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THE BACKGROUND OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PART ONE†

*Joseph J. Stengel**

IT is generally agreed that the antecedent history of the Fourth Amendment to the Constitution of the United States is concerned primarily with those events that took place in England and the American Colonies in the thirty years immediately preceding the adoption of the Amendment.¹ However, it also seems clear that it was the executive abuse of search and seizure in England throughout the centuries that led to those events.² The search for the reason "why" of the Fourth Amendment should then logically begin with the earliest recorded events, statutes and cases involving search and seizure in English history and be brought forward through the days of the Colonies and the Confederation to the time of the adoption of the Bill of Rights.

I. SEARCH AND SEIZURE IN ENGLAND

An examination of the scanty material available on the legal institutions of Anglo-Saxon times (roughly 597 A.D. through 1066 A.D.) does not prove helpful in determining just what the law of search and seizure was in those days. The criminal procedure then in vogue, however, would seem to render unnecessary any law on search and seizure.

The old procedure was of two sorts: the first dealing with the criminal taken in the act of committing an offense; and the second, when the crime was not manifest.³ With respect to the former, the "hand-having" thief, or the "red-handed" slayer with the "gory" knife in his hand,

†The second part of Mr. Stengel's article will appear in the next volume.

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¹ See, e.g., LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13 (1937); DOUGLAS, *THE RIGHT OF THE PEOPLE* 149 (1958).

² COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 364 (6th ed. 1890).

³ PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 427 (5th ed. 1956).

taken in hot pursuit, by those following the "hue and cry," was summarily disposed of; or if brought before any court was summarily hanged or beheaded, on proof that he was taken under "hue and cry," without any formal "appeal" or charge against him.⁴

The general features of the second sort were as follows: (1) The summons of the accused by the accuser; (2) when both are present, the accuser makes a solemn oath in support of his charge, sometimes supported by "oath-helpers" (persons who swear to the truth of the principal's oath); (3) the accused solemnly denies the charge upon oath; and (4) the court proceeds to "medial" judgment which was generally to the effect that the accused should "clear" himself by one of the "ordeals."⁵

The efficiency of that system is doubtful. The respected English legal scholars, Pollock and Maitland, were of the opinion that great difficulty was experienced in compelling the accused and suspected persons to submit themselves to justice.⁶ But, they wrote, a man of evil repute was already half-condemned, and if he evaded justice it was all but conclusive proof of guilt.⁷ Also, a person who had been several times charged but failed to make an appearance for three court sessions, might be pursued, arrested and treated as an outlaw, if he failed to give security to answer his accusers.⁸ Probably, most malefactors were apprehended during the course of the "hue and cry."

The Anglo-Saxon dooms (documents containing laws and penalties for misdemeanors) constantly refer to the theme of cattle "lifting" or theft. A person whose cattle had been driven off was required to fol-

⁴ Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 545 (1924).

⁵ PLUCKNETT, *supra* note 3. The "ordeals" were of two sorts—fire and water. In the first, the accused was required to carry a heated iron over a distance of nine feet. His hand was then bandaged for three days. When the bandages were removed, if the hand did not contain "unhealthy" matter, he was declared innocent. If it did, he was guilty. The water "ordeal" was itself divided into two sorts—that of hot water and that of cold water. In the former, the accused plunged his arm into a bowl of boiling water and took out a stone; his guilt or innocence was ascertained by inspecting his hand after three days. In the latter, he was let down into water, and his guilt or innocence was determined by the depth to which he sank. *Id.* at 113-15.

⁶ 1 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 49 (2d ed. 1959).

⁷ *Id.* at 50.

⁸ *Id.* According to Plucknett, the consequence of having been declared an outlaw was very serious indeed. The outlaw is "attained," he forfeits his chattels, and his land escheats. If captured, he could be hanged merely upon proof of the outlawry having been made. Anyone could capture him and kill him if he resisted. PLUCKNETT, *supra* note 3, at 431.

low the trail, and it was the duty of his neighbors to assist him.⁹ If the trail led into another man's land, the occupier had to show that it led out again; otherwise, it was an accusing fact.¹⁰

Even so, it appears that the search party had to exercise caution before entering upon a man's curtilage, for there is some indication of a great regard for the privilege of a person not to be disturbed in the peaceful occupancy of his home.¹¹ This is evidenced by the crime of *hamsocn* (or *hamfare*), an offense involving violation of a man's dwelling.¹² The regard for the sanctity of the home in those days is further shown by the additional penalties awarded for crimes committed against the owner while in his house.¹³

The system of the administration of criminal justice, as we know it today, had its beginnings after the Norman Conquest (1066). The

⁹ There was no professional police force in those days. Sheriffs were, however, bound to make arrests. Constables appear in the literature at the end of this period, but they were then primarily military officers, although it was their duty to head the "hue and cry." 2 POLLOCK & MAITLAND, *supra* note 6, at 582. It was also the law, in King Cnut's time (1017-1035), that if a person found a thief but let him go without raising the hue and cry, or if he heard the hue and cry but disregarded it, he himself was subject to penalties. Wilgus, *supra* note 4, at 545, citing *Laws of King Cnut, secular*, c. 29.

¹⁰ 2 POLLOCK & MAITLAND, *supra* note 6, at 157.

¹¹ LASSON, *supra* note 1, at 18-19. Lasson writes that Alfred the Great (871-891) seemed to be most solicitous of "the rights of his subjects" and cites as authority a case related in the *Mirror of Justices* wherein Alfred "hanged Maclin, because he hanged Helgrave by warrant of indictment not special." *Id.* at 19. If Lasson concluded from that passage that a warrant of indictment served in those days as authority to make an arrest, it would seem that his conclusion has doubtful validity. His source has been discredited by no less authority than Pollock & Maitland. They say, "As for the deliberate fables of later apocryphal authorities, the 'Mirror of Justices' being the chief and flagrant example, they belong not to the Anglo-Saxon but to a much later period of English law. For the most part they are not even false history; they are speculation or satire." 1 POLLOCK & MAITLAND, *supra* note 6, at 28. Furthermore, it has generally been recognized that the indictment was introduced in England by William the Conqueror and was not made part of the "law of the land" until the year 1166 when Henry II issued his Assize of Clarendon. 2 *id.* at 642-50. See also, LANGER, AN ENCYCLOPEDIA OF WORLD HISTORY 195-96 (1940).

¹² The crime of *husbrice* seems to have been an aggravated form of *hamsocn*, the latter being the beginning of an attack on a house, e.g., if a stone were thrown at the door; while the former would be the act of breaking into the house. 2 POLLOCK & MAITLAND, *supra* note 6, at 453-54, 493.

¹³ To slay a man in his own house or court caused a forfeiture of life and property to the king, with a saving for the dower of the criminal's wife. *Id.* at 457, citing *Domesday Book* i. 154b. Every householder had his "peace" or "mund". Such peace could be broken by fighting in his house, and, besides all other payments that would have to be made to atone for the deed of violence, the culprit had to make a payment to the householder for breach of his "mund." *Id.* at 454.

Assize of Clarendon remodeled criminal procedure and firmly established in England the grand jury system.¹⁴ Thereafter, when there occurred an indictment of felony, it was the duty of the sheriff to arrest the indicted. Unless there was such an indictment, except when in hot pursuit after the "hand-having" thief, the arrest of a suspected felon was an act of peril because if the person arrested had committed no felony, the person making the arrest was open to an action or even an "appeal"¹⁵ of false imprisonment. A plea of "probable cause" was apparently no defense. This may explain why the *Eyre Rolls* (records of traveling justices) show few arrests other than those made in hot pursuit of a thief.¹⁶

In 1215, Magna Carta was accepted by King John at Runnymede. The famed passage in Chapter 39: "No free man shall be taken or imprisoned or disseized or outlawed or exiled or in any wise destroyed, save by the lawful judgment of his peers or the law of the land," has frequently been cited as one of the foundations of the principle against unreasonable search and seizure.¹⁷ Under this provision the power of justices of the peace to issue warrants was disputed for centuries. Coke, for example, argued that a man could not lawfully be arrested for a felony "unless he be indicted thereof."¹⁸

¹⁴ 12 Hen. 2, c. 2 (1166). The statute also ordered the arrest of accused robbers, murderers, thieves or a "receiver of such." Chapter 16 of the statute ordered the arrest of waifs or unknown men.

¹⁵ An "appeal" was an accusation of felony. 1 POLLOCK & MAITLAND, *supra* note 6, at 466.

¹⁶ A review of the *Eyre Rolls* shows that arrests were rarely made except where the thief was caught in the act with the stolen goods in his possession. *Id.* at 583. Before the end of Henry III's reign, there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause and, very probably, the sheriff could, thereunder, plead justification for the arrest of a suspect later proved innocent of felony. *Id.*

¹⁷ LASSON, *supra* note 1, at 20. Lasson cites Coke, James Otis, Chief Justice Pratt and Lord Mansfield. Chapter 39 is also said to be the forerunner of the "due process clause." See also, 1 KENT, COMMENTARIES ON AMERICAN LAW 621 (10th ed. 1860). Brant points out, however, that modern scholarship could tear the chapter into irrelevant shreds. Coke identified "liberties" with gifts of property rights by the king. Some scholars conclude that "free customs" meant principally the right to levy tolls. Brant says that the "law of the land" in King John's day commonly signified trial by battle or by ordeal. A man's peers (above the peasant level) were, according to Brant, "his social equals, whose function in law was to referee the battle or decide whether the defendant's reaction to a red hot iron denoted guilt or innocence." Whatever those terms meant to the barons at Runnymede, concludes Brant, "to generations of Englishmen and to Americans setting forth their inalienable rights, they included a fair trial by an impartial jury." BRANT, THE BILL OF RIGHTS 82 (1965).

¹⁸ 4 COKE, INSTITUTES OF THE LAWS OF ENGLAND 176 (1797). Hale disagrees, holding

The Ordinance of 1233 instituted night watchmen, directing them to arrest a man who enters a "vill" at night and the man who goes armed.¹⁹ Another ordinance, issued about twenty years later, mentions the arrest of "disturbers of our peace."²⁰ These enactments obviously contemplated arrests without warrant.

In addition to the requirement that all able-bodied males take up the hue and cry, there was also an early attempt to assign mass responsibility for crime prevention and detection. Edward I decreed in the Statute of Manchester that the whole of the "hundred" where a robbery was committed was to answer for it unless they produced the offender within forty days.²¹ The statute might be termed an attempt at a mass "arrest," in that the "hundred" were being held to answer for a crime without even a showing of "reasonable grounds" for the belief that the persons had committed a crime.

It was during the middle part of the fourteenth century that the first "due process of law" clause was enacted. It provided that: "No man of what estate or condition that he be, shall be put out of land or tene-ment, nor taken, nor imprisoned, nor disinherited nor put to death without being brought in to answer by due process of law."²²

Earlier in that same century, justices of the peace were instituted and "assigned to keep the peace."²³ They were later authorized "to take and arrest all those they may find by indictment or suspicion and put them in prison."²⁴ About this time, there was in existence the practice of issuing general commissions of inquiry, such as for the arrest of all suspected of having committed a certain type of criminal offense. The last mentioned statute prohibited such general inquisitorial methods and their attendant abuses.

Up to this time, there was no provision in any of the statutes enabling

that since a private person might, and a constable ought to, arrest supposed felons without a warrant, the justices of the peace, by the statute "assigned to keep the peace," *a fortiori*, had the power to issue a warrant on "probabilities." 2 HALE, PLEAS OF THE CROWN 149 (1st Amer. ed. 1847).

¹⁹ 17 Hen. 3 (1233). A "vill" was roughly a township. What the "vill" actually was is a matter of some controversy. Generally, it was a cluster of houses on an ancient road, with the parish church and manor house nearby. PLUCKNETT, *supra* note 3, at 83.

²⁰ 36 Hen. 3 (1252). The statute also ordered the appointment of constables.

²¹ 13 Edw. 1, c. 2 (1285). For the purpose of temporal justice, England was divided into counties; the counties were divided into "hundreds;" and the "hundred" was divided into "vills" or townships. 1 POLLOCK & MAITLAND, *supra* note 6, at 529.

²² 18 Edw. 3 (1344).

²³ 1 Edw. 3, c. 16 (1326).

²⁴ 34 Edw. 3, c. 1 (1360).

justices of the peace to take information as to the commission of a crime and to issue thereupon a warrant of arrest.²⁵ Yet during this period, justices of the peace assumed and practiced the power to issue warrants based only on information, and these warrants superseded or were considered the equivalent to the old hue and cry.²⁶ The right of summary arrest continued, however, in cases involving felonies.²⁷

Professor Lasson traces the beginning of the legislative history of search and seizure in England to this same period.

Beginning with the early statutes and running down to those enacted in the latter part of the seventeenth century, legislation of this character seems to have been uniformly characterized by the granting of general and unrestricted powers.²⁸

In 1336, an act was passed granting to innkeepers in passage ports the authority to search guests for false money.²⁹ The innkeepers were to receive one-fourth of any resulting forfeiture. Official "searchers" were appointed to keep the innkeepers honest.

The efforts of the Crown to protect the guilds were reflected in the statutes granting the privilege to officials and guild officers to search for and to seize items used or manufactured in violation of the regulations. An act in the last years of the fifteenth century authorized the Mayor of London and the wardens of shearsmen to enter and search the workmanship of all manners of persons occupying the "broad shear."³⁰ In the second decade of the sixteenth century, another act gave local governing authorities and the masters and wardens of tallow-chandlers the "full power and authority to search for all manner of oils brought in to be sold, in whose hands they may be, and as often as the case shall require."³¹

The political and religious unrest arising during the Elizabethan and Stuart periods caused the enactment of oppressive laws concerning printing, religion, seditious libel and treason. With the enforcement of these laws, the history of search and seizure began to run into broader

²⁵ 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 190 (1883).

²⁶ Wilgus, *supra* note 4, at 548. Lord Camden said they "crept into the law by imperceptible practice." *Entick v. Carrington*, 95 Eng. Rep. 807 (K. B. 1765).

²⁷ Wilgus, *supra* note 4, at 548.

²⁸ LASSON, *supra* note 1, at 23.

²⁹ 9 Edw. 3, c. 9, 10, 11 (1336).

³⁰ 39 Eliz. 1, c. 13 (1595).

³¹ 3 Hen. 8, c. 14 (1511). The act also granted the right to condemn and destroy all altered oils and to commit and punish the persons violating the act.

channels.³² To assist the wardens of the Stationers' Company in the enforcement of the licensing provisions and regulations issued thereunder, the Court of the Star Chamber, seven years later, enacted the first of its ordinances decreeing that the wardens, or their deputies, should have authority to search import packages and warehouses, where they suspected a violation of the printing laws to be taking place, to seize the books printed contrary to law, and to bring the offenders before the Court of High Commission.³³

As the sixteenth century came to a close, the Star Chamber issued a decree confining the printing trade to London, except for one press in Oxford and one in Cambridge. No book or shorter work could be printed unless it first passed the censorship of the Archbishop of Canterbury or the Bishop of London. Officers were authorized to search wherever "they shall have reasonable cause of suspicion," and "to seize all books and other printed material published contrary to the ordinances."³⁴

The first record of the issuance of search warrants for anything but stolen goods is to be found in the proceedings of the Star Chamber in the time of Elizabeth.³⁵ By the time of Charles II, search warrants were issued routinely in Star Chamber proceedings to find evidence among the papers of political suspects.³⁶ In the meantime, the Court of High Commission began the practice of issuing general warrants.³⁷

On April 1, 1634, for example, the Commissioners addressed a circular, "to all justices of the peace, mayors, and all other officers of the peace," which read as follows:

There remain in divers part of the kingdom sundry sorts of separatists, novelists, and sectaries as follows: Brownists, Anabaptists, Arians, Traskites, Familists, and some other sorts, who on Sunday and other festival days, under pretence of repetition of sermons, ordinarily are to meet together in such great numbers, in private houses and

³² LASSON, *supra* note 1, at 24. Consider, for example, the Queen's Injunctions of 1559 licensed books. 1 Eliz. 1, c. 6 (1559).

³³ PROTHERO, *SELECT STATUTES AND CONSTITUTIONAL DOCUMENTS* 168 (1913).

³⁴ BRANDT, *supra* note 17, at 99-100.

³⁵ EATON, *MEMORANDA OF LAW AND AUTHORITIES CITED BEFORE THE COMMITTEE OF WAYS AND MEANS, MARCH 6, 1874, IN THE MATTER OF SEIZING BOOKS AND PAPERS FOR ALLEGED FRAUDS UPON THE REVENUE* 5 (1874). The Court of Star Chamber had considerable jurisdiction over varied crimes, generally misdemeanors. PLUCKNETT, *supra* note 3, at 459.

³⁶ Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 362-63 (1921). See instances cited in *Trial of Algarnon Sidney*, 9 How. St. Tr. 818, 853, 868, 901, 985 (1683).

³⁷ Fraenkel, *supra* note 36.

other obscure places, and there keep private conventicles and exercise of religion by law prohibited.³⁸

The circular then directs the persons addressed "to enter any house where they shall have intelligence that such conventicles are held, and every room thereof search for persons assembled and all unlicensed books," and to bring the persons before the Ecclesiastical Commissioner.³⁹

Stephen tells of a general warrant issued to John Wragg, the messenger of the chamber. The warrant stated that the Commissioners had "credible information" that the conventicles were held in London and "elsewhere" of "Brownists, Antinomians, and others." It directed Wragg, with a constable and such other assistance as he felt necessary, to enter all houses and search for such sectaries and for unlicensed books, and to bring them before the Commission, or to commit them to the nearest prison and acquaint the commissioners therewith, unless they (the sectaries) give bonds for their appearance before the Commission.⁴⁰

The general warrants soon became common in proceedings for seditious libel against authors and printers.⁴¹ They were grounded on some clauses in the acts for regulating the press, and when the acts expired in 1694, the same practice was continued in almost every reign, down to the year 1763.⁴² Opposition by the courts to general warrants apparently began when an unspecified court discharged the person, upon application for a writ of *habeas corpus*, who had been arrested on such a warrant, in which the charge was not specified.⁴³ And, after *Semayne's Case*,⁴⁴ at common law no officer executing a search warrant, or arresting without a warrant, could force his way into a private dwelling without first knocking and giving notice of his authority. The reason given was the

³⁸ 2 STEPHEN, *supra* note 25, at 420 n. 2 quoting *Calendar of State Papers, Domestic Series* (1633-34) 538.

³⁹ 2 STEPHEN, *supra* note 25, at 426-27.

⁴⁰ *Id.* Sir James Stephen felt that such warrants were "wholly illegal."

⁴¹ Fraenkel, *supra* note 36, at 362-63.

⁴² 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 649 (Bigelow ed. 1891).

⁴³ 2 HALE, *supra* note 18, at 111, citing *Brown's Case*, decided in 1647. There was also parliamentary opposition to arrests without probable cause. In 1629, Sir Edward Coke led a committee of Parliament in presenting to Charles I the "Petition of Right" wherein one of the bitterest complaints was that "divers of your subjects have of late been imprisoned without any cause shewed." Parliament made Charles promise that "no freeman, in any such manner as is before-mentioned, be imprisoned or detained." BARTH, THE PRICE OF LIBERTY 10-11 (1961).

⁴⁴ 77 Eng. Rep. 194, 196 (K.B. 1604).

fear of unnecessary damage to private property caused by officers breaking into houses when they might, had they asked, been admitted freely. However, cases reported during this era of English history are replete with incidents of executive abuse in the area of search and seizure.⁴⁵

The general warrant received its death blow from the boldness of John Wilkes and the wisdom of Lord Camden.⁴⁶ On April 23, 1763, Number 45 of the *North Briton* was published, containing "insulting remarks about the king."⁴⁷ Lord Halifax, one of the secretaries of state, issued a general warrant directing four messengers, taking with them a constable, to conduct a "strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper;" to apprehend and seize them, together with their papers; and to bring them in safe custody before him.⁴⁸

The messengers, armed with their roving commissions, in three days arrested no less than 49 persons on suspicion. Among those arrested was Dryden Leach who had printed one number of the *North Briton*, but not Number 45. Leach was released. The messengers finally succeeded, however, in arresting the publisher and printer of the offending document and from them learned that Wilkes was the author. Oral orders were given to apprehend Wilkes under the general warrant. Wilkes, examining the warrant, did not see his name thereon, and declared the warrant to be "a ridiculous warrant against the whole English nation." He refused to obey it. He was brought before Halifax but refused to answer questions. He was committed to the Tower of London, and expelled from the Commons.

The journeyman printers brought an action for damages against the messengers. Lord Chief Justice Pratt (Lord Camden) hearing the case, held that the general warrant was illegal; that it had been illegally exe-

⁴⁵ The cases, collected in Howell's State Trials, are filled with incidents of arrests without warrants, searches without warrants, searches under roving commissions and searches under general warrants.

⁴⁶ 2 MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 124-30 (Holland ed. 1912). Wilkes was a member of Pitt's opposition party in the House of Commons and was "no shining light of personal or political morality, but a notorious reveler in Rabelaisian orgies who had bought a parliamentary seat at Aylsbury with his wife's money." BRANT, *supra* note 17, at 189.

⁴⁷ BRANT, *supra* note 17 at 189. Wilkes discussed the treaty that transferred Silesia to Prussia at the end of the Seven Years War. He called King George's speech from the throne on the subject "the most abandoned instance of ministerial effrontery ever attempted to be imposed on mankind," and came close to saying that the King knew he was being induced to countenance a lie.

⁴⁸ *Id.* The *North Briton* bore no names as to printer, publisher or author.

cuted; that the messengers were not protected under the law in carrying out their duties with respect to the general warrant; and awarded damages to the printers.⁴⁹

Wilkes himself brought an action against Wood, Under Secretary of State, who had supervised the execution of the warrant. Halifax was examined during the course of the trial, and Lord Chief Justice Pratt roundly denounced the general warrant. The jury awarded the plaintiff one thousand pounds damages.⁵⁰ Four days after Wilkes obtained his verdict against Wood, Leach won a verdict against the messengers. At the trial, the longstanding practice of the issuance of general warrants by the Secretary of State's office was aired before the court. Lord Mansfield proclaimed the warrant illegal, holding that the judging of information should not be left to the discretion of the officer, but that such is the function of the magistrate.⁵¹

In a somewhat related case, Halifax issued a warrant directing messengers to search for John Entick, a clerk, the author or one concerned in the writing of several numbers of the "Monitor, or British Freeholder." The messengers were to seize Entick, together with his books and papers, and bring him before Halifax. The messengers apprehended Entick in his home, and seized papers and books from his bureau and desk.⁵²

Entick brought an action against the messengers for the seizure of his papers and recovered three hundred pounds damages. Lord Camden pronounced an elaborate judgment, holding that general warrants were void for uncertainty. Lord Camden stated that at common law, the search warrant was unknown and that any nonconsensual entry onto the land of another was a trespass. He also said the first use of the search warrant was confined to cases where the owner of chattels was willing to swear—with a suit for trespass certain to follow were he mistaken—that property stolen from him was lodged on the land of another. Then followed the dictum with respect to the search for evidence that formed the basis of the Supreme Court's opinion in *Boyd v. United States*⁵³ linking the fourth amendment with the self-incrimination clause of the fifth amendment:

⁴⁹ *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

⁵⁰ *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

⁵¹ *Money v. Leach*, 97 Eng. Rep. 1075 (1765).

⁵² This case differed from that of *Wilkes* in that the warrant named the person against whom it was directed. However, it was a general warrant with respect to the papers.

⁵³ 116 U.S. 616 (1886).

But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law toward criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.⁵⁴

At this time, Lord Chatham delivered his speech against general warrants which contained the eloquent passage:

The poorest man may, in his cottage, bid defiance to all forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.⁵⁵

The general warrant was finally declared illegal by the House of Commons in 1766.⁵⁶

The issuance of warrants by magistrates was, in the meantime, recognized by various statutes,⁵⁷ and was finally set upon an indisputable statutory foundation in 1848.⁵⁸ Where a complaint was made to a justice that any person had committed an indictable offense, the justice could issue a summons for such person, or, if he thought it necessary, and if the charge was made on oath, and in writing, he could issue a warrant for such person's apprehension.⁵⁹

The threat of invasion of privacy of the ordinary law abiding citizen by excisemen was also a matter of concern in the England of the middle eighteenth century.

⁵⁴ *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765). Wigmore says that this language "does not state that the rule against unreasonable searches is a function of the privilege against self-incrimination; rather it states merely that both rules, whatever they may proscribe, do so to protect the innocent from cruelty and injustice." 8 WIGMORE, EVIDENCE 381 (3d ed. 1940).

⁵⁵ COOLEY, *supra* note 2, at 364 n. 2 quoting Chatham's *Speech On General Warrants*.

⁵⁶ Fraenkel, *supra* note 36, at 362.

⁵⁷ *E.g.*, 9 Geo. 1, c. 7 (1722); 13 Geo. 2, c. 13 (1740); 44 Geo. 2, c. 92 (1804).

⁵⁸ 11 & 12 Vict. c. 42 (1848).

⁵⁹ 1 STEPHEN, *supra* note 25, at 191.

Mr. Pitt spoke against this measure [the cider tax], particularly against the dangerous precedent of admitting the officers in excise into private houses. Every man's house was his castle, he said. If this tax is endured, it will necessarily lead into introducing the laws of excise into the domestic concerns of every private family, and to every species of the produce of the land. The laws of excise are odious and grievous to the dealer, but intolerable to the private person. The precedent, he contended, was particularly dangerous, when men by their birth, education, profession, very distinct from the trader, became subjected to those laws.⁶⁰

While some relief from unrestricted search and seizure was being given to religious and political nonconformists, the ordinary, run-of-the-mill criminal suspect fared badly in this respect. The Vagrant Act of 1744 provided that justices of the peace of the governmental subdivisions were to meet at least four times during the year "and by their warrants, command the Constables or other Peace-officers . . . who shall be assisted with sufficient men of the same Places, to make a general Privy Search in one Night, throughout the several and respective Limits, for the finding and apprehending of Rogues and Vagabonds."⁶¹

Eight years later, there was enacted "An Act for the better preventing Thefts and Robberies, and for regulating Places of Publick Entertainment, and punishing Persons keeping disorderly Houses." The Act directed that should any person be apprehended on the charge of being a rogue and vagabond, the justices who examined him were empowered to order the overseers of the poor of the parish in which that person happened to be apprehended, "to insert an Advertisement in some published Paper, describing such suspicious Person and any Thing or Things which shall have been found upon him, or in his custody, and which he shall be suspected not to have come honestly by." The place and time where such person was to be brought before the justices for re-examination were included in the advertisement.⁶²

The justices were thus empowered to examine on oath any person who had been taken into custody in a general privy search or under a special warrant and charged with being a rogue and vagabond, an idle or disorderly person, or suspected of felony "although no direct proof be then made thereof." The substance of the examination was to be put in writing, signed both by the person examined and by the justices, and

⁶⁰ 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 1307 (1763).

⁶¹ 17 Geo. 2, c. 5, § 6 (1744).

⁶² 25 Geo. 2, c. 36, § 12 (1752).

transmitted to the next General or Quarter Sessions of the County. There it was to be filed and kept on record.⁶³

If the suspected vagabond failed to convince the justices that he had a "lawful way of getting his livelihood" or be unable to procure a responsible householder "to appear to his character" and, if necessary, give security for his appearance in court on some other date, the justices were empowered to commit him to a prison or house of correction for not more than six days. This "preventive police law" or control over the "wandering poor" was made permanent in 1755.⁶⁴

By the Middlesex Justices Act, constables were authorized to take into custody and carry before a justice such "suspected persons and reputed thieves" as might be found in avenues or public streets. If it appeared on the oath of one or more witnesses that the person so apprehended was "of evil fame and a reputed thief," not being able to give a satisfactory account of himself, and should the justices be satisfied that there had been "an intent to commit felony," the suspect was deemed a rogue and a vagabond within the meaning of the Vagrant Act and could be sentenced to six months' imprisonment at hard labor. The Act thus empowered a constable to take into custody, and a justice to sentence to imprisonment, a person suspected of an evil intent but not found guilty of a crime.⁶⁵ In 1783, it was held that a police officer could arrest without a warrant upon such information as amounts to a "reasonable and probable ground of suspicion," and be protected from liability for damages in the event it later developed that the arrestee was innocent of the charge.⁶⁶

Watchmen and beadles had authority at common law to arrest and detain in prison for examination, persons found walking in the streets at night, whom there was "reasonable ground" to suspect of a felony, although there was no proof of a felony having been committed. The statement of Heath, J., is particularly enlightening as to the standard of "probable cause" or "reasonable ground" for arrest then in effect in England. He said: "At every Old Bailey sessions numbers of persons

⁶³ 3 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 44-45 (1956).

⁶⁴ 28 Geo. 2, c. 19 (1755).

⁶⁵ 32 Geo. 3, c. 53 (1792).

⁶⁶ *Ledwith v. Catchpole*, Cald. Mag. Cas. 291 (1783). The old rule had been that the officer arrested without a warrant at his peril, because if a felony had, in fact, not been committed, he would be liable in fact to the arrested person. *Samuel v. Payne*, 99 Eng. Rep. 280 (K.B. 1780).

are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way.”⁶⁷

II. IN THE AMERICAN COLONIES AND CONFEDERATION

Prior to the Revolution, most of the colonies relied upon the common law of England to supplement charter provisions and statutes in the administration of justice.⁶⁸ Thus, the charter of the first permanent settlement, Virginia, provided that the ordinances were, in substance, to conform to the laws of England; and, in 1621, an ordinance was accordingly issued which required the General Assembly of the Virginia Colony “to imitate and follow the policy of the form of government, laws, customs, and manner of trial and other administration of justice used in the realm of England, as near as may be.”⁶⁹

Eighteen years later, a House of Representatives was established in the Colony of New Plymouth, which body “adopted the common law of England as the general basis of their jurisprudence.”⁷⁰ Earlier, James I granted the Duke of Lenox a charter for a territory he named “New England,” which afterwards became Massachusetts. All ordinances and proceedings were to be, as near as “conveniently” may be, agreeable to the laws, statutes, government, and policy of England.⁷¹

The Colony of Connecticut likewise was authorized to establish “laws and ordinances not contrary to the laws of this realm of England,”⁷² and the charter incorporating the English Colony of Rhode Island and Providence Plantations authorized the making of laws and ordinances “not contrary and repugnant unto, but as near as may be agreeable to, the Laws of or realm of England, considering the nature and constitution of the place and people.”⁷³

The charter of the Province of Maryland provided for authority to make all laws for the province, “so that such laws be consonant to reason, and not repugnant or contrary, but as far as conveniently may be, agreeable to the laws, statutes, customs, and rights of this our realm of England.”⁷⁴ Similarly, the laws of the territory that subsequently

⁶⁷ *Lawrence v. Hedger*, 128 Eng. Rep. 6 (C.P. 1810).

⁶⁸ RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 42 (1955).

⁶⁹ 1 STORY, *supra* note 42, at 21, 23.

⁷⁰ *Id.* at 31.

⁷¹ *Id.* at 36-37.

⁷² *Id.* at 59.

⁷³ *Id.* at 65.

⁷⁴ *Id.* at 72-73.

became New York, East and West New Jersey, Pennsylvania, Delaware, North and South Carolina, and Georgia were to conform to the law and customs of England.⁷⁵ Thus, as put by Story,

And so has been the uniform doctrine in America, ever since the settlement of the colonies. The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them, upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law.⁷⁶

Chief Justice Holt, in 1694, declared that in the settlement overseas "all the laws in force in England are in force there," and Attorney General West expressed his opinion, twenty-six years later, that the common law of England was carried to the colonies, unless there was "some private Act to the contrary." Thus, when a colonist cited such authorities prior to 1775, they were thinking of those English laws which protected personal rights.⁷⁷

During the period involved in the settlement of the colonies, "due process of law" meant, in England, "by indictment or presentment of good and lawful men."⁷⁸ The same meaning was carried over into the colonies.⁷⁹ The legislatures in the colonies enacted "due process of law" clauses in their laws. The Maryland General Assembly, in 1639, enacted an "Act for the liberties of the people," declaring that all Christian inhabitants of the colony, slaves excepted, "Shall have and enjoy all such rights liberties immunities privileges and free customs . . . as any natural born subject of England hath or ought to have or enjoy." The common law and due process was specifically mentioned as part of this heritage.⁸⁰

The Massachusetts' Body of Liberties, promulgated twelve years later, had a due process clause.⁸¹ Similarly, the set of fundamental laws of New Jersey had a due process clause, as did the Pennsylvania "Frame of Government of 1683," and the New York "Charter of Libertyes and Privileges." In fact, in each of the American Colonies settled during

⁷⁵ *Id.* at 77-103.

⁷⁶ *Id.* at 109-10.

⁷⁷ RUTLAND, *supra* note 69, at 4.

⁷⁸ 2 COKE, *supra* note 18, at 50.

⁷⁹ KENT, *supra* note 17, at 623.

⁸⁰ RUTLAND, *supra* note 69, at 14.

⁸¹ STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS 78 (1908).

the seventeenth century, guarantees protecting the colonists' rights and their property from arbitrary infringement were part of the written law by 1701.⁸²

However, except for such general guarantees, there was no specific prohibition against unreasonable search and seizure until just before the Revolution. And it is likely that the colonial courts paid as little attention to the citizens' right to privacy as did the Star Chamber. The New York Mayor's Court, for example, in a case involving one Tuder who had fleeced a yokel, handed down an order providing that any constable, sheriff or marshal might search Tuder's house at any time without warrant while Tuder stood bound to good behaviour.⁸³ Searches without warrant may well have been the rule because, although the New York City court calendars in those days were filled with a great number of larcenies, robberies and burglaries, there were found to be only three recorded instances of search warrants having been issued or involved therein.⁸⁴

The colonial legislatures could also be guilty of arbitrary enactments. For example, in 1771, the North Carolina "Act for Preventing Tumults" provided that, upon indictment found, or presentment made, against any person for any of the crimes described in the Act, the judge or justices of the court were to issue a proclamation to be affixed or put at the court house and each church and chapel, commanding the offender to surrender within 60 days, and stand trial. On failure to do so, he would be deemed guilty of the offense charged, and it was lawful for anyone to kill or destroy him, and his lands and chattels were to be confiscated to the King for the use of the government.⁸⁵

Despite such oppressive measures, the sentiment in the colonies was crystallizing against arbitrariness. As an example, the General Court of Massachusetts enacted a statute forbidding the issuance of general warrants for the arrest of deserters in the French and Indian War.⁸⁶

The principal agitation in the colonies in regard to search and seizure, however, did not focus on the use of the general warrant in proceedings involving political and religious offenses, as it did in England, but instead was brought to a head in the proceedings concerning commercial of-

⁸² RUTLAND, *supra* note 69, at 23.

⁸³ Sheriff v. Tuder & Mann (Ms. Mins. Mayor's Ct. N.Y.C. 1677-82, fol. 173b), cited in GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 428 (1944).

⁸⁴ *Id.*

⁸⁵ 1 LABAREE, ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, 291-92 (1935).

⁸⁶ Prov. St. 31 & 32 Geo. 2, c. 1 (1758).

fenses in *Paxton's Case*.⁸⁷ In 1662, Parliament enacted a statute authorizing the examination of ships and vessels, and persons found therein, for the purpose of finding goods to be imported or exported, or on which the duties were not paid. Officers were authorized to enter into and search any suspected vaults, cellars, or warehouses for such goods.⁸⁸ The "writ of assistance" (an ancient writ issuing from the Court of Exchequer to the sheriff commanding him to be in aid of the king's collectors) could be used in enforcing the statute.

By 1761, the British government, thoroughly incensed by the evasion of the Molasses Act of 1733 through colonial smuggling and by the illicit trade carried on by colonists with the French enemy, resorted to the writs of assistance, which made possible the search of all premises where smuggled goods might be found.⁸⁹ In Boston, an officer of the Crown, Paxton, had applied for the writ, the old writs being about to expire after the death of George II. James Otis, then Attorney General in the Colony of Massachusetts, resigned his office to attack the writs and attacked the Act of Parliament cited by the Crown in support of the writ. Otis cited Coke's famous dictum in the *Dr. Bonham's Case*, in which Coke sought to establish the superiority of the common law over acts of Parliament, and enunciated the view that acts of Parliament which conflicted with "natural equity" were of no effect.⁹⁰ The court sent to England for advice, and the ministers ordered the court to issue the writs, which it subsequently did.⁹¹

Paxton's writ, when finally issued, read, in part, as follows:

AND WHEREAS our Commissioners for managing and our causing to be levied and collected customs subsidies and other duties have [by Commission or Deputation under their hands & seal dated at London the 22d day of May in the first year of our Reign] deputed and em-

⁸⁷ Quincy (Mass.) 51 (1761).

⁸⁸ 13 & 14 Car. 2, c. 11, § 5 (1662).

⁸⁹ LANGER, *supra* note 11, at 517.

⁹⁰ Jeremiah Gridley argued the case for the Crown. He contended that the writ should issue because of the situation at hand and the need for revenue. Otis, on the other hand, attacked the issuance of the writ as contrary to the fundamental principles of law. He contended that if general warrants were approved by the court, every petty customs official might invade the home of any Bostonian he had the slightest reason to suspect. BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 212-19 (1950).

⁹¹ HUITT, *Constitutional Ideas of James Otis*, 2 KAN. L. REV. 160 (1953). John Adams, a spectator, noted later in his diary the feelings of the listeners and that ". . . every man . . . appeared to me to go away, as I did, ready to take arms against writs of assistance." 1 SMITH, JOHN ADAMS 56 (1962). Still later he wrote, "then and there the Child Independence was born." BOWEN, *supra* note 90 at 217.

powered Charles Paxton Esqr. to be Surveyor & Searcher of all the rates and duties arising and growing due to us at Boston in our Province aforesaid and [in & by said Commission or Deputation] have given him power to enter into [any Ship Bottom Boat or other Vessel & also into] any Shop House Warehouse Hostelry or other place whatsoever to make diligent search into any trunk chest pack case truss or any other parcell or package whatsoever for any goods wares or merchandize prohibited to be imported or exported or whereof the Customs or other Duties have not been duly paid and the same to seize to our use in all things proceeding as the Law directs.⁹²

The issuance of the writ aroused the citizens of Boston. The *Boston Gazette* said:

To the everlasting Honor of the great and worthy Squire Graspoll, that Man of Truth and Justice, we are well informed that every Province in America, except Massachusetts-Bay and Halifax, have refused to grant General Warrants or Writs of Assistants [*sic*] to the order of the Commissioners; even the little Colonies of Georgia and the Floridas' have absolutely refused it.⁹³

The unpopular action by the court resulted in the drawing up by the Boston town meeting of "A List of Infringements and Violations of Rights." Included on the list were complaints against the writs of assistance.⁹⁴

Subsequent to the decisions in the cases outlawing the use of the general warrant in England, the American Colonies began incorporating provisions against unreasonable search and seizure in bills or declarations of rights. In June 1776, Virginia enacted its "Declaration of Rights," the first bill of rights in America setting forth specifics. Article 10 of the Declaration provided:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described, and supported by evidence, are grievous and oppressive, and ought not to be granted.⁹⁵

⁹² Quincy (Mass.) app., at 420. Writs of assistance were not discontinued in England until 1817. *Id.* at 535.

⁹³ Boston Gazette, Sept. 11, 1769.

⁹⁴ RUTLAND, *supra* note 69, at 25.

Two months later, Pennsylvania followed with "A Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania," containing a similar stipulation with the additional *proviso* that a search warrant must be supported by oath or affirmation. It declared:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and 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.⁹⁶

A total of eight states had formulated a bill of rights during a revolutionary period, the last being New Hampshire.⁹⁷

The law of arrest in effect in the last days of the colonies is expressed in a decision rendered in 1774 by the Superior Court of Hartford County in Connecticut. According to the opinion, "An arrest is justified by any person, with or without a warrant, to prevent a breach of the peace, which was about to take place; also where a high-handed offense has been committed, and an immediate arrest becomes necessary, to prevent an escape."⁹⁸

The days of the Confederation saw effect being given by the courts to the expressed political sentiments against warrants. The Superior Court of Litchfield, in Connecticut, held a general warrant to be unlawful, stating, "And the warrant in the present case, being general, to search all places, arrest all persons, the complainant should suspect, is clearly illegal." The court, however, would not rule on whether the illegality of the warrant vitiated the proceedings upon the arraignment of the accused arrested thereunder.⁹⁹

Under the common law, the issuance of search warrants for stolen goods was based on a showing of "reasonable cause to suspect."¹⁰⁰ The

⁹⁵ George Mason, a delegate to the Constitutional Convention, was, in the main the author of the Declaration of Rights. Article 10 was not authored by Mason, however, but was added to his list at the Virginia Convention. Moore, *George Mason, The Statesman*, 14 WM. & MARY COL. Q. (N.S.) 13 (1933).

⁹⁶ Quoted in BARTH, *supra* note 43, at 73-74.

⁹⁷ RUTLAND, *supra* note 69, at 46-47, 74.

⁹⁸ *Knot v. Fisher Gay*, 1 Root (Conn.) 66-67 (1774). The generally accepted definition of arrest at common law is the "apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime." 4 BLACKSTONE, COMMENTARIES * 289.

⁹⁹ *Frisbie v. Butler, Kirby* (Conn.) 213-15 (1787).

standard was no greater in the requirements for the issuance of statutory warrants in the several States immediately after the Declaration of Independence and during the period of the Confederation.¹⁰¹ Such was also the standard under the tariff laws enacted in the colonies and in the States during the Confederation.

In the Virginia Colony, the tariff law merely required that the complaint be under oath.¹⁰² The same simple requirement is to be found in the statutes of the newly-formed States of Massachusetts,¹⁰³ Pennsylvania¹⁰⁴ and South Carolina.¹⁰⁵ A tariff law in the Pennsylvania Colony provided for a showing of "reasonable suspicion" before a search warrant would be issued.¹⁰⁶ So, also, in 1783, did a law enacted in the State of Massachusetts.¹⁰⁷ And, during the same period, a State of Pennsylvania tariff act provided, ". . . no search of any dwelling shall be made in manner aforesaid until due cause of suspicion hath been shown to the satisfaction of a justice . . . as in the case of stolen goods."¹⁰⁸

Before Congress acted on the proposed Bill of Rights, it passed the Act of July 31, 1789, which permitted a search to be made, by day, of a dwelling house, store, building, or other place for goods subject to duty, upon a warrant issued by a justice of the peace, based on oath or affirmation.¹⁰⁹ The Act authorized certain officers "to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods . . .; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they . . . shall . . . be entitled to a warrant . . . to search for such goods . . ."¹¹⁰

On September 25, 1789, the Bill of Rights was submitted to the several states. The following August, after nine states had already ratified the proposed amendment, a new Collection Act was passed with

¹⁰⁰ 2 HALE, *supra* note 43, at 113.

¹⁰¹ See, e.g., 19 Mass. Bay Acts and Resolves, c. 1176, at 926 (1777); 11 Pa. Stat. c. 1157, § 3 (1782).

¹⁰² Hening Va. Stat. c. 1, §§ 9, 10 (1738).

¹⁰³ Mass. Laws and Resolves, c. 18, at 542 (1783).

¹⁰⁴ 12 Pa. Stat., c. 1226, § 2 (1786).

¹⁰⁵ 4 S.C. Stat. No. 1207, § 1 (1784).

¹⁰⁶ 8 Pa. Stat., c. 656, § 11 (1772).

¹⁰⁷ Mass. Laws and Resolves, c. 12, at 527 (1783).

¹⁰⁸ 10 Pa. Stat., c. 925, § 5 (1780).

¹⁰⁹ Act of July 31, 1789, 1 Stat. 29, 43.

¹¹⁰ *Id.*

provisions as to search warrants identical with those of the original act mentioned above.¹¹¹

CONCLUSION

The long history of executive abuse in England and the Colonies in the area of search and seizure indicates the reason "why" the provisions of the Fourth Amendment were urged upon Congress and the states by various persons fearful of a strong central government. The *Wilkes* and *Entick* affairs throw light on the reason for the requirement in the second clause of the Amendment for particularity, while the contemporaneous statutes and court cases stating the basis required for making arrests and searches are helpful in determining what the framers meant by "probable cause" in the first clause. Also relevant as aids in the construction of the Amendment are, of course, the debates in Congress and in the state legislatures relating to the adoption of the Bill of Rights, newspaper articles of that period, and Congressional enactments contemporaneous with the adoption of the Bill of Rights. Such are, however, beyond the scope of the instant article.

¹¹¹ Act of August 4, 1790, 1 Stat. 145.