Liberty Tree

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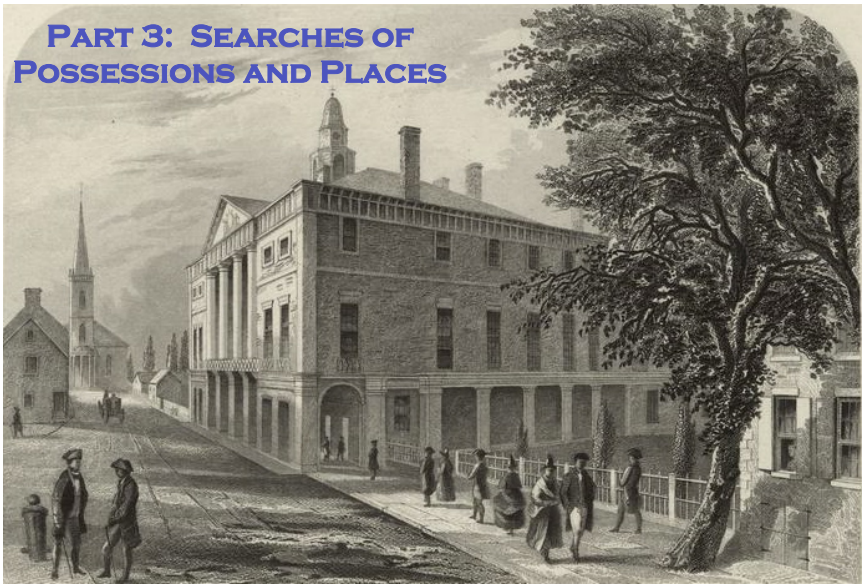
The Fourth Amendment Enfeebled

Part 3: Searches of Possessions and Places



The First Congress conducted business in old city hall, renamed "Federal Hall," on Wall Street, N.Y., from 1789 through 1791. It was here that James Madison proposed his amendments on June 8,1789. On August 24, 1789, 17 amendments were sent to the Senate By September 14, 1789, 12 amendments of the Bill of Rights were sent to the States for ratification.

In *Hester v. United States*, 265 U. S. 57 (1924), the Supreme Court refused to apply the Fourth Amendment to exclude the testimony of two internal revenue agents who *trespassed* on defendant's land, concealed themselves one hundred yards away from his house, and testified that they saw him come out and hand a bottle of whiskey to another. Despite the trespass and warrant-less search, the *Hester* court concluded, without any explanation, that a private "open field" was not a particular "place" which should be described in a warrant, because there was no search of person, house, papers or effects.

As shown in last installment of this series,[1] the Supreme Court failed to examine the meaning of the word "effects" as used in the Fourth Amendment, and merely dictated their conclusion without any reasoned basis. In so doing, they ignored evidence that the Framers intended *all* private property to be protected against *unreasonable* searches, which means all searches except those which flow from exigent circumstances.

Drafting the Fourth

On June 8, 1789, James Madison proposed the following language to the Congress as an amendment to be added to the Constitution:

> 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.[2]

Madison's proposed amendments were referred to committee, and on August 17, 1789, the House debated the amendments as received out of committee. By that time, the word "effects" had been substituted for the phrase "their other property."

There is no record of any debate in the committee regarding this change. As explained in the previous installment of this series, however, this substitution did *not* narrow the meaning; "effects" used without any qualifier meant the same thing as "worldly substance" or "property," that is, it covered everything the people might own.

However, the phrase "from all unreasonable searches and seizures" had been struck, and Mr. Gerry of Massachusetts pro-posed

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Fourth Amendment

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

1. January 2024 issue of the Liberty Tree.
2. https://founders.archives.gov/documents/Madison/01-12-02-0126

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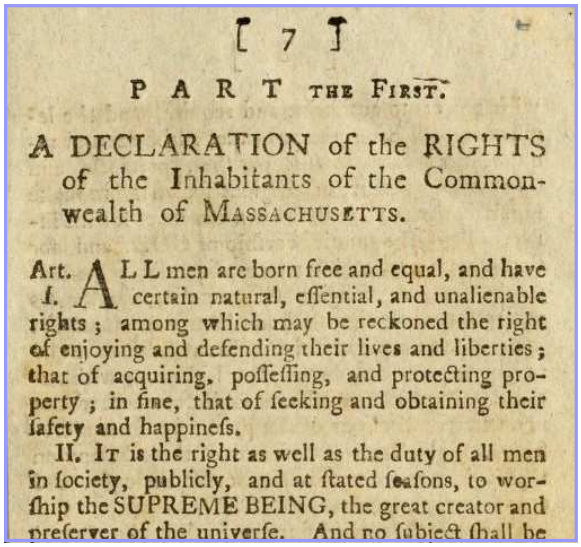
that the phrase "to be secured" be altered to "to be secure," and that the phrase with a slight change, "against all unreasonable searches and seizures" be added back. This motion passed. [3]

Mr. Benson of New York advocated cleaning up the language to make the amendment clearer, proposing that "by warrants issuing" should be altered to "and no warrant shall issue." This motion "lost to a considerable majority." Mr. Livermore of New Hampshire likewise objected to the words "and not" between "affirmation" and "particularly," on grounds that it would be clearer stated in the positive. This too was rejected.[3] But the text of the amendments was sent back to committee, where those changes *were* made, and the House approved them on August 22nd. The House sent the proposed amendment to the Senate on August 24th,[4] the Senate made no changes to it, and the requisite number of States ratified it by December 15, 1791.



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PART THE FIRST.

A DECLARATION of the RIGHTS of the Inhabitants of the Commonwealth of MASSACHUSETTS.

Art. I. ALL men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II. IT is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe. And no subject shall be

Massachusetts' 1780 Declaration of Rights specifically pointed out "the unalienable right of acquiring, possessing, and protecting property," and forbid searches of that property in the absence of warrants supported by oath and particularly describing the place, person, and things to be searched or seized.

Persons, houses, papers and POSSESSIONS

It is abundantly clear that the desire of the people at the time of the framing of the Fourth Amendment was that *all* their property, or possessions, should be protected from warrantless searches and seizures. This had *already* been declared a RIGHT by several States *prior* to the introduction and ultimate ratification of the federal Bill of Rights.

Examining these early State provisions, it is obvious that they considered the right to be free from illegal search and seizure to include *all a person's possessions*.

The 1780 "Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts," Art. XIV, stated in part: "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*." The New Hampshire Bill of Rights, XIX, adopted in 1784, used this same wording.[5]

The Pennsylvania Bill of Rights, Section X, adopted in 1776, stated in part: "[T]he people have a right to hold themselves, their houses, papers, and *possessions* free from search and seizure." The Vermont Declara-tion of Rights, adopted in 1777, used this exact wording.

When Rhode Island finally ratified the U.S. Constitution on May 29, 1790 (due to bullying by the States of the union), the small State made a point to declare "That every person has a right to be secure from all unreasonable searches and seisures of his person, his papers *or his property*."

"Possessions" is defined as property, which is all a man owns, but "applies properly to corporeal things" such as houses, lands, and moveables. See Bouvier's *Law Dictionary*, 1839. Further, a linguistic analysis of the use of "possessions" in American English from 1760-1776 revealed that 86 percent of the time, this word clearly or likely included land.[6]

The clear import of these early declarations of rights, made before or at the time of ratification, shows that the people intended that lands be protected from unreasonable searches and seizures, and that particularized warrants must be obtained from a judicial officer before entrance on private land was authorized.

The determination by the *Hester* Court omitted any and all consideration of this history, in addition to ignoring the true meaning of 'effects,' which includes *all* property.[7] To this day, the black-robed liberty thieves continue to fail to take this history into account. As a result, the people are not secure in *all* their possessions.

Searching "PLACES" for persons or things

Note that in Madison's proposed wording, a violation of the security of a person and his property occurs when a warrant is issued without sworn probable cause and without particularly describing the "places" to be searched for the "persons or things" to be seized. "Places" was

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3. *Debates and Proceedings of the Congress of the United States,* Vol 1, compiled by Joseph Gales (1834), p. 738. Other accounts of these proceedings differ as to whether these amendments were actually rejected.
4. A Senate markup of this document is at https://catalog.archives.gov/id/3535588.
5. Mr. Gerry and Mr. Livermore, representatives from these States, certainly understood this right to extend to all possessions. If the word effects were to *narrow* this right, why did they not propose to reinstate "their other property," where they were keen to strengthen the clarity of the amendment in other ways? It is reasonable to conclude that they understood 'effects' to mean *at least* the same thing as "other property."
6. See Phillips, James C. "A Corpus liguistic Analysis of 'Possessions' in American English, 1760-1776." https://ssrn.com/abstract=4668264.
7. See *Liberty Tree*, January 2024 issue.

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amended by Congress to the singular "place," but persons and things remained plural. A natural implication of this change is that Congress intended that separate warrants be issued for each separate "place" officers wish to search, or, stated another way, a *separate specific cause* to believe certain named persons or things will be found at each *specific place* described.

Notably, it is now conceded that "searches" even of some seized "things" are illegal without warrants. In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court determined that law enforcement officers must obtain a search warrant to search cell phones. Riley's lawyer argued before the court that allowing cops to access all the information on a cell phone seized during a lawful (warrantless) arrest was comparable to giving "the police officers authority to search through the private papers and the drawers and bureaus and cabinets of somebody's house."[8] In other words, the cell phone, containing more personal records than the "papers" considered by the Framers, has become a *place* where (digital) papers rest. Accordingly, warrants to search cell phones should be based on sworn probable cause statements, and should particularly describe the exact records needed to be seized from the search.

Jeffrey Fisher, Professor of Law at Stanford Law School, board member of the Due Process Insti-tute, argued against warrantless cell phone searches at the Supreme Court in *Riley v. California.*

Granger cartoon depicting the threat Prohibition enforcement posed: drowning the flame of Liberty.

In John Bouvier's Law Dictionary of 1839, "place" as used in pleading or evidence means "a particular portion of space, locality." In Webster's 1828 American Dictionary of the English Language, "place" is defined as:

> A particular portion of space of indefinite extent, occupied or intended to be occupied by any person or thing, and considered *as the space where a person or thing does or may rest or has rested*, as distinct from space in general.

As one usage example, Webster provides, "The *place* where thou standest is holy ground. Exodus 3:5." This confirms what every English speaker knows — places include any defined areas of ground!!

"Place" can refer to any privately owned land in the world. Why then, if a house is the only space protected by the Fourth Amendment, as the Supreme Court concluded, didn't the Framers simply require warrants "particularly describing the *house* to be searched" rather than the *place*? It is reasonable to conclude that the Framers intended warrants to be required for *more* "places" than houses and their curtilage. The *Hester* court ignored this detail in summarily ruling that nearly all private lands can be searched and invaded without warrant.

The declarations of rights established by several States prior to the Fourth Amendment framing serve to show how protection against warrantless searches was understood at the time. Masschusetts 1780 Declaration XIV declared that all warrants are "contrary to" the right to be secure from unreasonable searches of "all ... possessions" when "the cause or foundation of [those warrants] be not previously supported by oath or affirmation." Warrants were to be issued "to make search in suspected places." New Hampshire used the same language. Pennsylvania and Vermont, although rearranging the words, provided similarly: that searches *absent* warrants based on oath and particularly describing "suspected places" to be searched are "contrary to" the right to be free from search and seizure. Again, if these States had specified "suspected houses" rather than "suspected places," one could perhaps argue that they did not understand *all their possessions* to also include land. A person of ordinary sense can see that each of these States intended and understood that the people ought to be free from illegal, warrantless seizures of all private property.

Prohibition furnishes 'reason' to violate the people's security

In 1924, the Supreme Court ignored the historical background and meaning of words in the Fourth Amendment in *Hester* to exclude all open fields from being "secure" from warrantless searches. Just a year later, they ignored the historical meaning of "unreasonable searches and seizures" in order to justify warrantless, discretionary searches of automobiles on mere suspicion.

8. Fuchs, Erin (April 29, 2014). "Supreme Court Hears Case That Could Open Up 'Every American's Life To The Police Department'". *Business Insider.*

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In 1921, undercover prohibition agents met with Mr. Carroll to buy illegal whiskey. Carroll left the meeting, purportedly to get the liquor, but returned without it and said he would deliver it the next day. But he never came back, and never sold any whiskey. A week later, while patrolling a stretch of road, the same agents saw Mr. Carroll in what they believed was the same Oldsmobile roadster he had used before (although they hadn't gotten a good look, it being dark the first time). They followed said car, but lost it. Two months and a week later, they saw Carroll in the same roadster, and stopped the car to search it. They seized 68 bottles of whiskey hidden in the upholstery, and then arrested Mr. Carroll for violating the Volstead Act.

In his defense, Mr. Carroll claimed the seizure violated the Fourth Amendment, and the seized whiskey evidence should have been suppressed at trial.

While the prohibition act required a search warrant to search any private dwelling (but not if used for a business purpose!), it did not require a search warrant for automobiles:

> When ... any officer of the law shall discover any person in the act of transporting ... intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. [Whenever such seizure is made], he shall take possesion of the ... automobile ... or any other conveyance, and shall arrest any person in charge thereof.

If such seizure took place without a warrant, was the Fourth Amendment violated? In *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court, eager to give law enforcement discretionary power to harrass Americans, said NO, because the search had been made "where it is not practicable to secure a warrant," and that it was made with "probable cause" and was a "reasonable" search.

Rejecting the Fourth Amendment

In passing legislation supplemental to the National Prohibition Act, the Senate had proposed prohibiting any U.S. officer from searching the "property or premises of any person without previously securing a search warrant," making it a misdemeanor to do so. This was objected to in the House, and the Judiciary Committe, to whom the matter was referred, recommended dropping "property" — if it were included, it would "seriously interfere" with the Government's enforcement of laws! The Committee reported that "The Constitution does not forbid search [without a warrant] but it does forbid unreasonable search." Including "property" would:

> ... make it impossible to stop the rum running automobiles ... It would take from the officers the power that they absolutely must have to be of any service, for if they cannot search for liquor without a warrant, they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured, the automobile would be beyond the reach of the officer, with its load of illegal liquor disposed of." The law, as finally passed, made it a misdemeanor to search "property" only if a warrantless search was done "maliciously and without probable cause.[9]

The *Carroll* Court favored officer 'discretion' to search above the rights of the people to be secure in their property, baldly stating, "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interest and rights of individual citizens."[10] Of course, the "public interest" lies in preserving the security and privacy of each individual — their God-given rights — not whatever nebulous common good or public safety reason tyrants invent to destroy such security.

The *Carroll* Court was ***wrong*** about the history and meaning of the phrase "unreasonable search and seizures," but the underlying premise, particularly in Carroll's case, that no warrant could have been obtained, or that it was impossible to get a warrant to stop an automobile, was most certainly false. The agents had the alleged "probable cause" *over two months prior* to the stop of the automobile, and they could have easily obtained a warrant to stop the car in question and search it *whenever they found it on their patrol*. But as usual, government thugs are always desirous of trespassing on the bodies and properties of others without any hindrance, and the *Carroll* Court wrongly approved such conduct.

In the next installment of this series, we will delve into the court's false determination of the meaning of an "unreasonable" search.

9. Carroll v. United States, 267 U.S. 132, 145-146 (1925).
10. *Id.*, at 149.