

## Indianapolis v. Edmond and the Original Understanding of the Fourth Amendment

By Bruce Newman, Ph.D.

In a recent case, *City of Indianapolis v. Edmond* (99-1030), the United States Supreme Court held that Indianapolis's vehicle check point program violated the Fourth Amendment by allowing suspicionless searches of vehicles for criminal evidence. While acknowledging that suspicionless searches have been held constitutional in certain situations, i.e., for the purpose of intercept illegal aliens (*United States v. Martinez-Fuerte*<sup>1</sup>), for the purpose of operating sobriety checkpoints (*Michigan Dept. of State Police v. Sitz*<sup>2</sup>), and for the purpose of conducting driver license and vehicle registration checks (*Delaware v. Prouse*<sup>3</sup>), the Court held that suspicionless searches would not be considered constitutional if the primary purpose of the search was to detect evidence of criminal wrongdoing.

Chief Justice Rehnquist, joined by Justices Scalia and Thomas dissent. The dissent argues that there should be one standard for inspection roadblocks. And that is the

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<sup>1</sup>428 U. S. 543 (1976).

<sup>2</sup>496 U. S. 444 (1990).

<sup>3</sup>440 U. S. 648 (1979).

*Martinez-Fuerte, Sitz* and *Prouse* standard. Chief Justice Rehnquist argued that the roadblock was constitutional under the *Martinez-Fuerte, Sitz, and Prouse* precedents. According to the Chief Justice, the seizure (of the automobile during the search) in *Edmond* was "*plainly constitutional under our jurisprudence: brief, standardized, discretionless...which effectively serve(s) a weighty state interest with only minimal intrusion on the privacy of their occupants.*"<sup>4</sup> In other words, with barely a nod (if that) to the Constitution, Rehnquist argues that the search follows the precedents mentioned above and therefore is constitutional. He is not willing to differentiate between vehicle stops which have criminal searches as their primarily and therefore will require individualized suspicion, and stops for other purposes which will not require individualized suspicion. (the non-law enforcement primary purpose test). Instead, he is willing to allow all seizures of vehicles during roadblock inspections as long as the roadblocks meet the above stated test (brief, standardized, discretionless). The dissent at least has the virtue of consistency. He will make

<sup>4</sup>*Indianapolis v. Edmond* (99-1030). Chief Justice Rehnquist dissenting. Emphasis added.

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enforcement purposes subject to suspicionless seizures. Yet, while this does not violate the Twentieth century precedent, is this reasoning in keeping with the original understanding of the Fourth Amendment?

Justice Thomas suggests an answer. Although Justice Thomas joined Chief Justice Rehnquist's dissent from the Court's decision, he wrote separately. He states that he doubts that the Founders would have approved of the seizure in *Edmond*, or the seizures in *Martinez-Fuerte*, *Sitz* or *Prouse* for that matter:

Taken together, our decisions in...*Sitz* and...*Matrinez-Fuerte*... stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Farmers of the constitution would have considered "reasonable" a program of indiscriminate stops of individuals not suspected of wrongdoing.<sup>5</sup>

Thomas is not comfortable with any of the cases in this line of Fourth Amendment jurisprudence. And the reason he is not comfortable is because doubts that any of the cases are in keeping with the original understanding of the amendment. He finds it incredulous that the Farmers of the

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<sup>5</sup>Id. Justice Thomas dissenting.

Fourth Amendment would have approved of indiscriminate stops of individuals. He states, however, that in this case he will vote with the dissent because the constitutionality of *Sitz* and *Martinez-Fuerte* was not argued or briefed and because the dissent's reasoning follows the precedent:

Respondents did not, however, advocate the Overruling of *Sitz* and *Martinez-Fuerte*, and I am reluctant to consider such a step without the benefit of briefing and argument. For the reasons given by the Chief justice, I believe that those cases compel upholding the program at issue here. I, therefore, join his opinion.<sup>6</sup>

Justice Thomas's opinion raises, yet does not attempt to answer, an interesting question: would the Founders have opposed stops seizures on public roadways? In this paper I examine the original understanding of the Fourth Amendment to attempt an answer to this question. I conclude two things. First, the Founders were much more concerned with searches of real property, often insisting, not only on suspicion, but also a on warrant when searches of real property are involved. Secondly, while the Founders did not consider warrants necessary for searches and seizures off of real property (which for the sake of simplicity I

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<sup>6</sup>Id.

call searches in public areas) the evidence suggests suspicion was required. Indeed, the Fourth Amendment was a direct response to the British general warrant, which did not require particularized individual suspicion. This in turn suggests that Justice Thomas is right; the suspicionless searches in *Sitz*, *Prouse* and their progeny are not in keeping with the original understanding of the Fourth Amendment.

### **The Colonists and Writs of Assistance**

In 1696, the British Parliament passed a law allowing for the use of writs of assistance in the colonies. The writ was a form of a general warrant. Probable cause that the items searched for would be found in a particular place was not required. Under such a writ, officials could enter any place, including a house or place of business, and search for and seize prohibited goods. As Nelson Lasson puts it, "The writ empowered the officer and his deputies and servants to search at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye."<sup>7</sup>

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<sup>7</sup>Nelson Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*

The particular, or specific warrants, on the other hand, of course require particularized probable cause. The government official must go before a neutral magistrate and demonstrate to him that he has probable cause to find the goods he is looking for at the particular place he described. Then the judge decides if there is probable cause. If the officer has not demonstrated probable cause to search a particular place the judge is not supposed to issue the warrant. The warrant gives the added protection of having a magistrate decide the legitimacy of every search.

The writs of assistance were most often used in the colonies of Massachusetts and New Hampshire, and were used frequently to enforce revenue and custom laws.<sup>8</sup> A pernicious aspect of these writs of assistance is that they were not returnable after execution. Once issued they were good for the life of the sovereign -- in fact, life and six months, not expiring until six months after the sovereign's death. Therefore, the power granted the official was

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(Baltimore: The Johns Hopkins Press, 1937), 54.

<sup>8</sup>Telford Taylor, *Two Studies in Constitutional Interpretation* (Columbus, Ohio: Ohio University Press, 1969), 35.

almost unlimited. For the life of the sovereign the writs allowed the official to search wherever he suspected illegal goods were stored.<sup>9</sup>

James Otis first aroused the colonists against the writs of assistance. And, if John Adams's report is to be believed, it was he who immediately gave birth to the movement for American independence. In 1760, King George II died, and in 1761 the writs of assistance expired. Sixty-three Boston merchants requested a hearing before the Superior court of Massachusetts on the question of renewing the writs. Arguing for the merchants and against the writs, Otis claimed that they were "instruments of slavery on the one hand, and villainy on the other," and that the writ was "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law book."<sup>10</sup> Writs threatened liberty, he argued, because they violated the privileges of the home:

. . . One of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house

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<sup>9</sup>Nelson Lasson, 54.

<sup>10</sup>Schwartz, *The Bill of Rights: A Documentary History*, 186.

officers may enter our houses when they please -- we are commanded to permit their entry -- their menial servants may enter -- may break locks, bars and every thing in their way -- and whether they break through malice or revenge, no man, no court can inquire -- bare suspicion without oath is sufficient.<sup>11</sup>

Otis's main objection was that writs of assistance transgress upon the right of an English subject to be left alone in his house as long as he is not injuring anyone else. The home is the individual's castle, his realm; government officials should not enter while he is peaceful. To allow government officials to enter whenever they pleased would destroy the liberty man enjoys in his home. It would no longer be his castle.

Otis's argument is expanded in "The Rights of the Colonists and a List of Infringements and Violations of Rights," a pamphlet issued by the town of Boston in 1772, and largely written by Samuel Adams.<sup>12</sup> Adams proclaims that the American colonists are endowed with natural rights, the most important of these being the rights to life, liberty, and property:

Among the Natural Rights of the colonists are these First. a Right to Life: Secondly to liberty; thirdly to Property; together with the Right to support and defend them in the best

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<sup>11</sup>Id. 190.

<sup>12</sup>Id., 199.



manner they can<sup>13</sup>

According to Adams, the colonists possess rights not because they are Englishmen, but because they are human beings. These rights are not gifts of the government, but of God:

It is the greatest absurdity to suppose it in the power of one or any number of men at entering into society, to renounce their essential natural rights, or the means of preserving those rights when the great end of civil government from the very nature of its institution is for the support, protection and defense of those very rights: the principal of which as is before observed, are life, liberty and property. If men through fear, fraud or mistake, should in terms renounce and give up any essential natural right, the eternal law of reason and the great end of society, would absolutely vacate such renunciation; the right to freedom being the gift of God almighty, it is not in the power of Man to alienate this gift, and voluntarily become a slave.<sup>14</sup>

To paraphrase the Declaration of Independence, we are endowed by our *Creator* with certain unalienable rights, rights that are true and eternal. The British government owed the colonists the protection of their rights. Instead, they abused these rights. They abused these natural rights through, among other things, these general warrants known as writs of assistance:

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<sup>13</sup>Id. 200.

<sup>14</sup>Id., 202

These Officers (revenue officers of the crown) are by their Commission invested with powers . . . to enter and go on board any Ship, Harbor, Creek or Haven, within limits of their commission; and also in the day time to go into any house, shop cellar, or any other place where any goods wares or merchandises lie concealed, or are suspected to lie concealed, whereof the customs & other duties, have not been, or shall not be duly paid . . . and the said house, shop, warehouse, cellar, and other place to search and survey, and all and every the boxes, trunks, chests and packs then and there found to break open.<sup>15</sup>

Again, we see the concern that general warrants allow government to search indiscriminately. In this passage, Adams, unlike Otis, does not limit his complaint to invasion of the home, but argues that all property, including shops, warehouses and houses, should be protected against general warrants. Indeed, Adams also complains of indiscriminate searches vehicles of transportation, in this case ships. In particular interest to the situation that is the basis of *Indianapolis v. Edmond*, the general warrant treated the guilty and the innocent alike. The general warrant assumed that one's life, liberty and property were gifts of the state, not natural rights. What the state gave, the state could take away.

The point can be further developed by turning to James

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<sup>15</sup>Id., 205.

Wilson, one of the most important and influential political thinkers of late eighteenth century America. In his "Lectures on Law," Wilson explores Edmund Burke's understanding of the difference between civil and natural liberty. Burke argues that man can't completely enjoy natural and civil rights together. When man enters civil society he gives up his natural rights.<sup>16</sup> Wilson contends that the implication of this view is that under government people surrender their natural rights in return for "civil privileges."<sup>17</sup> A citizen's rights are seen as gifts of the government rather than gifts of God. If this view is correct, Wilson says, then "man is not only made *for*, but made *by* the government: he is nothing but what the society frames, he can claim nothing but what the society provides."<sup>18</sup> The purpose of good government, however, according to Wilson, is not the abridgment of natural rights, but rather the nourishment and protection of those natural rights, for "man's natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise. As it is with regard

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<sup>16</sup>James Wilson, "Law Lectures" in *The Works of James Wilson*, ed. Robert Green McCloskey (Cambridge MA: Belknap Press, 1967), 2:588.

<sup>17</sup>*Id.* 588-589.

<sup>18</sup>*Id.*, 589, emphasis in original.

to his natural liberty, so it is with regard to his other natural rights."<sup>19</sup>

Since government is made for man, and not man for government, it is the duty of government to serve man. And that means protecting his natural rights. Rights are not something to use as barter - the government protects us in return for the surrender of some of our rights. Rather, good government protects and nourishes those rights.

The Founders wanted a government that protected and nourished natural rights, the rights -- in the words of the Declaration of Independence -- of life, liberty, and the pursuit of happiness. A good and wise government protects these rights, and since the British government did not do so, it was not a good and wise government. The concern that people such as Samuel Adams and James Otis had over the indiscriminate searches sanctioned by writs of assistance was that they violated the rights to life, liberty and property.

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<sup>19</sup>Id, 588.

## The Early State Constitutions

Eight of the early states had bills of rights,<sup>20</sup> and all of these protected against general warrants.<sup>21</sup> Four of the state bills of rights (those of Pennsylvania, Vermont, New Hampshire and Massachusetts) also contained statements against unreasonable searches and seizures; but the wording was such, as Nelson Lasson points out, that it is clear that the unreasonable search or seizure thus targeted is the one conducted by a general warrant.<sup>22</sup> The

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<sup>20</sup>By early states I mean the original thirteen and Vermont. Vermont adopted a declaration of rights in 1777 that included a declaration against general warrants (Section 11). See Schwartz, *The Bill of Rights: A Documentary History*, 1:323; and Lasson, 82.

<sup>21</sup>Schwartz, *The Great Rights of Mankind: A History of the Bill of Rights*. (Madison, WI: Madison House, 1992), 90. Both Landynski (38) and Lasson (79-82) only mention seven states. Both forget Delaware, which passed a declaration of rights in 1776. Section 17 of that document condemns general warrants. See Schwartz, *The Bill of Rights: A Documentary History*, 1:278.

<sup>22</sup>81, n.10. For example, the Massachusetts Declaration of Rights of 1780 (Part 1, Article 14), which is very close to the wording of the Fourth Amendment (see Landynski, 38 and Lasson, 82), states that "Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to

first constitutional guarantee against general warrants was found in Section 10 of the June 12, 1776 Virginia

Declaration of Rights:

That general warrants, whereby any 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 offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.<sup>23</sup>

This Declaration of Rights, which is typical of the other state constitution's statements on search and seizure, condemns general warrants because they allow a person's property or person to be invaded without the support of evidence. They in effect allow anyone's property or person to be searched and seized. These warrants are indiscriminate, and as such they infringe upon a person's natural right to liberty and property. It is also important to note that the complaint in the Virginia Declaration of Rights is directed against general warrants. All searches, even warrantless searches under some circumstances, are not condemned. It is the indiscriminate searches under the authority, and hence protection, of general warrants that are prohibited.

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seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with formalities, prescribed by the laws." Kurland and Lerner 5:237. Emphasis added.

<sup>23</sup>Kurland and Lerner, 5:237.

## Search and Seizure and the Ratification of the Constitution

General warrants were also an issue in the debate over the ratification of the U.S. Constitution. Many of the opponents of the original Constitution were concerned that it lacked a bill of rights. Samuel Bryan, in the Antifederalist essay "Centinel I," argued that the Pennsylvania Ratifying Convention would decide the fate of the liberties of Pennsylvanians. Ratifying the proposed new Constitution would be a mistake, he claimed, because it would set up a permanent aristocracy and did not protect the liberties of the citizens. Under the Pennsylvania Constitution one was protected against unreasonable searches and seizures, but under the Constitution one's house would no longer be one's castle, and one's person and property would not be held free from general warrants.<sup>24</sup> The "Letter #4 from a Federal Farmer," argued that a federal bill of rights was needed to protect, among other essential rights, the "freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not

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<sup>24</sup>[Samuel Bryan] "Centinel" I, in *Debates on the Constitution* ed. by Bernard Bailyn. (New York: The Library of America, 1993), 1:52-53.

issued with due caution, for searching and seizing men's papers, property, and persons."<sup>25</sup> At the Pennsylvania Ratifying Convention Robert Whitehill proposed a series of amendments to the federal Constitution. Among those amendments was one that stated that "warrants unsupported by evidence . . . are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others."<sup>26</sup> The New York, Maryland, Virginia and North Carolina conventions all passed resolutions urging that a bill of rights be added to the federal Constitution, and that the bill of rights contain prohibitions against general warrants.<sup>27</sup> The Founding generation considered general warrants breaches of the natural rights of man, and wanted to make sure that the new federal government did not make use of them.

While all the men cited above were Antifederalists, I do not mean to imply that only the Antifederalists were worried about general warrants. The supporters of the Constitution did not complain of a lack of a specific prohibition against general warrants because they favored these warrants. Rather, they thought a bill of rights was

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<sup>25</sup>"Letters from the Federal Farmer, #4" in *Debates*, 1:279.

<sup>26</sup>In Bailyn, 1:872.

<sup>27</sup>*Id.*, 2:538; 2:554; 2:560; 2:567.



unnecessary and harmful. They thought, to paraphrase Alexander Hamilton in *Federalist Paper 84*, that the Constitution itself was a bill of rights, and as such protected the people's natural rights through the mechanisms of separation of powers, checks and balances, and the federal system with its explicit delegation of authority to the national government. A bill of rights was a mere "parchment barrier," worth only the paper it was written on, and the inclusion of a bill of rights in the constitution might suggest that the rights listed were the only rights the people had, and so imply that the federal government had more power than it really should.

#### **The Fourth Amendment**

Nevertheless, soon after the first Congress convened in 1789, Congressman James Madison introduced his proposed amendments to the Constitution -- amendments that would create a federal bill of rights. One proposed amendment stated that:

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

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the places to be searched, or the persons or things to be seized.<sup>28</sup>

Madison's proposed amendment is one flowing statement. It simply says that the rights of the people to be secure in their persons and homes shall not be violated by warrants issued without cause, i.e., general warrants. It is quite clear that general warrants are the mischief being aimed at here. The final version<sup>29</sup> splits the amendment into two clauses<sup>30</sup> -- the reasonableness clause, which states that all searches must be reasonable, and the warrant clause, which delineates the procedures a government official must follow in obtaining a proper warrant. How are the two clauses related? I have already indicated that the colonists' complaints were directed towards general

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<sup>28</sup>Robert A. Goldwin, "Congressman Madison Proposes Amendments to the Constitution," *The Framers and Fundamental Rights*, ed. Robert A. Licht (Washington, DC: AEI Press, 1991), 78.

<sup>29</sup>"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>30</sup>Lasson, 100-103, explains how this happened. Congressman Benson, who was chairman of the committee appointed to arrange the amendments, made a motion on the House floor that the words "by warrants issuing" be stricken and replaced with the phrase "and no warrants shall issue." The House voted down this proposed change, but in committee afterwards Benson apparently substituted his own words for the House approved version. It is Benson's version that was later approved by the Senate and ratified by the states and is the Fourth Amendment of today. I can find no explanation from Benson or a contemporary for this change in the wording. Also see Kurland and Lerner, 5:237.

warrants, not warrantless searches. Their argument was not that all searches were wrong, but that indiscriminate searches violated the natural rights to liberty and property, if not life, by assuming that the state could search and seize at will.

The Fourth Amendment was aimed not at limiting all warrantless searches, but rather indiscriminate ones. The Founders stipulate that government officials must appear before a judge and demonstrate probable cause to search before invading someone's property, but they did not condemn warrantless searches in public areas, of property and persons, *as long as there was cause*. Indeed, many warrantless searches took place at the time of the Founding and for many years thereafter.<sup>31</sup> This is especially true for searches incident to arrest.<sup>32</sup>

### **Federal Search and Seizure Case Law**

The Fourth Amendment case law at the federal level is sparse prior to the Twentieth Century. Congress passed a few statutes dealing with searches and seizures, usually -- but not exclusively -- in customs cases; but very few of the laws (many of which I will discuss later) were

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<sup>31</sup>See pp.50-60 below for some typical examples. Also, there were many federal cases involving customs laws. See Harris, 30-34.

<sup>32</sup>Taylor, 45.

challenged in the Supreme Court. Congress exercised limited criminal jurisdiction. Crime was considered a local matter to be handled by the states as part of their police power.<sup>33</sup> Only one Fourth Amendment case, *Ex Parte Burford* involved an improperly issued warrant.<sup>34</sup>

Of the Fourth Amendment cases the Supreme Court did hear, *Locke v. United States*<sup>35</sup> deserves comment. *Locke* is important because here John Marshall gives his famous definition of probable cause. He states,

that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and a well-known meaning. It imports a seizure made under circumstances that warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress.<sup>36</sup>

Probable cause does not require enough evidence to convict, but simply enough to provide reasonable suspicion. In fact, the terms *probable* and *reasonable cause* at the time of the Founding "meant 'probable cause to suspect.'"<sup>37</sup> The clear implication is that the government cannot search and

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<sup>33</sup>Lasson, 106.

<sup>34</sup>3 Cranch, 448, 1806.

<sup>35</sup>7 Cranch, 339, 1813.

<sup>36</sup>*Id.*, 367.

<sup>37</sup>Harris, 34; quoting *Little v. Barreme*, 2 Cranch 170, 176 (1804).

seize at its own fancy; there must be some suspicion to search and seize.

### State Case Law

Because of the paucity of search and seizure cases at the federal level in the early days of the republic, it is important to turn to state cases to understand the beliefs of early Americans on the issue of search and seizure. One of the most important cases involves a seizure. In *Wakely v. Hart*,<sup>38</sup> a case brought before the Pennsylvania Supreme Court, Wakely appealed his arrest and subsequent conviction on the charge of larceny. He had been arrested without a warrant and taken to jail where the stolen item, a watch, was found on his person.<sup>39</sup> Wakely contested his arrest because it violated the Pennsylvania Constitution's warrant requirement, and he sued for trespass and assault and battery. The court rejected his appeal and ruled for the defendant, Hart. In delivering the opinion of the court Chief Justice Tilghman said that the Pennsylvania

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<sup>38</sup>6 Binnery 316 [PA 1814].

<sup>39</sup>*Wakely*, 316.

Constitution's warrant clause is aimed at general warrants and nowhere prohibits an arrest without a warrant:

The provisions of this section (Pa. Con. art. 9, sec.7), so far as concerns warrants, only guard against their abuse by issuing them without cause, or in so general and vague a form, *as may put it in the power of the officers who execute them to harass innocent persons under pretence of suspicion*: for if general warrants are allowed, it must be left to the discretion of the officer, on what persons or things they are to be executed. But it is nowhere said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society.<sup>40</sup>

The warrant clause in question, then, according to Tilghman, is not an endorsement of warrants, but a limitation on them. To argue otherwise, by insisting that all arrests must be made with a warrant, endangers rather than protects the innocent. All of society is endangered when the guilty go free. The felon who is caught red-handed, who is seen committing a crime, may be arrested and searched without a warrant. He must be arrested on the spot or he may escape - and possibly commit another crime.

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<sup>40</sup>Wakely, 318; emphasis added.

<sup>41</sup>Wakely, 318-319. As mentioned in the previous chapter, it was at his peril because if the search did not turn up evidence, the person conducting the search could be sued for damages.

Tilghman further argues that if a person is not seen, but is known by other means to have committed a felony, the person may be pursued with or without a warrant. Even a private person may arrest, at his peril, a felon on probable cause of suspicion, with or without a warrant.<sup>41</sup> The criminal suspect must be convicted, or the seizure is not justified and the private individual is liable for damages even if he had probable cause for the seizure. The officer, on the other hand, is justified by probable cause.<sup>42</sup> These above-stated points are principles of common

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<sup>42</sup>Wakely does not mention officer justification, but obviously that is what the court means, for why else specify justification for private individuals only? For officer justification see *Rohan v. Sawin*, 59 Mass. 281, 284-285 (1850); *Reuck v. McGregor*, 32 NJL 70, 74 (1866); *Johnson v. State*, 30 GA 426, 430 (1860). The Georgia court in *Johnson* quotes no less than the famed English common law commentator Matthew Hale to back up its argument for officer justification for a warrantless arrest based on probable cause:

"by virtue of his office, empowered by law, to arrest felons, or those that are suspected of felony, and that before conviction and also before indictment. And these are under greater protection of the law, in execution of this part of their office, upon these two accounts:  
"1. Because they are persons more eminently trusted by the law, as in many other incidents to their office, so in this.

law, Tilghman says, and were not meant to be changed by the warrant clause of the constitution:

The whole section (Pa. Con. Art. 9, sec. 7) indeed, was nothing more than an affirmance of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great and the decisions *against them* only of modern date, agitation occasioned by the discussion of this important question had scarcely subsided, and it was thought prudent to enter a *solemn veto* against this powerful engine of despotism.<sup>43</sup>

On the other hand, Tilghman clearly states that the purpose of the amendment is to prevent indiscriminate searches and seizures. The purpose is to prevent the harassment of "innocent persons under the pretence of suspicion." General warrants infuriated the Founders because they allowed such indiscriminate searches. Indeed, the Founding generation was so concerned about these general warrants that they enumerated in the federal and many state constitutions prohibitions against these "engines of despotism."

### **Congressional Search and Seizure Statutes**

Another way of establishing the original understanding

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"2. Because they are, by law, punishable, if they neglect their duty in it."...these officers, that are thus entrusted, may without any other warrant but from themselves, arrest felons and those that are probably suspected of felonies;..."

2 Hale's Pleas of the Crown, 85, 86 and 1 East P. C. 301; quoted in *Johnson v. State*, 430-431.

<sup>43</sup>Wakely, 319, emphasis in original.



of the Fourth Amendment is to look at the laws the early Congresses passed concerning search and seizure. Most of these laws, like the ones involved in *Sailly* and *Jones*, concerned customs. The same Congress that proposed what eventually became the Fourth Amendment passed three customs acts that bear on our question. The first, The Collections Act of 1789, empowers federal officers to search for goods imported into the United States without duty:

. . . every collector naval officer and surveyor, . . . shall have full power and authority, 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, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they . . . upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; . . . .<sup>44</sup>

The officers can search ships and vessels without a warrant if they have "reason to suspect" such a ship or vessel contains contraband goods. The authors of this act consider such a warrantless search reasonable. However, even here the officers must have reasonable suspicion to search. They cannot just search a ship or vessel arbitrarily. Notice, when it comes to homes, stores or any particular buildings the officer must go before a

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<sup>44</sup>Collections Act, 1 Stat. 29, 43 (1789).

justice of the peace, give an oath or affirmation and secure a warrant. The members of this First Congress obviously did not consider a warrant necessary for all searches; but also they believed that private buildings were entitled to extra protection from government searches. To search these private buildings a warrant was needed.<sup>45</sup>

As James Etienne Viator has pointed out, the Collection Act became law less than a month before Madison proposed his search and seizure amendment to the U. S. Constitution. The same Congress that proposed the Fourth Amendment passed more than one act that allowed warrantless searches outside of buildings, but required a warrant to search buildings:

Hence, because the same legislators were busy working on both proposals, it is not unreasonable to assume that the sorts of searches detailed in the Collection Act provide persuasive evidence of

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<sup>45</sup>The importance of the First Congress can not be over-emphasized. Its decisions have long been given special importance because it came into session a mere two years after the Constitutional Convention, because many of its members were delegates to the Constitutional Convention, and because it set the precedents for future Congresses. Indeed the Supreme Court has said, "early congressional enactments 'provide 'contemporaneous and weighty evidence' of the Constitution's meaning.' Such 'contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.'" *Printz v. United States* (117 S. Ct. 2367, 1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986) and *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), and *Myers v. United States*, 272 U. S. 52, 175 (1926)).

<sup>46</sup>James Etienne Viator, "The Fourth Amendment in the Nineteenth Century," in Hickok, 175.

what search and seizure techniques were considered to be reasonable within the meaning of the Fourth Amendment."<sup>46</sup>

Viator nicely explains the distinction between searches of buildings and other searches found in the Collection Act of 1789:

...the Collection Act of 1789, therefore, should be enough in and of itself to refute anyone who argues that, at least by the original understanding, the reasonableness clause of the Fourth Amendment should be read in tandem with the warrant clause of the Fourth Amendment to declare that the only reasonable searches countenanced by the Fourth Amendment's congressional enactors were those proceeded under a warrant . . . the Collection Act paid homage to the traditional English axiom that "a man's home is his castle" by providing that any search of a building -- and, notice, not just a house but a store or other building -- was to proceed under a warrant given on oath or affirmation and particularly describing the location to be searched.<sup>47</sup>

The passage of the Collection Act by the First Congress argues against the position of Landynski and others that the Fourth Amendment allows only searches conducted by a warrant. As Viator correctly emphasizes, the Collection Act did not give special protection to homes, but provided protection to all privately owned buildings.<sup>48</sup>

The second act I want to consider is An Act Further to Provide for the Collection of Duties (3 Stat. 231, 1815).

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<sup>47</sup>Ibid.

<sup>48</sup>Also see Harris, 29; Lasson, 125-126.

This act is similar to the first act described. It requires a search warrant to search any house, store or other building for goods unlawfully imported into the United States. It provides for warrantless searches outside of buildings:

. . . it shall be lawful for any collector, naval officer, surveyor, or inspector of the customs . . . to stop, search, and examine any carriage or vehicle, of any kind whatsoever, and to stop any person traveling on foot, or beast of burden, on which he shall suspect there be any goods, wares, or merchandise, which are subject to duty, or which shall have been introduced into the United States in any manner contrary to law; and if such officer find any goods, wares, or merchandise, on any such carriage, vehicle, person travelling on foot, or beast of burden, which he shall have probable cause to believe are subject to duty, or shall have been unlawfully introduced into the United States, he shall seize and secure the same for trial.<sup>49</sup>

In this statute the customs officer is only allowed to seize items if there is probable cause to suspect that the items have been illegally imported into the United States. Nevertheless, when it comes to buildings a warrant is required for a search:

. . . if any of the said officers of the customs shall suspect that any goods . . . which are subject to duty, . . . are concealed in any particular dwelling house, store, or other building, he shall, upon proper application, on oath, to any judge or justice of the peace, be entitled to a warrant, directed to such officer, who is hereby authorized to serve same, to enter such house, store, or other building, in day time

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<sup>49</sup>An Act Further to Provide for the Collection of Duties, 3 Stat. 231, 232 (1815).

only, and here to search and examine whether there are any goods, . . . which are subject to duty. . . .<sup>50</sup>

Again, we see a double standard. Buildings, including homes and stores, receive extra protection under the statute. And it is not only homes, but also places of business, stores, that receive the extra protection of a warrant requirement.

Following this clause requiring a warrant to search a Building, Congress reiterates that a warrant is not to be required to search in vehicles or public areas:

*Provided always,* That the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, or to packages on any animal or animals, or carried by man on foot.<sup>51</sup>

Congress feels so strongly about the right to search vehicles and persons on foot without a warrant that it adds a clause to this section of the statute specifically stating that although all searches in buildings are to be conducted by warrants, this should not be interpreted to mean that warrants are required for searches in vehicles or public areas. There could be no clearer evidence that the early Americans did not believe that the Fourth Amendment set out an absolute warrant requirement. The Fourth

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<sup>50</sup>Ibid.

<sup>51</sup>Ibid., emphasis in original.

Amendment obviously was not meant by the early generations to require a warrant in all situations.<sup>52</sup>

### Conclusion

*Indianapolis v. Edmond* decision illustrates a troubling propensity of the twentieth-century Court. The Court jealously guards (sometimes to the point of creating new rights) the protections available to criminal suspects; while at the same time is indifferent to the violations of the constitutional rights of law-abiding citizens. This

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<sup>52</sup>For further example of acts that differentiate between searches on one's premises and outside of those premises, see An Act to Provide more Effectually for the Collection of Merchandise Imported into the United States and of the Duties Imposed by Law on Goods, Wares and on Tonnage of Ships or Vessels (1 Stat. 145, sections 48 and 51) and Duty Collection Act (1 Stat. 627, sections 66-70). Cf. An Act to Reduce Internal Taxation and to Amend an Act Entitled An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt and for other Purposes (14 Stat. 98, section 15; which requires a revenue officer to obtain a search warrant before searching premises that are being used to commit fraud on the United States) with An Act for Enrolling and Licensing Ships or Vessels to be Employed in the Coasting Trade, and Fisheries, and for Regulating the Same (1 Stat. 305, section 27, which allows the officer to search any ship or vessel without a warrant). Other examples of acts that require warrants to search premises are: An Act to Regulate the Disposition of the Proceeds of Fines, Penalties, and Forfeitures Incurred under Laws Relating to the Customs and for other Purposes (14 Stat. 546), An Act to Amend Section Three-thousand and Sixty-six of the Revised Statutes of the United States, in Relation to the Authority of Search Warrants (22 Stat. 49), the Act of 20 February 1865 (13 Stat. 441, Sec. 3), and the Act of 10 February 1891 (26 Stat. 742, Sec. 5).

is particularly true in the Court's Fourth Amendment jurisprudence. The Court has strengthened the protections of criminal suspects, for example, disallowing warrantless searches based on probable cause in public areas (roadways, sidewalks, etc.) although such searches took place at the time of the Founding.<sup>53</sup> At the same time, the Court allows the government a to obtain a warrant to search commercial property (and sometimes homes) without demonstrating probable cause although the Fourth Amendment clearly requires a warrant.<sup>54</sup> *Edmond* continues this

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<sup>53</sup> See *United States v. Chadwick* (433 U. S. 1, 1977), *United States v. Ross* (456 U. S. 798, 1948), *Arkansas v. Sanders* (442 U. S. 616, 1979), *California v. Acevedo* (111 S. Ct. 1982, 1991). (One might argue that after *Acevedo* searches of vehicles on public roads is returned to the original standard by permitting warrantless searches based on probable cause. This is true but I note Justice Scalia's comment in his concurring opinion:

I agree with the dissent that it is anomalous for a briefcase to be protected by the "general requirement" of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile. On the other hand, I agree with the Court that it would be anomalous for a locked compartment in an automobile to be unprotected by the "general requirement" of a prior warrant, but for an unlocked briefcase within the automobile to be protected. I join in the judgement of the Court because I think its holding is more faithful to the text and tradition of the Fourth Amendment, and if these anomalies in our jurisprudence are ever to be eliminated that is the direction in which we should travel. (*Acevedo*, 1992)

<sup>54</sup> Text of warrant clause; For representative cases see: *Marshall v. Barlow's, Inc.* (426 U. S. 307, 1978), *Donovan*

tendency. Indeed, in *Edmond* the Court cites *Camera v. Municipal Court*<sup>55</sup> (which allowed a suspicionless inspection of a home, and *Burger v. New York*<sup>56</sup> (which allowed a suspicionless search of a junkyard). After *Edmond*, suspicionless stops of vehicles will be permissible where the primary purpose of the search is not criminal, while stops of vehicles of criminal suspects, must be based on probable cause. In other words, it is permissible to harass and inconvenience presumably law-abiding citizens with car stops, but if the stop concerns a criminal matter, then suspicion is required. Criminal suspects are awarded more protection than law-abiding citizens.

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v. Dewey (452 U. S. 594, 1981), *Colonnade v. United States* (397 U. S. 72, 1970), *United States v. Bislow* (406 U. S. 31, 1972).

<sup>55</sup>387 U. S. 523 (1967).

<sup>56</sup>*New York v. Burger*, 482 U. S. 691 (1987).



