Liberty Tree

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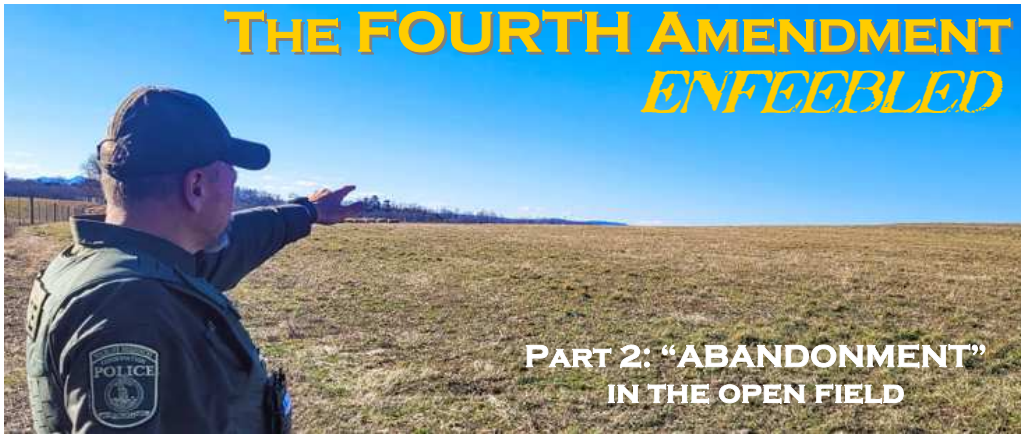

The "abandonment" and "open fields" doctrines introduced in 1924 by the Supreme Court constitute a tyrannical repudiation of individual rights, and allows federal and state enforcement officers to invade most of the private property of America. Above, a conservation officer points across a field. And as far as the eye can see, he is able to invade without a warrant, because the Supreme Court ignored all legal history and the intent of the Framers when they decided this doctrine.

In December 2006, *without any warrant*, the Virginia Department of Game and Inland Fisheries installed a surveillance camera in farmer Steve Vankesteren's field and recorded him trapping and killing hawks. Vankestern was charged with taking or possessing a "migratory bird" under federal law, and he moved to suppress the video footage because it had been obtained by violating his Fourth Amendment rights. The district court refused to exclude the video, and Vankesteren was found guilty. The Fourth Circuit Court of Appeals refused to remand the case to suppress the video.

Why? Because, the Fourth Circuit said, in *Hester v. United States*, 265 U.S. 57 (1924), "the Supreme Court first held that the protection of the Fourth Amendment did not extend to open fields." And in *Oliver v. United States*, 466 U.S. 170 (1984), "the [Supreme] Court held that 'an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home [the curtilage].'"

Fourth Amendment as originally proposed by James Madison, June 8, 1789.

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

A century of OPEN FIELD tyranny

The "open fields" doctrine does *not* just include open fields! "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example ... a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." *Oliver*, at 180 n. 11. In short, for over a hundred years now, the Supreme Court has denied citizens the protection of a warrant when it comes to *all* of their private land (with the exception of a house and its curtilage). Federal officers feel free to enter private land at will, install surveillance cameras, and engage in a fishing exercise to accuse landowners of anything they can come up with.

Thus, the Supreme Court supports even greater tyranny than the Declaration of Independence described as a reason to separate from the British monarchy — "He has erected a multitute of new offices and sent hither swarms of officers to harrass our people, and eat out their substance." These charges against the King referred to the customs officials and military tribunals established to enforce trade laws and prevent smuggling. The general warrants Parliament allowed under this scheme, and the invasion of houses and privacy suffered by the colonies, led ultimately to the establishment of the Fourth Amendment, to ensure that such harassment would never

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happen again. But just as restrictive trade laws provided the impetus for general warrants, so restrictive alcohol manufacture and trade laws provided the impetus for the Supreme Court to approve something *worse* than general warrants — officers can simply trespass on private land whenever they want to perform an "unreasonable" search.

Prohibition agents run amuck

Shortly after Prohibition began in the 1920s, revenue agents, acting without a warrant, *invaded private land* to stake out a South Carolina home on some information that moonshine whiskey was available there. From 50 to 100 yards away, the agents saw a man arrive and receive a quart bottle from Mr. Hester, who came from the house. Both men were alerted to the agents, and Hester grabbed a gallon jug from a nearby car and ran, as did the visitor with his bottle. When one agent fired his pistol, Hester dropped his jug, which shattered, and the visitor threw away his bottle into the nearby field. The revenue agents testifed at trial that the liquid remaining in the containers was moonshine whiskey, based on their experience. Hester was charged with concealing distilled spirits removed from a distillery warehouse in a manner not provided by law.[1] He argued that because the agents had no warrant, and trespassed on private land in order to obtain their observations, their testimony should be excluded, as it was obtained in violation of the Fourth Amendment.

Of course, the agents had simply trespassed on private land to witness the events, and to seize the containers. As we will show, they had no legal authority to do so. But in 1924, a unanimous U.S. Supreme Court decided in just two paragraphs, in *Hester v. United States*, 265 U.S. 57, 59 (1924), that the Fourth Amendment did not apply. Despite the trespass, the agents' testimony was *not* obtained by an illegal search or seizure, said the Court.

Justice Oliver Wendell Holmes, writing the opinion, declared that "there was no seizure in the sense of the law when the officers examined the contents of each [container] after it had been abandoned," and that although the warrantless search and seizure took place on private property, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open field." The Court did not analyze the meaning of the words of the Fourth Amendment, nor its history in the context of criminal procedures, but merely stated, "The distinction between the latter [open field] and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226."[2]

A Special Agent teamed up with a Sheriff and Chief Deputy to find this whiskey still in the 1920s, one of many stills found every year during Prohibition. Enforcement officers such as these were allowed to invade private property at will, based on *Hester v. United States*.

If the Supreme Court had actually undertaken an examination of the meaning and context of the Fourth Amendment, or even the authority given to the agents by the laws passed by Congress, they could not have ruled as they did. But the black-robed liberty thieves were not interested in liberty, and still have not overturned this invalid ruling.

What is abandonment of property?

The Fourth Amendment states that the right to be secure in one's effects shall not be violated, and at a minimum, the word 'effects' includes personal belongings, including the containers dropped or thrown by Hester and his guest.[3]

In *Hester*, the Supreme Court was obviously interested in justifying *any* actions taken by the revenue agents. So the dropped or thrown evidence

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1. Hester was also charged with failing to pay a tax on the whiskey, but the Fourth Circuit overturned that judgment, because the prosecution did not prove this was the case. Hester was convicted of violating Revised Statutes §3296
2. *Hester*, at 59. The Court referenced Blackstone's *Commentaries*, Vol. 4, in which a burglary was said not to occur if a man merely crossed invisible boundaries, but which would occur if he entered the curtilage, that is, a barn, stable, or warehouse that were within the same common fence so as to be considered "branches and appurtenants" of the main house. Notably, this reference has nothing to do with what is actually protected under the Fourth Amendment.
3. For reading ease, the words "effects," "house," and "property," when referred to as terms, will be surrounded by single quotation marks.

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in the containers seized and examined by those agents was held not to be excluded because "[t]he defendant's *own acts*, and those of his associates, disclosed the jug, the jar and the bottle." These"acts" were acts of abandonment, according to the Court.

Abandoned property, having no owner, may be seized without a warrant. But when is property abandoned? The unanimous justices utterly failed to show any *legal basis* for their conclusion that personal property merely dropped or thrown onto a *private* field is abandoned. Looking to Black's *Commentaries on the Laws of England*, published in 1765-1769, we see that at common law, a man who:

> ... scatters his treasure into the sea, or upon the *public* surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and there it belongs, as in a state of nature, to the first occupant, or finder; unless the owner appear and assert his right, which then proves that the loss was by accident and not with an intent to renounce his property.[4]

Even property scattered on public land may not be abandoned, but note that property is certainly *not* abandoned if scattered on the *private* surface of the earth. Since the containers were thrown in a private field, they would not have been considered abandoned at common law.

Consider if the defendants had thrown down their containers inside the house, or so close to it that they were within the "curtilage." Seizing the discarded containers and examining them without a warrant would constitute an illegal search and seizure, because the security of the 'house' cannot be violated, according to the reasoning of the Court, which expressly noted that the evidence had *not* been obtained from Hester's residence. Since property is not abandoned to the public by discarding it within one's own house, how can it be "abandoned" by discarding it within the boundaries of one's own land? Does merely allowing your property to remain in your field mean the entire public is free to invade and simply pick up any property they find? If it does, then private ownership has no meaning whatsoever, and trespass and theft are no longer crimes.

If the property had been discarded on *public* land (which it was not), the argument would have been about whether the men intended to renounce their property or not. Given that an agent fired his pistol *before* the men dropped the containers, did they intend to abandon these 'effects' forever, or to simply run unhampered?

Since the protected effects were *not* cast onto public land, however, and thus there was no real abandonment, the *Hester* Court had to further declare that the Fourth Amendment did *not* protect private lands outside of a house and its curtilage in order to obtain the outcome the justices wanted.

But if everything left in an open (private) field is subject to warrantless search and seizure, why characterize the 'effects' found therein as "abandoned"? Because personal 'effects' *are* protected by the Fourth Amendment, thus the Court had to invent two reasons to justify the agents' illegal actions: (a) the property was abandoned and (b) in a private area unprotected by the Fourth Amendment: the "open field."

We have already shown that "abandonment" of property does not occur on private lands. Next, we will look at whether the Framers of the Fourth Amendment intended that it protect *all* private property, or just all private property *except* open fields.

"Effects," the ignored elephant

In *Hester*, the Supreme Court decided that 'effects' in the Fourth Amendment phrase "persons, houses, papers and effects" does not include private land (the "open field"), implying that the word only means personal property. They failed to base this opinion on any legal authority or examination of the meaning of 'effects' at the time of the constitutional framing, however. Indeed, the court ignored the meaning completely.

Before 1857, inheritance adjudication in England was divided between common-law courts, which decided decedents' real property, and church courts which, applying separate rules, adjudicated personal property dispositions. In the 17th and 18th centuries, as wills began to increasingly be used, judges were called upon to construe wills as passing

4. *Black's Commentaries*, Vol. 1, Ch. 8, XIII (p. 285).

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on rights to both real and personal property. Because the common law rules determined the legal heirs of lands, whether a testator meant to bequeath lands to someone *other* than the legal heir was frequently at issue. The courts generally took a very conservative approach — if the will didn't explicitly state that lands were bequeathed, they construed it to mean that the testator did *not* intend to depart from the heritage rules.

William Murray, EARL OF MANSFIELD, Lord Chief Justice of the King's Bench from 1756-1788, explained the meaning of *effects* in 1775 as *all property*. He is best known, perhaps, for his opinion in *Somersett's Case* (1772) that slavery had no basis in common law and had never been established by English legislation, and so was not binding in law.

It was in this context — and in bankruptcies — that decisions on the meaning of 'effects' took place. While it was *often* used in everyday language to refer to moveable goods and not lands, 'effects' was *also* used to refer to *all* property, including land. In the latter sense, 'effects' is *synonymous* with 'property,' encompassing everything a person has acquired for their own use.

In 1775 — 14 years before the Bill of Rights was drafted — Lord Mansfield rendered an opinion in *Hogan v. Jackson* which makes the usage of 'effects' clear. In *Hogan*, the will-maker had stated:

> AND AS TO MY WORLDLY SUBSTANCE, I bequeath to my dearly beloved mother ... my house and lands of Glanbegg, ... And also the lands of Ballygally ...[5]

Lord Mansfield found the phrase 'my worldly substance' "have always been understood to include both real and personal estate, and to indicate an intent in the testator, who uses them, to dispose of all his property." As to the meaning of 'effects':

> There is but one point upon which the whole case turns : Which is, to fix the meaning of the word effects in the English language. ... If the word effects is equivalent to worldly substance [or] synonimous to property, there is an end of the question: Because then, all the cases prove, that the sweeping clause passes a fee [land]. [But] if ... effects mean chattels, or personalty *only*, then the residuary clause can include them only. I take effects to be synonimous to worldly substance, which means **whatever can be turned to value**; and therefore, that real and personal effects mean all a man's property.

Again, Lord Mansfield said, "What is substance ? It is every property a man has. ... every thing that can be turned into money." And in "several clauses of the bankrupt laws which make it felony in a bankrupt to conceal, remove, or embezzle any part of his goods, wares, merchandize, monies or *effects*; the word "effects" is made use of in this sense [of substance]."

Effects, then, are worldly substance, all a man's property including land. In 1839, John Bouvier, in his *Law Dictionary Adapted to the Constitution and Laws of the United States of America*, summed it up:

> **Effects**. This word *simpliciter* is equivalent to *property* or *worldly substance*, ...

Simpliciter is a Latin word meaning "simply and just," *i.e.,* alone and by itself. Thus, 'effects' used alone, without any qualifiers — just as it appears in the Fourth Amendment — includes all property. And 'property,' in Bouvier's 1839 dictionary, is "the right and interest which a man has in lands and chattels":

> ... property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any consideration, or even throwing them away.

'Effects,' then, simply means property, which includes lands and woods and every other place one may own. This meaning was clearly elucidated years before the Fourth Amendment was proposed, discussed, or ratified.

But the black-robed liberty thieves overthrew the guarantee of the Fourth Amendment that the government would not violate the security of a person's land without discussing the meaning of the 'effects.' We can now see why — the actual meaning negates their opinion. Yet to this day, the Supreme Court has upheld a pretend authority of a federal agent to trespass private land if their search is merely "reasonable."

In future installments, we will describe how the Supreme Court's "open fields" doctrine also failed to take into account the Framer's intent and overthrew the procedures required at common law, *i.e.,* the "due process" guaranteed to all Americans. *Stay tuned.*

5. *Hogan v. Jackson*, 1 Cowp. 299 (1775). All quotes herein are from Cowper's *Reports of Cases Adjudged in the Court of King's Bench from 1774 to 1778* (1784), beginning at p. 299. All emphases are added.