Unreasonable Searches and Seizures of Papers

Eric Schnapper

University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/faculty-articles

Part of the Fourth Amendment Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Publications at UW Law Digital Commons. It has been accepted for inclusion in Articles by an authorized administrator of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
UNTIL a decade ago, the Supreme Court consistently held that documents enjoyed special protection under the fourth amendment. For example, more than a dozen decisions over the course of a century reiterated that an individual's private papers
were absolutely exempt from seizure, regardless of the existence of an otherwise valid warrant. Throughout this period, the Court also invalidated on fourth and fifth amendment grounds the use of compulsory process to obtain private papers from a defendant for introduction in a criminal proceeding. Noting that the historical limitations on searches and seizures in England arose out of conflicts between the government and the press, the Court further insisted that any search warrant or subpoena for documents that affects free speech be scrutinized with particular care. Many of the Court's decisions were based on its 1886 opinion in *Boyd v. United States*, which Justices Brandeis and Frankfurter praised as "a case that will be remembered as long as civil liberty lives in the United States."

In the last ten years, however, the Burger Court has repeatedly questioned these longstanding principles. The Court has derided the protection accorded to private papers as "a rule searching for a rationale." In 1976, the Court apparently discarded the broad rule against the compulsory production of incriminating documents, as-

---


serting that it was based on "discredited" precedents. Moreover, the Court has in recent years often upheld search warrants and subpoenas used to obtain documents from the press, a practice virtually unknown in Anglo-American jurisprudence since the reign of George III. Boyd, once lauded as a landmark in the protection of civil liberties, has been dismissed as wrongly decided.

The Supreme Court nevertheless has stopped short of completely disavowing the century of precedents granting special fourth amendment protection to papers. The Court has expressly reserved the question of whether some papers, such as diaries, are immune from seizure. Moreover, the Court continues to give at least lip service to the principle that "scrupulous exactitude" is required in deciding if the fourth amendment permits compulsory production of speech-related documents.

The Court's present ambivalence regarding the seizure of papers reflects a more basic uncertainty about the structure of the fourth amendment. The amendment has two separate clauses: one prohibits "unreasonable" searches and seizures, and the other sets out prerequisites for the issuance of a warrant. Many Supreme Court decisions treat the search and seizure clause as if its sole effect is

14 See, e.g., Fisher v. United States, 425 U.S. 391, 407-08 & n.9 (1976) (noting that purely evidentiary materials may be seized under proper circumstances and reserving question of whether there are some materials of evidentiary value whose nature precludes search and seizure); Warden v. Hayden, 387 U.S. 394, 303 (1967) (same). The Court reiterated the traditional rule regarding private papers as recently as in General Motors Leasing Corp. v. United States, 429 U.S. 338, 355-56 (1977) (citing Boyd).
16 See supra note 2 (text of fourth amendment).
to permit searches without a warrant if the search itself is not "unreasonable." Under this interpretation the mere existence of a warrant meeting the requirements of the warrant clause would fully satisfy the fourth amendment; neither documents nor any other objects enjoy absolute or even special protection from seizure. Another line of decisions, however, holds that the warrant clause and the search and seizure clause establish distinct constitutional rights, and thus even a search based on a valid warrant is impermissible if otherwise "unreasonable." This alternative reading of the fourth amendment requires a separate inquiry into


18 The most complete articulation of this view is in Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Holding that police could enter and search a newsroom with a search warrant issued ex parte, the Court argued:

[T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

Id. at 565. The warrant requirements, the majority suggested, "struck the balance between privacy and public need . . . ." Id. at 559. See McKenna, The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment, 53 Ind. L.J. 55, 72 (1977) (assuming that if requirements of warrant clause are satisfied, search will be held reasonable).

Other portions of Zurcher back away from this extreme position. The Court held that "overall reasonableness" is a precondition for the issuance of any warrant, in effect reading the search and seizure clause into the warrant clause. The Court noted that the standard of reasonableness depends on the location to be searched and the articles to be seized. 436 U.S. at 564-65. The majority emphasized that its opinion did not "assert that searches, however or whenerver executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized." Id. at 559-60. The Supreme Court's differing views of the significance of the search and seizure clause are noted in Comment, supra note 1, at 279 n.32.


whether a seizure of papers based on a warrant is reasonable.

The Supreme Court's inconsistent interpretation of the fourth amendment's structure parallels the Court's changing view of the amendment's historical origins. The Court has correctly emphasized that the fourth amendment was written in response to a "long misuse of power in the matter of searches and seizures both in England and the colonies,"21 and that it was intended to place in the Constitution the rights guaranteed by several famous English court decisions of the 1760's.22 Preeminent among these decisions is Entick v. Carrington,23 which the Supreme Court has often cited as the "wellspring of the rights now protected by the Fourth Amendment."24

The Court's opinion in Boyd interpreted Entick as forbidding any seizure of private papers,25 and thus as providing a specific historical basis for construing the search and seizure clause to contain such a prohibition.26 More recently, however, the Court has

24 19 How. St. Tr. 1029, 85 Eng. Rep. 807 (C.P. 1765). The most complete report of the Entick decision is in Howell's State Trials, which took the statement of the case from Wilson's Reports but then presented "the Judgment itself at length, as delivered by the Lord Chief Justice of the Common-Pleas from written notes." 19 How. St. Tr. at 1029.
27 See Weeks v. United States, 232 U.S. 383, 390 (1914) (asserting that the fourth amendment was intended to protect against practices condemned in England, "such as . . . general warrants . . . and the seizure of . . . private papers").
described *Entick* as a condemnation only of general warrants,\(^27\) providing no basis for reading into the search and seizure clause any requirements beyond those in the warrant clause. The earlier interpretation is more accurate. In the eighteenth century, general warrants, which the fourth amendment condemns,\(^28\) were warrants that failed to name the individual possessing the things to be searched or seized.\(^29\) Today, however, the Court characterizes a warrant as “general” if it fails to specify the things to be searched or seized, regardless of whether it names the individual possessing them.\(^30\) Although the warrant in *Entick* did not meet this more modern requirement of specificity, the warrant included all the information the courts of the 1760's demanded.\(^31\) Thus, the *Entick* court invalidated the seizure not because the court regarded the underlying warrant as a general warrant, but because the seizure violated the distinct prohibition on seizures of papers.

This article argues that the Supreme Court’s original view of the history and meaning of the fourth amendment was correct: seizures of papers were condemned in eighteenth-century England without respect to the validity of any underlying warrant, and the search and seizure clause thus embodies requirements independent of the warrant clause.\(^32\) Part I discusses the eighteenth-century English

---


\(^29\) See, e.g., Henry v. United States, 361 U.S. 98, 100 (1959); Draper v. United States, 358 U.S. 307, 316 n.3 (1959) (Douglas, J., dissenting); see also West v. Cabell, 153 U.S. 78, 85 (1894) (warrant included incorrect name).


\(^31\) The warrant referred to Entick by name, and thus its validity was not in issue. See infra notes 67-90 and accompanying text.

\(^32\) A number of commentators have suggested that private papers should enjoy some degree of special protection under the fourth amendment. See McKeuna, supra note 18, at 56.
decisions, including *Entick*, and concludes that the case law of that era had two separate branches. One branch forbade general warrants and led to the adoption of the warrant clause; the other, exemplified by *Entick*, prohibited the seizure of certain papers and lies behind the search and seizure clause. Part II, relying on debates in Parliament and on a series of widely circulated pamphlets, describes the public controversy in the 1760's over the English government's search and seizure practices. It shows that the use of general warrants and the seizure of private papers were attacked on distinct grounds in the public arena as well as in the courts. Part III suggests several basic principles of fourth amendment jurisprudence that this history appears to require. First, the search and seizure clause forbids the inspection of innocent private papers in the course of a search for inculpatory documents that by themselves are unprotected by the fourth amendment. Second, an assessment under the search and seizure clause of the reasonableness of a seizure of private papers should take into account the problem of compulsory self-incrimination. Third, the fourth amendment strictly limits court-compelled production of documents by the defendant in a suit or prosecution for libel or other speech-related activity.

I. THE ENGLISH CASES

The fourth amendment is based in large part on six celebrated English court decisions, including *Entick v. Carrington*,\(^{23}\) handed down in the two decades prior to the American Revolution.\(^{24}\) All


six cases involved unsuccessful efforts by the English government to apprehend the authors and publishers of allegedly libelous\textsuperscript{35} publications, most notably the then famous *North Briton No. 45*.\textsuperscript{36} The decisions attracted considerable public attention in both England\textsuperscript{37} and the American colonies.\textsuperscript{38}

Most commentators, as well as the recent decisions of the Supreme Court, regard these cases as considering only the legality of general warrants.\textsuperscript{39} The cases, however, actually consider two distinct issues: first, the validity of general warrants, and second, the absolute immunity of certain property from search or seizure. *Entick*, the most renowned of the decisions, held that the government

\begin{footnotesize}

\textsuperscript{36} The content and impact of *North Briton No. 45* is discussed in G. Rudé, supra note 27, at 22-23; O. Sherrard, A Life of John Wilkes 86-88 (1930); C. Trench, Portrait of a Patriot: A Biography of John Wilkes 98-101 (1962).

\textsuperscript{37} G. Rudé, supra note 27, at 24-30, 34; O. Sherrard, supra note 36, at 97-104; C. Trench, supra note 36, at 113-22.

\textsuperscript{38} Professor Rossiter notes that the American press "was full of his trials, tribulations, and speeches, so full indeed that one may go to almost any issue of any newspaper between 1763-1775 and read of John Wilkes," the author of *North Briton No. 45*. C. Rossiter, Seedtime of the Republic 527 n.158 (1953). Between June 1763 and May 1764 the weekly *Boston Gazette, and Country Journal* carried 36 separate stories about Wilkes, as well as an advertisement for a pamphlet entitled "An Authentick Account of the Proceedings Against John Wilkes . . . Containing all the Papers relative to this interesting affair, from that Gentleman's being taken into Custody by his Majesty's Messengers to his Discharge . . . ." *Boston Gazette, and Country Journal*, July 4, 1763, at 3, col. 2. A story summarizing the jury verdict in favor of Wilkes explained: "By this important decision, every Englishman has the satisfaction of seeing, that his house is his castle, and is not liable to be searched, nor his papers pried into by the malignant curiosity of King's Messengers, and an utter end put to that unconstitutional practice . . . ." *Boston Gazette, and Country Journal*, Feb. 20, 1764, at 4, col. 1.

Wilkes' extensive following in the American colonies is discussed in B. Bailyn, The Ideological Origins of the American Revolution 110-12 (1967); Maier, John Wilkes and American Disillusionment with Britain, 20 Wm. & Mary Q. 373 (1963). "'Wilkes and Liberty' were toasted from New England to South Carolina. Towns were named after him—such as Wilkes-Barre, Pennsylvania . . . —as were children, for instance, the Boston Son of Liberty Nathaniel Barber's son Wilkes." P. Maier, From Resistance to Revolution 163 (1972). The number "45" was displayed throughout the colonies as a sign of resistance, just as it was in England. I. Brant, The Bill of Rights: Its Origin and Meaning 191, 194 (1965) (American use of "45"); C. Trench, supra note 36, at 121 (English use of "45").

\textsuperscript{39} See supra note 27.
\end{footnotesize}
could not seize private papers even with a valid warrant. The Entick court foreshadowed the requirements of the fourth amendment’s search and seizure clause by holding that seizures of certain papers are impermissibly intrusive, that they may improperly incriminate the author with his own words, and that the power to search and seize documents should not be available in libel cases.

A. The General Warrants Cases

Huckle v. Money, the first reported decision on general warrants, arose from the arrest of a journeyman printer suspected of having helped print North Briton No. 45. John Money, one of the lesser crown officials known as messengers, arrested William Huckle with a warrant issued by the Secretary of State, Lord Halifax. Huckle brought a civil action for damages against Money. Neither Huckle nor the court questioned Halifax’s authority to issue arrest warrants, and the case involved no search or seizure of evidence. The court, however, characterized the warrant as “general” because it did not specifically order the arrest of Huckle. The warrant merely directed Money and others “to apprehend and seize the printers and publishers of . . . the North Briton . . . .” Lord Chief Justice Pratt, sustaining a jury verdict for Huckle, commented that the jurors saw the Secretary of State exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant . . . . To enter a man’s house by virtue of a nameless warrant . . . . is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

The jury awarded Huckle £300 in damages although he had been

---

41 See infra notes 76-87 and accompanying text.
43 Id. at 1405, 95 Eng. Rep. at 768.
44 The Secretary of State’s authority to issue arrest warrants was expressly upheld in Entick v. Carrington, 19 How. St. Tr. 1029, 1048-59 (C.P. 1765).
45 Huckle, 95 Eng. Rep. at 768.
in custody only six hours.\textsuperscript{47}

\textit{Wilkes v. Wood,}\textsuperscript{48} decided in the same year as \textit{Huckle}, was captioned “The Case of General Warrants” when reported in 1790.\textsuperscript{49} John Wilkes, a member of Parliament, brought a trespass action against Robert Wood, another of the King’s messengers. Wood and several other officials, acting under a warrant issued by Lord Halifax, had entered Wilkes’ home, searched it for several hours, and seized all the papers and manuscripts they found.\textsuperscript{50} The warrant was similar to the one in \textit{Huckle}. It ordered the seizure of the author and printers of \textit{North Briton No. 45} along with their papers, but did not identify any individuals by name.\textsuperscript{51}

As in \textit{Huckle}, neither the plaintiff nor the court objected to the fact that the warrant failed to specify the papers to be seized,\textsuperscript{52} or that it had not been issued by a judge. Justice Pratt observed that instead the issue was “whether a Secretary of State has a power to force persons houses, break open their locks, seize their papers, \&c. upon a bare suspicion of a libel by a general warrant, without name of the person charged.”\textsuperscript{53} At the close of the trial, Justice Pratt singled out the failure to identify the suspect as the warrant’s fatal defect:

The defendants claimed a right, under precedents, to force persons houses, break open escutores, seize their papers, \&c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.\textsuperscript{54}

\textsuperscript{47} Money treated Huckle “very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damage.” 19 How. St. Tr. at 1405, 95 Eng. Rep. at 768.
\textsuperscript{48} Lofft 1, 98 Eng. Rep. 489 (C.P. 1763).
\textsuperscript{49} Id. at 1, 98 Eng. Rep. at 489.
\textsuperscript{50} Id. at 4-5, 98 Eng. Rep. at 491.
\textsuperscript{52} An open-ended authorization to seize all papers would be invalid under the fourth amendment. See, e.g., Lo-Ji Sales v. New York, 442 U.S. 319, 325-26 (1979).
\textsuperscript{53} Wilkes, Lofft at 3, 98 Eng. Rep. at 490.
\textsuperscript{54} Id. at 18, 98 Eng. Rep. at 498.
Justice Pratt instructed the jury to return a verdict in Wood's favor only if Wilkes was in fact the author of *North Briton No. 45* and the search and seizure was therefore justified. The jury found in favor of Wilkes, awarding him £1000 in damages.

*Leach v. Money* was the only general warrants case decided by the King's Bench. Dryden Leach sued John Money and two other messengers for trespass and false imprisonment after they entered Leach's house, arrested him, and held him for several days on suspicion of printing *North Briton No. 45*. The warrant used to arrest Leach did not name him or any other suspect; accordingly, both eighteenth-century case reporters characterized *Leach* as concerning "general warrants." Because Leach clearly had not printed *North Briton No. 45*, the court's final opinion, upholding a jury verdict in his favor, concluded that even a valid warrant could not provide a defense to Leach's claim.

At least one member of the court, however, indicated a more far-reaching basis for finding in favor of Leach. Lord Mansfield...
framed the issue as "whether this general warrant be good," and concluded that it was not, "upon the single objection of the uncertainty of the person, being neither named nor described . . . ." He explained that "[i]t is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."

The warrant's failure to refer to Leach by name was thus its critical flaw. The three other members of the court agreed with Lord Mansfield that the warrant was invalid, although they did not explain their reasons. Hargrave's 1775 annotation commented that "all the four judges thought general warrants to seize the person universally illegal, except where the granting of them was specially authorized by act of parliament . . . ." With the decision in *Leach*, the prohibition against general warrants, that is, against warrants that failed to identify the individual whose person or property were to be seized, was firmly established in English law.

**B. Entick and the Seizure of Papers**

*Entick v. Carrington* arose under circumstances similar to *Wilkes*. In an attempt to locate the author of several allegedly libelous editions of the *Monitor*, Nathan Carrington and three other messengers forcibly entered John Entick's home, read through Entick's books and papers, and seized several hundred pamphlets and charts. Entick sued Carrington and the others for trespass.

---

64 Id. at 1027, 97 Eng. Rep. at 1088. Mansfield's reference to "the magistrate" apparently includes Lord Halifax.
65 Neither the arguments of counsel nor Lord Mansfield's opinion refer to the failure of the warrant to specify Leach's home as a place to be searched for the printer of *North Briton* No. 45.
66 Id. at 1028. Insofar as Lord Mansfield concluded that Parliament could authorize general warrants, he disagreed with Justice Pratt. Pratt held that the general warrant in *Wilkes* was "contrary to the fundamental principles of the constitution," *Wilkes*, 98 Eng. Rep. at 499, and declared that "[n]o precedents, no legal determinations, not an Act of Parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution." Id. at 490.
68 See supra notes 48-56 and accompanying text.
69 19 How. St. Tr. at 1030-32.
70 Id. at 1030-32. The jury returned a special verdict, finding most facts as alleged by
The warrant the messengers relied on in *Entick*, however, differed in one crucial respect from the warrants in *Huckle, Wilkes,* and *Leach*. Instead of vaguely commanding the messengers to arrest and to seize the papers of "the authors, printers and publishers"73 of certain editions of the *Monitor*, the warrant expressly named Entick as the suspect whose possessions were to be seized.72 Thus, the warrant's specific identification of Entick distinguished it from the general warrants at issue in the other decisions. Indeed, not once do either the lengthy arguments of counsel or the opinions refer to the *Entick* warrant as a general warrant. By contrast, the opinion twice describes *Leach* as the "Case of General Warrants."73 Hargrave's annotation explained that *Entick* involved all the issues presented in *Leach* "except the question of General Warrants."74

Because *Entick* did not involve a general warrant as defined in the eighteenth century, the case has relatively little bearing on the meaning of the fourth amendment's warrant clause. The decision, however, is clearly critical to the meaning of the search and seizure clause. The phrase "search and seizure" or its equivalent, although not appearing in any of the general warrants cases, was repeatedly used by Lord Camden in *Entick*.76 Neither the court nor the plaintiff's counsel suggested that the defendants' conduct was illegal because of a procedural defect in the warrant, or that a valid warrant would have been a defense to the trespass alleged. The court condemned the very nature of the search and seizure, not the underlying warrant.

Lord Camden's opinion offered three different rationales, with distinct ramifications for the meaning of the search and seizure clause, in upholding Entick's claim. First, Lord Camden argued...
that the government may not ordinarily seize an individual's property:

The great end, for which men entered into society, was to secure their property. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing . . . . If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.\textsuperscript{76}

In a number of instances, the court noted, some property could be seized “for the sake of justice and the general good.”\textsuperscript{77} Private papers, however, “are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection . . . .”\textsuperscript{78} If searches and seizures of papers were permitted, “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger,”\textsuperscript{79} and an individual’s “most valuable secrets”\textsuperscript{80} could be exposed to government scrutiny. Lord Camden traced the search and seizure of papers to the discredited practices of the Star Chamber,\textsuperscript{81} and to an opinion of the infamous Chief Justice Scroggs.\textsuperscript{82}

Second, the court emphasized that preventing and punishing libel did not justify seizing papers. The court noted that because English law punished the publication, writing, or even possession of a libel, many homes were potentially subject to search:

whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal . . . .

He that has it or has had it in his custody; he that has published, copied, or maliciously reported it, may fairly be under a reasonable

\textsuperscript{76} Id. at 1066.
\textsuperscript{77} Id. (the “right of property is set aside by positive law” in such cases as “[d]istresses, executions, forfeitures, taxes, &c.”).
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 1063.
\textsuperscript{80} Id. at 1064.
\textsuperscript{81} Id. at 1069.
\textsuperscript{82} Id. at 1070. William Scroggs, Chief Justice of King’s Bench from 1678 to 1681, was impeached in 1681. He has been described as “undoubtedly one of the worst judges who ever disgraced the bench.” D. Walker, The Oxford Companion to Law 1121 (1980).
suspicion of having the thing in his custody, and consequently become the object of the search-warrant.83

The court rejected the argument that the seizure of papers in libel cases was necessary to prevent sedition, refusing to distinguish political from nonpolitical libel or to consider a "state necessity" justification.84 Thus, any warrant "to seize and carry away the party's papers in the case of a seditious libel" was held "illegal and void."85

Third, the court rejected the idea that the government could seize papers for use as evidence in a criminal case:

It is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. . . .

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder . . . that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.86

In Lord Camden's view, the law deliberately refused to authorize "paper searches" in order to prevent forced self-incrimination:

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.87

Of the three rationales advanced by the court in Entick, the first

---

83 19 How. St. Tr. at 1072.
84 Lord Camden noted:
[W]ith respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.
If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative.
Id. at 1073.
85 Id. at 1074.
86 Id. at 1073.
87 Id. Paper searches were also denounced as forcible self-incrimination in Wilkes v. Wood, Loftt 1, 1, 98 Eng. Rep. 489, 490 (C.P. 1763) ("Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom.").
and third stand for the principle that the government can never seize private papers, with or without a valid warrant. The second rationale bars seizures of papers only in libel cases. Commentators at the time regarded the decision as establishing both rules. For example, Hargrave's 1775 annotation describes the *Entick* decision both as "against the seizure of papers" and as holding that "a warrant to search for and seize the papers of the accused, in the case of a seditious libel, is contrary to law." All three aspects of the court's opinion had an important impact on the framers' understanding of the fourth amendment's search and seizure clause.

II. THE PUBLIC CONTROVERSY IN ENGLAND

Searches, seizures, and general warrants were not only the subject of litigation, but were also the focus of a public controversy that raged in England throughout the 1760's. The public debate, like the cases discussed in Part I, treated general warrants and the seizure of papers as independent issues. Critics of the two practices traced them to different historical abuses: they compared general warrants to the nameless warrants for which Justice Scroggs had been impeached, and analogized the seizure of papers to the

---

88 Although *Entick* does at one point discuss the procedures used to obtain the warrant, improper procedure clearly was not an alternative basis for invalidating the search. Defendants' counsel attempted to analogize the search and seizure of papers to searches and seizures of stolen goods, an established practice at common law. *Entick*, 19 How. St. Tr. at 1040. The court rejected the analogy for three reasons. First, the court pointed out that stolen goods do not belong to the person from whom they are seized. Id. at 1066. Second, the court noted that the common law rule permitting searches for stolen goods was "the only case of the kind," and held that the courts should adopt another such rule only if expressly authorized by an act of Parliament. Id. at 1067. Finally, the court noted that the issue and execution of a search warrant for stolen goods involved several procedural safeguards not present in *Entick*, including an oath by the owner of the goods. Id. The court did not, however, conclude that the search in *Entick* was unlawful because the defendants had not followed the procedures applicable to a search warrant for stolen goods. Instead, the court reasoned that if paper searches were legal the common law would have established comparable procedural safeguards; because the law had not, paper searches were illegal. Id.

89 Id. at 1075-76.

90 Id. at 1029.

91 See, e.g., Father of Candor, A Postscript to the Letter on Libels, Warrants, &c. in answer to a Postscript in the Defence of the Majority, and Another Pamphlet, entitled, Considerations on the Legality of General Warrants 12-13 (2d ed. London 1765) [hereinafter cited as A Postscript]. A facsimile reproduction of the 1771 edition of *A Postscript*, with slight modifications and expanded footnotes, may be found in Libels, Warrants and Seizures: Three Tracts 1764-1771, at 140 (1974). All cites in this article, however, refer to
sweeping seizures used in the seventeenth century to enforce the Licensing Acts. Like the English courts, the commentators opposing the seizure of papers sought a prohibition against that practice in order to protect innocent private papers from government inspection and to prevent compulsory self-incrimination, and noted that enforcement of libel laws was an especially inappropriate basis for such an intrusion.

Neither the arrests of Leach and Huckle nor the seizure of En-tick's papers, however, significantly affected the debates in Parliament or the salvos of pamphlets exchanged on these issues. The public controversy centered mainly on the arrest of John Wilkes and the seizure of his papers in April 1763. For the remainder of

the second London edition of 1765.

See supra note 82 and accompanying text. For a discussion of Scroggs' opinions, see N. Lasson, supra note 62, at 38-39.

See, e.g., Father of Candor, A Letter Concerning Libels, Warrants and the Seizure of Papers 59 (5th ed. London 1765) (referring to the Licensing Act under Charles II) [hereinafter cited as Letter From Father of Candor]. See infra note 179 and accompanying text. In 1695, the House of Commons refused to renew the Licensing Act, objecting that the Act allowed:

[A]ll men's houses—as well peers' as commoners'—to be searched at any time, either by day or night, by a warrant under the sign-manual, or under the hand of one of the secretaries of state, directed to any messenger, if such messenger shall, upon probable reason, suspect that there are any unlicensed books there; and the houses of all persons free of the Company of Stationers are subject to the like search on a warrant from the master and wardens of the said company or any one of them.

XI H.C. Jour. 305 (1695); see also N. Lasson, supra note 62, at 31-34, 37-39 (detailing the abusive search and seizure practices of the 1600's).

The passage of the cider tax in March 1763 occasioned a preliminary debate over searches of private homes and set the stage for the Wilkes controversy. Like other excise taxes, the cider tax was enforced by providing crown officials with the power to enter any building at will to detect evasions of the tax. Act of March 31, 1763, 3 Geo. 3, ch. 12, § X. William Pitt, later Lord Chatham, attacked the proposed cider tax because it would result in searches of private homes. Stating that every man's home is his castle, Pitt objected that the tax would "necessarily lead to introducing the laws of excise into the domestic concerns of every private family, and to every species of produce of the land. The laws of excise are odious and grievous to the dealer, but intolerable to the private person." 15 Parl. Hist. Eng. 1307 (1813).

The close relationship between the issues raised by the cider tax and those raised later in the year by the Wilkes affair is illustrated by the curious historiography of Pitt's famous remark concerning private property. Cooley's version of that statement, which he attributes to a speech by Pitt on general warrants, reads:
the decade, Wilkes' repeated confrontations with both Parliament and a series of administrations elicited strong public support for his cause on both sides of the Atlantic. The Wilkes controversy spawned ideas, described in the following sections, that played a significant role in the development of the fourth amendment.97

A. The Wilkes Affair

On April 26, 1763, Lord Halifax issued a warrant directing the seizure of “the authors, printers and publishers” of North Briton

The poorest man may, in his cottage, bid defiance to all the 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.

T. Cooley, A Treatise on the Constitutional Limitations 365 n.4 (5th ed. 1883). Lieber, writing in the same era, gives a rather different account of Pitt’s statement, but also attributes it to a speech on general warrants by “the great Chatham”: “Every man’s house . . . is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut; the wind may whistle around it; the rain may enter it; but the King cannot.” F. Lieber, On Civil Liberty and Self-Government 60 (3d ed. 1877). Goodrich, on the other hand, offers a version similar to Cooley’s, but asserts that the remark was made during a speech on the excise tax:

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

C. Goodrich, Select British Eloquence 65 (1852) (emphasis in original). None of these versions appears in the published debates of the House of Commons. Whichever version and attribution is correct, that the same remark might with equal plausibility be associated with opposition to the excise tax and an attack on general warrants indicates the close relationship between the two issues.

The Supreme Court has referred to Pitt’s remark on a number of occasions. See United States v. Ross, 456 U.S. 798, 822 n.31 (1982) (Goodrich text); Steagald v. United States, 451 U.S. 204, 229 (1981) (Rehnquist, J., dissenting) (no text; remark attributed to Pitt while Prime Minister although he was not Prime Minister during either his speech on the excise tax or his speech on general warrants); Payton v. New York, 445 U.S. 573, 601 n.54 (1980) (Goodrich text; dated March 1763, the time of Pitt’s excise tax speech); id. at 609 n.3 (White, J., dissenting) (no text; attributing remark to speech on the excise tax); Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (Douglas, J., dissenting) (Goodrich text; attributing remark to speech on the excise tax); Miller v. United States, 357 U.S. 301, 307 (1958) (Goodrich text; attributing remark to speech on the excise tax).

97 The Supreme Court has recognized the importance of the Wilkes controversy to an understanding of the fourth amendment. See United States v. United States Dist. Court, 407 U.S. 297, 328-29 n.6 (1972) (Douglas, J, concurring); Stanford v. Texas, 379 U.S. 476, 483-84 (1965); Marcus v. Search Warrant, 367 U.S. 717, 728-29 & n.22 (1961); Frank v. Maryland, 359 U.S. 360, 376-77 (1959) (Douglas, J, dissenting); Boyd v. United States, 116 U.S. 616, 626-27, 630 (1886); see also infra notes 235-50 and accompanying text (describing in detail the relationship between the controversy and the framing of the fourth amendment).
No. 45. On April 29, Lord Halifax directed Nathan Carrington and several other messengers to execute the warrant on Wilkes, based on statements by the publisher and the printer of *North Briton* No. 45 that Wilkes was the pamphlet's author. The messengers appeared at Wilkes' home on the morning of April 30, but did not detain him. Wilkes went to the office of the printer of the *North Briton*, where he reportedly destroyed the original manuscript of No. 45. When Wilkes returned to his home, the messengers arrested him and seized all his papers, which they brought to Lord Halifax. Later that day, Halifax and the Earl of Egremont, the other Secretary of State, issued a second warrant that referred to Wilkes by name and that ordered his imprisonment in the Tower of London. Wilkes' attorney obtained from Justice Pratt a writ of habeas corpus directed to the messengers, but the order was of no effect because Wilkes was no longer in the messengers' custody.

On May 3, Wilkes and his attorney appeared before the Court of Common Pleas, again seeking an order directing Wilkes' release. By this time Wilkes was being held pursuant to the April 30 special warrant, not the general warrant of April 26. Both Wilkes and Justice Pratt had earlier challenged the legality of the April 26 general warrant, but by May 3 it was technically no longer at

---

98 See supra note 59 (full text of warrant).
100 G. Rudé, supra note 27, at 24. Other authors have suggested that Wilkes visited the printer's office to protect the next edition of the *North Briton* from destruction. See, e.g., C. Trench, supra note 36, at 104.
101 Halifax reportedly told Carrington to seize all Wilkes' papers. C. Trench, supra note 36, at 103.
102 The warrant, addressed to the constable of the Tower, read: These are in his majesty's name to authorize and require you to receive into your custody the body of John Wilkes, esq. herewith sent you for being the author and publisher of a most infamous and seditious libel intituled the North Briton number 45 tending to inflame the minds and alienate the affections of the people from his majesty and to excite them to traiterous insurrections against the government and to keep him safe and close until he shall be delivered by due course of law and for so doing this shall be your warrant.
103 English Liberty: Being a Collection of Interesting Tracts, From the Year 1762 to 1769; Containing the Private Correspondence, Public Letters, Speeches, and Addresses, of John Wilkes, Esq. 81 (London 1769) [hereinafter cited as English Liberty].
104 Id. at 24, 29.
issue. Accordingly, Wilkes' counsel argued at the May 3 hearing that Wilkes was wrongfully being imprisoned, but did not attack the April 26 warrant. Wilkes, in his own address to the court, objected to the seizure of his papers but did not mention the general warrant under which he was originally apprehended. Wilkes addressed the court at a subsequent hearing on May 6, and again did not discuss the April 26 general warrant. Instead, he objected:

my house [has been] ransacked and plundered; my most private and secret concerns divulged . . . . Such inhuman principles of star-chamber tyranny will, I trust, by this court, upon this solemn occasion, be finally extirpated, and henceforth every innocent man, however poor and unsupported, may hope to sleep in peace and security in his own house, unviolated by King's messengers, and the arbitrary mandates of an overbearing Secretary of State.

Justice Pratt recognized Wilkes' immunity from arrest as a member of Parliament and ordered him freed.

Although Wilkes was released from custody and seemed protected from criminal prosecution, his papers remained in the possession of Lord Halifax. On the day of his release Wilkes sent an audacious letter to Halifax and the Earl of Egremont asserting that his house had been robbed and demanding the return of the "stolen goods" in their possession. Halifax wrote to Wilkes explaining:

your papers were seized in consequence of the heavy charge brought against you, for being the author of an infamous and seditious libel . . . . [S]uch of your papers, as do not lead to a proof of your guilt, shall be restored to you; such as are necessary for that

---

105 Id. at 26. The issue of this second, special warrant temporarily frustrated Wilkes' pre-existing plan to challenge the legality of general warrants. O. Sherrard, supra note 36, at 96. 106 Wilkes complained, "[m]y papers have been seized, perhaps with a hope the better to deprive me of that proof of [the government's] meanness, and corrupt prodigality . . . ." English Liberty, supra note 102, at 84. 107 Id. at 87-88. 108 G. Rudé, supra note 27, at 27. Parliament subsequently declared that the immunity did not extend to the writing of libels. See infra note 148 and accompanying text. 109 At least some of those papers were never returned. G. Rudé, supra note 27, at 24, 28. 110 English Liberty, supra note 102, at 89-90. Wilkes unsuccessfully sought a warrant to search the homes of Halifax and Egremont for his papers. Id. at 90.
purpose, it was our duty to deliver over to those, whose office it is to collect the evidence, and manage the prosecution against you.\textsuperscript{111}

Wilkes' response complained without elaboration that his papers had been seized under an "illegal warrant," and emphasized his determination to "assert the security of my own house."\textsuperscript{112}

Less than two weeks after Wilkes' release, the first of a series of pamphlets on the Wilkes affair was published. A Letter to the Right Honorable Earls of Egremont and Halifax, His Majesty's Principal Secretaries of State, on the Seizure of Papers\textsuperscript{113} addressed only the seizure of Wilkes' papers and not the general warrant under which he was first arrested. The author noted that although earlier discussion had focused on the scope of Wilkes' parliamentary immunity from arrest, the "SEIZURE OF PAPERS is . . . of greater importance, or more general concern, as a QUESTION OF LIBERTY, interesting in the highest degree to EVERY SUBJECT in the kingdom."\textsuperscript{114}

A Letter to Egremont and Halifax argued that seizures of papers were "unprecedented and illegal" for several related reasons.\textsuperscript{115} First, disclosure of confidential information about personal or business affairs might cause irreversible harm:

The merchant has his secrets of trade; the philosopher his discoveries in science. Every accurate man has the impenetrable secret of his circumstances; the state of his affairs. Many have their Wills, settlements, and dispositions of their estates, sealed up in silence not to be broke, but with their own heart-strings. . . . A man's riches may be there in things known to none but himself; and his poverty may from thence only appear, the unseasonable discovery of which may involve him in irreparable ruin.\textsuperscript{116}

\textsuperscript{111} Id. at 90-91.
\textsuperscript{112} Id. at 91-92.
\textsuperscript{113} (London 1763) [hereinafter cited as Letter to Egremont and Halifax].
\textsuperscript{114} Id. at 5-6.
\textsuperscript{115} Id. at 31. The author acknowledged that papers could be seized in the case of treason so "that the sinews of rebellion may be cut." Id. at 22. But treason necessitates "a certain necessary rigour and severity . . . which would be cruelty, if extended to other crimes." Id. The author also had reservations about using seized papers at the trial of alleged traitors, arguing that "surely it cannot be law even in cases of treason . . . that papers found in a man's closet, not published, and unconnected with any thing but themselves, can constitute a crime, or be brought as a proof of guilt." Id.
\textsuperscript{116} Id. at 8. The harm caused by the seizure of papers could not be undone: "The mischief and damages occasioned by the seizure of papers must in every case be very great, in many infinite, and irreparable; such as no consideration, no restitution can compensate, no satisfaction indemnify." Id. at 7.
Second, personal papers often contain an individual’s most private thoughts, never intended to be disclosed to anyone else, "things that the world never saw and no man has a right to look upon".\textsuperscript{117}

Papers . . . are our closest confidants; the most intimate companions of our bosom; and next to the recesses of our own breasts, they are the most hidden repository we can have. Our honour and fame, our estates, our amusements, our enjoyments, our friendships, \textit{are}, and even our vices \textit{may be}, there: things that men trust none with, but themselves; things upon which the peace and quiet of families, the love and union of relations, the preservation and value of friends, depend.\textsuperscript{118}

Third, an individual’s papers ordinarily include confidential communications with others; seizure would expose those confidences and affect people other than the owner of the papers.\textsuperscript{119} The result would be

an end of confidence amongst mankind. A severe restraint is laid upon friendship and correspondence, and even upon the freedom of thought . . . . [H]e will be the wisest man that corresponds the least with others, and the most prudent who writes very little, and keeps as few papers as he can by him. None but a fool in this case will have any secrets at all in his possession.\textsuperscript{120}

Seizures of confidential communications in libel cases, “in which \textbf{Politics}, \textbf{Party}, \textbf{Prejudice} and \textbf{Resentment} will always have a great influence,” would be particularly unfortunate.\textsuperscript{121}

Finally, \textit{A Letter to Egremont and Halifax} attacked the statement in Halifax’s letter to Wilkes\textsuperscript{122} that the papers seized would be used against Wilkes in a subsequent criminal proceeding:

What was the pretence of this late violation of rights so sacred in their nature, this invasion of property, in a critical point, which comprehends every valuable interest a man can have? A person is suspected of being the author of a printed paper, which, in the judgment of the secretaries of state, was a seditious libel, and the

\textsuperscript{117} Id. at 25.
\textsuperscript{118} Id. at 8-9.
\textsuperscript{119} Id. at 10-11.
\textsuperscript{120} Id. at 25-31.
\textsuperscript{121} Id. at 30.
\textsuperscript{122} See supra note 111 and accompanying text.
proof of the fact is to be sifted out of his own papers: for your lordships have said in your letter, which is published, that such of the papers seized, as tend to make out the guilt of the owner are to be kept, and used for that purpose . . . .

If there is a circumstance that can aggravate the injury, which is in itself too great almost to be conceived, it is this use that is to be made of the papers . . . .

When a person is brought upon his trial for any offence, he is not bound, nor will any court suffer him to give evidence against himself; but by this method, if allowed, though a man’s tongue is not permitted to bear testimony against him, his thoughts are to rise in judgment, and to be produced as witnesses to prove the charge. A man’s Writings lying in his closet, Not Published, are no more than his thoughts, hardly brought forth even in his own account, and, to all the rest of the world, the same as if they yet remained in embrio in his breast . . . .

Although A Letter to Egremont and Halifax drew no distinctions among papers, the arguments it advanced do not compel the conclusion that all papers should be immune from seizure. The author of the pamphlet was primarily concerned with personal secrets, private reflections, confidential correspondence, and other papers analogous to an individual’s thoughts “in embrio in his breast.” Business records, for example, thus would not implicate the values articulated in A Letter to Egremont and Halifax. This distinction was of little importance to the Wilkes controversy because the messengers apparently had seized every scrap of paper they found in Wilkes’ home. Thus, the author did not need to consider explicitly whether a search and seizure limited to nonconfidential business or household records would be permissible.

A Letter to Egremont and Halifax also contains a brief passage suggesting that defects in the April 26 warrant aggravated the abuse inherent in the seizure of Wilkes’ papers. Specifically, the

---

122 Letter to Egremont and Halifax, supra note 113, at 19-21. See also id. at 24-25 (“[no] man should be deprived of any benefit, or advantage, his own silence, or the secrecy of papers not published, can afford to protect him against conviction. As he can keep his mouth shut, so his privacies ought to be sacred, and his repositories secure.”). The author compared Wilkes’ situation to that of the widely-regarded seventeenth-century author Algernon Sydney, who prior to the Glorious Revolution had been convicted of treason and executed on the basis of an unpublished essay found in his home. Id. at 16-17.

124 See supra note 123 and accompanying text.

125 See supra note 101 and accompanying text.
author objected that the messengers did not have "so much as a pretence of a warrant naming the owner."\textsuperscript{126} The defective warrant, however, was not the underlying problem; it merely made the already unacceptable seizure of papers more intolerable. Nothing in \textit{A Letter to Egremont and Halifax} suggests that the seizure would have been proper if the warrant had named Wilkes. The author discussed warrant procedure nowhere else in the pamphlet, and never used the term "general warrant."

Later in the year, another pamphlet appeared that objected primarily to the warrants under which Wilkes had been imprisoned.\textsuperscript{127} \textit{Observations upon the Authority, Manner and Circumstances of the Apprehension and Confinement of Mr. Wilkes, Addressed to Free-Born Englishmen}\textsuperscript{128} argued that the April 26 warrant, which the author called a "general warrant,"\textsuperscript{129} gave the messengers a dangerous authority to arrest anyone they pleased:

\begin{quote}
If such a warrant is of any authority at all, might not the messengers, to whom it is directed, have gone to the houses of and seized the persons of any of the Dukes, Princes of the Blood Royal, of my Lord Chancellor, the Archbishop of Canterbury, or any great officer of State, Peer or Coommoner of the realm? . . . Is not this, then, a pretty discretion to lodge in four of the King's, ordinary messengers . . . ?\textsuperscript{130}
\end{quote}

In order to discover the authors and publishers of \textit{North Briton} No. 45, the messengers might conduct sweeping investigations, receive evidence, and administer oaths. The author complained that these functions were improperly delegated to messengers "who have till now been considered only as a higher sort of postmen or letter carriers . . . ."\textsuperscript{131} Messengers were "very little practised in the law," however learned they might otherwise be.\textsuperscript{132}

\textit{Observations} went on to attack the warrant of April 30. Because it identified Wilkes by name, the April 30 warrant was not a gen-

\begin{footnotes}
\item[126] \textit{Letter to Egremont and Halifax}, supra note 113, at 12. In addition, the warrant was issued "without information upon OATH by virtue of a VERBAL ORDER of a secretary of state." Id.
\item[127] See supra notes 98, 102 and accompanying text.
\item[128] [London 1763] [hereinafter cited as \textit{Observations}].
\item[129] Id. at 22.
\item[130] Id. at 7.
\item[131] Id. at 9-10.
\item[132] Id. at 11.
\end{footnotes}
eral warrant as that term was used in the 1760's. Nevertheless, the author argued that the warrant was defective because it asserted no basis for imprisoning Wilkes: "Mr. Wilkes' name is prudently inserted in the warrant . . . . But tho' Mr. Wilkes is named in the warrant, it proceeds upon no charge by oath, no view of the magistrate committing, nor any other ground whatever in the warrant." Moreover, the pamphlet noted that the Secretaries of State, who issued the warrant, were apparently also the sole source of whatever evidence supported it. Observations called on English juries to award damages for "invasions" under both warrants, and urged Parliament to make clear that the warrants were illegal.

Observations articulates most of the requirements later stated in the fourth amendment's warrant clause, except the requirement that warrants describe the place to be searched. The author thus advanced a much broader argument than the opinions of the courts in the general warrants cases. Observations did not suggest, however, that a proper warrant could authorize "a general seizure of papers."

The arguments in Observations against seizures of papers were distinct from its criticisms of general warrants. The pamphlet reiterated several contentions from A Letter to Egremont and Halifax, objecting that the government had revealed to the public the content of some of Wilkes' papers, and that the Secretaries of State planned to use the papers to prove Wilkes' guilt. The au-

---

133 Id. at 22.
134 Id. at 22-23 ("The Secretaries of State are witnesses; they are the magistrates too; they charge, they commit upon their own testimony . . . .").
135 Id. at 35.
136 Id. at 32-33.
137 See supra note 2 (text of fourth amendment).
138 See supra notes 42-66 and accompanying text.
139 Observations, supra note 128, at 14.
140 The author asserted:

It was not dealing according to the law with the papers of a private gentleman seized, on any pretence whatever, to publish in newspapers the secrets and privacies of them, as has been done in the instance now under consideration. This is a part of the illegal proceeding the most inexcusable; it is an irreparable injury to the person immediately affected by it, his family and friends; an insult upon the public, and a high breach of trust in those who have been guilty of it.

Id. at 14. See supra notes 116-21 and accompanying text.
141 Observations, supra note 128, at 17. See supra notes 122-123 and accompanying text.
thors of A Letter to Egremont and Halifax and Observations thus viewed general warrants and seizures of papers as presenting independent issues.

B. Initial Parliamentary Debates, 1763-64

Developments in the second half of 1763 focused public debate on the government's use of general warrants in libel cases. In the search for the authors and publishers of various editions of the North Briton and the Monitor, authorities in 1762 and 1763 had arrested 48 persons in addition to Wilkes under general warrants. Wilkes urged a number of those arrested to sue the government officials involved, and in late 1763 William Huckle and Dryden Leach won substantial damage awards. On December 6, a jury awarded Wilkes himself £1000 in damages against the messengers after Justice Pratt condemned general warrants as "a rod of iron for the chastisement of the people of Great Britain."142

Developments were considerably less favorable for Wilkes in Parliament, where Lord Halifax was among the leadership of the majority, and where many members viewed Wilkes' growing popularity with horror rather than with admiration. The opposition, led by William Pitt, initially embraced Wilkes and his cause, seeing an opportunity to increase their own public support.143 In the fall of 1763, however, the government obtained a copy of a satirical poem entitled An Essay on Women, which Wilkes had helped compose. All sides in Parliament regarded the work as blasphemous and libelous.145 The House of Lords voted unanimously to condemn An Essay on Women as "a most scandalous, obscene, and impious libel."146 Meanwhile, the House of Commons resolved by a vote of 273 to 111 that North Briton No. 45 was "a false, scandalous, and seditious libel," and ordered it burned in public.147

Observations also suggested that government officials might use seizures of papers to obtain and to destroy evidence of their own misconduct. Observations, supra note 128, at 15.

142 Huckle and Leach were awarded £2900 and £400 respectively. G. Rudé, supra note 27, at 28. See supra notes 42-47, 57-66 and accompanying text.
143 O. Sherrard, supra note 36, at 105. See supra notes 48-56 and accompanying text.
144 O. Sherrard, supra note 36, at 100-113.
145 G. Rudé, supra note 27, at 33.
146 Id. In the House of Commons, even Pitt denounced Wilkes as "the blasphemer of his God, and the libeller of his King." 15 Parl. Hist. Eng. 1364 (1813).
147 15 Parl. Hist. Eng. 1359-60 (1813); G. Rudé, supra note 27, at 33. A crowd disrupted
Despite his popularity with the public, Wilkes’ legal position became increasingly precarious. In November 1763 the House of Commons resolved that parliamentary immunity did not extend to the crime of libel, thus exposing Wilkes to prosecution for having written *North Briton No. 45* and *An Essay on Women*. Wilkes fled to France, and in early 1764 was expelled from Parliament. He was subsequently indicted for seditious libel, and the King’s Bench formally declared him an outlaw when he failed to appear to face the charges.

The exile of Wilkes removed a source of trouble for the government, but the opposition in Parliament still pressed for a decision on the legality of Lord Halifax’s conduct. The opposition renewed Wilkes’ complaint, made before his exile, that his arrest and the seizure of his papers under a warrant “in which no person was named in particular” violated his rights as a member of Parliament. Sir William Meredith placed a resolution before the House of Commons: “That a General Warrant for apprehending and seizing the authors, printers and publishers of a seditious libel, together with their papers, is not warranted by law.” Supporters of the resolution argued that the warrants Lord Halifax had issued conferred sweeping authority on the messengers to act “in such manner, and against such persons as their informer should think fit to advise.” Thus, although the resolution literally concerned
only libel cases, the primary argument in its favor was more broadly framed.

The language of the resolution left unclear whether the seizure of papers was an issue independent of the issue of general warrants. The one account of the debates that clearly mentions seizures of papers, however, appears to indicate that supporters of the resolution considered such seizures improper whether or not ordered by a general warrant:

A general warrant not expressing the name of the party to be apprehended, is void in law: for it is leaving it to the arbitrary discretion of a common officer to arrest persons, and search what houses he thinks fit; and the seizure of papers has frequently been condemned as illegal.153

The government made no attempt to defend its treatment of Wilkes. Its spokesmen argued instead that the House of Commons should take no action on legal issues that were the subject of pending litigation.154 Supporters of the resolution responded that the pending suits against Lord Halifax and the messengers did not justify parliamentary inaction, and condemned the government’s argument as “eva[sion] by a pretence that is false, is a mockery of justice, and an imposition on the House.”155 A motion to postpone consideration of the resolution nevertheless passed by the narrow margin of 232 to 218.156

C. Public Reaction to the Stalemate

The decision of the government to oppose parliamentary action, although undoubtedly intended to quiet the Wilkes controversy,
had the opposite effect. The public’s concern about general warrants and seizures of papers was compounded by frustration that a majority of the House of Commons had failed to address the issues. A broadside of the era listed the dissenting members of Parliament beneath the heading: “In most societies of this metropolis, the healths of the following gentlemen are drank as friends to liberty, and anxious to protect their fellow-subjects from having their persons imprisoned, their houses broke open and searched, and their papers seized without lawful process.”¹⁵⁷ A new round of pamphlets, published in the remainder of 1764 and in 1765, continued to treat general warrants and seizures of papers as independent problems.

Charles Townshend, a member of Parliament who had opposed postponing consideration of the general warrants resolution, wrote the first of these new publications, A Defence of the Minority in the House of Commons.¹⁶⁸ Most of the pamphlet attacked the postponement on the ground that general warrants were not, in fact, the issue in any pending suit.¹⁶⁹ In support of the resolution itself, Townshend argued that because it condemned general warrants only in libel cases, it did not preclude the use of general Warrants issued by Secretaries of State in every extreme case, which imagination can put or which necessity would justify . . . . I may think it justifiable in Consideration of the public Danger, the nature of the Offence, the Necessity of Secrecy and Dispatch in preventing such Conspiracies against the public Weal, to connive at the use of general Warrants of Apprehension; but in the Case of a Libel already published, where the Mischief is done, where the Degree of the public Danger is comparatively so small, and the Offence itself, to the reproach of our Laws, so very vague and undefined, I may and do think that such unlimited Power, over the Persons and goods of all Subjects, is neither necessary nor expedient to be lodged in any Hands.¹⁶⁰

Apparently, Townshend objected to general warrants primarily because they granted unlimited discretion to messengers.¹⁶¹ A De-

¹⁵⁷ A copy of this broadside is at the Beinecke Rare Book Library at Yale University (Broadsides 4, By 6, 1765).
¹⁶⁸ (London 1764) [hereinafter cited as A Defence of the Minority].
¹⁶⁹ Id. at 7-31.
¹⁶⁰ Id. at 5-6.
¹⁶¹ See id. at 35; see also supra note 152 and accompanying text (House of Commons
fence of the Minority did not discuss the legality of seizures of papers.

A Letter From Candor to the Public Advertiser discussed general warrants and seizures of papers separately, and treated them as distinct issues. The pseudonymous Candor argued against general warrants that "ordinary Messengers, having nobody named in such warrant, might by virtue thereof have taken up ever so many persons in the kingdom . . . ." In addition, Candor objected to the general warrant Lord Halifax had issued because it was not based on sworn evidence: "Even if somebody had been named in the warrant, must there not be an Information upon oath, of his being Author, Printer or Publisher?"

Candor argued separately that seizures of papers were impermissible even "if somebody were named and alleged to be charged upon oath with being Author, Printer, or Publisher of a Libel." As had the author of A Letter to Egremont and Halifax, Candor regarded the use of private papers against their owner in a criminal proceeding as a species of compulsory self-incrimination. Permitting seizures of papers, even if based on sworn allegations,

would lead to the seizing of a man and his papers for a libel, against whom there was no proof, merely slight suspicion, under a hope that, among the private papers of his bureau, some proof might be found which would answer the end. It is a fishing for evidence, to the disquiet of all men, and to the violation of every private right; and is the most odious and infamous act, of the worst sort of inquisitions . . . . It is, in short, putting a man to the torture, and forcing him to give evidence against himself.

Candor objected that putting one's thoughts on paper could never by itself constitute a crime:

---

163 Id. at 30.
164 Id.
165 Id.
166 See supra notes 122-123 and accompanying text.
167 A Letter From Candor, supra note 162, at 31.
Since the . . . reign of the last Stuart, every man that has the faintest notions of Law or Liberty, must know the position *Scribere est agere* [to write is to act] has been condemn'd, and that the mere writing and leaving in one's own study, any discourse whatever, is not criminal, it being no act which the Law takes notice of; for, any man is at liberty to think, and to put what thoughts he pleases on paper, provided he does not publish them.168

Although the seizure of papers might have been justified under some circumstances, Candor concluded that the practice had so much potential for abuse that it should be completely forbidden:

by degrees, men known to be in opposition to the Ministry . . . would have their studies rummaged, whenever a galling or abusive pamphlet came out, published, perhaps, on purpose; under a frivolous pretence, that they were rumored to be the writers or editors of it; but really and truly, for the sake of getting at private correspondence and connections, and for the business of disarming opposition . . . .169

If seizures of papers were permitted in libel cases "it would soon become usual, under the pretence of better keeping the Peace, to exercise this power in very ordinary cases."170

Later in 1764, a response to *A Defence of the Minority* was published under the title *A Defence of the Majority in the House of Commons, on the Question Relating to General Warrants, In Answer to the Defence of the Minority.*171 The pamphlet argued primarily that general warrants were indeed at issue in a number of cases pending when Parliament had refused to adopt a resolution on the matter.172 *A Defence of the Majority* also responded to the contention in *A Defence of the Minority* that libel was too minor an offense to justify resort to a general warrant,173 not by arguing that general warrants were innocuous or ordinarily legal, but by insisting that libel was a particularly dangerous crime. Seditious libel was not "a Sort of harmless Sport, a mere Exercise of Wit and

---

168 Id. at 30.
169 Id. at 31-32.
170 Id. at 31.
171 (London 1764) [hereinafter cited as *A Defence of the Majority*]. The authorship of the pamphlet is generally attributed to Charles Lloyd, the secretary to George Grenville.
172 Id. at 21-28. For the opposing argument, see supra note 155 and accompanying text.
173 See supra note 160 and accompanying text.
Talents, and innocent Exertion of the Liberty of the Press," but rather "the subtle Poison that creeps imperceptibly through every Vein; the Seed of Jealousy, Revolt, and Civil Discord: and is at least the Parent of Treason, if not the Offspring of it." The author stopped short of actually supporting general warrants, however, and made no attempt to justify seizures of papers.

A Defence of the Majority also correctly pointed out that the resolution before the House of Commons, which condemned "a general warrant for apprehending and seizing the authors, printers and publishers of a seditious libel, together with their papers," had been vaguely worded. A prohibition against general arrest warrants directing the seizure of the unnamed suspect's papers might not forbid either a general arrest warrant with no reference to papers or a "particular warrant, describing the person, for the seizing of the papers." The author argued that if such interpretations were possible, the resolution was "no security at all." A Defence of the Majority thus recognized the minority's intent to prohibit all seizures of papers, including those conducted under an otherwise valid warrant.

The next pamphlet in the exchange, A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace or the Behaviour; with a View to some Late Proceedings and the Defence of Them by the Majority, was the longest and most widely circulated publication arising out of the Wilkes controversy. Written under the pseudonym Father of Candor, the pamphlet first appeared in October 1764, and by 1765 had been published in five editions.
Father of Candor distinguished general warrants and seizures of papers in unambiguous terms: "a General Warrant is good in no case whatever, for the apprehension of persons or papers, or both; and . . . a Particular, or any Warrant, for seizing papers, is likewise, as the law now stands, good in no case whatever . . . ." He also attacked a suggestion in A Defence of the Majority that the resolution before the House of Commons, by expressly referring only to libel cases, might sanction general warrants and seizures of papers relating to other crimes. He noted that because the government had used general warrants and seizures of papers only in libel cases, Parliament had no reason to condemn other possible abuses: "when a parliament condemns any thing in one case, it intimates a disapprobation of every similar case and of every the like species, altho' not named expressly in their resolution." Father of Candor argued that resolutions of Parliament "in a great constitutional point" should not be construed with "that kind of quibbling which is tolerated" in less important matters.

Father of Candor's attack on general warrants was based on the familiar objection that they relied on the discretion of a common officer to arrest what persons, and search what houses he thinks fit: and if a Justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such a general warrant, which might have the effect of an hundred blank warrants.

Father of Candor argued further that the higher officials who issued general warrants might also abuse their discretion. He therefore opposed general warrants even in emergency situations:

bad men, as one may easily figure to one's self, will be apt to lay
stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to gratify personal pique . . . . If such warrants were to be allowed legally justifiable in any instances, it would be exceedingly difficult, nay, impossible, to restrain Ministers from grievously oppressing any man they did not like, under many pretences, from time to time, for their own safety, without any motive of public good.\textsuperscript{186}

Like the author of \textit{A Letter to Egremont and Halifax}, Father of Candor opposed seizures of private papers because of the secrets and confidences these documents contained.\textsuperscript{187} He described in graphic terms the inevitable invasion of privacy:

\begin{quote}
What then, can be more excruciating torture, than to have the lowest of mankind, such fellows as Mooney, Watson, and the rest of them, enter suddenly into [a person's] house, and forcibly carry away his scrutiores, with all his papers of every kind . . . . These papers are immediately to be thrown into the hands of some clerks, of much curiosity, and of very little business in times of peace, who will, upon being bid to sort and select those that relate to such and such a particular thing, naturally amuse themselves with the perusal of all private letters, memorandums, secrets and intrigues, of the gentleman himself, and of all of his friends and acquaintance of both sexes. In the hurry too of such business, notes, bonds, or even deeds, and evidence of the utmost consequence to private property, may be divulged, lost, torn or destroyed, to his irreparable injury.\textsuperscript{188}
\end{quote}

In addition, Father of Candor denounced the use of a criminal defendant's private papers against him as "making a man give evidence against and accuse himself, with a vengeance."\textsuperscript{189}

Father of Candor also argued that even if Wilkes' papers were not absolutely immune from seizure, the search of his home was improper because of the basis and scope of the warrant:

\begin{itemize}
\item \textsuperscript{186} \textit{Id.} at 49-50.
\item \textsuperscript{187} Father of Candor asserted:
\begin{quote}
Many gentlemen have secret correspondences, which they keep from their wives, their relations, and their bosom friends. Every body has some private papers, that he would not on any account have revealed. A lawyer hath frequently the papers and securities of his clients; a merchant or agent, of his correspondents. \textit{Id.} at 54. See also supra notes 116-21 and accompanying text (argument in \textit{A Letter to Egremont and Halifax}).
\end{quote}
\item \textsuperscript{188} \textit{Letter From Father of Candor}, supra note 92, at 54-55.
\item \textsuperscript{189} \textit{Id.} at 56.
\end{itemize}
Nothing . . . can be forcibly taken from any man, or his house entered, without some specific charge upon oath. The mansion of every man being his castle, no general search warrant is good. It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal in itself, in my custody, before any magistrate is authorized to grant a warrant to any man to enter my house and seize it. Nay further, if a positive oath be made, and such a particular warrant be issued, it can only be executed upon the paper or thing sworn to and specified, and in the presence of the owner, or of somebody intrusted by him, with the custody of it. Without these limitations, there is no liberty or free enjoyment of person or property, but every part of a man's most valuable possessions and privacies, is liable to the ravage, inroad and inspection of suspicious ministers, who may at any time harass, insult and expose, and, perhaps, undo him.190

A document that was "criminal in itself," such as a forgery, might be subject to seizure, but there could be no "taking [of] all papers indiscriminately. . . . Nothing can be touched, without some criminal charge in law specifically sworn against it. And where there is even a charge against one particular paper, to seize all, of every kind, is extravagant, unreasonable and inquisitorial."191

Father of Candor's insistence that a warrant must specify the place to be searched and the thing to be seized was criticized in *A Candid Examination of the Legality of the Warrant Issued by the Secretaries of State for Apprehending the Printers, Publishers, etc. of a Late Interesting Paper.*192 The author argued that searches not meeting Father of Candor's proposed requirement were nonetheless "strictly legal, justifiable, and necessary for the very being and support of the whole System of Government."193 For example, in the case of the infamous Gunpowder Plot, after a vague and anonymous threat,

[a] diligent search was ordered to be made in the Parliament-

---

190 Id. at 58. The reference to a "general search warrant" failing to identify the things to be searched or seized appears to be the only use of the phrase in the pamphlets of the era. In all other instances, a general warrant was a warrant that failed to identify the individual possessing the things to be searched or seized.

191 Id. at 59. An authority to seize all papers, not merely inherently criminal documents, would render all "correspondences, friendships, papers and studies" subject to "the will and pleasure of the ministers for the time being, and of their inferior agents!" Id.

192 (London 1764) [hereinafter cited as *A Candid Examination*].

193 Id. at 4.
house, and all other rooms and lodgings adjoining, which produced a discovery of that most enormous treason. If the then Ministers should have thought themselves limited by the narrow bounds, to which at present it is attempted to confine their power no search could legally have been made, and consequently that treason could have been known but by its effects. Here was no particular treason charged, no particular place mentioned, only a general power to search, without having any particular object in view, but to make discoveries by any thing that might occur in the progress of it. The importance of the object, the Preservation of the State, authorized and justified the means.\footnote{Id. at 7. The author argued that ”to destroy this power for the Preservation of the State, because a Minister might make an improper use of it . . . is the most glaring and dangerous absurdity.” Id. at 8.}

A Candid Examination argued that search warrants limited in the manner Father of Candor proposed might forewarn those in possession:

> It is said, that the particular places to be searched should be distinctly and minutely specified in the Warrant, and the search restrained to those: might not this directly tend to defeat the discovery; if the Messengers, finding the Papers, etc., are not in any place mentioned in their warrant, are obliged to get a new Warrant, before they can search other suspected places, may not what is searched for, be in the interim removed?\footnote{Id. at 7-8.}

The pamphlet was limited to the proposed specificity requirement and did not discuss seizures of papers or general arrest warrants.

An unambiguous defense of both general warrants and seizures of papers was published in late 1764 or early 1765 in Considerations on the Legality of General Warrants, and the Propriety of a Parliamentary Regulation of the Same.\footnote{(London 1765) [hereinafter cited as Considerations]. The pamphlet was first printed no later than January 1765, because it was responded to in a pamphlet dated January 24, 1765. See supra note 91. The first edition (London 1765) is reproduced in facsimile in Libels, Warrants and Seizures: Three Tracts 1764-1771 (1974).} The author noted that general warrants and seizures of papers presented distinct issues,\footnote{Considerations, supra note 196, at 4.} and addressed them separately. Considerations defended general warrants as necessary in cases where a suspect's name was not known:
The slightest Consideration will point out to us Variety of Cases, in which special Warrants cannot possibly be used; many others may occur which human Wisdom cannot foresee. Is then the Guilty to escape, because no nominal Description can be given of him? or is it lawful, in such Case, to grant a Warrant describing him by other Marks peculiar to him alone? Suppose a Murder is committed by a Person, whose Name is unknown in that Part of the Kingdom: what is to be done? Is the Murderer to be left to escape, because a nominal Warrant cannot be issued against him? Would the Law, in such Case, hold a general Warrant to arrest the Person guilty of the murder, to be illegal, and a Violation of the Liberty of the Subject? Surely not.198

The crucial distinction was not between more and less serious offenses, but between instances "where special Warrants can, and where they cannot be effectual to lay hold on the guilty Person."199

Considerations took an intermediate position on seizures of papers, defending the use of seized papers in a criminal proceeding but disapproving a general search for papers. The author acknowledged that the law ordinarily provides "protection . . . to the papers of every individual"200 and that "the Papers of every innocent Man are under its Protection."201 An individual's papers "which relate to any Crime he has committed"202 should nevertheless be subject to seizure:

because the Law, from Motives of Compassion, will not oblige the Party charged to produce any thing against himself, does it follow that every thing in his Possession is Sacred, and that nothing found in his Custody is to be used in Evidence by his Accuser? Does not the daily Practice prove the Falsity of that Idea? Are not Persons arrested on Suspicion of Felony constantly searched? Are not the Papers or Goods found upon him produced in Evidence against him? Is his House more sacred than his Person? Is his Closet protected, when his very Pockets may be rifled? Is not the Practice and the Right of searching Houses for stolen Goods universally admitted? Are not the very Letters, nay the Confessions of the Accused, used in Evidence of his Guilt? Where then is the Rule of Law, where the Principle, that no Man is to furnish Evidence

198 Id. at 6.
199 Id. at 9.
200 Id. at 14.
201 Id. at 16.
202 Id. at 14.
against himself? He is not compelled to do it by his own Act; but the Prosecutor is at Liberty to avail himself of whatever he can find in the House, on the Person, under the Hand, or even from the Mouth of the Accused, to prove the Truth of his Charge.  

Considerations condemned, however, “the general and undistinguishing Seizure of all Papers whatsoever” because such broad seizures could not be justified as “necessary.”

Father of Candor responded to Considerations in early 1765 with A Postscript to the Letter on Libels, Warrants, &c. Father of Candor pointed out that although Considerations undertook to defend general warrants, it in fact justified only warrants describing the suspect by “Marks peculiar to him alone.” A warrant “containing a specific description of a particular person, solely and peculiarly applicable to him . . . is to all intents and purposes a special warrant.” The warrant issued by Lord Halifax, however, did not contain such a specific description: “A paper or book has its title printed in the title-page, and it goes every where by that title; but, no man walks about with the title of ‘Author, Printer or Publisher of the North Briton, No. 45,’ imprinted on his face . . . .” Father of Candor recognized that general warrants were subject not only to deliberate abuse, but could also lead to mistaken arrests:

There is nothing in the countenance of any man . . . which can determine him to be or not to be the Author, Printer or Publisher of any piece; so that many innocent men would be causelessly harassed from vain, light surmises, and idle reports of ignorant, ill-informed or ill-intentioned people, were such general warrants received.

Father of Candor added a new argument to his earlier attack on general warrants, declaring that only a magistrate should issue a

---

203 Id. at 13. The author also approved of the seizure of papers related to a crime “to be afterwards carried into Execution . . . [to] prevent [its] perpetration.” Id. at 11.
204 Id.
205 A Postscript, supra note 91.
206 See supra note 198 and accompanying text.
207 A Postscript, supra note 91, at 8.
208 Id. at 9.
209 Id. Father of Candor noted that many of those arrested under general warrants in 1762 and 1763 were found to be unconnected with the condemned publications. Id. at 10.
warrant and that he should base his decision on evidence under oath:

A man to be apprehended at all must be guilty of some breach of the law; and this must either happen in the view of the magistrate, or be proved to him by oath, before he can issue a warrant for his arrest . . . . It is the province of the magistrate alone to judge, and no man can delegate his judicial capacity to another. But, if he grant a discretionary, that is, a general, and not a particular warrant, the officer is left to judge for himself . . . . The liberty of every Englishman would then be left at the mercy of every impudent Bailiff, Constable, Messenger, or Footman, intrusted with process.\(^ {210} \)

Father of Candor's proposed requirements would have invalidated not only general warrants but also specific warrants, such as the April 30 warrant for Wilkes' confinement, not based on sworn statements.\(^ {211} \)

Shifting his focus to seizures of papers, Father of Candor attacked as meaningless the distinction Considerations drew between seizures of all of an individual's papers and seizures only of particular documents. Even under a warrant authorizing the seizure only of certain specified papers belonging to an individual,

his house and all his papers may be rummaged and gutted by this sort of law, that is, upon mere political suspicion, in order . . . to fish for evidence really to prove him a libeller . . . . Every private paper, according to this doctrine, might be scrutinized by the examiner; for, without doing so, how could he determine whether something could not be proved from thence?\(^ {212} \)

Father of Candor thus recognized that rummaging through an individual's papers in search of particular documents involves the same invasion of privacy whether all papers or only specified papers are seized.

**D. Resumption of Parliamentary Debates, 1765-66**

In January 1765, The House of Commons resumed debate on general warrants and seizures of papers a year after consideration

\(^ {210} \) Id. at 11.

\(^ {211} \) See supra note 102 and accompanying text.

\(^ {212} \) A Postscript, supra note 91, at 18.
had been postponed. In the intervening period, *A Defence of the Majority, A Candid Examination, and Considerations* had aired a wide variety of arguments in support of Lord Halifax’s warrants. Nevertheless, no spokesman for the majority openly defended either general warrants or seizures of papers. Their primary argument remained that Parliament should not act while those issues were pending in the courts.\(^{213}\)

The opponents of general warrants, however, raised an entirely new argument:

> [even if] general warrants describing the offence, do not give officers in general a right to seize the innocent, they throw in the way of messengers, who are to be so well paid for taking care of the offender’s person, a temptation to enquire into the character and life of all persons, and thus tend in some shape, to convert these subordinate ministers of justice into so many spies and informers . . . such an enquiry, even when conducted in the discreetest manner, might injure the most virtuous in their reputation and fortune.\(^{214}\)

Because the messengers were not merely authorized by Lord Halifax to apprehend those connected with *North Briton No. 45*, but were under orders from him to do so, this sort of overzealous behavior was not unlikely.

The House of Commons again treated seizures of papers as a separate issue. Opponents characterized private papers as “often dearer to a man than his heart’s blood, and equally close,”\(^{215}\) and warned that papers could too easily be converted into weapons against their owner:

> though a minister may have less temptation to satiate avarice by the garbling of such papers, he may have what is a great deal worse, a much stronger [temptation] to glut his revenge, by com-

---

\(^{213}\) 16 Parl. Hist. Eng. 7, 13-14 (1813). Although no judicial precedent had explicitly found general warrants legal, the parliamentary majority noted that in a number of prior cases individuals held under general warrants had come before the King’s Bench seeking bail. In no case had counsel—who the majority asserted were undoubtedly “lovers of liberty and very able lawyers”—challenged the warrants. Id. at 13. To question the legality of general warrants without a court decision “would be impeaching the character” of the King’s Bench. Id. at 12.

\(^{214}\) Id. at 10.

\(^{215}\) Id.
bining or disjoining them, so as to make of them engines capable of working the destruction of the most innocent persons.\textsuperscript{216}

Critics of seizures of papers reiterated Father of Candor's argument that even a warrant specifying the documents to be seized would permit the government to rummage through all of an individual's papers:

even a particular warrant to seize seditious papers alone, without mentioning the titles of them, may prove highly detrimental, since in that case, all a man's papers must be indiscriminately examined, and such examination may bring things to light which it may not concern the public to know, and which yet it may prove highly detrimental to the owner to have made public . . . .\textsuperscript{217}

Sir William Meredith proposed a new resolution: "That a General Warrant for apprehending the authors, printers, or publishers, of a libel, together with their papers, is not warranted by law, and is an high violation of the liberty of the subject."\textsuperscript{218} In an attempt to narrow the resolution, George Hay proposed a prefix that read in part: "That in the particular case of libels, and of no other crime, it is proper and necessary to fix, by a vote of this House only, what ought to be deemed the law in respect of general warrants . . . ."\textsuperscript{219} An amendment of this amendment was approved deleting the phrase "and of no other crime."\textsuperscript{220} The House of Commons then adopted the Hay amendment, but subsequently voted down the resolution as amended.\textsuperscript{221} This maneuvering confirmed Father of Candor's understanding that Parliament intended the resolution to refer to libel only as one instance in which general warrants were unacceptable.\textsuperscript{222}

In April 1766, the House of Commons reconsidered the matter and agreed on three resolutions. The first concerned only general

\textsuperscript{216} Id.
\textsuperscript{217} Id. at 10-11. See supra note 212 and accompanying text. Indeed, some private letters of Wilkes, it was noted, had improperly been made public as a result of the search of his home. 16 Parl. Hist. Eng. 11 (1813).
\textsuperscript{218} Id. at 7. This was essentially the same resolution Meredith had proposed a year earlier, except for the addition of the last eleven words, and the deletion of "seditious" before "libel." See supra note 151 and accompanying text.
\textsuperscript{219} 16 Parl. Hist. Eng. 7 (1813).
\textsuperscript{220} Id. at 8.
\textsuperscript{221} Id.
\textsuperscript{222} See supra notes 181-83 and accompanying text.
warrants: "That a General Warrant for apprehending the author, printer, or publisher, of a libel, is illegal; and, if executed on the person of a member of this House, is also a breach of the privilege of this House."\(^2\)\(^2\)

A broader version of this resolution was approved three days later, omitting the reference to libel and asserting that general warrants were illegal in any situation unless specifically authorized by Parliament.\(^2\)\(^4\) The third resolution, passed the same day as the first, dealt separately with seizures of papers:

That the seizing or taking away the papers, of the author, printer, or publisher, of a libel, or the supposed author, printer, or publisher, of a libel, is illegal; and that such seizing or taking away the papers of a member of this House, is a breach of the privilege of this House.\(^2\)\(^5\)

The condemnation applied whether or not a seizure of papers was based on a general warrant.

\textbf{E. Conclusion}

The resolutions of April 1766 largely ended the public controversy in England concerning general warrants and seizures of papers. By that time Parliament and the courts had condemned both practices, and the government showed no interest in resuming either one. In the years that followed, however, commentaries by members of Parliament and others discussed what had been fought over and achieved between 1763 and 1766. These pamphlets, speeches, and public letters played an important role in shaping public opinion on both sides of the Atlantic.

Wilkes continued to complain about the government’s conduct toward him and justifiably claimed credit for having won protection of the rights of all Englishmen. In a 1766 letter to Lord Grafton, Wilkes remarked:

\begin{quote}
I please myself ... with the reflection, that no minister has since dared to issue a General Warrant, nor to sign an order for the Seizure of Papers. In the one, the personal liberty of every subject
\end{quote}

\(^{223}\) Id. at 209. The second resolution read: "That a General Warrant for seizing and apprehending any person or persons being illegal, except in cases provided for by act of parliament, is, if executed upon a member of this House, a breach of the privilege of this House." Id.

\(^{225}\) Id.
is immediately concerned. On the other, may depend not only his own safety and property, but what will come still more home to a man of honour, the security, the happiness of those with whom he is most intimately connected, their fortunes, their future views, perhaps secrets, the discovery of which would drive the coldest stoic to despair, their very existence possibly, all that is dear and sacred in friendship and in love.\textsuperscript{226}

Wilkes cited these same two issues as his claim to fame in a statement printed in London newspapers in March 1768: "The two important questions of public Liberty, respecting General Warrants and Seizure of Papers, may perhaps place me among those who have deserved well of mankind, by an undaunted firmness, perseverance, and probity . . . ."\textsuperscript{227}

Following his conviction and imprisonment for seditious libel, Wilkes addressed an open letter to the gentlemen, clergy, and freeholders of Middlesex County, which the London newspapers printed in June 1768:

In the whole progress of ministerial vengeance against me for several years I have shewn to the conviction of all mankind, that my enemies have trampled on the laws, and been actuated by the spirit of tyranny and arbitrary power. The general warrant, under which I was first apprehended, has been adjudged illegal. The seizure of my papers was condemned judicially.\textsuperscript{228}

A year later, Wilkes wrote from the King's Bench prison another description of the government's past attacks on the constitution, again listing separately "the case of general warrants" and "the seizure of papers."\textsuperscript{229}

These issues were again aired in February 1769 when Parliament expelled Wilkes for the second time.\textsuperscript{230} George Grenville's speech in favor of the motion to expel provoked a detailed public attack on his own role in the Wilkes affair. A Letter to the Right Honora-

\textsuperscript{226} English Liberty, supra note 102, at 154. See also id. at 144 (William Pitt "was the cause that in 1764 no point was gained for the public in the two great questions of general warrants, and the seizure of papers.").

\textsuperscript{227} Id. at 156. The document was an open letter to the liverymen of the city of London.

\textsuperscript{228} Id. at 192.

\textsuperscript{229} A Collection of All Mr. Wilkes's Addresses to the Gentlemen, Clergy, and Freeholders of the County of Middlesex 25 (London 1769) (letter dated February 16, 1769).

\textsuperscript{230} Wilkes was first expelled from Parliament in January 1764. See supra note 149 and accompanying text.
ble George Grenville charged Grenville with having personally “advised a General Warrant and a Seizure of Papers . . .” and with blocking parliamentary action on these issues:

The present Lord Chancellor declared from the Bench “that a general warrant is unconstitutional, illegal, and absolutely void,” and that he should always consider it as a “rod for the chastisement of the people of Great Britain,” and his Lordship judicially condemned the seizure of papers, but you, Sir, long prevented any Parliamentary censure in either case . . . and till Lord Rockingham’s time we do not find the least mark of disapprobation of general warrants or the seizure of papers in the House of Commons.

Without Wilkes’ “cool perseverance and firmness,” the author insisted, “neither general warrants nor the seizure of papers [would have] been judicially condemned to this hour.”

The eighteenth-century public controversy in England, like the cases discussed in Part I, established two independent rights: a prohibition against general warrants and a limitation on seizures of papers. These rights sprang from the same tradition of individual liberty that led to the federal Bill of Rights in America. The restrictions on general warrants and seizures of papers are traceable to the influence of the Magna Carta and its progeny, just as are the first American colonial charters, the declarations of rights in the early state constitutions, and the first ten amendments to the federal Constitution. The English common law of searches and seizures at the time the fourth amendment was adopted thus became part of the American tradition of individual liberty.

The Wilkes controversy also directly influenced the framers of
the fourth amendment. The English search and seizure cases received extensive publicity in England and in America, and the Wilkes case was the subject of as much notoriety and comment in the colonies as it was in Britain. Wilkes' cause generated many supporters among American colonists, some of whom became key figures in the framing of the Constitution. The Committee of the Sons of Liberty in Boston, including such early luminaries as John Adams, Joseph Warren, John Hancock, Josiah Quincy, and James Otis, corresponded with Wilkes to demonstrate American support for his cause and to express admiration for his efforts on behalf of individual liberty. One member of the Sons of Liberty, William Palfrey, wrote that "The fate of Wilkes and America must stand or fall together."

The declarations of rights in the early colonial charters and state constitutions incorporated the English common law of searches and seizures. Section 10 of the Virginia Declaration of Rights, for example, although it did not directly refer to the English common law, demonstrates the important influence of the 1760's con-

---

236 See Bradley, supra note 32, at 463 & n.12; see also N. Lasson, supra note 62, at 13 (the "events which took place in England ... in the thirty years preceding adoption of the Amendment ... were immediately and directly the moving factors in the elevating of the principle of reasonable search and seizure to a constitutional" significance); R. Perry, Sources of Our Liberties 427 (1959) ("The fourth amendment grew out of the use by British officials of general warrants to enforce the acts of trade and to search for seditious publications."); R. Rutland, The Birth of the Bill of Rights 1776-1791, at 11 (1955) (The notorious Wilkes case led to the common law disfavor toward general warrants that "was regarded by Americans as a correct view of the matter."); C. Stevens, Sources of the Constitution of the United States 226-28 (1894) (The controversy in England over searches and seizures, such as in the Wilkes case, "excited the sympathy of both England and the colonies" and led to the adoption of the fourth amendment); J. Story, Commentaries on the Constitution of the United States 238 (1884) ("Such [general] warrants were, however, held illegal by the courts of justice in England. And this amendment not only pronounces them illegal; but prohibits Congress from passing any laws to give them effect.").

237 See supra notes 37-38 and accompanying text.


239 See R. Postgate, That Devil Wilkes 171-78 (1929); A. Williamson, supra note 238, at 192.

240 R. Postgate, supra note 239, at 176.

troversy on the development of state bills of rights. These bills of rights expressed the opposition of the American states to general warrants and to searches and seizures of papers and private effects.

Although the intellectual traditions of individual liberty were firmly established by 1789, the proposed federal Constitution did not contain a bill of rights. The opponents of the Constitution—the Antifederalists—vigorously opposed a constitutional framework that did not establish specific limits on national encroachment on individual liberties. The Antifederalists extracted promises that the Constitution would be amended to include a bill of rights in return for their support of ratification. The Antifederalists drew on English common law and the Wilkes controversy to argue for specific protections against unreasonable searches and seizures and against general warrants. Samuel Adams, one of the most prominent Antifederalists, was a member of the

242 R. Perry, supra note 236, at 304 (the influence of English common law on the Virginia Declaration of Rights is evident from the condemnation of general warrants in § 10).

243 See, e.g., Massachusets Declaration of Rights § XIV, reprinted in 1 B. Schwartz, supra note 241, at 342 ("[A]nd 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 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 the formalities, prescribed by the laws.").

244 Id. ("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."); Vermont Declaration of Rights § XI, reprinted in 1 B. Schwartz, supra note 241, at 323 ("That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure . . . .").


247 S. Boyd, supra note 246. The Antifederalists in key states chose to support ratification of the Constitution and to work for reform within the system, using the amendment process. Although they won a bill of rights, they did not accomplish their goals of protecting state sovereignty, limiting the extent of national power, and augmenting the number of representatives. Id.

248 See, e.g., The Federal Farmer, reprinted in H. Storing, supra note 245, at § 2.8.104-05; Elbridge Gerry, reprinted in Pamphlets on the Constitution of the United States 12-13 (P. Ford ed. 1888); A Farmer, reprinted in H. Storing, supra note 245, at § 5.1.6-13. The Federalists recognized the force of these arguments and took the position that England uniquely required such protections for individual rights because of the royal monarchy. H. Storing, supra note 245, at § 2.2 n.1 & § 5.1 n.8.
Sons of Liberty that corresponded with John Wilkes and declared him one of the great patriots of his era. Robert Whitehill, a delegate to the Pennsylvania ratifying convention, argued that absent a bill of rights, "[t]here is no security, by this Constitution, for people's houses or papers. . . . The case of Mr. John Wilkes, and the doctrine of general warrants show that judges may be corrupted." The framers of the Bill of Rights thus relied heavily on the well-known abuses of searches and seizures in England to persuade the states to ratify the fourth amendment to the Constitution.

The development of the common law of search and seizure in England and the substantial public discussions surrounding the Wilkes affair illuminate the background of the fourth amendment. The Supreme Court has cited Entick, in particular, as a source of fourth amendment doctrine:

As every American statesmen, during our Revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

The array of arguments advanced in opposition to seizures of papers, especially in view of the very limited extent to which any spokesman defended such seizures, are of obvious importance in assessing the circumstances under which the search and seizure clause provides limited or absolute protection for private papers.

III. SEARCHES AND SEIZURES OF PAPERS UNDER THE FOURTH AMENDMENT

The force of the eighteenth-century arguments, both legal and political, against seizures of papers stems in part from the peculiarly compelling combination of circumstances involved. The sweeping searches and seizures of the papers of John Wilkes, John

249 See supra note 239 and accompanying text.
Entick, and others encompassed documents of the most personal and legally innocuous nature. The allegedly unlawful conduct that prompted these seizures, the publication of material criticizing the government, was widely regarded as only a minor offense, if not a genuine public service. Moreover, the forcible extraction of evidence offended a generation apparently far more sensitive than our own to compulsory self-incrimination.

Interpreting the fourth amendment in a manner faithful to this history and to the intent of the framers is thus not a simple task. Only the most extreme situations\(^2\) will involve the same combination of aggravating factors present in the searches that provoked the eighteenth-century debate. Most modern cases involve less abusive practices, less serious invasions of privacy, and nonpolitical crimes. The application to twentieth-century litigation of the eighteenth-century principles underlying the fourth amendment thus requires an analysis of those principles more rigorous and more detailed than was necessary 200 years ago.

Moreover, many arguments relevant to twentieth-century search and seizure doctrine were not advanced during the eighteenth-century controversy. First, no commentator characterized the warrant in Wilkes' case as "general" merely because it ordered the indiscriminate seizure of all his papers, and only one author objected to this aspect of the seizure.\(^2\) Second, because a Secretary of State was technically a justice of the peace, no author challenged Lord Halifax's power to issue otherwise lawful warrants. Third, no critic complained that Lord Halifax or the messengers lacked what we would today describe as probable cause to arrest Wilkes and to seize his papers. Fourth, although commentators discussed a wide variety of confidential papers that deserved immunity from seizure, none listed the actual document the messengers were seeking: the original manuscript of *North Briton No. 45*.

A search and seizure of papers whose defects under the warrant clause might today seem so blatant as to be uninteresting thus presented to eighteenth-century theorists a very different set of


\(^2\) See supra notes 190-91 and accompanying text (argument in *Letter From Father of Candor*).
Searches and Seizures

problems: intrusion into privacy, forced self-incrimination, and the widespread chilling of speech-related activity. English courts and commentators therefore demanded a flat prohibition on seizures of papers, recognized by the Supreme Court in Boyd v. United States. Although the Court has recently retreated from this principle, the historical background of the search and seizure clause at least requires certain safeguards, set forth in the following sections. First, inspection of innocent private papers by government officials during a search for inculpatory documents must be forbidden. Second, courts should consider the problem of compulsory self-incrimination in determining the reasonableness of a particular seizure of papers. Third, the availability to plaintiffs and prosecutors of court-compelled production of documents in libel and other speech-related cases should be severely limited.

A. Private Papers

The most frequently repeated objection to the search and seizure in Wilkes' case was that the authorities had taken and examined his "personal" or "private" papers. Critics focused on the large volume of unrelated papers government officials read in their search for documents pertaining to North Briton No. 45. None of Wilkes' supporters, however, characterized as "private" a document that might have proved Wilkes to be the author of the libelous publication. The seizure of inculpatory documents was objectionable only because it amounted to self-incrimination, not because the documents seized were entitled to remain private.

This concern for the confidentiality of innocent private papers led Wilkes and his supporters to object to all searches and seizures of papers. They understood that if the government were permitted to search for any particular document, officials could conduct a sweeping search to locate that document. Even if the authorities in the Wilkes case had been seeking only evidence that John Wilkes had written North Briton No. 45, and thus needed to seize only a single sheet of paper, the messengers would have had no quick and easy way to identify that document. If the messengers found on a table in the foyer of Wilkes' house a file labeled "Editions of the

116 U.S. 616 (1886).
See supra notes 9-12 and cases cited therein.
See, e.g., supra notes 116-23, 166-70, 187-89 and accompanying text.
North Briton I have written," no further search would have been necessary. In the absence of such a convenient coincidence, however, the only way the messengers could have found the document they sought was to read every document in the house.

All of Wilkes’ papers were seized and removed to government offices simply for convenience. If the warrant’s only defect was its order to seize all of Wilkes’ papers,257 instead of only those papers related to the alleged libel, the messengers could lawfully have read through every one of Wilkes’ papers at his home. Wilkes and his supporters, however, objected that government officials had read his private papers, not that they had read them at the wrong place.

The Supreme Court, mindful of the history of abuses in the background of the fourth amendment, has cautioned that the amendment’s search and seizure clause does not permit an “indiscriminate rummaging”258 or “a general, exploratory rummaging”259 through an individual’s possessions. A narrowly-drawn search warrant ordinarily prevents such open-ended exploratory searches. For example, in a search for a gun, the primary invasion of privacy is the physical presence of the police. The search may reveal a certain amount of information about the owner’s personal life—furniture or clothing tastes, perhaps—but not necessarily more than would be apparent to a plumber fixing a leaky faucet. The intrusion is limited because the police can quickly distinguish a gun from other items the owner may not wish to have closely inspected, such as a diary, political tracts, or exotic lingerie.260

Because papers cannot so easily be distinguished from each other, a typical search for a document is necessarily a rummaging search of the most intrusive kind.261 Although the difference be-

257 Such a warrant might violate the fourth amendment’s requirement that warrants “particularly describ[e]” the objects to be seized. See supra note 2 (text of fourth amendment).
260 But see State v. Hawkins, 463 P.2d 858, 859 (Or. 1970) (police officers opened a diary to see if it was hollowed out to contain drugs and “inadvertently” noticed a passage in which the author confessed to committing a crime).
261 The practical argument for an open-ended exploration of all of a suspect’s papers was candidly made in United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), cert. denied sub nom. Thomas v. United States, 402 U.S. 984 (1971). The court held that “[h]aving found the letter in the course of a lawful search, the agents [were] entitled . . . to read it to see whether it was an ‘instrumentality’ for effecting the conspiracy . . . .” 409 F.2d at 897.
tween a gun and a love letter is so obvious that the police need not scrutinize the letter, the only way to determine whether a letter promises a romantic tryst or a sale of cocaine is to read it from beginning to end. Justice Stewart noted in his dissenting opinion in Zurcher v. Stanford Daily, as had Father of Candor two centuries earlier, that a search for even a single document entails a search through all of an individual's papers:

in order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one.

Recent experience with seizures of papers amply confirms Justice Stewart's assertion. In Andresen v. Maryland, state investigators, acting under a warrant authorizing seizure of all evidence and instrumentalities of a crime, seized 80 documents from the defendant's offices. The government voluntarily returned 52 and a state court suppressed 10 others on the ground that they had no connection to the crime charged. Stanford v. Texas involved a four-hour search during which officials seized 14 cartons of materials, including half of the books in the defendant's house, as well as "many of [his] private documents and papers, including his marriage certificate, his insurance policies, his household bills and receipts, and files of his personal correspondence." None of the documents seized included the Communist Party records mentioned in the warrant application. In Kremen v. United States, federal agents seized the entire contents of a cabin and

---

263 See supra note 212 and accompanying text.
264 436 U.S. at 573 n.7 (Stewart, J., dissenting). See also State v. Bisaccia, 45 N.J. 504, 515-16, 213 A.2d 185, 191 (1965) ("even a search for a specific, identified paper may involve the same rude intrusion [as a general search] if the quest for it leads to an examination of all of a man's private papers"). Such a thorough search would be as intrusive as the search Justice Pratt condemned in Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765). See supra notes 67-90 and accompanying text.
266 Id. at 466-67.
268 Id. at 479-80.
269 Id.
took them to an office 200 miles away. Of the items seized, "only a fragmentary part" was ever introduced into evidence. Similarly, *Silverthorne Lumber Co. v. United States* involved "a clean sweep of all the books, papers and documents found" in the defendant's offices.

Subpoenas hardly provide more adequate protection. They often require the production of documents beyond the actual needs of government prosecutors, and thus can be as overinclusive as outright seizures. In *Branzburg v. Hayes*, a grand jury investigating violence and threats of violence by members of the Black Panther Party subpoenaed from a newspaper reporter all "'[n]otes and tape recordings of interviews . . . reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization . . . .'" *Wheeler v. United States* involved a mail fraud investigation in which a grand jury subpoenaed "all the cash books, ledgers, journals and other books of account" of a firm, together with copies of every letter or telegram signed by its president or treasurer. In 1952, a subcommittee of the House Un-American Activities Committee directed the executive secretary of the Civil Rights Congress to produce "'all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress.'"

A narrow warrant specifying what documents to seize but allowing the search of every file to uncover those documents may be as intrusive as a broad warrant that never identifies the documents at all. In *Lo-Ji Sales v. New York*, officials conducted a six-hour search of an adult bookstore in which they viewed films, perused a

---

271 Id. at 347-48.
272 251 U.S. 385 (1920).
273 Id. at 390. One commentator has observed, "'[w]hen 75% of the items seized pursuant to a warrant are irrelevant to the prosecution's case, that warrant can hardly be said to leave no discretion to the person executing it.'" McKenna, supra note 18, at 80.
275 Id. at 675-76 n.12.
276 226 U.S. 478 (1913).
277 Id. at 482-83.
large number of publications, and ultimately ordered the seizure of 431 reels of film and 397 magazines.\textsuperscript{280} Police officials in Zurcher, rather than seizing all of a newspaper's photographs, searched its photographic laboratories, filing cabinets, and desks. In the end, nothing was seized.\textsuperscript{281} In Stanley v. Georgia,\textsuperscript{282} police officers searching for evidence of gambling activities instead found three rolls of film and arrested the owner for possession of obscene materials.\textsuperscript{283} Mapp v. Ohio\textsuperscript{284} involved a search for a bombing suspect in which police ransacked an entire house, looking through the defendant's photo albums and personal papers, and eventually discovered several pamphlets that they concluded were pornographic.\textsuperscript{285} In Harris v. United States,\textsuperscript{286} five federal agents conducted a "careful and thorough" five hour search of the defendant's apartment looking for stolen checks and instead found altered draft cards.\textsuperscript{287}

Read in light of its historical background, the fourth amendment's search and seizure clause condemns the inspection of innocent private papers by government officials in search of a document that by itself may be unprotected. The prohibition applies equally to private papers read at the owner's home or office and those seized and read at a government office. If seizable documents are mixed with constitutionally protected papers so that the former cannot be identified without reading the latter, the fourth amendment prohibits a search through the materials, even with a narrowly-drawn warrant.\textsuperscript{288}

An otherwise seizable document does not, however, obtain immunity from seizure merely because it is located among protected documents. The government remains free to subpoena seizable documents, thus allowing the individual in possession, or his coun-

\textsuperscript{280} Id. at 322-23.
\textsuperscript{281} Zurcher, 436 U.S. at 551.
\textsuperscript{282} 394 U.S. 557 (1969).
\textsuperscript{283} Id. at 558.
\textsuperscript{284} 367 U.S. 643 (1961).
\textsuperscript{285} Id. at 644-45.
\textsuperscript{286} 331 U.S. 145 (1947).
\textsuperscript{287} Id. at 146-49.
\textsuperscript{288} An individual should not be able to invoke this rule to immunize a substantial number of unprotected documents if he has scattered among them a few private papers. Cf. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 455-65 (1977) (cataloguing of presidential papers containing a small proportion of personal papers).
sel, to separate the documents from papers protected by the fourth amendment. In Zurcher, the Supreme Court rejected a newspaper’s contention that the fourth amendment requires law enforcement officials in search of photographs as evidence against a third party to use a subpoena instead of a search warrant to obtain the photographs from the newspaper’s files. Because officials presumably could identify the photographs they sought without reading any documents, the Court’s holding may be consistent with the protection of private papers. Had the authorities been seeking documents, however, they should have been required to use a narrowly-drawn subpoena.

When the government believes that neither the individual in possession of the seizable documents nor his counsel can be relied on to separate those documents from protected papers, it may request a judge to review the materials in an in camera proceeding. Although such proceedings are not common, they are sometimes used to review materials that the prosecution asserts are privileged from examination by the defendant. A private party should have access to the same procedure against the government. If the government has reason to believe that documents are in danger of destruction it may seek a warrant directing that the documents be seized unread, placed under seal, and brought to a judge for a prompt in camera examination.

Subpoena and in camera procedures will ordinarily both further the government’s interest in obtaining a specific seizable document and preserve the privacy of other papers the fourth amendment protects. These procedures should be used only to identify and to obtain documents that the government has specified with reasonable particularity. Search warrants have sometimes authorized police to browse through an individual’s papers, not in search of a specific document or type of document, but to seize any document

\[299\] Zurcher, 436 U.S. at 560-63.

\[290\] An unresolved factual dispute in Zurcher was whether the police had read any notes or correspondence during the search. The Supreme Court indicated that any such action would have “exceeded the limits of the warrant.” Id. at 551 (footnote omitted).

\[291\] Justice Powell, in his concurring opinion in Zurcher, argued, “[i]f the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief.” Id. at 569. The terms of the amendment do reflect a special concern for papers, see supra note 2, and the historical background of the amendment indicates which papers were of particular concern to the framers.
that might prove a particular crime.\textsuperscript{292} These searches have often found none of the evidence contemplated by the warrant, and have instead uncovered items resulting in charges unrelated to the original investigation.\textsuperscript{298} Neither a court in an in camera proceeding nor an individual pursuant to a subpoena should be expected to conduct such a fishing expedition. If a court or an individual were asked to turn over unrelated materials to the police, an in camera proceeding or a subpoena focused on even the most specific documents could become an open-ended rummaging for any document relating to any crime. The procedures would be as offensive to the fourth amendment as search warrant of similar scope.

During the decades that the Supreme Court exempted private papers from seizure, it distinguished between protected papers and documents—such as forged checks—said to be “instrumentalities” of crime.\textsuperscript{294} Whatever its theoretical and practical problems, this distinction is not inconsistent with the prevailing eighteenth-century concern for private papers. Courts and commentators two centuries ago cited documents concerning an individual’s personal life\textsuperscript{295} or political and speech-related activities\textsuperscript{296} as deserving of secrecy. Business or financial documents were occasionally mentioned,\textsuperscript{297} but were clearly of far less concern. Ordinarily neither business records nor documents that are instrumentalities of crime

\textsuperscript{292} See, e.g., Andresen v. Maryland, 427 U.S. 463, 479 (1976) (warrant authorized the seizure of all “fruits, instrumentalities and evidence of crime at this [time] unknown”).
\textsuperscript{293} See supra notes 279-87 and accompanying text.
\textsuperscript{294} See United States v. Calandra, 414 U.S 338, 341 (1974) (loansharking record); Harris v. United States, 331 U.S. 145, 147, 154 (1947) (altered draft cards); Davis v. United States, 328 U.S. 582, 583 (1946) (unlawfully possessed gasoline ration coupons); Marron v. United States, 275 U.S. 192, 199 (1927) (ledger “a part of the outfit or equipment actually used” to violate the National Prohibition Act); Gouled v. United States, 255 U.S. 298, 309 (1921) (“contracts . . . used as instruments . . . for perpetrating frauds”).
\textsuperscript{295} See supra notes 78-80, 116-20, 188 and accompanying text. Personal letters are particularly likely to contain confidential information. As one commentator has noted:

The confiscation of personal letters involves a potentially serious invasion of privacy. People often reveal aspects of their lives to close friends, relatives, ministers, doctors and others that they would not want revealed to anyone else. Letters sent to an individual could involve discussions of such matters as easily as those sent by an individual.

Comment, supra note 1, at 302-03.
\textsuperscript{296} See supra notes 160, 169 and accompanying text. For a modern example of sensitive political or speech-related documents, see NAACP v. Alabama, 357 U.S. 449 (1958) (membership lists).
\textsuperscript{297} See supra notes 116, 188 and accompanying text.
contain the personal or speech-related confidences that were the historical focus of the fourth amendment's search and seizure clause.298

B. "Unreasonable" Self-Incrimination

For almost a century the Supreme Court referred to the problem of compulsory self-incrimination in determining the reasonableness of a particular search and seizure of papers.299 In Boyd v. United States,300 the Court commented on "the intimate relation between" the fourth and fifth amendments,301 and noted that if a seizure of private papers is at issue "the Fourth and Fifth Amendments run almost into each other."302 Within the last decade, however, the Court has attempted to distinguish strictly between the two constitutional protections. In Fisher v. United States303 and Andresen v. Maryland,304 the Court suggested that in assessing a challenge to the seizure or subpoena of incriminating documents fourth and fifth amendment issues must be treated separately.305 The Court implied that the seizure of incriminating documents in no way affects the validity of a search.

The Court's earlier approach was clearly more consistent with the language and historical origins of the fourth amendment. Boyd implicitly assumed that courts, in determining the reasonableness of a search and seizure, can and should consider the degree to which the seized documents would incriminate their owner with his own words.306 Indeed, nothing in the language of the fourth


300 116 U.S. 616 (1886).

301 Id. at 633. The fifth amendment declares, among other things, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

302 116 U.S. at 630; see id. at 633, 634-35.


305 Id. at 471-73; Fisher, 425 U.S. at 400-01, 408-09.

amendment forbids considering self-incrimination, or any other factor, in an assessment of reasonableness.

All searches and seizures involve a serious invasion of privacy, and are permitted by the fourth amendment only when the interests of society outweigh the various injuries to the privacy interest of the individual. A court should thus not be required to ignore injuries to constitutionally-protected interests in assessing the overall reasonableness of a particular search. On the contrary, injuries to these interests deserve special consideration. The Supreme Court has consistently demanded that courts consider injuries to speech-related interests in determining if the fourth amendment forbids a search, whether or not the search also violates the first amendment. The values protected by the fifth amendment are no less relevant to a claim of unreasonableness than the values protected by the first amendment. Government conduct that falls short of actually violating the first or fifth amendments may nevertheless injure their protected interests. These injuries should be considered if they occur in connection with, and thus compound, the invasion of privacy inherent in a search and seizure.

Moreover, Boyd recognized that historically the possibility of self-incrimination was a factor in evaluating the reasonableness of a search and seizure. Referring to Lord Camden's opinion in Entick v. Carrington, the Court asked:

Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures?

The self-incriminatory character of private papers was an important theme in eighteenth-century arguments against seizures of papers, articulated in Entick and by Justice Pratt in Wilkes v. Wood and by a number of pamphleteers. Each argued not

309 Boyd, 116 U.S. at 630.
310 Lofft 1, 3, 98 Eng. Rep. 489, 490 (C.P. 1763) ("Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom."). See supra
only that the use of seized papers as evidence was improper, but also that the seizure of incriminating documents was itself unlawful.

Since *Boyd*, however, the facts of the search and seizure cases coming before the Supreme Court have understandably dampened the Court's enthusiasm for the principle that animated the framers of the fourth amendment. A number of the first cases after *Boyd* concerned the seizure of documents belonging to a corporation, not to the individual asserting self-incrimination. Later cases involved documents that, at least in the Court's view, were instrumentalities for committing the underlying offense. The most recent decisions concerned tax and business records, materials bearing only a slight resemblance to the documents that eighteenth-century English courts and commentators sought to protect.

The particular concern of eighteenth-century commentators focused on papers, such as diaries, intended solely for the use and perusal of the author. In that era, writing out one's ideas for purely private analysis and reflection was seen as an essential part of the thought process. Commentators regarded these writings as essentially unspoken thoughts that had never left the bosom of the thinker. Exposing to government scrutiny documents essential to the private development of ideas would stultify normal intellectual life and development. Justice Brennan articulated the same concern when he argued that "[t]he ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed" if an author feared that his written thoughts would be used against him in a criminal proceeding.

---

notes 48-56 and accompanying text.

311 See, e.g., supra notes 123, 141, 167, 189 and accompanying text.
313 See supra note 294 and accompanying text.
315 See supra note 123 and accompanying text.
316 *Fisher v. United States*, 425 U.S. 391, 420 (1976) (Brennan, J., concurring). Professor Taylor has described the use of a diary in a criminal proceeding as coming "perilously close" to a violation of the fifth amendment. T. Taylor, Two Studies in Constitutional Interpreta-
Some more recent Supreme Court decisions suggest, however, that the execution of a search warrant does not constitute compulsory self-incrimination because the police take all the action: the owner of the documents seized is not compelled to do anything.\footnote{1} The same, of course, might be said of an electronic device that could read the mind of a defendant as he sat in the courtroom and broadcast his thoughts to the jury. Ultimately, courts must ask whether the government has invaded the inner sanctum of ideas and emotions protected by the Constitution, not whether the invasion was achieved by means other than actual physical compulsion.\footnote{18}

The suggestion that seizures of papers do not involve compulsion also ignores the realities of a search. If Nathan Carrington, acting as a private citizen, had attempted to enter John Entick's home to seize Entick's papers, Entick could have shot him as he crossed the doorway.\footnote{19} Moreover, Entick would have had an absolute right to the return of any item Carrington seized.\footnote{20} A search warrant, forcing an individual to submit to what would otherwise be theft or burglary, surely involves more compulsion than the milder forms of

\footnote{17} See, e.g., Andresen v. Maryland, 427 U.S. 463, 473 (1976). This doctrine was criticized in McKenna, supra note 18, at 61-62.

\footnote{18} Similarly, to suggest that an individual waives his privilege against self-incrimination when he "voluntarily" writes down his thoughts is to revive in an extreme form the discredited notion that the government may require the waiver of a constitutional right as a condition of receiving a benefit. See Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"); Speiser v. Randall, 357 U.S. 513, 518 (1958) (states cannot deny veterans' tax exemption to those who refuse to take loyalty oath). The doctrine of unconstitutional conditions applies to conditions on the exercise of fifth amendment rights. See Lefkowitz v. Cunningham, 431 U.S. 801, 805-06 (1977); Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). If individuals have a constitutionally-protected right to place their thoughts in a diary or some other equally personal document, and a similar constitutional right against self-incrimination in a criminal proceeding, the government should not be able to condition the exercise of one of these rights on waiver of the other.

\footnote{19} Wilkes reportedly remarked to the messengers who came to his house to arrest him and to seize his papers, "bad you come at one or two in the morning, I should have shot the first man who entered my house; and with this sword, which I know well how to use, I should have spilt the last drop of your blood!" C. Trench, supra note 36, at 106 (1962).

\footnote{20} Wilkes had attempted to exercise this right against Lord Halifax. See supra note 110 and accompanying text.
pressure the Supreme Court has held to violate the fifth amendment.\textsuperscript{321}

C. Speech and the Seizure of Papers

The seizures of papers that generated the eighteenth-century controversy were conducted to facilitate prosecutions for seditious libel. Under the common law of that era, criticism of government officials was under certain circumstances a criminal offense.\textsuperscript{322} Although courts were slowly limiting its scope, the law of seditious libel retained enough vitality at the end of the eighteenth century to lead to the adoption in the United States of the Sedition Act of 1798.\textsuperscript{323} Indeed, prosecutions for seditious libel continued in England until the early nineteenth century.\textsuperscript{324}

Wilkes and his supporters argued that the enforcement of libel law was not important enough to justify the intrusion involved in a seizure of papers.\textsuperscript{325} Although the critics of seizures of papers did not question that seditious libel could legitimately be made criminal, they recognized that the distinction between seditious libel and legitimate political speech was elusive,\textsuperscript{326} and that the government could abuse libel law to punish unpopular authors and causes.\textsuperscript{327} Therefore, commentators of the era were not prepared to give prosecutors the same array of methods, including searches and seizures, available against less controversial and presumably more important crimes.

Although seditious libel is no longer a crime in this country, the law of civil libel continues to provide present and former government officials with a weapon to silence or to punish their critics.

\textsuperscript{321} See, e.g., Lefkowitz v. Turley, 414 U.S. 70, 71-76 (1973) (architects threatened with loss of state contracts for five years).
\textsuperscript{322} See supra note 35 and authorities cited therein.
\textsuperscript{324} A. Aspinall, Politics and the Press 1780-1850, at 384 (1949); H. Wickwar, The Struggle for the Freedom of the Press 1819-1832 (1928).
\textsuperscript{325} See supra note 160 and accompanying text; A Letter From Candor, supra note 162, at 30-32. But see Entick v. Carrington, 19 How. St. Tr. 1029, 1074, 95 Eng. Rep. 807, 818 (C.P. 1765) (“All civilized governments have punished calumny with severity; and with reason.”).
\textsuperscript{326} See, e.g., Letter From Father of Candor, supra note 92, at 18 (“this misdemeanor is only a breach of the peace by political construction”).
\textsuperscript{327} See, e.g., id. at 14; see also id. at 32 (“prosecutions for libels generally arise from, and are pursued with a spirit of party-revenge”).
The Supreme Court's decisions in *New York Times v. Sullivan* and its progeny have given the press substantial protection from libel suits. Nevertheless, civil libel law in the United States today is in a sense even more far reaching than eighteenth-century seditious libel law in England. In Wilkes' day only critics of the very highest officials were prosecuted for seditious libel; observers could criticize with impunity the vast majority of government employees. Today, however, even the lowest public officials may attempt to mulct in damages their critics.

Civil libel law today thus plays a role similar to the law of seditious libel two hundred years ago, and is accepted with similar ambivalence. The impact of eighteenth-century libel law, however, was limited by the general unavailability in civil and criminal cases of compulsory process to obtain documents. Whatever rules constrain modern libel law after *New York Times*, neither that decision nor the framers of the Constitution suggested abandoning the protections offered by the earlier restrictions on the production of papers.

In *Herbert v. Lando*, the Supreme Court permitted a libel plaintiff to probe the defendant journalists' opinions through the discovery process, declining to infer from the first amendment a right to refuse to answer questions. If a libel plaintiff sought to discover documents, however, any court-compelled production would be virtually indistinguishable from Lord Halifax's methods two centuries ago. A fourth amendment prohibition against document discovery by libel plaintiffs would undoubtedly make the burden of proof imposed by *New York Times* more difficult to overcome. Nevertheless, Wilkes and his supporters successfully opposed compulsory production of papers because of the resulting obstacle, not in spite of it.

IV. CONCLUSION

The history of the eighteenth-century controversy over seizures of private papers reveals several distinct aspects of the fourth amendment. First, government officials may not peruse personal

---

papers in search of documents not protected by the fourth amendment. Second, the fourth and fifth amendments protect an individual’s personal thoughts and reflections even if put on paper. Third, the government or a plaintiff cannot compel the production of documents from a defendant being prosecuted or sued for speech-related activities such as libel.

Few if any of the cases the Supreme Court has decided in the last decade have squarely presented these issues. But the Court has had increasing difficulty accounting for the opinions in *Boyd* and its progeny. The Court, apparently unaware of the complex history of the search and seizure clause, has instead developed its own very specific theories of the meaning of the fourth amendment. These theories may be internally consistent and even analytically elegant, but they bear little relation to the events behind the adoption of the amendment.

The words of the fourth amendment, Justice Frankfurter argued,

> are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words. . . . One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. . . . Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed . . . that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary.\(^3\)

The Court in the last decade has come precariously close to a construction of the fourth amendment that, with only a minor change in the paperwork, would have permitted Lord Halifax and the King’s messengers to seize the papers of John Entick and John Wilkes.\(^3\) Such an anomalous result, elevating the convenience of contemporary prosecutors over the intent of those who wrote the

---

\(^3\) United States v. Rabinowitz, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting); see also Harris v. United States, 331 U.S. 145, 161-62 (1947) (Frankfurter, J., dissenting) (invoking and detailing the English and colonial experiences that led to the adoption of the fourth amendment); Davis v. United States, 328 U.S. 582, 603-07 (1946) (Frankfurter, J., dissenting) (same).

\(^3\) The Supreme Court has in fact openly rejected one of the primary rationales used in *Entick* to condemn seizures of papers: that the seizure violates the suspect’s property rights
fourth amendment, would be particularly incongruous coming from a Court ostensibly committed to the principles of strict construction.

in the papers. See Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Warden v. Hayden, 387 U.S. 294, 301-04 (1967); supra notes 76-78 and accompanying text.