue in the other decisions. Indeed, not once do either the lengthy arguments of counsel or the opinions refer to the *Entick* warrant as a general warrant.").

Scroggs.[91] If the seizure of libels was lawful, then they were proper objects of searches and "half the kingdom would be guilty in the case of a favourite libel, if libels may be searched for and seized by whomsoever and wheresoever the secretary of state thinks fit."[92] Given the magnitude of the pool into which the criminal documents were commingled, tolerating libel might be a lesser evil than tolerating the search powers necessary to ferret out the libels.

Pratt, however, left the question open, saying "if" private possession of a libel is crime, "as many cases say," disturbing search powers follow.[93] In the fuller report he says, "If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution."[94] Although it seems that libels were contraband that had no legal value,[95] I have been unable to find concrete post-*Entick* examples of seizing stocks of offending pamphlets. In 1819 Parliament adopted a Libel Act as part of the notorious Six Acts, a crackdown on radicalism. Section 1 of the Act authorized the seizure of copies of a libel following the conviction of the author or publisher.[96] From the general purpose of the Six Acts, I suppose the Libel Act broadened prior seizure powers, but this is only conjecture.

The reported opinions were only one source of public information about the controversy over the seizure of papers. Before Wilson's reports were published in 1770, the parliamentary debate about general warrants in 1764 set off a pamphlet war between Whigs and Tories. There are at least passing references to the special evil of seizing papers in every Whig tract I have seen, and a full exposition of the theory later expressed in *Boyd*, including the notion that use of papers at trial is compelled self-incrimination, in the most prominent pamphlet of them all.

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[91] On the opinion of the twelve judges referred to in *Entick*, see Phillip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 686 (1985).

[92] *Entick*, 2 Wils. at 292.

[93] *Id.*

[94] 19 How. St. Tr. at 1072.

[95] *See* Fores v. Johnes, (1802) 170 Eng. Rep. 654, 654–55 (noting that plaintiff sold prints to defendant and sued for payment and Justice Lawrence ruled that "the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel").

[96] 1819, 60 Geo. 3, c. 8, § 1 (U.K.), *reprinted in* 3 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 255–56 (1820).

D. THE PAMPHLET WAR OF '64

After the brouhaha in the Commons in February 1764, the Tories undertook a propaganda campaign to vindicate the use of general warrants in libel cases. Dr. Johnson, with characteristic pungency, declared that general warrants were "a matter about which the people cared so very little, that were a man to be sent over Britain to offer them an exemption from it at a halfpenny a piece, very few would purchase it."[97] The Whigs had a propaganda machine of their own and put it in gear.[98]

The Whigs' first salvo following the equivocation in the Commons was *A Defence of the Minority in the House of Commons, on the Question Relating to General Warrants*, written by Charles Townshend but printed without attribution by John Almon in 1764.[99] The *Defence of the Minority* focused primarily on general warrants, but also asked rhetorically what law then in force could deter Halifax from issuing another general warrant by which his messengers might enter another author's "House abruptly, alarming *His* family, keeping Him in close Custody; tumbling His most secret and confidential Papers and Deeds carelessly *into a Sack*, as in the former Instances, and trusting them to the Hand of a common and unresponsible Person, without Schedule or Security for recovery of them?"[100]

Townshend's pamphlet inspired a rebuttal by Charles Lloyd, again printed without attribution.[101] This *Defence of the Majority* is said to have "thoroughly crushed its rival."[102] There promptly appeared a surrebuttal, printed again by Almon and presumably authored again by Townshend.[103] This *Reply* emphasizes the dangers of seizing papers: "What private Gentleman can think his Property or Reputation safe, if the Title Deeds, by which he holds the *one* may be taken away, and every Secret of his Life be exposed to hurt the *other*?"[104]

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[97] *See* ROBERT R. REA, THE ENGLISH PRESS IN POLITICS 1760–1774, at 107 (1963).

[98] For an extensive survey of the controversy in England, *see* Schnapper, *supra* note 90, at 884–913.

[99] *See id.* at 897.

[100] CHARLES TOWNSHEND, THE DEFENCE OF THE MINORITY IN THE HOUSE OF COMMONS, ON THE QUESTION RELATING TO GENERAL WARRNTS 35–36 (London, J. Almon 1764).

[101] CHARLES LLOYD, A DEFENCE OF THE MAJORITY IN THE HOUSE OF COMMONS, ON THE QUESTION RELATING TO GENERAL WARRANTS, IN ANSWER TO THE DEFENCE OF THE MINORITY (London, J. Wilkie, 2d ed. 1764). I am working with the second edition, which has an addendum but does not appear to have been revised.

[102] REA, *supra* note 97, at 108.

[103] SIR WILLIAM MEREDITH, A REPLY TO THE DEFENCE OF THE MAJORITY, ON THE QUESTION RELATING TO GENERAL WARRANTS (London, J. Almon 1764).

[104] *Id.* at 19.

The *Reply* was soon reinforced by a polemicist who "deserves to be ranked among . . . the great Georgian pamphleteers."[105] The true identity of the author (or authors) known as "Candor" and "Father of Candor" is still a matter of conjecture.[106] But it is generally agreed that the two pamphlets, *A Letter from Candor to the Public Advertiser*[107] and *A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace of Behaviour*,[108] swept the field.[109]

Candor discusses private papers in the *Letter to the Public Advertiser*. After condemning the Wilkes warrant for generality, Candor says:

> [A]ny man is at liberty to think, and to put what thoughts he pleases upon paper, provided he does not publish them. In the case, therefore, of a Libel, this inquisitorial power of ransacking papers will not be endured. It would lead to the seizing of a man and his papers for a libel, against whom there was no proof, merely slight suspicion, under a hope that, among the private papers of his bureau, some proof *might* be found which would answer the end. It is a fishing for evidence, to the disquiet of all men, and to the violation of every private right; and is the most odious and infamous act, of the worst sort of inquisitions, by the worst sort of men, in the most enslaved counties: It is, in short, putting a man to the torture, and forcing him to give evidence against himself.[110]

Candor clearly described the seizure of papers as an evil distinct from general warrants, and clearly linked it to the privilege against self-incrimination.

A still clearer exposition of the theory later adopted by *Boyd* appears in Father of Candor's *A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace of Behavior*. The very title distinguishes the issue of general warrants from the issue of seizing papers. For a measured writer, Father of Candor expressed an extreme degree of

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[105] REA, *supra* note 97, at 110.

[106] *See, e.g.*, ANNABEL PATTERSON, NOBODY'S PERFECT: A NEW WHIG INTERPRETATION OF HISTORY 44–45 (2002) (attributing authorship to Almon in collaboration with Pratt); DEBORAH D. ROBERTS, BOOKSELLER AS ROGUE: JOHN ALMON AND THE POLITICS OF EIGHTEENTH CENTURY PUBLISHING 23 (1986) (authorship variously attributed to Pratt, John Dunning, or the two collaborating).

[107] CANDOR, A LETTER FROM CANDOR TO THE PUBLIC ADVERTISER (London, J. Almon 1764).

[108] FATHER OF CANDOR, A LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS, AND SURETIES FOR THE PEACE OF BEHAVIOUR (London, J. Almon, 5th ed. 1765) (1764).

[109] *See, e.g.*, 10 CAMBRIDGE HISTORY OF ENGLISH AND AMERICAN LITERATURE § 17 (1921), *available at* http://www.bartleby.com/220/1717.html ("This masterly pamphlet attracted general admiration, and its cool and lucid reasoning, varied by an occasional ironic humour, did not meet with any reply.").

[110] CANDOR, *supra* note 107, at 30–31.

emotional antipathy to prying into private papers:

> What then, can be more excruciating torture, than to have the lowest of mankind, such fellows as Mooney, Watson, and the rest of them, enter suddenly into his house, and forcibly carry away his scrutores, with all his papers of every kind, under a pretence of law, *because* the Attorney-general had, *ex officio*, filed an information against the author, printer and publisher of some pamphlet or weekly paper, and somebody had told one of these greyhounds that this gentleman was thought by some people to be the author![111]

The seizure of papers was an "absolute illegality" and an "abominable outrage,"[112] and the use of seized papers at a criminal trial "would be making a man give evidence against and accuse himself, with a vengeance."[113]

The libel itself might be seized, but no other documents, because only the libel was contraband:

> It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal in itself, in my custody, before any magistrate is authorized to grant a warrant to any man to enter my house and seize it. Nay further, if a positive oath be made, and such a particular warrant be issued, it can only be executed upon the paper or thing sworn to and specified, and in the presence of the owner or of somebody intrusted by him, with the custody of it.[114]

Father of Candor was well-known in America.[115] On his website, Roger Roots claims to have found more than 100 copies of Father of Candor's *Letter Concerning Libels* in American libraries, some, apparently, once owned by Rufus King and Benjamin Franklin.[116]

The most popular tract to emerge from the Wilkes affair was *Britannia's Intercession for the Deliverance of John Wilkes,* a celebration of Wilkes and liberty in mock-biblical rhetoric.[117] Even this rather lowbrow production made special mention of papers: "And they looked into his dwelling, and searched for his papers, and all secret workings, and they took them every one."[118]

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[111] FATHER OF CANDOR, *supra* note 108, at 54.

[112] *Id.* at 54.

[113] *Id.* at 55–56.

[114] *Id.* at 58.

[115] *See* LEONARD LEVY, SEASONED JUDGMENTS 157 (1995) (Americans found a lot of thunder "in Pitt, Camden, Wilkes, and in 'Father of Candor,' all of whom they knew well").

[116] *Father of Candor's "Letter Concerning Libels, Warrants [etc.]["]*, ROGER ROOTS, *available at* http://rogerroots.org/contactus.html (last visited Mar. 4, 2013).

[117] BRITANNIA'S INTERCESSION FOR THE DELIVERANCE OF JOHN WILKES, ESQ. FROM PERSECUTION AND BANISHMENT TO WHICH IS ADDED A POLITICAL AND CONSTITUTIONAL SERMON AND A DEDICATION TO L*** B*** (7th ed. London 1769).

[118] *Id.* at 7.

E. ENDGAME IN PARLIAMENT

In 1766 Bute's successor, Grenville, was in turn replaced by the Marquess of Rockingham.[119] By then, *Leach* had declared general warrants for libels illegal, and *Entick* had ruled the seizure of papers illegal. "Accordingly, resolutions were now agreed to, condemning general warrants, whether for the seizure of persons or papers, as illegal . . . ."[120] The resolutions were distinct. The actual wording of the general warrants resolution was not confined to libel, while the second resolution condemned seizing the papers "of the author, printer, or publisher, of a libel, or the supposed author, printer, or publisher of a libel."[121] Looking back on the Rockingham administration, which lasted just over a year, Edmund Burke celebrated its various accomplishments.[122] The list includes these two consecutive items:

> The personal liberty of the subject was confirmed, by *the resolution against general warrants.*
>
> The lawful secrets of business and friendship were rendered inviolable, by *the resolution for condemning the seizure of papers*.[123]

From the speech Wilkes gave in court after his arrest, to the separate opinions in *Entick* and *Wilkes*, to the Father of Candor pamphlets, to the resolutions of the House, warrants for papers and general warrants were seen as related, but distinct, abuses.

III. THE SEIZURE OF PAPERS IN AMERICA FROM THE ENGLISH CONTROVERSY THROUGH THE FOUNDING ERA

A. AMERICAN INTEREST IN THE ENGLISH CONTROVERSY

We have long known that the tribulations of Wilkes were followed closely in the colonies. We also have at least some direct evidence that American Whigs followed the *Entick* litigation and understood the seizure of papers as a distinct abuse. Eric Schnapper previously brought to light a report of the Wilkes verdict in the *Boston Gazette* to the effect that this "important decision" gave "every Englishman [ ] the satisfaction of seeing,

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[119] *See* 2 MAY, *supra* note 74, at 130.

[120] *Id.*

[121] Schnapper, *supra* note 90, at 910 (citation omitted). On the language of the resolutions and their timing, see *id.* at 909–10.

[122] 1 EDMUND BURKE, *A Short Account of a Late Short Administration* (1766), *in* THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 265, 265 (Boston, Little, Brown & Co. rev. ed. 1865).

[123] *Id*.

that his house is his castle, and is not liable to be searched, nor his papers pried into by the malignant curiosity of King's Messengers, and an utter end put to that unconstitutional practice . . . ."[124]

The *Accessible Archives* website maintains a searchable collection of colonial newspapers.[125] The most numerous items in the 1760s appear to be issues of the *South Carolina Gazette*, a Patriot organ,[126] although some other papers also appear. The archive contains close coverage of the Wilkesite cases, down to the names of counsel and the amount of damages, and includes multiple references, some by Wilkes himself, to the distinct evil of seizing papers.[127] The "seizure of papers" was not an obscure issue

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[124] Schnapper, *supra* note 90, at 876 n.38 (quoting BOS. GAZETTE & COUNTRY J., Feb. 20, 1764, at 4).

[125] ACCESSIBLE ARCHIVES, http://www.accessible.com/accessible/ (last visited March 4, 2013).

[126] *See* SIDNEY KOBRE, THE DEVELOPMENT OF THE COLONIAL NEWSPAPER 147 (1943) (listing the *Gazette* as a Patriot paper).

[127] In chronological order, and abbreviating the *Gazette* as SCG, see: *London, J 17*, SCG, Oct. 1, 1763 ("J 23. Yesterday the Rev. Mr. Entick, Mr. Arthur Beardmore, his clerk, and Messrs. Wilson and Fell, were discharged by the court of King's-Bench, from the recognizance they were obliged to enter in Michaelmas Term, on account of the several numbers of the Monitor, concerning which no prosecution has been carried on."); *id.* ("J. 7. . . . Yesterday one of the most important points of English liberty was determined at Guildhall, before the right hon. lord chief justice Pratt, and a social [sic; should be "special"] jury of eminent merchants, in a cause wherein William Huckell, one of the journey men printers apprehended on account of the North-Briton, No. 45; was plaintiffs, and the king's messengers defendants; when after a hearing of ear [sic; should be "near"] twelve hours, and many learned arguments on both sides, a verdict was given for the plaintiff in 300 *l.* damages, and full costs of on which there was the greatest acclamations that could possibly be shewn.") (this report goes on to list the names of counsel for the parties); *id.* ("J. 9 . . . Thursday morning about ten, came on the cause of James Lindsey, another of the journeymen printers, plaintiff, for false imprisonment by three of the king's messengers, on account of No. 45 of the North-Briton. . . . The whole damages given against the King's messengers in that fourteen causes, which have been tried, amount to 2,900 £ besides all the costs of suit, which will be very considerable. It is remarkable that this is the first attack that has been made upon the authority of the secretaries of state, and will abolish the dangerous practice of issuing general and anticonstitutional warrants."); *id.* ("J 12 . . . Mr. Wilkes appeared at all the late trials, and received [t]he repeated congratulations of the public . . . . It is very remarkable, that most of the counsel for the journeymen printers were juniors. Mr. serjeant Glynn is the youngest serjeant in England, and Mr. Wallace and Mr. Gardiner, were admitted to the bar only last trinity term two years."); *id.* ("J. 13. Next Michaelmas term will be tried the actions which Mr. Wilkes has brought against, Philip Carteret Webb and Robert Wood, Esq;'s."); *Summary of London Intelligence, from January 1764, to June Inclusive*, SCG, Oct. 1, 1764 ("May 4th, came or before lord chief justice Pratt. an action brought by Mr. Arthur against Mr. Carrington, for forcibly [entering his] house and and [sic] taking away many of his paper[s], and for false [imprisonment of] his person six days and on[e] half, in the house of Mr. Blackmore, one of the said messengers; when after a [trial] of seven hours, hi[s] lordship summed up the [case] in a genteel charge, and the jury went out, who in three quarters hour brought in their [verdict] against the defendants for ONE THOUSDAND

POUNDS DAMAG[E]S. Upon the determination of the jury, there was an universal shout term [from] a considerable number of spectators."); *We Have Chosen to Fill Up this Day's Paper with a Few Late Articles*, SCG, Aug. 25, 1764 ("Monday evening the fourteen journeymen printers, who some time since obtained a verdict against the King's messengers, for false imprisonment, received their money from Mess's, Carrington and Blackmore, two of the said messengers, in manner following: thirteen of them who had 200 £ costs and damages, received 120 £ each, and one of them, who had 300 £ decreed him, received 170 £ and to pay their attorney."); *Charles-Town, April 6, 1765*, SCG, Apr. 6, 1765 ("LATE letters from London inform us that . . . general warrants, the house had resolved, that it was improper and unnecessary to fix, by a vote of the house, what ought to be deemed the law, in the particular case of libels, while prosecution were actually depending in the courts of law—widely different from what Wednesday's *General Gazette* tells us, 'That the matter was cognizable only in the courts of law.'"); *European Intelligence*, S.C. & AM. GEN. GAZETTE, Aug. 8, 1766 (reporting various resolutions offered in the House to condemn general warrants and seizures of papers); *London, November 14. The Report of His Royal Highness the Duke*, VA. GAZETTE, Mar. 7, 1766 ("Yesterday the Right Hon. Lord Camden gave his opinion upon the granting of general warrants by Secretaries of State. After enlarging on and explaining numbers of cases, which lasted two hours and twenty minutes, his Lordship declared such warrants (except in cases of high treason) to be illegal, oppressive, and unwarrantable."); *Naples, May 24*, SCG, Sept. 1, 1766 (report from the *Brussels Gazette* that "Mr. Wilkes, who on advice of the first resolution of the lower house, which declared illegal *General Warrants* for arresting and carrying off persons and papers, had ventured to [t]respass into his own country, in the confidence that this bill would pass in like manner in the house of peers, has taken the resolution of quitting the kingdom, and returning to Paris, finding himself unable to get his proscription taken off, and to procure his re-establishments in his rights and privileges."); *London, June 21*, S.C. GAZETTE & COUNTRY J., Sept. 9, 1766 (containing a fuller quotation from the story from the Brussels Gazette: "The Refusal of the upper House to approve of the Bill which had passed the House of Commons, touching the Seizure of Papers in the Houses of private Persons, has Caused a good Deal of Discontent in the Publick."); *London, March 4. A Letter from Parish, Dated February 19, Says*, S.C. GAZETTE & COUNTRY J., May 24, 1768 (publishing a letter from Wilkes that read: "[s]ince the exertion of my firmness in an important moment, no minister has once dared to issue a general warrant against your persons, or sign an order for the seizure of your papers, and I trust that such despotism will never be again exerted over the free subjects of this country."); *To the Worthy Liverymen of the City of London*, VA. GAZETTE, May 26, 1768 (publishing a letter from Wilkes that read: "The two important questions of public liberty, respecting *General Warrants* and the *Seizure of Papers,* may perhaps place me among those, who have deserved well of mankind, by an undaunted firmness, [perse]verance and probity."); *To the Gentlemen, Clargy, and Freeholders of the Country of Middlesex*, SCG, Aug. 23, 1768 (publishing a letter from Wilkes to Middlesex Gentlemen that said: "The General Warrant [under] which I was first apprehended, has been adjudged illegal. The Seizure of my papers was condemned judicially."); *To the Gentlemen, Clergy, and Freeholders of the Country of Middlesex*, VA. GAZETTE, Sept. 15, 1768 (printing Wilkes's letter to Middlesex Gentlemen, including the separate references to general warrants and the seizure of papers); *London, December 7*, SCG, Mar. 16, 1770 ("LONDON, DECEMBER 7": printing Justice Wilmot's instructions to the jury in *Wilkes v. Montagu*, in part as follows: "the plaintiff had been taken up unlawfully, has been imprisoned seven days, had had his papers examined, and seized, that those papers have been likewise and illegally taken notice of . . . he has had those papers taken from his house without the pretence of right whatever.").

of law; it was the stuff of everyday political conversation in the colonies.

B. RECEPTION OF THE COMMON LAW OF SEARCH AND SEIZURE

Although the reception of English law in the newly independent American states was not automatic or uniform, a basic pattern emerged. The Americans adopted the English common law together with statutes in force at the time of Independence, unless the English rule conflicted with a natural right or a state constitution's declaration of rights.[128] This meant that any judge or justice of the peace considering issuing a warrant to seize papers who looked up the law would learn that, under *Entick*, such a warrant was unknown to the common law.

The Founding-era justice system relied heavily on justices of the peace (JPs), prominent citizens who agreed to serve as officials with authority, both judicial and executive, over a wide variety of local issues. In their judicial capacity, JPs had power to issue warrants to arrest and to search, as well as to interrogate arrested suspects and determine whether to commit or bail them. Professional lawyers wrote encyclopedic manuals to advise these amateurs. The JP manuals provide a fertile source of evidence about the Founding-era justice system.[129]

Samuel Freeman's *Massachusetts Justice*, published in 1795, compiles forms for various writs a JP might be called upon to issue. The only form provided under the heading for "search warrant" is for a warrant for stolen goods.[130] Other manuals did not leave the prohibition on warrants for papers to implication. Eliphalet Ladd's abridgement of a leading English manual by Richard Burn, published for New Hampshire JPs in 1792, prefaces the regurgitation of Burn with this terse paragraph: "General search warrants are illegal. 2 *Wils.* 288. Lord *Camden*. Bill of rights of

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[128] *See, e.g.*, DEL. CONST. art. 25 (1776) ("The common law of England, as-well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention."); N.J. CONST. art. XXII (1776) ("That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.").

[129] *See* Moglen, *supra* note 88, at 1096 ("[M]anuals provided JPs with an alphabetical digest of information relating both to their common law and statutory responsibilities, including forms for the dispatch of the most frequent civil and criminal business. Moreover, the manuals contained basic articles on the subject of criminal investigation and adjudication that changed very little over the years.") (citations omitted).

[130] SAMUEL FREEMAN, THE MASSACHUSETTS JUSTICE 269–70 (1795).

Newhampshire [sic], article XIX."[131] The citation to *Entick* runs directly into the New Hampshire Constitution's Bill of Rights, which provided, "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."[132]

William Walter Hening's *New Virginia Justice*, published in 1795, quoted the *State Trials* report of *Entick*: "On trespass, the jurors found a special verdict; and Lord *Camden,* in delivering the resolution of the court, observed, 'That a warrant to seize and carry away papers in the case of seditious libel was illegal and void.'"[133] Hening went on to discuss *Wilkes v. Wood*.[134]

Of the Founding-era manuals I have seen, some, like Ladd and Hening, cite *Entick* and expressly prohibit warrants for papers. Others, like Freeman, mention only warrants to search for stolen goods or fugitive felons. None suggests common law authority to issue warrants for papers.

We have other direct evidence that some Founding-era American lawyers were familiar with *Entick v. Carrington*. Joseph Hawley was a Massachusetts Whig and associate of John Adams.[135] Hawley's commonplace book includes a version of Otis's argument in the Writs of Assistance case in which Otis implores the court to "tear into rags this remnant of Starchamber tyranny."[136] Other accounts of the argument do not include this phrase, but identical language appears in Serjeant Glynn's argument in *Entick*. If Hawley inserted Glynn's argument by either accident or design, Hawley had to be familiar—intimately familiar—with *Entick* itself.

Josiah Quincy Jr. was a leader in the Sons of Liberty and another associate of John Adams (they were on the same side in the Boston Massacre trial). Quincy's commonplace book includes a citation to *Entick* in a series of passages about statutory interpretation, with the notation "Gen.le War:T."[137] It seems highly unlikely that Hawley, Quincy, and Hening were alone. Hundreds of Americans attended the English Inns of

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[131] ELIPHALET LADD, BURN'S ABRIDGEMENT 357 (1792).

[132] N.H. CONST. art. I, § 19.

[133] WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 404 (1795) (citing Entick v. Carrington, 11 How. St. Tr. 313, 321).

[134] *Id.*

[135] Regarding Hawley's use of Glynn's argument, I rely entirely on SMITH, *supra* note 61, at 239–41.

[136] *Entick*, 2 Wils. at 283, 19 How. St. Tr. at 1039.

[137] 2 PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 229 (Daniel R. Coquillette & Neil L. York eds., 2007).

Court.[138] "Nearly one-half of the signers of the Declaration of Independence and three-fifths of those who wrote the constitution had some formal legal training."[139] Leaving lawyers aside, printers and polemicists had a sharp incentive to know the law of seditious libel.

C. STATUTORY RESPECT FOR THE RULE OF *ENTICK*

Common law could be modified by statute. Late in the nineteenth century, the *Boyd* Court would assert that an 1863 revenue measure:

> [W]as the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence.[140]

With one possible nineteenth-century exception, I have not found any such pre-1863 statute.

A statute authorizing seizures of papers was proposed in the Pennsylvania legislature in 1780.[141] Pennsylvania was then governed by a unicameral legislature and an executive council, established by a radical constitution that was the focal point of local politics.[142] Pennsylvania, with the rest of the United States, was at war with Britain; the treason of General Benedict Arnold, who had assumed celebrity status in Philadelphia in 1778, was exposed only in the autumn of 1780.

All I can find of the proposed "bill for apprehending and punishing persons corresponding or trading with the enemies of the united states [sic]" is a debate on an amendment at the second reading of the bill in the House.[143] The operative language was that the Supreme Executive Council would have power to issue warrants "to seize his, her or their papers who may be suspected as aforesaid[.]"[144]

The proposal was condemned by one writing under the name of Zuinglius in the *Pennsylvania Gazette*.[145] Zuinglius wrote that "the seizure

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[138] NORMAN K. RISJORD, JEFFERSON'S AMERICA, 1760–1815, at 48 (2010).

[139] *Id.* at 48–49.

[140] Boyd v. United States, 116 U.S. 616, 622–23 (1886).

[141] *See* 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 545 (1782) [hereinafter HOUSE JOURNAL] (referencing Dec. 5, 1780 journal entry).

[142] *See* ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776–1790, at 53–121 (1942); ALLEN C. THOMAS, A HISTORY OF PENNSYLVANIA 143–61 (1913).

[143] HOUSE JOURNAL, *supra* note 141, at 545.

[144] *Id.* The entry records a vote on a motion to amend the bill to add "and charged by oath or affirmation" before "aforesaid." The amendment was defeated.

[145] Zuinglius, *For the PENNSYLVANIA GAZETTE*, PA. GAZETTE, Dec. 20, 1780.

of papers" "in the case of Wilkes in England, has been shewn to be contrary to common law."[146] The common law of England:

> [H]as been declared, by act of Assembly, to be the birth right of these citizens; and if that were not so, yet the possession of private papers, as of our secret thoughts, is a natural right which we do not give up when we enter into society, and which no law can justly take from us.[147]

Further, he wrote, "An act of Assembly, like a statute of England, may restrain the common law, if it shall please the legislators; though that, I presume, will be seldom found adviseable [sic]. But an invasion of the natural rights of men is in all cases, tyrannical and arbitrary."[148]

The only difference between Zuinglius in 1780 and *Boyd* in 1884 is resort to the constitutional provision as a trump on the statute. Pennsylvania's 1776 constitution included a declaration of rights, including a declaration that "the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure . . . ."[149] The provision, however, was hortatory, continuing:

> [A]nd therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.[150]

Given that the applicable constitutional provision did not purport to bind the assembly, it might seem reasonable that Zuinglius relied on natural rather than constitutional law. Zuinglius added this final remark: "I shall conclude by observing, that this I believe is the only state, where a law of this kind has been thought necessary to be established. Even those states invaded by the enemy have not thought it necessary."[151]

Whether the objections of Zuinglius or the cooling of wartime passions carried the issue cannot be determined. The proposed bill for seizing papers never passed into law.[152] What seems clear is that proponents of the power

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[146] A * note cites "3 Bur. 1763 Wil. b. 151." *Id.*

[147] *Id.*

[148] *Id.*

[149] PA CONST. art. I, § 10 (1776).

[150] *Id.*

[151] Zuinglius, *supra* note 145.

[152] No such bill appears in 10 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 43–259 (James T. Mitchell & Henry Flanders eds., Wm. Stanley Ray 1904) (containing acts and documents from the regular session of the 1780 General Assembly of the Commonwealth of Pennsylvania), *available at* http://www.palrb.us/stlarge/browse/getpage.php?volno=10&typedoc=act&sessyr=1780&ss=0.

to seize papers felt the need for statutory authority, that opponents objected to this heretical idea, that the opponents prevailed, and that the failed proposal was an aberration from American practice even in wartime.

D. STATE SEARCH-AND-SEIZURE PROVISIONS BEFORE THE CONSTITUTION OF 1789

After Independence the new states set up governments, typically enacting written constitutions accompanied by declarations or bills of rights. The earliest state provisions—Delaware, Maryland, North Carolina, Pennsylvania, and Virginia, all adopted in 1776—were rifle-shot prohibitions of general warrants.[153] All the later provisions—Vermont (1777), Massachusetts (1780), and New Hampshire (1783)—adopted "double-barreled" provisions declaring a general right against unreasonable searches and seizures coupled with a specific prohibition of general warrants.[154] In 1790, Pennsylvania adopted a new constitution with a double-barreled provision.[155] The Vermont, Massachusetts, New Hampshire, and (both) Pennsylvania constitutions refer specifically to "papers."[156]

E. ANTI-FEDERALIST CONCERNS AND AMENDMENTS PROPOSED DURING RATIFICATION OF THE 1789 CONSTITUTION

The want of a Bill of Rights was the central objection to the proposed Constitution of 1789, and this objection included explicit references to search and seizure.[157] Apprehensions about the new government's search powers took formal and collective form in amendments proposed either by the majority to accompany ratification, or by delegates dissenting from ratification. Maryland proposed the simple ban on general warrants (so did the Pennsylvania dissenters),[158] while Virginia proposed declaring that

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[153] *See* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 234–35 (1997).

[154] *Id.* at 234.

[155] *Id.* at 235.

[156] *Id.* at 234–35.

[157] *See, e.g.*, *Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II, Freeman's Journal (Philadelphia), Oct. 24, 1787*, *reprinted in* I THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES 77, 89 (Bernard Bailyn ed., 1993) ("[T]here is no declaration, . . . that the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and that therefore [general] warrants . . . are contrary to that right and ought not to be granted."). For a summary of anti-federalist search-and-seizure concerns, see CUDDIHY, *supra* note 66, at 673–80.

[158] *See Robert Whitehill's Amendments and the Final Vote, December 12, 1787*, *in* I DEBATE ON THE CONSTITUTION, *supra* note 157, at 871, 872; *In Convention of the Delegates of the People of the State of Maryland, April 28, 1788*, *in* II DEBATE ON THE CONSTITUTION

"every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers and property; all [general] warrants therefore . . . are dangerous and ought not to be granted."[159] North Carolina and New York (which had no state constitutional provision) adopted a similar formulation including a declaration of a general right to security in person, papers, and property.[160] The Massachusetts ratification message proposed amendments but not one about search and seizure.[161] The Massachusetts minority, dissenting from ratification, resolved only that the Constitution never be construed "to subject the people to unreasonable searches and seizures of their persons, papers or possessions."[162]

Despite the variations a pattern is fairly clear. After 1776, no state constitutional provision reverted to Virginia's simple ban on general warrants. The only state ratifying majority to propose a federal amendment in those terms was Maryland. The constitutions of Massachusetts, Pennsylvania, New Hampshire, and Vermont included declarations of a right to be secure in papers as well as other property; and in their ratification messages, New York, North Carolina, and Virginia adopted this formulation.

F. CONGRESSIONAL DRAFTING OF THE FOURTH AMENDMENT IN 1789

The drafting history of the Fourth Amendment is largely lost and what remains is dubious.[163] According to the *Annals of Congress*, James Madison's initial proposal in the House of Representatives read as follows:

> The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[164]

The Committee of Eleven sent the following language to the floor of the House: "The right of the people to be secured in their persons, houses,

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552, 554 (Bernard Bailyn ed., 1993) (proposed amendments).

[159] *Form of Ratification, Which was Read and Agreed to by the Convention of Virginia*, *in* II DEBATE ON THE CONSTITUTION, *supra* note 158, at 557, 560 (resolutions of Virginia).

[160] *See id.* at 567 (North Carolina); *id.* at 538 (New York).

[161] *See The Form of Ratification of Massachusetts, Feb. 6, 1788*, *in* I DEBATE ON THE CONSTITUTION, *supra* note 157, at 943–45.

[162] *See* COGAN, *supra* note 153, at 232–33.

[163] *See* CUDDIHY, *supra* note 66, at 732.

[164] 1 ANNALS OF CONG. 452 (1789) (Joseph Gales ed., 1790).

papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."[165]

Elbridge Gerry thought the omission of the words "against unreasonable searches and seizures" was a "mistake," and his motion to insert them was passed.[166] Representative Egert Benson of New York thought the "declaratory provision ['by warrants issuing'] was good so far as it went" but moved to add the words "and no warrant shall issue."[167] The *Annals of Congress* record this motion as losing, but either this record is incorrect or Benson succeeded in adding his proposed language in his capacity as chair of a committee on style. Madison described the published reports later included in the *Annals* as "frequently erroneous and sometimes perverted."[168] The Senate made no changes to the House proposal and there is no record of the Senate debates.[169] What emerged from Benson's committee is the language that Congress sent to the country and that we have today in the Fourth Amendment.

G. EARLY PRACTICE

There are several examples of search-and-seizure practices approved during the Founding era. These include the compelled disclosure of documents in civil litigation; the authorization of warrants to enforce Founding-era customs duties; and warrants issued to enforce the Sedition Act of 1798. To begin with civil discovery, the common law did not provide for any pretrial discovery of documents.[170] Instead, the party seeking discovery could initiate an action in equity, in support of the action at law.[171] Section 15 of the Judiciary Act simplified this arrangement by authorizing courts:

> [I]n the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they

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[165] *Id.* at 783.

[166] *Id.*

[167] *Id.*

[168] CUDDHIHY, *supra* note 66, at 731.

[169] *See, e.g.*, PAULINE MAIER, RATIFICATION 453–54 (2010).

[170] *See, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1485, at 704 (Boston, Little, Brown & Co. 1866) ("Another defect of a similar nature is the want of a power in the courts of common law to compel the production of deeds, books, writings, and other things, which are in the custody, or power of one of the parties, and are material to the right, title, or defence of the other.") (footnote omitted).

[171] *Id.*

> might be compelled to produce the same by the ordinary rules of proceeding in chancery . . . .[172]

Boyd seems quite accurate, however, that "the ordinary rules of proceeding in chancery" did not extend to compelling the disclosure of documents exposing the discovering party to criminal prosecutions, penalties, or forfeitures.[173]

The early revenue laws authorized searches for, and seizures of, undutied goods. For example, the first Act to regulate the Collection of Duties authorized warrants for "goods, wares and merchandise" subject to duty.[174] No authority to seize papers is mentioned.

Even under the English law of seditious libel, the prosecution had to prove that the defendant was somehow involved in publishing the libel—as author, printer, or distributor. Section 3 of the 1798 Sedition Act went further, providing that the accused might "give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases."[175]

Quite aside from the alleged libel itself, other papers, such as correspondence and contracts, might be useful evidence of authorship or publication. They might also, at least potentially, admit the falsity of the publication. The Act said nothing about enforcement. Discussions of enforcement make no mention of warrants to seize papers.[176] Republican journalists were indicted by grand juries and arrested on warrants, but I have seen no evidence of search warrants to search for and seize personal papers.

Judge Hobart's warrant to arrest William Durell, dated July 14, 1799, directs the marshal only to "apprehend and take William Durell, of Mount Pleasant in the Country of Westchester, Printer, and to bring him forthwith before me, to answer unto such matters of misdemeanor as on behalf of the said United States shall be objected against him," followed by a particular

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[172] Federal Judiciary Act, ch. 20, § 15, 1 Stat. 73 (1789).

[173] *See, e.g.*, 2 STORY, *supra* note 170, § 1494 at 710 ("[Courts of equity] will not compel a discovery in aid of a criminal prosecution; or of a penal action; or of a suit in its nature partaking of such a character; or in a case involving moral turpitude; for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures.").

[174] Ch. 5, § 24, 1 Stat. 29, 43 (1789).

[175] Sedition Act, ch. 73, § 3, 1 Stat. 596 (1798).

[176] *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAW AND AMERICAN CIVIL LIBERTIES 182–87 (1956).

allegation of criminal libel.[177] Anthony Haswell, another publisher charged with sedition, described the warrant for his arrest: "You are hereby commanded to arrest Anthony Haswell, of Bennington, Printer, and cause him forthwith to appear before our circuit court of the United States, now sitting in Rutland. Of this fail not at your peril."[178] In marked contrast to the Wilkes and Entick warrants, no power to search, let alone to seize papers, is included in the warrants for Durell and Haswell.[179]

Taken together, the evidence suggests that Americans followed the Wilkes affair with great interest, absorbed the message of the separate iniquity of seizing papers, carried *Entick* into American law, and refused to tamper with the common law by statute for seventy years after 1791. Did they understand the Fourth Amendment to perpetuate the common law rule against any statutory modification whatsoever? That question did not reach the Supreme Court until the famous ruling in *Boyd*.

IV. THE UNTOLD STORY OF *BOYD V. UNITED STATES*

A. THE COMMON LAW BACKGROUND

The story of the *Boyd* case properly begins with a statute authorizing customs officers to seize the books and papers of importers suspected of evading taxes. The story begins with a statute because *Entick*, quite aside from the federal Constitution, declared the common law. Louisiana excepted because of her civil law tradition, all the American states received the English common law after Independence.[180] Typically reception was qualified by rejecting doctrines contrary to fundamental rights or by acknowledging that the legislators could alter the common law rules.[181]

Entick was a libertarian ruling and was not contrary to fundamental rights. So until the prohibition on warrants for papers was either

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[177] The National Archives has posted an image of the warrant, in Hobart's hand, on its website. *See* United States v. William Durell*: Violating the Alien and Sedition Acts*, NAT'L ARCHIVES, http://www.archives.gov/education/lessons/images/alien-and-sedition.pdf (last visited Mar. 6, 2013).

[178] Tyler Resch, *Anthony Haswell is Jailed!*, BENNINGTON MUSEUM, http://www.benningtonmuseum.org/anthony-haswell.html (last visited Dec. 27, 2012).

[179] A review of all known prosecutions under the Sedition Act makes no mention of any search warrants. *See* Gordon T. Belt, *Sedition Act of 1798—A Brief History of Arrests, Indictments, Mistreatment & Abuse*, FIRST AMENDMENT CENTER (Feb. 29, 2009), http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/Sedition_Act_cases.pdf.

[180] *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 110–11 (1985).

[181] *See id.*; Atwater v. City of Lago Vista, 532 U.S. 318, 337 n.9 (2001) ("Founding-era receptions of common law, whether by state constitution or state statute, generally provided that common-law rules were subject to statutory alteration.") (citations omitted).

superseded by statute or overruled judicially, a warrant for papers would be a nullity at common law. *Entick v. Carrington* is cited, either by court or counsel, in sixteen reported antebellum American decisions.[182] Many of these are not search-and-seizure cases at all, and not all of the search cases say anything about papers.[183]

Nonetheless the citations indicate that *Entick* was good law in antebellum America. The three cases that discuss private papers, moreover, suggest that the private-papers aspect of *Entick* was just as authoritative as any other aspect of the decision. In *United States v. Crandell*,[184] Crandell stood trial for criminal libel and, citing *Entick*, objected to the introduction of pamphlets found in execution of a warrant to "search for and seize any incendiary pamphlets or papers which should be found in the defendant's possession . . . ."[185] The court ruled "that if the matter now proposed to be read, is not charged in the indictment, and would be, of itself, a substantive libel, and therefore indictable, it cannot be given in evidence."[186] Contraband or instrumentalities of crime were not exempt from seizure simply because they happened to be paper, but papers of evidentiary value that were not at least alleged to be criminal in themselves should not have been seized and could not be used at trial. The jury acquitted.

In *Commonwealth v. Dana*,[187] the defendant challenged his conviction for possessing illegal lottery tickets on the ground that the tickets had been seized on the authority of an invalid warrant. After discussing *Entick* in detail, the court held that:

> [T]he right of search and seizure does not depend on the question whether the papers or property seized were intended to be used in evidence against the offender or not. The possession of lottery tickets with the intent to sell them was a violation of law. The defendant's possession, therefore, was unlawful, and the tickets were liable to

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[182] A Westlaw search for "(entick /s carrington) & date(before 1860)" performed October 23, 2011, returned sixteen hits.

[183] In *Grumon v. Raymond*, 1 Conn. 40 (1814), the plaintiff sued in trespass and the court, having ruled defendant's warrant was void for generality, cited *Entick* for the proposition "that if a warrant which is against law be granted, such as no justice of the peace or other magistrate, high or low, has power to issue, the justice who issues and the officer who executes it are liable in an action of trespass." *Id.* at 45. In *Bell v. Clapp*, 10 Johns. 263 (N.Y. Sup. Ct. 1813), plaintiff sued defendant for trespass, and the court sustained defendant's demurrer based on a warrant for stolen flour. *Id.* at 266. The court cited *Entick* for the proposition that a particularized warrant for stolen goods, "so well guarded, [is] a lawful authority." *Id.* at 265.

[184] 4 D.C. (4 Cranch) 683 (1836).

[185] *Id.* at 691.

[186] *Id.* at 692.

[187] 43 Mass. (2 Met.) 329 (1841).

> seizure as belonging to the corpus delicti, or for the purpose of preventing any further violations of law.[188]

The second ground of decision in *Dana* was that illegally seized items could be used in evidence notwithstanding their tainted history.[189] This ground, however, reinforces the distinction between private papers and contraband papers. The accused would have the right to *the return* of illegally seized papers, *unless* they were contraband.[190]

In *Robinson v. Richardson*,[191] the court struck down a statute authorizing creditors to obtain warrants for books and papers of insolvent debtors. After discussing *Entick*, the court held the statute unconstitutional because it authorized warrants for the benefit of civil litigants.[192]

There is no *negative* reference to *Entick v. Carrington* in any of the sixteen reported decisions. Nor does any reported antebellum decision permit the seizure of private papers under warrant.

Any official contemplating a warrant to seize private papers who looked up the law would have concluded that such a warrant was illegal. *Robinson* shows how the constitutional issue could arise: A legislature could pass a statute that expressly authorized the courts to issue search warrants for private papers. The statute would trump *Entick* given *Entick*'s role as a common law precedent. At that point the statute would be subject to constitutional challenge, and the issue would arise as to whether *Entick*'s per se prohibition of seizing private papers was incorporated into the constitutional search-and-seizure provision. The first federal statute authorizing warrants to seize papers was a Civil War revenue measure adopted in 1863.

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[188] *Id.* at 337.

[189] *See id.* ("Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence.").

[190] The Supreme Court would not reach this result until more than fifty years after *Dana*, but the logic is straightforward. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that "the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused").

[191] 79 Mass. (13 Gray) 454 (1859).

[192] *Id.* at 457 ("All searches therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offences in violation of penal laws, must be held to be unreasonable, and consequently under our constitution unwarrantable, illegal and void.").

B. THE 1863 STATUTE

Waging war costs money, and the Civil War was no exception. Prior to hostilities the government had relied largely on import duties to fund its operations.[193] As it became clear that the war would not be short and cheap, Congress resorted to paper money, excise taxes, a rudimentary income tax, and increases in tariffs.[194] By the end of the war, domestic excise taxes were the single largest source of federal revenue, but tariffs were still supplying more revenue than the income tax.[195]

Wherever there are taxes, there will also be tax evasion. In November of 1862, Treasury Secretary Salmon P. Chase dispatched the department's solicitor, Edwin Jordan, to investigate and report on corruption in the New York Customs House. Chase forwarded Jordan's report to E.B. Washburne, the Chairman of the House Committee on Commerce, who ordered it printed.[196]

Jordan reported what was notorious already—corruption in the customs house was rampant. While there was "very considerable direct smuggling" of "jewelry, laces, rich silks, and other costly goods," "the most usual mode in which frauds [were] committed [was] by the use of invoices, in which the goods to which they relate[d] [were] falsely described, or undervalued."[197] According to Jordan, "Under existing laws, there is no adequate security against the use of false and fraudulent invoices, and there would often be great difficulty, even on the part of the most competent and faithful officers, especially in cases of undervaluation, in detecting the frauds . . . ."[198]

Jordan reiterated his earlier proposal for legislative reforms. These proposals included a specialized enforcement officer in Washington, D.C., regulation of invoice practices, criminal penalties for fraud, prohibitions on "emoluments" to customs agents from importers, and "[p]rovisions designed to facilitate the procurement of proof of fraudulent practices."[199]

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[193] *See* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA 13–14 (2d ed. 2004) ("[T]he tax regime that followed the creation of the new constitutional order was based on customs duties; it lasted until the Civil War, making it the longest in American history.").

[194] *See* STEVEN R. WEISMAN, THE GREAT TAX WARS 44 (2002).

[195] *See* BROWNLEE, *supra* note 193, at 35 (noting that excise taxes accounted for 50% of federal revenue, tariffs for 29%, the income tax for 21%).

[196] *See* S.P. CHASE, TO PREVENT AND PUNISH FRAUD, H.R. MISC. DOC. NO. 18 (1863) (letter from the Secretary of the Treasury to the House of Representatives).

[197] *Id.* at 5.

[198] *Id.*

[199] *Id.* at 8.

Chase sent Jordan's report to Washburne on February 9, 1863. The next day, Washburne introduced Jordan's proposed legislation.[200] On March 3, An Act to prevent and punish Frauds upon the Revenue passed into law.[201] The provisions "designed to facilitate the procurement of proof" included the following from the seventh section of the Act[202]:

> [W]henever it shall be made to appear, by affidavit, to the satisfaction of the district judge of any district within the United States, that any fraud on the revenue has been at any time actually committed, or attempted . . . said judge shall forthwith issue his warrant, directed to the collector of the port . . . to enter any place or premises where any invoices, books, or papers relating to such merchandise or fraud are deposited, and to take and carry the same away to be inspected; and any invoices, books or papers so received or taken shall be retained by the officer receiving the same, for the use of the United States, so long as the retention thereof may be necessary, subject to the control and direction of the Solicitor of the Treasury.[203]

The *Boyd* opinion asserts that:

> [This] act of 1863 was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property.[204]

Radical as it may have been, the measure excited no floor debate that I have found. In context this is not surprising. The bill passed into law on March 3, the last day of a session of Congress dealing with the gravest crisis in American history. Following the heavily qualified Union victory at Antietam the previous September, Lincoln declared emancipation on January 1, 1863.[205] The Union was engaged in a desperate effort to suppress treason committed for the sake of slavery; the "victory" at

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[200] CONG. GLOBE, 37th Cong., 3d Sess. 861 (1863) (statement of Rep. Washburne).

[201] Ch. 76, 12 Stat. 737 (1863); CONG. GLOBE, 37th Cong., 3d Sess. 1489 (1863).

[202] The enacted legislation appears identical to the proposed bill, H.R. 736, 37th Cong. (1863), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=037/llhb037.db&recNum=3559.

In the Senate, Fessenden, as chair of the Committee on Finance, introduced the measure as S.B. 506 on February 6 and then with minor amendments not touching the warrant provision again on February 10. *See* CONG. GLOBE, 37th Cong., 3d Sess. 750, 837 (1863) (statements of Sen. Fessenden). The markup of the Senate Bill dated February 10 is available online at http://memory.loc.gov/cgi-bin/ampage?collId=llsb&fileName=037/llsb037.db&recNum=1848. Given the dates, it seems plausible to suppose that Chase had conveyed Jordan's report to Fessenden but that the report was printed only by the House.

[203] Ch. 76, § 7, 12 Stat. 737, 740.

[204] Boyd v. United States, 116 U.S. 616, 622–23 (1886).

[205] *See, e.g.*, 1 SHELBY FOOTE, THE CIVIL WAR 707 (1986).

Antietam cost 12,000 casualties.[206] That same third of March, as the session expired, Congress passed the first conscription act.[207] There was little time for fussing over revenue measures. If there had been time, it was not a season for constitutional scruples.[208]

C. POSTWAR LEGISLATION AND CONSTITUTIONAL CHALLENGES

The war left the Union deeply in debt, but economic expansion and end-of-war spending permitted a degree of postwar tax relief.[209] The postbellum Republican Congress chose to retain high tariffs and an income tax while phasing out unpopular excise taxes.[210] The continued reliance on import duties implied the continued need to police fraud in the customs houses.

On March 2, 1867 (again the very end of the session, and the same day as the income tax bill was enacted[211]), Congress passed An Act to regulate the Disposition of the Proceeds of Fines, Penalties, and Forfeitures incurred under the Laws relating to the Customs.[212] The second section of the Act reiterated the seventh section of the 1863 Act, the sole modification being that warrants to seize books and papers were to be directed to the marshal of the court rather than the customs collector.[213] Again there appears to have been no floor debate. Again it was the last day of session, and other business pressed (the income tax bill and the Tenure in Office Act[214] passed that same day).

Constitutional issues were, however, emerging.[216] In 1868 Congress

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[206] *Id.* at 702.

[207] *See, e.g.*, RICHARD F. SELCER, CIVIL WAR AMERICA 1850–1875, at 62 (2006).

[208] *Cf. Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).

[209] *See* WEISMAN, *supra* note 194, at 93–96.

[210] BROWNLEE, *supra* note 193, at 36–39; WEISMAN, *supra* note 194, at 95–103.

[211] Tax Anti-Injunction Act of 1867, ch. 169, 14 Stat. 475 (1867) (current version at 26 U.S.C. § 7421(a) (2006)).

[212] Ch. 188, 14 Stat. 547 (1867); CONG. GLOBE, 39th Cong., 2d Sess. 2004 (1867).

[213] *Id.* § 2.

[214] Tenure of Office Act of 1867, ch. 154, §§ 1, 3, 6, 14 Stat. 431 (1867) (repealed 1887). The Act provided the predicate for impeaching President Andrew Johnson.

[216] I have seen a reference to one such challenge from 1867, a document by Sidney Webster called, "In matter of petition of Galwey & Casado, and order of Judge Betts thereon power of the government to enter private premises, search, seize, and carry away private papers." I have not yet seen this particular source. Webster was a prominent lawyer for importers and is said to have won the first million-dollar fee in American history by successfully representing the importer of French silk ribbons. *See* 19 THE HARV.

adopted An Act for the Protection in certain Cases of Persons making Disclosures as Parties, or testifying as Witnesses.[217] The Act provided that:

> [N]o answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness.[218]

The purpose of the 1868 statute was to facilitate revenue collections by obviating constitutional objections to compelled discovery.[219]

The relationship between the 1868 exclusionary rule and the authorization of warrants for papers in the 1867 Act is unclear. The *Boyd* opinion asserts that the 1868 law "abrogated and repealed the most objectionable part of the act of 1867 . . . ."[220] On the other hand, in the circuit court decision *Stockwell v. United States*, rendered in the April term of court in 1870, Judge Clifford rejected challenges both to the legality of a warrant for papers and to the use of the seized documents in evidence.[221] The court rejected the Fourth Amendment challenge to § 2 of the 1867 Act because "it is not perceived that any greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing such a search for the imported goods."[222] Judge Clifford rejected the objection to use of the seized papers in evidence because "invoices, books, or papers so seized, like the implements of crime, or stolen goods seized on search warrants, may in a proper case be given in evidence against the offender and perpetrator of the

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GRADUATES MAG. 170 (1910).

[217] Ch. 13, 15 Stat. 37 (1868).

[218] *Id.* § 1.

[219] CONG. GLOBE, 40th Cong., 2d Sess. 951 (1868) (statement of Sen. Frelinghuysen).

[220] Boyd v. United States, 116 U.S. 616, 632 (1886).

[221] Stockwell v. United States, 23 F. Cas. 116 (C.C.D. Me. 1870), *aff'd*, 80 U.S. 531 (1871). The Supreme Court opinion does not address the legality of the warrant or the admissibility of the documents. The circuit court opinion identifies both challenges:

> Two objections were taken by the defendants, at the trial, to the admissibility of the books, papers and documents as offered in evidence: I. That the court was not authorized to issue nor the marshal to execute the warrant in question. II. That the district attorney could not, if objected to by the defendants, put in evidence against them papers from his own possession, obtained and placed there by force of the warrant.

Id. at 120.

[222] *Id.* at 121.

fraud."[223]

Before the Supreme Court, however, Stockwell raised only two issues: (1) the use of a civil action to recover a double penalty under an Act of 1823, and (2) a jury instruction that imputed Stockwell's knowledge of illegal importation to other members of his firm.[224] The Supreme Court rejected these challenges.[225] *Stockwell* sheds no light on the constitutional issues surrounding the seizure of papers, but does indicate that the 1868 Act did not put an immediate end to the practice of issuing warrants for papers under the 1867 Act.[226] Arguably, the 1868 exclusionary rule might have been limited to oral testimony and documents surrendered by the target, exclusive of documents seized under warrant.[227]

In 1872, Cephas Brainerd, another lawyer for import interests, published a pamphlet attacking both the seizure of papers and the reliance on informants in customs investigations.[228] Brainerd invoked *Entick* and the resolutions condemning general warrants and seizures of papers:

> This inquisitorial warrant is open to every condemnatory observation made by Lord Camden In the case of the general warrants in the time of Wilkes, Entick and [the] "monitor or British Freeholder". . . . upon a charge made on information and belief that a crime has been committed in regard to a particular importation, all the books and papers of a mercantile firm are stripped from their warehouse or dwellings under the pretence that they contain evidence of the particular crime, and these are retained in the custody of Customs House officials and informers, all interested pecuniarily in the discovery of a fraud, until they see fit to return them to their owner.[229]

Brainerd followed up with a sarcastic bow to evenhandedness, noting that in all fairness it should be noted that one judge—Scroggs!—had vouched for the legality of general warrants.[230]

Despite the clarity of his claim that the warrants authorized by the

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[223] *Id.* at 123 (citing Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841)).

[224] *See* Brief of the Plaintiff in Error at 3–4, Stockwell v. United States, 80 U.S. 531 (1871) (No. 76-5876).

[225] *Stockwell*, 80 U.S. at 549–52.

[226] *See* Transcript of Record at 20–21, *Stockwell*, 80 U.S. 531 (observing that the search warrant issued March 30, 1868, and the statute became law on February 25, 1868).

[227] This was the position taken later by the court in *United States v. Hughes*, 26 F. Cas. 417, 419 (C.C.S.D.N.Y. 1875) ("The statute speaks of evidence or discovery obtained from the party or witness, and not that obtained from invoices and bills of lading which have been wrested from him.").

[228] CEPHAS BRAINERD, THE CUSTOMS REVENUE LAWS: SUGGESTIONS FOR THEIR AMENDMENT, IN REGARD TO THE SEIZURE OF BOOKS; THE DISTRIBUTION OF PENALTIES; THE LIMITATION OF ACTS, ETC. (1872).

[229] *Id.* at 13–14 (citations omitted).

[230] *Id.* at 15.

1867 Act are "flatly in contradiction of Article IV of the Amendments,"[231] Brainerd did not propose outright repeal. Brainerd's proposal "concede[d] the right of, and the necessity as well for a seizure and examination of books and papers—it seeks only to limit its exercise within a liberal construction, toward the Government, of the Fourth Amendment to the Constitution."[232] His proposal for a reformed process for seizing papers remains interesting because it suggested some middle ground between inviolability for papers under *Entick* and *Boyd* and the modern equivalence of papers with other "effects."

Brainerd proposed requiring an affidavit by a government official alleging specific facts amounting to a prima facie case of fraud before a warrant would issue.[233] Moreover, he proposed sealing the papers to be seized and having them inspected within two days in front of a United States commissioner with a right of appearance for the importer personally or through counsel.[234] Any specific entries or items could be used in evidence only if certified copies were filed with the clerk of the court, and both sides would have the right to memorialize entries for use as evidence.[235] After twelve days, the books would have to be "returned without mutilation."[236]

The most sophisticated and celebrated constitutional attack on the seizure of private papers came from Sherburne Blake Eaton.[237] Eaton's clients eventually came to include J.P. Morgan and Thomas Edison,[238] from which we may infer that he was the best that money could buy. His first claim to fame as a lawyer, however, apparently followed his attack on the constitutionality of warrants for papers.

In February 1874, Eaton testified before the House Ways and Means Committee.[239] Eaton laid out the theory the *Boyd* Court would later adopt, plus another constitutional argument. Eaton invoked both the Fourth Amendment *and* the Due Process Clause of the Fifth.[240] He had

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[231] *Id.* at 12.

[232] *Id.* at 16–17.

[233] *Id.* at 17–18.

[234] *Id.* at 17.

[235] *Id.*

[236] *Id.*

[237] For a biography of Eaton, see 7 CYCLOPEDIA OF AMERICAN BIOGRAPHY 130 (1897).

[238] *Id.* On Eaton representing J.P. Morgan as well as Edison, see FORREST MCDONALD, INSULL: THE RISE AND FALL OF A BILLIONAIRE UTILITY TYCOON 31 (1961).

[239] H.R. MISC. DOC. NO. 264, at 68–86 (1874) (testimony before the Committee on Ways and Means regarding moities and customs-revenue laws). Brainerd testified the same day.

[240] *Id.* at 70 (statement of S.B. Eaton).

considerable authority for both arguments.

Eaton supported his Fourth Amendment argument by an extended appeal to *Entick v. Carrington*.[241] Eaton, however, also made a due process argument. Eaton quoted the then-controlling Supreme Court decision in *Murray's Lessee v. Hoboken Land and Improvement Company*.[242] The test of due process under *Murray's Lessee* was whether a procedure was known to the English common law, and *Entick* had emphatically declared that a warrant to seize papers was *not* known to the common law. So in 1874, Eaton's reliance on *Murray's Lessee* was compelling.

Eaton's "argument before the congressional committee of ways and means, for the reform of the customs and revenue laws and the repeal of the statute authorizing moieties and the seizure of books and papers, attracted wide attention in the United States."[243] It was also "translated into French and German [and] was circulated on the continent of Europe."[244] His client, the New York Chamber of Commerce, reprinted his testimony as a pamphlet.[245] Eaton had written the first draft of *Boyd* twelve years in advance.

D. THE 1874 ACT

Two things changed in the twelve years between Eaton's testimony and the *Boyd* decision. First, Congress replaced the 1867 authorization of warrants to seize books and papers with a quite different procedure.[246] Under the new procedure, the district courts lost the authority to issue warrants to seize books and papers. Instead, in all revenue actions "other than criminal," the government could serve a demand on the defendant:

> [A]nd if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained

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[241] For Eaton's argument regarding *Entick*, see *id.* at 76.

[242] *Id.* at 71 (statement of S.B. Eaton) (quoting *Murray's Lessee*, 59 U.S. (18 How.) 272, 277 (1856)) ("'We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors.'").

[243] 7 CYCLOPEDIA OF AMERICAN BIOGRAPHY, *supra* note 237, at 130.

[244] *Id.*

[245] S.B. EATON, A DISCUSSION OF THE CONSTITUTIONALITY OF THE ACT OF CONGRESS OF MARCH 2, 1867, AUTHORIZING THE SEIZURE OF BOOKS AND PAPERS FOR ALLEGED FRAUDS UPON THE REVENUE (1874).

[246] An Act to Amend the Customs-Revenue Laws and to Repeal Moieties, ch. 391, 18 Stat. 187 (1874).

to the satisfaction of the court.[247]

If produced, the documents could be inspected by the government in the presence of their owner and were admissible in evidence but were not forfeited.[248]

No longer could papers be seized on authority of a warrant. On the other hand, importers who refused to open their books to government officers would be presumed (practically conclusively) to have violated the revenue laws. The statute excepted criminal proceedings but not proceedings for forfeitures or penalties.

From the government's standpoint, the new procedure had another advantage. Judge Clifford's opinion in *Stockwell* had held that seized papers could be used in evidence, notwithstanding the 1868 Act's bar on using evidence obtained by any "judicial proceeding" in forfeiture proceedings and criminal prosecutions.[249] There appears to have been at least some authority for the contrary view, i.e., that papers seized on a warrant issued under the 1867 Act could *not* be used in evidence by force of the 1868 Act.[250] So one can read the 1874 disclose-or-confess procedure as a concession to Eaton's constitutional arguments, a government escape hatch from the 1868 exclusionary rule, or both.

The courts soon heard challenges to the constitutionality of the disclose-or-confess procedure. The early cases all involved forfeiture proceedings against liquor distilleries, and they all reached the same result

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[247] *Id.* § 5, 18 Stat. at 187.

[248] *Id.*

[249] *See* Stockwell v. United States, 23 F. Cas. 116, 123 (C.C.D. Me. 1870), *aff'd*, 80 U.S. 531 (1871).

[250] *See* H.R. MISC. DOC. NO. 264, *supra* note 239, at 73 (statement of S.B. Eaton) (citing *Bingham v. Jordan, Marsh & Co.*) ("In the United States court of Massachusetts, in a recent case of great general interest, it was held by Judge Lowell, that, in view of the existence of this prohibitory statute, it was 'difficult to understand' how the inspection of books and papers is to be availed by the Government for any useful purpose, since this act provides that no evidence thus obtained shall be used for any penalty, or in any criminal action; that any evidence thus obtained might be used to collect duties, or be used by the collector in his future dealings with the same party or others; but that it is no part of the law to seize books and papers for the benefit of the collector, in the administration of his duties as collector."). Eaton gave no citation for *Bingham* but may have been referring to *In re Jordan*, 13 F. Cas. 1077 (D. Mass. 1873) (holding that revenue agents responsible for examining books and papers described in warrant could not assist marshal in separating papers described in warrant from other documents). The reported opinion does not include the "difficult to understand" language, so it seems more likely either that Eaton referred to an opinion in the same matter that went unreported or that the official report omits Judge Lowell's remark about the new exclusionary rule. Eaton went on to say that the 1868 exclusionary rule was inadequate because the government could seize papers and then introduce other evidence derived from them. H.R. MISC. DOC. NO. 264, *supra* note 239, at 74.

by very similar reasoning.[251] The distilleries' Fourth Amendment claims were rejected on the theory that distillers consent to the government's rules when they enter that closely regulated trade—an early version of the modern "administrative search" doctrine. The Fifth Amendment claims were rejected by characterizing in rem forfeiture proceedings as civil rather than criminal cases.

The second important legal development that occurred between Eaton's testimony in 1874 and the *Boyd* decision in 1886 was the Supreme Court's retreat from the rigid historical test of due process. In *Hurtado v. California*, the Court rejected a Fourteenth Amendment due process challenge to felony prosecutions initiated by information filed by a prosecutor as opposed to an indictment returned by a grand jury.[252] The common law did not permit felony informations, so Hurtado had a strong claim under the historical test of *Murray's Lessee*.

Hurtado equated the Fourteenth Amendment's Due Process Clause with its Fifth Amendment predecessor, but then recharacterized the historical test as *permitting* any procedure known to the common law rather than *forbidding* any procedure not known to the common law.[253] The negative version of the historical test would "deny every quality of the law but its age, and . . . render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."[254]

Hurtado asserted limits beyond which legislatures could not go, but described those limits in normative rather than historical terms:

> [Due process] refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.[255]

This natural law interpretation (substantive due process, we would call it today) allowed the Court to balance liberty against the police power. Eaton's due process argument against warrants for business records might still prevail if a majority of the Court concluded that such warrants were

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[251] *See* United States v. Three Tons of Coal, 28 F. Cas. 149 (E.D. Wis. 1875); United States v. Mason, 26 F. Cas. 1189 (N.D. Ill. 1875); United States v. Distillery No. 28, 25 F. Cas. 868 (D. Ind. 1875).

[252] 110 U.S. 516, 538 (1884).

[253] *Id.* at 534.

[254] *Id.* at 529.

[255] *Id.* at 535.

"contrary" to "fundamental principles."[256] But it might also lose under the amorphous new test. After *Hurtado*, the clean kill-shot set up by the juxtaposition of *Murray's Lessee* and *Entick v. Carrington* was gone.

E. *BOYD*

Why did the issue take so long to reach the Supreme Court? *Stockwell* did reach the Court, but only on other issues. We don't know how often the government resorted to the formal disclose-or-confess procedure, or how often individuals cooperated "voluntarily" with official requests for records. We can imagine, however, the obstacles to litigating the issue posed by the lower court rulings of 1875, and realize in the process both how unusual the facts of *Boyd* actually were and how intertwined the various propositions in the final opinion turn out to be.

The lower court cases upholding the disclose-or-confess procedure had rejected Fourth Amendment claims either because the taxpayer consented to reasonable regulations by entering a business like the liquor trade,[257] or because the disclose-or-confess procedure involved no physical trespass.[258] They rejected the Fifth Amendment claim either because tax proceedings were civil[259] or because the procedure did not make any use of the suspect's testimony.[260]

Boyd was factually quite distinctive.[261] The government needed glass on an emergency basis, and the Boyds sold the government glass from stock

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[256] H.R. MISC. DOC. NO. 264, *supra* note 239, at 76, 79; *see also Hurtado*, 110 U.S. at 535.

[257] *See* United States v. Distillery No. 28, 25 F. Cas. 868, 870 (D. Ind. 1875) ("No one can engage in the manufacture and sale of spirits without the consent of the government. That consent is obtained on certain terms and conditions.").

[258] *See* United States v. Three Tons of Coal, 28 F. Cas. 149, 158 (E.D. Wis. 1875) ("The cases are not like those condemned by the courts of England where general warrants empowered the officers to enter any private house, and intrude upon the privacy of any citizen and seize private papers or property for purposes of personal prosecution on any charge the crown might choose to make.").

[259] *See Distillery No. 28*, 25 F. Cas. at 869 ("This proceeding is entirely independent of any criminal prosecutions which have been commenced or which may hereafter be commenced against them.").

[260] *See* United States v. Hughes, 26 F. Cas. 417, 419 (C.C.S.D.N.Y. 1875) (holding that business records seized by warrant issued under the 1867 Act were not "evidence [ ]obtained from the party" and therefore were not excluded from evidence by the 1868 Act). The issue was statutory, but the court's reasoning applied to any potential Fifth Amendment claims as well: the defendant "has been perfectly silent. He has disclosed nothing. He has discovered nothing." *Id.*

[261] For the lower court proceedings, see *United States v. Boyd*, 24 F. 690 (S.D.N.Y. 1885) (the civil forfeiture case) and *United States v. Boyd*, 24 F. 692 (S.D.N.Y. 1885) (the criminal case).

on which the duty had been paid in exchange for permission to import a replacement quantity duty-free.[262] They allegedly brought in more glass duty-free than they had supplied to the government in the first place.[263]

So, to begin with, there was nothing especially sinister about glass. Liquor was a dangerous, traditionally regulated commodity that could be prohibited altogether in the exercise of the police power. Glass was a quotidian object of lawful commerce. Saying those trading in glass voluntarily shouldered whatever rules the government wanted to make about glass would have permitted the liquor exception to swallow the general rule against unreasonable searches.

Second, while revenue violations typically were *potentially* criminal, actual criminal prosecutions were not the norm. The Boyd brothers not only lost the action for debt; they were indicted criminally and convicted. Whether the invoice disclosed in response to the disclose-or-confess notice was used in the criminal trial is not clear from the report. The Supreme Court's ruling reversed both the civil and the criminal judgments,[264] suggesting that the invoice was used in the criminal trial. Even if it were not, the potential for self-incrimination in a case where the taxpayers were prosecuted criminally was much more salient than in the run-of-the-mine cases of forfeitures or penalties.

Third, the Boyds had neither voluntarily surrendered the invoice *nor* withheld it to suffer the statutory inference of guilt. They had surrendered it under constitutional protest and raised, albeit in a clumsy way, the constitutional issue before the Supreme Court.[265]

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[262] The gist of the criminal accusation was as follows: The defendants were indicted under § 12 of the Act of June 22, 1874, for the fraudulent entry of thirty-five cases of imported plate-glass as free, by means of a false and fraudulent letter. *See Boyd*, 24 F. at 693–94. The government had previously procured from the defendants a large quantity of their own plate-glass—for immediate use in the construction of the United States courthouse and post-office building in Philadelphia—at a discount from the domestic price equal to the rate of duties, under an agreement with the defendants that they might import, free of duty, new glass in the same amount to replace that furnished to the government. *See id.* at 694. The proofs tended to show that under this arrangement the defendants had previously imported, and entered free of duty, a much larger quantity of glass than sufficient to replace what they had thus supplied to the government. *See id.*

[263] *Id.*

[264] This is not clear from the Supreme Court opinion, but the West system shows the criminal conviction reversed by the Supreme Court opinion.

[265] *See* Brief of the Plaintiff in Error at 22–24, Boyd v. United States, *in* 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 479, 501–03 (1975) [hereinafter Brief]. Most of the brief is devoted to technical issues of forfeiture law and jury instructions. The constitutional issue is not even listed in the assignments of error, Brief at 4–5, and instead is mentioned as an afterthought. The brief states apologetically, "Time does not permit us to

Fourth, the disputed invoice was for twenty-nine cases of glass *legally* imported. It was not contraband or the instrumentality of any fraud. Its sole value to the government was to show that the duty-free letter for the thirty-five cases imported later was obtained by fraud.

So *Boyd*'s various propositions are all important to the result. Only if (1) the Fourth and Fifth Amendments are to be liberally construed could the Court say that the Boyds had been searched or, in the forfeiture proceeding, incriminated.[266] Only if (2) warrants for papers were unreasonable per se would the adversary process afforded the Boyds fail to satisfy the Fourth Amendment. Even granting that (3) the threat of adverse inference inducing the discovery of the invoice was tantamount to unconstitutional search and seizure, the usual rule, exemplified by *Dana*, was that illegal procurement would not block admission of evidence. So (4) the use of a lawful document against its owner had to be characterized as compelled self-incrimination before the Boyds could win.

F. *BOYD* AND *LOCHNER*

Akhil Amar,[267] Morgan Cloud,[268] and the late Bill Stuntz[269] have, in

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elaborate, as we wish, the propositions hinted at in the foregoing observations. *Id.* We shall endeavor to do so orally, citing" *inter alia*, *Entick* and *Murray's Lessee*. *Id.* Really competent counsel would not have relied on *Murray's Lessee* two years after *Hurtado*, at least not without a fuller discussion. But *Murray's Lessee* and *Entick* feature prominently in Eaton's attack on the statute. The brief is what one would expect if someone at the last minute favored Boyd's lawyers, Edwin B. Smith and Stephen G. Clarke, with a copy of Eaton's pamphlet.

[266] *See* 7 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 740 (1987) ("Justice Bradley had displayed a determination to give the Amendments a large meaning, without concern for the literal texts.").

[267] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 788 (1994) ("[T]he spirit inspiring *Boyd* and its progeny was indeed akin to *Lochner*'s spirit: a person has a right to his property, and it is unreasonable to use his property against him in a criminal proceeding.").

[268] Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 576 (1996) (citing Amar, *supra* note 267) ("The Court's opinion exemplified both the style of formalist reasoning and the exaltation of property rights for which the *Lochner* opinion has been vilified."). Cloud equivocates on the ultimate merits of *Boyd* in a way Amar does not, but nonetheless sees *Boyd* and *Lochner* as cut from the same cloth.

[269] William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 428 (1995) ("Indeed, it may be fair to say that at about the time of Lochner v. New York, Fourth and Fifth Amendment law posed a greater threat to activist government, at least at the federal level, than did substantive due process."). Stuntz is not unsympathetic to *Boyd* on formal doctrinal grounds. *See id.* (formal arguments for *Boyd* "looked right"). Yet Stuntz may be in another way *Boyd*'s harshest critic, describing *Boyd* as the centerpiece of a constitutional regime designed to shield business from humane social regulation.

somewhat different ways, linked *Boyd* with the notorious substantive due process decision *Lochner v. New York*.[270]

Some of the evidence adduced so far indeed supports the *Boyd*-as-*Lochner* story. The real brief for the Boyds was written by a brilliant lawyer representing the New York Chamber of Commerce in testimony before Congress. The *Boyd* opinion tracks Eaton's arguments very closely. *Boyd*, clearly, had the effect of complicating federal regulation of business.

Yet that story is at most only partially true. If the Justices were really interested in protecting business from regulation, they would have reaffirmed the historical test of due process in *Hurtado*. Before 1937, the limited federal jurisdiction over commerce made the states the most important source of social welfare legislation. If *Murray's Lessee* had remained the law, *Entick* would have been fastened to the states as well as to the federal government.

Instead, both before and after *Boyd* the Court applied a flexible test of substantive due process to state social-welfare regulations. Prior to *Lochner*, the leading cases were *Munn v. Illinois*[271] and *Holden v. Hardy*.[272] *Munn* rejected a due process challenge to the Illinois "Granger Law" that limited what farmers could be charged by the owners of grain elevators.[273] *Holden* rejected a due process challenge to a Utah law limiting the hours that miners could work.[274] Notably, Justice Bradley, the author of *Boyd*, dissented from the Court's 1890 decision requiring quasi-judicial hearings in state rate-making procedures.[275] His dissent, relying on *Munn*, is not an opinion one would expect from anyone inclined to read laissez-faire economics into the Constitution.

After *Boyd*, the Court refused to apply either the Fourth Amendment or the Fifth Amendment Self-Incrimination Clause to the states,[276] where the real threats to business interests then lay. The post-*Boyd* federal cases upheld the constitutionality of transactional immunity against Fifth Amendment challenge[277] and denied corporations the privilege against self-

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[270] 185 U.S. 45 (1905).

[271] 94 U.S. 113 (1876).

[272] 169 U.S. 366 (1898).

[273] *Munn*, 94 U.S. at 134.

[274] *Holden*, 169 U.S. at 367.

[275] 134 U.S. 418 (1890).

[276] Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that the Fourth Amendment does not apply to states); Twining v. New Jersey, 211 U.S. 78 (1908) (holding that the Fifth Amendment privilege does not apply to states).

[277] Brown v. Walker, 161 U.S. 591 (1896). For the plausibility of the claim that *even*

incrimination.[278] But one year after *Lochner*, the Court retreated from *Boyd* by holding that the Fourth Amendment's ban on warrants for papers did not extend to subpoenas.[279]

There is one more reason to be skeptical of the conventional critique of *Boyd* as *Lochner*: Louis Brandeis. The most eminent progressive jurist in American history celebrated *Boyd* as a great landmark of civil liberty in his famous dissent in *Olmstead v. United States*.[280] If *Boyd* were cut from the same cloth as *Lochner*, Brandeis's *Olmstead* opinion would be utterly inexplicable.

G. *BOYD* AS DOCTRINE: TWO APPARENT ANOMALIES

The evidence presented in this Article indicates rather strongly that the Founders regarded papers as deserving greater protection than other effects. Two strands in the doctrine that emerged under *Boyd* might cast doubt on the preference for papers. One is the Supreme Court's extension of the immunity enjoyed by papers to innocent, non-forfeitable chattels other than documents—the mere-evidence rule. The second is the search-incident-to-arrest doctrine, which allowed the seizure of papers from the person of a suspect when lawfully taken into custody. Let us consider these potential counterexamples in turn.

1. *The Mere-Evidence Rule*

Papers and other effects could be put on the same plane in two ways. Modern cases like *Burgess* reduce papers to the protections for ordinary effects.[281] But nondocumentary chattels might also be elevated to the status of papers. That is what the Supreme Court did in the 1920s. In *Gouled v. United States*[282] the government had obtained papers relevant to show fraud and bribery, some by an undercover agent's surreptitious theft and some by warrant naming specific documents to be seized. The Court, answering questions certified by the Court of Appeals, stated:

> There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of

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transactional immunity is inconsistent with the Fifth Amendment, see *id.* at 610 (Shiras, J., dissenting).

[278] Hale v. Henkel, 201 U.S. 43, 69–70 (1906).

[279] *Id.* at 75–76.

[280] *See* Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (characterizing *Boyd* as "a case that will be remembered as long as civil liberty lives in the United States").

[281] *See* United States v. Burgess, 576 F.3d 1078 (10th Cir. 2009).

[282] 255 U.S. 298 (1921).

> the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized . . . , and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.[283]

To say that papers used to commit crimes are forfeitable and *may* be seized is not tantamount to saying that other chattels may *not* be seized unless they *are* forfeitable.

I have a speculative but plausible explanation for the mere-evidence rule's elevation of other chattels to the status of papers under *Boyd*. Discouraging law enforcement excesses in the investigation of possessory offenses required extending the *Boyd* rule not just to chattels other than documents, but indeed to contraband chattels like Prohibition-era liquor. The latter move was utterly contrary to the logic of *Entick* and *Boyd*, but the Court made the move just four years after *Gouled*.[284] If we assume that the Justices were concerned about deterring abuses in the enforcement of Prohibition, *Gouled*, heterodox and ahistorical as it was, is explicable as the necessary stepping-stone to the suppression of *illegal* chattels like moonshine and cocaine. Given the modern exclusionary rule's explicit basis in deterrence of Fourth Amendment violations, today there is no pragmatic reason to give other chattels the same protection as "papers."

2. *Search Incident to Arrest*

Papers can be equated with other "effects" by permitting the seizure of papers, rather than by barring the seizure of chattels. We have seen that until the 1863 revenue measure, there had been an unbroken pattern of exempting documents from seizure under warrant. Yet the search of persons upon arrest was a familiar Founding-era practice,[285] and in the

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[283] *Id.* at 309 (citations omitted).

[284] Agnello v. United States, 269 U.S. 20, 36 (1925) (holding that illegally seized cocaine could not be used in evidence against victim of warrantless home invasion). The government argued that Agnello had waived his objection to the evidence by not filing a motion for return of property, then excused the defense from making a motion that, if granted, would have gotten the defendant rearrested on the courthouse steps. *See id.* at 34. The truly bizarre reasoning was that the pretrial motion was required only to avoid inquiry into collateral facts during trial. Since, in the instant case, the government conceded there was no warrant to enter, the *Agnello* Court said the trial court should have sustained the evidentiary objection during trial. *Id.* at 35. The unanimous Court, understandably, said nothing about what was to be done with the cocaine after trial.

[285] *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1960) (finding "little reason to doubt that search of an arrestee's person and premises is as old as

course of searching the prisoner, documents might well be discovered. Search of the person arrested seems to have been so standard as to escape legal challenge until late in the nineteenth century.[286]

After *Boyd* the collision of the search-incident power with the ban on seizing papers was inevitable. The New York Court of Appeals, per that familiar apologist for blundering constables, Benjamin Cardozo, took the position that the search-incident power trumped the private-papers rule so that even documents not subject to forfeiture as contraband or instrumentalities could be seized from the person arrested.[287] This seems unsound, because it permitted the police to go further without warrant than a judge could go by issuing one.

Learned Hand delivered the true exposition of *Entick* and *Boyd* in the search-incident context.[288] Beautifully penetrating the pooling problem, Hand articulated what might be called the "anti-rummaging" principle:

> After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past.[289]

Documents, Hand declared, could only be seized when they were forfeitable ("[t]he forged note, the fraudulent prospectus").[290] But *even*

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the institution of arrest itself").

[286] There is no discussion of search powers during arrest in Blackstone or in any JP manual I have seen. Stephen, writing in 1883, treats arrest extensively without mentioning search. 1 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 190–94 (1883).

[287] People v. Chiagles, 237 N.Y. 193, 197–98 (1923) (upholding use as evidence of letters taken from defendant on arrest).

> Conceding the legality of the arrest, [defendant] concedes by implication the legality of the search. What he complains of is not the search but the seizure that succeeded it. The search, we are told, may lawfully be made, but what is found must be returned, though it be proof positive of guilt, unless at the same time it is an implement of felony. This is to carry the immunity beyond the bounds of reason.

Id.

[288] *See* United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926).

[289] *Id.* at 203.

[290] *Id.* at 204. On this point the difference with Cardozo is theoretically important but practically minute, because it "is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records

when the object of the search was forfeitable, the police had no more constitutional power upon arrest than a judge issuing a warrant to comb through a vast trove of innocent papers in quest of an illegal one. The Supreme Court subsequently endorsed Hand's view, albeit temporarily.[291]

V. SUMMING UP: HISTORY AS OPPORTUNITY

A. THE CASE AGAINST EQUATING "PAPERS" AND "EFFECTS"

If *Boyd* cannot be written off as the product of a vast right-wing conspiracy, it does not automatically follow that *Boyd* was right. The warrant at issue in *Entick* was *both* a sweeping warrant *and* a warrant for papers. *Entick* says the latter is a distinct and grievous legal wrong. Wigmore refused to take that feature of the opinion at face value. The real issue about *Boyd*'s legitimacy is whether a *specific* warrant to seize as evidence *papers* lawfully possessed is or is not constitutionally "unreasonable." According to Wigmore, *Boyd* "mistreats the Fourth Amendment, in applying its prohibition to a returnable writ of seizure describing specific documents in the possession of a specific person."[292] Others, including Justice Holmes[293] and, more recently, Professor Davies,[294] have shared Wigmore's view.

The *Boyd* majority should not be dismissed too lightly. For one thing, the opinion was written less than a century after the ratification of the Fourth Amendment. The Justices had walked the earth with the Founding

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necessary to keep track of the details." *Id.*

[291] *Compare* Marron v. United States, 275 U.S. 192, 192 (1927) (upholding admission of ledger kept by operator of a speakeasy as an instrumentality in the "immediate possession and control" of the person arrested), *with* United States v. Rabinowitz, 339 U.S. 56 (1950) (upholding search incident to arrest that extended to desk drawers and filing cabinet). Justice Minton's majority opinion in *Rabinowitz* reversed Hand's opinion below; Justices Black, Frankfurter, and Jackson dissented. *Rabinowitz* was subsequently repudiated by *Chimel v. California*, 395 U.S. 752 (1969).

[292] 4 JOHN HENRY WIGMORE, TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2264 (1904) (footnotes omitted).

[293] Holmes did not join Brandeis in *Olmstead* but dissented on other grounds. *See* Robert Post, *Federalism, Positivism, and the Emergence of the American Administrative State: Prohibition in the Taft Era Court*, 48 WM. & MARY L. REV. 1, 144 n.476 (2006) (noting in an internal memo about the *Olmstead* case, "[a]longside the sentence in which Brandeis observed that Boyd 'reviewed the history that lay behind the Fourth and Fifth Amendments,' *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting), Holmes commented: 'My impression was that Wigmore had thrashed the history' set forth in *Boyd*").

[294] Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Supreme Court "Fourth Amendment" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 956 (2010).

generation.[295] If the passage of time makes the original understanding more difficult to recover, the *Boyd* court has more than a century's worth of an advantage over us.

In the second place, one of the members of the *Boyd* majority was Horace Gray, a legal historian who compiled the first archive of primary sources related to the Writs of Assistance controversy.[296] "Here, in almost 145 pages, packed with footnotes, Gray delivered a magnificent display of research into the origin and use of search warrants up to and at the time of Otis's arguments."[297] That archive remains "essential reading."[298] True, Gray was not, apparently, an originalist.[299] But if Bradley's opinion had declared false history we would expect a deep student of the controversy over the writs, intimate with the grandson of John Adams,[300] to have known it and said something about it.

Scholars such as Cuddihy and Clancy have concluded that the amendment has the dual meaning suggested by the wording finally adopted: a general right against unreasonable searches and seizures is declared, and a specific prohibition against general warrants is superimposed on the general declaration.[301] If we accept the latter interpretation, as the Court has done,[302] the historical record cuts strongly against applying the same criteria for "papers" as for other "effects."

First, papers are specially mentioned in the constitutional text, and in Madison's proposal and Adams's Massachusetts provision before. Each provision, moreover, puts papers where you might expect from a normative point of view—papers ranked behind persons and houses, but ahead of all other "effects" or "possessions."[303]

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[295] Justice Bradley was born in 1813. Thomas Jefferson and John Adams famously expired on or about the Fourth of July, 1826. John Marshall lived until 1835.

[296] Horace Gray, *Notes*, *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 395 (1865).

[297] Robert M. Spector, *Historian on the Supreme Court: Justice Horace C. Gray, Jr. and the Historical Method*, 12 AM. J. LEGAL HIST. 181, 194 (1968).

[298] Thomas K. Clancy, *The Role of History*, 7 OHIO ST. J. CRIM. L. 811, 812 (2010) (book review).

[299] Spector, *supra* note 297, at 209 ("Gray viewed the Federal Constitution as a living organism that meant one thing in 1789, another in 1860, and still another in his own time.").

[300] *Id.* Charles Francis Adams spent "many years of friendship" with Gray, although it appears that Adams thought Gray an unimaginative judge. *Id.*

[301] *See* THOMAS K. CLANCY, THE FOURTH AMENDMENT 10–11 (2008); CUDDIHY, *supra* note 66, at 765–82.

[302] Countless cases have held warrantless searches "unreasonable." *See, e.g.*, Bond v. United States, 529 U.S. 334 (2000).

[303] Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1772 n.89

Wigmore's point that the Amendment permits *reasonable* searches for papers and therefore excludes *Boyd*'s per se ban is unpersuasive. For one thing, even under the rigid rule of *Boyd* it was "reasonable" to seize stolen papers, obscene books, and criminal libels. Second, if the Declaratory Clause is read to say that not all "searches and seizures" of "papers" are "unreasonable," the Warrant Clause can equally be said to permit no warrant to search or seize "papers" because the Warrant Clause refers to places to be searched and persons or things to be seized. "Things" correlates to "effects" in the Declaratory Clause, so that the distinction between "papers" and "things" implies that while "things" might be seized on a warrant, "papers" could not be.

Proponents of treating "papers" the same as other "effects" face a serious challenge in the constitutional text. If "papers" are entitled to no higher protection than other "effects" (or "possessions" in some of the state provisions), why does the text mention "papers" at all? If it was an accident, why did the Massachusetts, New Hamphsire, Pennsylvania, and Vermont constitutions also refer specially to "papers"? Coupling the text with the seizure-of-papers controversy gives a very good reason for what would otherwise be inexplicable.

Second, American courts recognized *Entick* as part of the received body of English common law. A statute might trump the common law, but the Fourth Amendment trumps a statute. Justice Story wrote that the Fourth Amendment is "little more than the affirmance of a great constitutional doctrine of the common law."[304] If the Fourth Amendment incorporated the common law, even a common law subject to reasoned statutory and judicial development, the Fourth Amendment's Declaratory Clause prohibits equating "papers" and "effects."

Third, at the heart of Whig opposition to seizing papers was the belief that *any* search of papers, even for a specific criminal item, was a *general search*. It followed that any warrant to sift through documents is *a general warrant*, even if it is specific to the location of the trove and the item to be seized. American patriots were familiar with the general warrants controversy in England, quite independently of any published law reports. They were in sympathy, in particular, with Father of Candor's *Letter Concerning Libels*. Every Whig pamphlet I have seen describes seizing papers as an abuse distinct from, but intrinsically resembling, in aggravated form, general warrants. The House of Commons, in linked resolutions,

(2011) ("[T]he Fourth Amendment singled out 'papers' for special protections above and beyond all other stuff—'effects.'").

[304] 3 STORY, *supra* note 7, § 1895, at 748.

condemned general warrants and seizures of papers.

Fourth, the earliest statutory provision authorizing search warrants for books and papers I have found is the 1859 Massachusetts act promptly declared unconstitutional in *Robinson*. The Congress that adopted the Sedition Act did not go so far; nor did the 1780 Pennsylvania legislature whose initial proposal was criticized by Zuinglius. It might be said that the *Entick* rule was limited in English law to libel cases, because the resolutions in the Commons were narrowly worded to gain reluctant supporters. Father of Candor expressly rejected limiting the prohibition of general warrants to libel cases,[305] and endorsed Candor's earlier words about "the absolute illegality of the seizure of papers."[306] I have seen no American authority limiting the prohibition of general warrants, or the ban on seizing papers, to libel cases; Zuinglius in 1780 admits no such limitation. The constitutional text suggests no such distinction. Some sources suggest an exception for national security cases.[307] This exception, however, would not have been necessary if *Entick* were limited to libel prosecutions.

The positive law has closed its eyes on history. Federal Rule of Criminal Procedure 41 flatly equates "documents, books, papers, any other tangible objects, and information."[308] The rule plainly contemplates "the seizure of electronic storage media" for "later off-site copying or review."[309] Today, federal agents may obtain warrants to seize and carry away entire troves of digitally stored private papers and peruse those files at remote locations, one by one. What the leading Whig polemicist denounced as an "abominable outrage," what the common law condemned as a relic of the Star Chamber, and what no American legislature authorized for the first eighty years of Independence, has become standard law enforcement procedure.

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[305] FATHER OF CANDOR, *supra* note 108, at 50.

[306] *Id.* at 54.

[307] CANDOR, *supra* note 107, at 33 ("Now, in the case of High Treason, so dangerous to the being of the whole state, it may not, perhaps, at particular junctures, be improper to support, or indemnify at least, even Secretaries of State in the seizure of papers, and of every thing else, however illegal, that may possible serve to a discovery and conviction of the Traitor."); Zuinglius, *supra* note 145 ("In cases where by defection to the enemy, as lately in the case of Arnold, or where by taking up arms, or by other means, the treason is notorious, the seizure of papers is justifiable by reason, and is warranted by law already existing."). Whigs did not uniformly admit a treason exception. *Cf.* Glynn's argument in *Entick v. Carrington*, (1765) 2 Wils. 275, 285 (K.B.).

[308] FED. R. CRIM. P. 41.

[309] *Id.*

B. THE POOLING PROBLEM AND THE ALL-OR-NOTHING DILEMMA

To say that the Fourth Amendment calls for special treatment of private documents does not answer the question of just what that special treatment should be. Current doctrine seems premised on a supposed dilemma. If private documents do not enjoy heightened constitutional status, and the government can show probable cause to believe that one document among thousands is either contraband or evidence, the police may scan the entire lot. In some cases their suspicions will prove baseless and they will have searched thousands of innocent but private entries for no good purpose. If, on the other hand, documents do deserve heightened constitutional protection, the government has no right to pick through the haystack in search of the needle, and documentary evidence of serious crimes would, as a practical matter, become off-limits to law enforcement. The scale of the pooling problem has changed dramatically between the asportation of all of Wilkes's papers in a sack to the perusal of all the files on Burgess's hard drive. The structure of the problem has not.

The pooling problem is not about either the lawfulness of the object of search or the particularity of a warrant. In the 1760s, libels could at least theoretically be seized; the problem was the need to look through reams of innocent private papers to find the contraband ones.[310] Under today's criminal law, a meth recipe would be an instrumentality of crime and subject to seizure even under *Boyd*. A warrant to search the suspect's computer might be scrupulously limited to searching for "documents containing any formula for synthesizing methamphetamine." Because gangsters are unlikely to label their working files with obvious markers of criminality, the problem is the sheer volume of innocent files that must be scanned if the criminal material is to be found (or conclusively found absent).

Burgess saw the dilemma as intractable and chose unrestrained police power as the lesser evil. Only ten years after the failure to search Zacarias Moussaoui's computer cost a chance to prevent the 9/11 attacks and all the horrors that have followed, the *Burgess* Court's position is probably inevitable, if the supposed dilemma is really irreducible. Even if *Boyd* offers the most plausible historical reading of private papers under the Fourth Amendment, there is zero practical prospect of a return to a per se ban on seizing private papers (especially if, as seems likely, this would logically entail a similar per se prohibition on nonconsensual electronic

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[310] On Chief Justice Pratt's equivocations about seizing even libelous papers, see *supra* text accompanying notes 91–96.

surveillance).

What, however, if the dilemma is false? What if *heightened* but not *absolute* protections for private documents—like those proposed by Chief Judge Kozinski or contained in the British legislation—had legitimate roots in text and history? We have taken similar approaches to at least some highly intrusive search-and-seizure practices. Wiretap orders by statute are considerably more demanding than ordinary search warrants, and their execution is subject to a duty to minimize interception of innocent conversations.[311] The Court has held that a court order based on probable cause is not enough to make compelled surgery to recover a bullet "reasonable."[312] Probable cause and an exigent circumstance alone are not enough to justify arrest by gunshot.[313] Some middle ground might be legitimate as well as sensible.

C. BEYOND ALL OR NOTHING

The seizures of Entick's and Wilkes's papers were indiscriminate, expropriating, unregulated, and inquisitorial. These same objections were raised, with considerable justice, against the 1863 customs statute. The revised statute that came before the Court in *Boyd* attempted an ingenious solution to the pooling problem, i.e., the sorting of the pool by the suspects themselves. As Justice Miller pointed out at the time, and Richard Nagareda argued a century later, the Court could have dealt with the statute before it solely on Fifth Amendment grounds.[314]

The *Boyd* majority seemed eager to strike down the 1863 statute, which was no longer in force. The majority never really grappled with whether the disclose-or-admit procedure was in any pertinent way similar to the warrants in *Wilkes* and *Entick.* Eaton had swung for the fences, for all or nothing, and won his wager.

One wonders how the *Boyd* majority would have ruled if Congress had adopted the reforms proposed by Eaton's colleague Cephas Brainerd rather than the disclose-or-confess arrangement. Brainerd proposed a particularized warrant, and permitted only a judicially supervised seizure for inspection and copying, limited at most to twelve days, with a right to

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[311] 18 U.S.C. § 2518 (2006).

[312] Winston v. Lee, 470 U.S. 753, 765 (1995).

[313] Tennessee v. Garner, 471 U.S. 1 (1985).

[314] *See* Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575 (1999). Nagareda supposed that *Boyd* was wrong on Fourth Amendment grounds and private papers could be seized on a warrant. The evidence assembled here, and by Professor Schnapper earlier, indicates at the very least that *Boyd*'s private-papers holding was not implausible.

attend the inspection personally and through counsel, and to preserve exculpatory evidence for trial.[315] These reforms would have made warrant practice discriminate, minimally rivalrous, and closely regulated. Brainerd offered them as permissible under a "liberal construction" of the Fourth Amendment "in favor of the government."

Eaton would surely have maintained his Fourth Amendment objection to any warrant to seize papers for use as evidence. Today that argument is academic, in the pejorative sense. The contemporary Supreme Court, repelled by the practical consequences of making papers inviolate, has all but abandoned *Boyd*. As things stand, *some* protection for personal documents would move the law closer to the original understanding and strike a better normative balance between personal privacy and public security in a digital age.

There is, moreover, a powerful argument that the original understanding did permit narrow, brief, and regulated seizures of papers. Search upon arrest was a familiar feature of Founding-era practice, and was not challenged on Fourth Amendment grounds until after *Boyd*. I have no specific instance of Founding-era seizures of papers incident to arrest, but likewise there is no known instance of a court holding the seizure of papers from an arrested person to be unconstitutional.

Judge Hand's anti-rummaging principle offers a principled resolution for how to respect the special value of private documents without precluding their seizure altogether. In Hand's account, all of the arrested person's papers could be seized, and then inspected. The government then had the right to retain for trial any that qualified as fruits, contraband, or instrumentalities. Hand saw a world of difference between seizing papers from the immediate control of a person under arrest and searching a houseful of private papers.

That distinction has normative appeal. Even when the government has probable cause to believe a criminal document can be found in a pool of innocent documents, at some point the exposure of innocent information becomes a greater evil than the loss of evidence. A better-than-even chance that a drug transaction or a lewd image of a child can be found in a desk drawer is very different than a better-than-even chance that the same items can be found in one of a million desk drawers.

Hand limited the search for papers to the immediate area of the arrested person, thus placing a sharp practical limit on the scope of the seizure. Any seizure of papers was to be brief and regulated, because the officer was bound to bring the suspect promptly before a magistrate. And it

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[315] *See* BRAINERD, *supra* note 228, at 16–18.

was to be minimally intrusive; the suspect could make little use of papers while in handcuffs or in jail, and as soon as he was released from custody he could obtain the return of any innocent papers taken.

Prior to the advent of digital technology, Hand's anti-rummaging norm offered a characteristically principled adjudication of the tension between Founding-era respect for papers and Founding-era acceptance of search powers implied by lawful arrest. Today the arrested person is likely to carry a cell phone, tablet, or flash drive *on the person* that can store more pages of text than Jack Wilkes read in his lifetime, let alone the lot that was carried off in a sack. In today's technological environment, the anti-rummaging principle Hand logically derived from *Entick* would not countenance either the search of thousands of files incident to arrest, or even pursuant to a search warrant for criminal files that might—and might not—be among the thousands of files to be scanned. At least the principle would not countenance such searches without limiting procedures of the sort proposed by Chief Judge Kozinski.

The anti-rummaging principle, then, suggests curtailing the warrantless seizure and search of digital devices incident to arrest. And it suggests that Chief Judge Kozinski's opinion in *Comprehensive Drug Testing* is not, as Judge Callahan argued, without "legal authority." On the contrary, that basic approach is supported by our highest legal authority, the text of the Constitution in historical context.[316]

There are difficult questions about both the substance of structural safeguards on digital searches, and about the institutions best equipped to formulate those safeguards. All I have suggested here is that safeguards that greatly reduce the special evils that attended the seizures of papers in the 1760s might make digital-age Fourth Amendment law simultaneously more legitimate and more functional. If that turns out to be true, the time may come when structuring digital searches is not just best practice, but also the only practice that is not "unreasonable."

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[316] *Compare* United States v. Comprehensive Drug Testing, 621 F.3d 1162, 1179 (9th Cir. 2010) ("The warrant application should normally include, or the issuing judicial officer should insert, a protocol for preventing agents involved in the investigation from examining or retaining any data other than that for which probable cause is shown."), *with Entick*, 19 How. St. Tr. at 1072 ("If libels are to be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution."), *and* FATHER OF CANDOR, *supra* note 108, at 58 ("[I]f a positive oath be made, and such a particular warrant be issued, it can only be executed upon the paper or thing sworn to and specified, and in the presence of the owner, or somebody intrusted by him, with the custody of it.").