No. 04-1414

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JEFFREY GRUBBS,

*Respondent.*

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

# BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PROFESSOR GEORGE C. THOMAS III IN SUPPORT OF RESPONDENT

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# BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PROFESSOR GEORGE C. THOMAS III IN SUPPORT OF RESPONDENT

## INTERESTS OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes, foster the integrity, independence and expertise of the criminal defense profession, and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide–joined by 80 state and local affiliate organizations with 28,000 members–including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Professor Thomas is the Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers University School of Law. Professor Thomas has published numerous books and articles dealing with constitutional and criminal law and legal history. The NACDL and Professor Thomas are concerned because the issues presented in this case relate to a widely-used type

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. Letters of consent from the parties have been lodged with the Clerk of the Court. Rule 37.3(a).

of search warrant, the constitutionality of which[2] may be properly assessed only pursuant to an adequate examination of the historical background of the Fourth Amendment.

## SUMMARY OF ARGUMENT

The Anglo-American revulsion toward the sort of broad governmental search-and-seizure authorizations that were still commonplace in the first half of the eighteenth century had many objects, and went through many phases. English search-and-seizure practices in the preceding centuries were commonly quite violent, and were used as weapons for stifling dissent, forestalling rebellion, and intimidating political opponents. But as the Revolution neared in America, and the colonists rapidly underwent a sea change in their attitude toward broad general warrants and writs of assistance, one theme became increasingly central: the conviction that non-particularized search-and-seizure authorizations were abhorrent because they conferred excessive *discretion*, and

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2. The question of the constitutionality of "anticipatory" search warrants is a "subsidiary" of, and is "fairly included" within (Sup. Ct. R. 14.1(a)), the question presented in the Petition, which asked whether the Fourth Amendment requires the suppression of evidence when officers conduct a search under an "anticipatory" warrant *and* certain conditions are present. *See* Pet. at (I); *see also Yee* v. *Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). It would have been futile for Respondent to press this argument below, in light of Ninth Circuit precedent. *See United States* v. *Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986), *abrogated on other grounds as noted in United States* v. *Weber*, 923 F.2d 1338, 1343 n.6 (9th Cir. 1990).

hence excessive *power*, on the government agents holding them.

The "anticipatory" warrants that are the subject of this case would have incurred the condemnation of the generation of Americans who drafted, approved, and ratified the Fourth Amendment, because these warrants confer on government officials the power and discretion to reach their own conclusion as to when the "triggering events" giving rise to their search power have occurred. Worse yet, in many cases–including this one–these warrants effectively go a step further, empowering government agents to *create* the conditions that they may then treat as giving them the power to search and seize. In view of the sharp conflict between this form of warrant and the original spirit and purpose of the Fourth Amendment, the Court should hold that "anticipatory" warrants are unconstitutional.

## ARGUMENT

### I.
### The Historical Background of the Fourth Amendment as an Expression of Abhorrence of Discretionary Searches

#### A.
#### General Warrants and Writs of Assistance in England

The historical record supplies no shortage of reasons for English and colonial American subjects to oppose broad-based governmental search-and-seizure authorizations. The preceding centuries had seen search-and-seizure practices evolve from a relatively uncontroversial set of methods for apprehending fleeing

felons and recovering contraband to an instrument of political, religious, and class-oriented governmental persecution.

In thirteenth century England, searches for fleeing criminals were effected by the ancient practice of the "hue and cry," which provided that subjects who witnessed a crime were to chase the perpetrator, blowing horns and shouting for others to join them.[3] Searches for, and seizure of, fleeing felons were conducted by the public, with minimal or no involvement of government officials, and no authorization to break into private dwellings.[4] Over the next two centuries, however, searches became both more extensive, with pursuers increasingly being permitted to enter private dwellings, and more a locus of government authority, as legislation empowered government officials to arrest persons suspected of past crimes.[5] By the fifteenth century, the Crown had begun issuing general authorizations empowering royal agents

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3. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 52 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School). Cuddihy's dissertation, which we rely on extensively as a compendium of primary materials and a source of useful insights, was identified by Justice O'Connor as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School District* v. *Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Professor Morgan Cloud described it as "a model of the effort and objectivity that are hallmarks of legal history." Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707, 1746 (1996).

4. Cuddihy, *supra* note 3, at 53-54.

5. *Id.* at 54-55.

to search for specified contraband or types of criminals.[6] While the legal framework for aggressive house-to-house searches had been articulated by the latter part of the fifteenth century, however, in practice this power was not widely exercised, and thus excited little opposition.[7]

Search-and-seizure practices underwent dramatic changes in the Tudor and early Stuart eras (1485-1642). Wide-ranging and highly-intrusive governmental searches came to be used as tools for "cleans[ing] the cities of vagabonds,"[8] regulating the entertainments and dress of the working classes,[9] and stifling political and religious nonconformity.[10] The latter two purposes were often overseen by two institutions that Revolutionary-era Americans came to view as emblematic of tyrannical and unjust government: the Privy Council and the Star Chamber. Both of these entities made it their practice to issue broad authorizations for aggressive search-and-seizure campaigns directed at entire categories of persons, places, or objects.[11] And because these search-and-seizure campaigns were used for their *in terrorem*

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6. *Id.* at 56.

7. *Id.* at 75-76, 79.

8. Procl. no. 16, n. p., 23 Dec. 1487 (cited in 1 *Tudor Royal Proclamations*, Paul L. Hughes and James F. Larkin eds., (1964-69) 17 (cited in Cuddihy, *supra* note 3, at 82)).

9. Cuddihy, *supra* note 3, at 84-85 (citing search authorizations directed at the playing of dice, bowls, and tennis, and the wearing of ostentatious headgear).

10. *Id.* at 115-99.

11. *Id.* at 115-16.

effect at least as much as for locating and seizing criminals or contraband, they became increasingly violent. Aggressive governmental house-to-house searches thus became a reality with which English subjects of all classes were intimately familiar, and opposition to these practices began to mount.

One of the earliest and most influential critiques came from Sir Edward Coke, who proclaimed in his 1642 treatise *Institutes of the Laws of England* that "for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stoln [*sic*] goods, is against Magna Carta."[12] Royal search practices were also attacked as unlawful and oppressive by Parliament, which resented the Crown's use of them as a tool for subduing and intimidating its members.[13]

By 1700, English scholars had begun to articulate a powerful critique of broad-based search authorizations, focusing specifically on the issuance of general warrants–*i.e.*, warrants that created broad authority to search and did not specify particular places that could be searched or things that could be seized. Nevertheless, such general warrants continued to be the norm in England, and continued to be used as tools of censorship and political control.[14]

Meanwhile, in 1662, the institution of "writs of assistance" was codified in English law, reinforcing yet

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12. 4 Sir Edward Coke, *The Institutes of the Laws of England* 176 (1642).

13. Cuddihy, *supra* note 3, at 242.

14. *Id.* at 292.

another legal basis for broad and indiscriminate governmental search-and-seizure authority. Similar writs had been in use for centuries, in the form of directions to peace officers to assist individuals in recovering money or property.[15] But the "Fraud Act" of 1662 regularized and broadened the writ, authorizing the issuance of writs empowering customs officials to "enter any house, shop, cellar, warehouse, or room or other place" and if necessary to "break open doors, chests, trunks and other packages" to locate and seize uncustomed goods.[16] As amended in 1701, the Act extended the duration of each such writ to six months after the death of the monarch in whose reign it was issued.[17] Technically, the customs officer's "writ of assistance" added little to the officer's *ex oficio* search authority.[18] In practice, however, the issuance of the writ reinforced and clarified the officer's authority, making it difficult or impossible for the subject of a search to claim in good faith that he had no obligation to permit the officer to conduct a search.[19]

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15. *Id.* at 299-300.

16. 13 and 14 Charles II, c. 11, sec. 5 (1662) (quoted in Cuddihy, *supra* note 3, at 306).

17. 1 Anne, stat. 1, c. 8, sec. 5 (1701) (cited in Cuddihy, *supra* note 3, at 306).

18. Cuddihy, *supra* note 3, at 650.

19. Thus, for example, Massachusetts Governor William Shirley directed the customs service to obtain writs of assistance from the colony's highest court, the Superior Court of Judicature, when the officers' *ex oficio* searches were repeatedly met with resistance and lawsuits. *See* 3 Thomas Hutchinson, *The History of Massachusetts* 92 (1764-1828) (cited in Cuddihy, *supra* note 3, at 731).

## B.
## The Colonial and Revolutionary American Experience with General Warrants and Writs of Assistance

Although America was destined to leap far ahead of Britain in rejecting broad governmental search-and-seizure authority, colonial Americans remained relatively sanguine with respect to these practices until the 1760s. Americans were familiar with the ancient principle that "a man's home was his castle," and on occasion would invoke it in support of the proposition that government officials could not invade the privacy of their homes under *any* circumstances.[20] But, notwithstanding their awareness of British scholars' attacks on the legality of general warrants,[21] colonial Americans did not broadly condemn them, and in fact treated them as the default mechanism for authorizing searches.[22] Indeed, Americans owned and used British legal treatises, which included proposed forms of search warrants, virtually all of them general in nature.

Notably, a form of general warrant known as a "Dormant Warrant," which resembled the present-day "anticipatory" warrant insofar as it was issued in view of possible future, rather than actual past, crimes, appeared in a number of these treatises. Richard Kilburne's *Choice Precedents Relating to the Office of a Justice of Peace* included a form of "Warrant Dormant" that authorized the holder to search suspicious places as often as he wished for up to

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20. *See* Cuddihy, *supra* note 3, at 363-69.

21. *See id.* at 370.

22. *See id.* at 376.

a year after an unsolved theft, in the anticipation that further thefts might occur during that time.[23] Kilburne's treatise was on bookshelves from Francis Dana's in Massachusetts to William Byrd's in Virginia.[24] Virtually the same sort of warrant, designed to be issued in anticipation of an outbreak of larcenies, appeared as a "Lodging Warrant" in other contemporary legal manuals. The "Lodging Warrant" authorized officials to "make diligent search in the most suspicious Places . . . for goods stoln [*sic*]" whenever and as frequently as the officer saw fit.[25] These "Dormant" and "Lodging" warrants were among the forms of general warrant familiar to Colonial Americans, and, by the same token, were among the forms of warrant that Americans later resolved to banish forever from the American legal landscape. *See Atwater* v. *City of Lago Vista*, 532 U.S. 318, 339-40 (2001) (citing *United States* v. *Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring)); *Vernonia School District* v. *Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting).

Notwithstanding the colonial governments'

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23. Richard Kilburne, *Choice Precedents Relating to the Office of a Justice of Peace* 406-07 (6th ed. 1700) (cited in Cuddihy, *supra* note 3, at 288-89). Similar "dormant" form warrants appeared in at least two other contemporary treatises. *See* John Bond, *Collection of Precedents* 507 (2d ed. 1696); Henry Care and William Nelson, *English Liberties* 177-78 (1700) (cited in Cuddihy, *supra* note 3, at 289 n.11).

24. *See* Herbert Johnson, comp., *Imported Eighteenth Century Law Treatises in American Libraries* 35 (Knoxville 1978) (cited in Cuddihy, *supra* note 3, at 466-67 n.15).

25. Giles Jacob, *Lex Mercatoria* 169 (3d ed. 1720); *see also* Joseph Higgs, *A Guide to Justices* 101-02 (3d ed. 1750) (cited in Cuddihy, *supra* note 3, at 625-26 & n.79).

practice of issuing general warrants, these warrants had not sparked widespread condemnation in America prior to 1760. The reason is simple: Although colonial governments turned to general warrants fairly routinely, they did not do so very frequently.[26] Nor did colonial governments have the means to effectuate broad and oppressive searches. Even major cities such as Boston and New York had at most a handful of constables, and those they had were unpaid members of the community who served for only a year before the job rotated to another, all the while keeping their regular jobs.[27] In contrast to the violent searches by professional proto-armies that had characterized Tudor and early Stuart England, the colonial American experience of general searches had been more akin to "letting one's brother-in-law and the merchant next door look under the kitchen table for Farmer Brown's stolen pewterware."[28]

A few factors led to the rapid turnabout in American attitudes after 1760. For one thing, the British government's practices with respect to customs searches stood in stark contrast to the general law-enforcement searches carried out by local constables. Perhaps because of the generally non-violent, surreptitious, and ostensibly victimless nature of smuggling, customs laws had always been accompanied by general search-and-seizure authority.[29] Moreover, enforcement of these laws was overseen, not by colonial governments and unpaid part-

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26. *See* Cuddihy, *supra* note 3, at 375.

27. *See id.* at 497-503.

28. *Id.* at 504.

29. *See id.* at 58.

time constables, but by the British government and its professional agents. English customs officers aggressively exercised their general search powers in the colonies, and by 1760 Americans' resentment of these harsh practices had become pronounced.[30]

Still more crucial to the sea change in Americans' opinions, however, was a trilogy of celebrated legal standoffs over search-and-seizure authority that occurred on both sides of the Atlantic between 1761 and 1776.

### 1.
### James Otis' Argument in the 1761 Writ of Assistance Case (*Paxton's Case*)

The first occurred in Massachusetts in 1761, after the death of George II in October of 1760 caused the writs of assistance issued during his reign to expire automatically, pursuant to the Fraud Act of 1662.[31] After customs official Charles Paxton applied to the Superior Court for the issuance of new writs, a group of Boston merchants petitioned the Superior Court to hear argument against the issuance of the writs. Surveyor General of the Customs Thomas Lechmere petitioned to be heard in support of the writs. The court agreed to hear arguments, and the merchants retained James Otis, Jr., the Crown's chief attorney in Massachusetts and son of one of the colony's most powerful politicians, to help argue

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30. *See id.* at 518.

31. *See supra* at 7 & n.16; 2 L. Kinvin Wroth and Hiller B. Zobel, eds., *Legal Papers of John Adams* 112 (Harvard University Press 1965) ("*Adams Legal Papers*").

their side of the case.[32]

As the two sides squared off in the Council Chamber of what is now the Old State House in Boston, a young Boston lawyer and patriot, and future author of the State search-and-seizure provision generally viewed as the Fourth Amendment's nearest ancestor,[33] sat "lost in Admiration."[34] John Adams, then 25 years old, would later proclaim Otis' argument against the Writs of Assistance "the first scene of the first Act of Opposition to

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32. *See* Cuddihy, *supra* note 3, at 763-65.

33. John Adams authored the 1780 Massachusetts Constitution and Declaration of Rights, which included the following provision:

> Art. XIV. Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person 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.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 684-85 (1999). Professor Amar has noted that "[t]he language, logic and structure of the Massachusetts Constitution's Article XIV rather clearly foreshadow the federal Fourth Amendment." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 67 (1996).

34. *Adams Legal Papers*, *supra* note 31, at 106.

the arbitrary Claims of Great Britain," adding: "[t]hen and there the child Independence was born."[35]

Adams' "Abstract" of Otis' argument, a version of which was published in the *Massachusetts Spy* in 1773,[36] indicates that among Otis' indictments of the writ was the fact that it empowered those holding it to search Americans' homes at their individual–and likely arbitrary and malicious–discretion. Otis complained that "every one with this writ may be a tyrant," and that "Custom house officers may enter our houses when they please . . . their menial servants may enter . . . and whether they break through malice or revenge, no man, no court can inquire."[37]

But Otis went beyond merely indicting general warrants and writs of assistance, adding that there was one form of search authorization that "may be legal":

> *special writs, directed to special officers,* and to search *certain houses,* &c. especially set forth in the writ, may be granted by the Court of Exchequer, at home, *upon oath made before* the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH.[38]

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35. March 29, 1817 Letter from John Adams to William Tudor (quoted in *Adams Legal Papers, supra* note 31, at 107).

36. *See id.* at 134-35 n.103.

37. *Id.* at 142.

38. *Id.* at 141.

Although Otis' broader theme, that the British Government's arbitrary claims could be declared contrary to fundamental legal principles, was more the focus of Adams' loftiest encomiums, the latter assertion–that specific warrants could be an acceptable substitute for general warrants and writs–was more essential to the development of the principles that would later be enshrined in the Fourth Amendment. Otis here picked up on a discussion that had originated a few decades earlier among British critics of the general warrant.[39]

In the preceding decades, many of the general warrant's British opponents had gone beyond simply attacking the warrant, and had begun grappling with the question of what might serve as a suitable replacement. What sort of replacement could be considered suitable, of course, turned on what aspect of the institution of the general warrant was seen as most abhorrent. If the chief objection was that the searches conducted pursuant to the warrants were too intrusive, it might be declared that the degree of penetration involved in searches must be constrained across-the-board. If it were that the searches were too violent, the proper remedy might be measures regulating the methods that the searchers could employ. If it were that the searches tended to be used as instruments of oppression against nonconformists and political opponents, a measure such as approval of the warrant by a diverse panel of reviewers might be suggested.

For these critics, however, the chief evil of the general warrant was none of these things, but rather their vesting of *discretion* in the searching official. Thus, one of

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39. *See* Cuddihy, *supra* note 3, at 535-60.

these scholars declared it "extremely hard to leave it to the discretion of a Common officer to arrest what Persons, and search what Houses he thinks fit."[40] Another asserted that allowing gamekeepers "to search what places they shall think proper" for poached animals would constitute an excessive grant of power.[41] As the House of Commons considered a general Navy impressment warrant, Sir John Barnard warned that such warrants placed an "unlimited power" in the hands of petty officers to "insist upon searching the house of any gentleman or any nobleman of the neighborhood."[42] In the upper house, Lord Gage similarly warned that the bill would subject every Englishman's home to forcible entry and search at "the caprice and insolence of every dirty little officer."[43]

These English critics recommended that the problem of excessive search-and-seizure discretion be solved by favoring the use of specific warrants, which narrowly cabin the officer's power to search for particularly-identified things in particularly-identified places, rather than authorizing them to break open and

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40. 2 William Hawkins, *Treatise of the Pleas of the Crown* 82 (1721) (quoted in Cuddihy, *supra* note 3, at 539).

41. 1 Richard Burn, *The Justice of Peace* 439 (1755) (quoted in Cuddihy, *supra* note 3, at 547).

42. March 6, 1740 Comments of Sir John Barnard, 20 *A Collection of the Parliamentary Debates in England from the year M, DC, LXVIII* 258-59 (1741) (quoted in Cuddihy, *supra* note 3, at 551-52).

43. March 6, 1740 Comments of Lord Gage, 3 *The Scots Magazine* 324 (quoted in Cuddihy, *supra* note 3, at 552).

search dwellings essentially at their whim. Recognizing that open-ended grants of search-and-seizure authority amounted to invitations to arbitrary, harassing, and malicious behavior, likely driven by class resentment, avarice, malice, or some combination of these motivations, these critics settled on an approach to grants of search-and-seizure authority that would cabin that power as narrowly as possible, while still allowing the officers to perform their proper functions.[44]

Despite his eloquence in advocating for the specific warrant, Otis lost *Paxton's Case*. The court suspended the proceedings in order to inquire into English policy on the writ question, and, after receiving assurances that the English Court of Exchequer granted the writs as a matter of course, rejected the merchants' challenge.[45] But Otis' widely-publicized arguments against the general warrant and in favor of the specific form gained tremendous currency among colonial Americans.[46] Commentators castigated the customs officials, and enthusiastically echoed Otis' condemnations of the writs' discretionary nature, decrying the issuance of writs that allowed a customs official to "ENTER FORCEABLY into a DWELLING HOUSE, and rifle every part of it, where he shall PLEASE to suspect uncustom'd goods are lodg'd."[47] Soon after, Otis won a seat in the Massachusetts House of

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44. Cuddihy, *supra* note 3, at 553-58.

45. *Id.* at 796-98.

46. *See* Davies, *supra* note 33, at 561 n.20.

47. Boston Gazette and Country Journal, Nov. 23, 1761 at 3 (quoted in Cuddihy, *supra* note 3, at 801).

Representatives by a nearly unanimous vote,[48] while in the 1765 Stamp Act Riot, Chief Justice Thomas Hutchinson, who had ruled against Otis and in favor of the writs, saw his house destroyed by rioters "with a savageness unknown in a civilized country."[49] Massachusetts Governor Sir Francis Bernard ascribed the violence to the rioters' memory of Hutchinson's role in *Paxton's Case*, informing the Lords of Trade that "[t]he Chief Justice took the lead in the Judgment for granting Writs, and now he has paid for it."[50] By giving forceful voice to colonial Americans' fierce resentment of discretionary searches, Otis had hammered the first nail in the coffin of the general warrant in America.

### 2.
### Chief Justice Pratt's Opinions in *The Wilkesite Cases*

The controversy over *Paxton's Case* had barely subsided when a new high-profile conflict over search-and-seizure authority arose, this time in England. In 1762, Member of Parliament John Wilkes began anonymously publishing a series of pamphlets entitled the *North Briton*, which derided and criticized the governing party.[51] When Issue 45, with its especially harsh attack upon a speech given by the King, appeared,

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48. Cuddihy, *supra* note 3, at 817.

49. Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 68 (The Johns Hopkins Press 1937).

50. Letter from Sir Francis Bernard to the Lords of Trade (quoted in Lasson, *supra* note 49, at 68).

51. Lasson, *supra* note 49, at 43.

the Secretary of State issued a warrant directing several messengers "to make strict and diligent search for the authors, printers, and publishers" of the pamphlet, and "to apprehend and seize [them], together with their papers."[52]

Having thus been granted an open-ended power to arrest, search and seize at their discretion, the messengers proceeded to arrest forty-nine people in three days.[53] Eventually they learned from one of them that Wilkes was the author of Issue 45, and confronted him at his home. Wilkes pronounced the messengers' warrant invalid and refused to submit to an arrest or search, whereupon the messengers carried him in a chair to the Secretary of State's office. They then returned to ransack Wilkes' house and seize all of his papers and effects.[54]

Eager to turn the arrest and search into yet another embarrassment for the government, Wilkes filed a dozen separate trespass suits within a month, and many of his cohorts followed suit.[55] These suits culminated in a number of widely-noted decisions, among them Chief Justice Pratt's eloquent condemnation of general warrants in *Wilkes* v. *Wood*. The Chief Justice declared:

> The defendants claimed a right under precedents to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no

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52. *Id.*

53. *Id.* at 43-44.

54. *Id.* at 44.

55. Cuddihy, *supra* note 3, at 894.

> inventory is made of the things 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.[56]

Further critiques of arrests and seizures pursuant to open-ended warrants were issued by Chief Justice Pratt and his colleagues in companion cases relating to Issue 45 of the *North Briton*.[57] On appeal of the decision in *Leach* v. *Money* to the King's Bench, Chief Justice Pratt's views were seconded by Chief Justice Mansfield, who opined: "It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer."[58]

The Wilkesite decisions attracted wide attention, and British papers printed enthusiastic affirmations of *Wilkes* v. *Wood*'s condemnation of discretionary searches.[59] The cases also received "[m]assive coverage"

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56. *Wilkes* v. *Wood*, Lofft 1; 98 Eng. Rep. 489 (quoted in Lasson, *supra* note 49 at 45).

57. *See* Cuddihy, *supra* note 3, at 896-907.

58. *Money* v. *Leach*, 3 Burr. 1692, 1742, 97 Eng. Rep. 1050, 1075 (quoted in Lasson, *supra* note 49, at 47).

59. *The Monitor* described the secretarial warrant as a device employed "to empower mean, Low-lif'd ignorant men to enter, and to act at discretion, and to overhaul things of the

in the American colonial press, which was "overwhelmingly sympathetic to Wilkes."[60] Moreover, people on both sides of the Atlantic were aware of Sir William Blackstone's condemnation of general warrants–which was based on the Court of King's Bench proceedings in *Leach*–in his 1769 *Commentaries on the Laws of England*.[61] Blackstone declared that "[a] general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the grounds of suspicion."[62]

The aggregate effect of these events on the minds of colonial Americans was dramatic. Hostility to general search-and-seizure authorizations "came not only from colonial judges but from town meetings, the Continental Congress, quasi-governmental agencies, pamphleteers, essayists, and the man-on-the-street."[63] A 1772 Boston town meeting resolved that customs officers' general

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m[o]st private nature . . . ." *Monitor, or British Freeholder*, Feb. 11, 1764, at 2595 (quoted in Cuddihy, *supra* note 3, at 934). *The London Magazine* declared that giving customs officers "a discretionary power to search for and seize whatsoever they should please to suspect" contravened England's laws and constitution. 34 *London Magazine* 283 (1765) (quoted in Cuddihy, *supra* note 3, at 935).

60. Cuddihy, *supra* note 3, at 1105.

61. *See* Davies, *supra* note 33, at 566 n.27.

62. 4 William Blackstone, *Commentaries on the Laws of England* 288 (1769) (quoted in Davies, *supra* note 33, at 580 n.78).

63. Cuddihy, *supra* note 3, at 1110.

search authority furnished every petty officer "with power more absolute and arbitrary than ought to be lodged in the hands of any man or body whatsoever."[64]

### 3.
### Efforts to Enforce The Townshend Acts with Writs of Assistance

Meanwhile, notwithstanding their victory in *Paxton's Case*, English customs officials continued to face obstacles in employing writs of assistance to search for and seize uncustomed goods in America. When customs officials attempted to search the cabinets of merchant Daniel Malcolm's house, he threatened to kill them if they broke the lock on a particular cabinet. After the officials had reported the incident to English officials, the English Attorney General and Solicitor General recommended that no prosecution be instituted, on the ground that the officials' writ was invalid.[65] One result was the enactment of writ-related provisions of a series of laws that came to be known as the Townshend Acts, after Chancellor of the Exchequer Charles Townshend, who oversaw their drafting and implementation.[66] By closing loopholes and clarifying matters that had been left to interpretation, such as which colonial courts were authorized to grant the writs, these provisions of the Townshend Acts were intended to remove all doubts regarding the writs' legality.

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64. "A List of Infringements and Violations of Rights," November 20, 1774, *Votes and Proceedings of the Freeholders of Boston* 16-17 (quoted in Cuddihy, *supra* note 3, at 1112).

65. Lasson, *supra* note 49, at 68-69.

66. *Id.* at 70.

But the Act could not purport to eliminate the higher-level critique of the writs that James Otis had pronounced in *Paxton's Case*, or that Chief Justices Pratt and Mansfield had articulated in the *Wilkesite Cases*. As customs officials, armed with the Townshend Acts, sought the colonial courts' cooperation in procuring writs of assistance in the latter 1760s, they soon discovered that these views had become firmly entrenched in America. Although a few colonial courts obliged, several not only refused, but in doing so cited rationales that closely tracked Otis' attack from the beginning of the decade. The judges in Pennsylvania, for example, opined that "arming officers of the Customs with so extensive a power, to be exercised totally at their own discretion would be of dangerous consequences and was not warranted by Law."[67] Chief Justice William Drayton, of the Florida provinces, explained that he "d[id] not think [him]self justified by Law to issue general writs for that purpose to be lodged in the hands and to be used discretionally (perhaps without proper foundation) at the will of subordinate officers."[68]

The Virginia courts agreed to grant writs, but insisted on drafting suitable versions, rather than following the forms provided by the customs officials. This course was sufficiently troubling to the English authorities to generate an indignant letter from the

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67. July 3, 1773 Letter of the Customs Officers at Philadelphia to the Customs Commissioners (quoted in O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in Richard B. Morris, ed., *The Era of the American Revolution* 60-61 (Columbia University Press 1939)).

68. November 17, 1772 Letter from William Drayton to William Cummings (quoted in Dickerson, *supra* note 67, at 64).

Treasury Board to the Attorney General lamenting:

> most of the [American] judges refused to grant [the] writs alledging [*sic*] that no information had been made to them of any special occasion for such writ, and unless such Information was made to them on oath they could not legally grant them, it being unconstitutional to lodge such a Writ in the hands of the officer which gave him unlimited power to act under it according to his own arbitrary Discretion.[69]

From the Virginia confrontation over the writs, a direct line of succession may be traced through the various State declarations of rights to the federal Bill of Rights' Fourth Amendment. Virginia in 1776 became the first State to formally condemn general warrants in such a declaration of rights,[70] and the six additional States that enacted declarations or bills of rights between 1776 and 1784 all included such a provision.[71] As noted above, John Adams, who had looked on with reverence nineteen years earlier as James Otis eloquently proclaimed discretionary search-and-seizure authority intolerable, authored Massachusetts' 1780 version, which came very near to the Fourth Amendment in its structure and

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69. August 31, 1772 Correspondence with Attorney General Edward Thurston (quoted in Dickerson, *supra* note 67, at 69). Thurston in response declared it "strange indeed, that any judge in the colonies should think the laws of the mother too harsh for the temper of American Liberty." *Id.* at 71.

70. *See* Lasson, *supra* note 49, at 79 & n.3.

71. *See id.* at 80-82 & nn.9-17.

wording.[72]

## II.
## "Anticipatory" Warrants' Essential Resemblance to General Warrants and Writs of Assistance

The moral of this history is plain: The spirit animating the Fourth Amendment is an abhorrence for governmental search-and-seizure authorizations that place excessive *discretion*, and thus excessive *power*, in the hands of government agents.[73] Warrants that fail to particularize in *all* possible respects the outer boundaries of the search-and-seizure power that they create therefore fly directly in the face of the core principle of the Fourth Amendment.

Equally importantly, it has never been sufficient for this cabining of the official's discretion to be effected in terms that leave room for *interpretation* on the part of

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72. *See supra* note 33.

73. *See* Davies, *supra* note 33, at 580-82 (noting the Revolutionary generation's "deep-rooted distrust and even disdain for the judgment of ordinary officers"); Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 970-71 (1997) (noting that the purpose of the Massachusetts Declaration of Rights' search-and-seizure provision was "to restrain the discretion of officers and executive officials"); Tracy Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. Cal. L. Rev. 1, 19-20 (1994) ("the search and seizure practices of the British authorities were opposed because of the arbitrary power exercised by customs officers and Crown officials. The Fourth Amendment was adopted to deter federal officials from exercising similar unrestrained power.").

the official–a flaw that inevitably allows the low-level official discretion reviled by the Framing generation to seep back in. Indeed, if this piece of the puzzle is overlooked, even the hated general warrants of the 1760s would have to be considered acceptable, because even they on their face normally delimited the permissible objects of the search and seizure–for example, by specifying that the officer must be seeking evidence of a particular crime, or particular contraband. In most cases, their flaw was not that they failed to particularize *at all*, but that they particularized in a manner that left room for the officer to make on-the-scene judgments as to whether particular searches and seizures were appropriate.

It is therefore unsurprising that the Fourth Amendment's particularity requirement reflects a remarkably emphatic effort to delineate boundaries to the officer's search-and-seizure authority that leave *no* room for on-the-scene judgment calls: The warrant must "*particularly* describ[e] the *place to be searched*, and the *persons or things to be seized*."[74] Officers not only are not trusted to decide for themselves whether a person or home is "suspicious," likely to be involved in a particular crime, or the object of a reliable tip–they are literally trusted to decide nothing beyond whether the "person" "place" or "thing" before them is the same as specified in the warrant. It is only a little exaggeration to suggest that if the Framers could have required that searches and seizures be conducted by programmable automatons, they would have done so.

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74. U.S. Const. amend. IV (emphases added).

The recent[75] innovation of allowing searches and seizures pursuant to "anticipatory" warrants is profoundly contrary to this core anti-discretion principle of the Fourth Amendment. Pursuant to these forms of warrant, low-level law enforcement officials are handed a partially-blank check, authorized to decide on their own whether the "triggering event" specified in the warrant really has occurred. Indeed, it is self-evident that the "anticipatory" warrant undermines the Fourth Amendment's oath requirement: The required oath is meant to compel the officer to swear to the existence of facts that establish probable cause–but since an officer executing an "anticipatory" warrant does not swear an oath that the "triggering event" actually has occurred before conducting the search, any oath provided with respect to such a warrant is necessarily incomplete.

It gets worse: In many cases, including this one, "anticipatory" warrants not only vest low-level officers with the power to determine whether a "triggering" event has occurred, but also empower them to *bring about* the very conditions that they may then treat as having "triggered" their authority. The search at issue here illustrates the point. At 7:19 a.m. on April 19, 2002, as Jeffrey Grubbs and his wife prepared their children for school, the postal inspectors huddled outside of his home had a piece of paper that accorded them no power to enter or search his home. At 7:20, however, one of them went to Grubbs' door and handed his wife a package. A few minutes later – with no new intervention by any

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75. *See* Norma Rotunno, Annotation, *Validity of Anticipatory Search Warrants–State Cases*, 67 A.L.R.5th 361, 361 (1993) (noting that "anticipatory" search warrants are a "relatively recent law enforcement tool").

magistrate and no new binding oath by any officer–the inspectors determined that their actions had activated the latent power of their "anticipatory" warrant. They immediately descended on Grubbs' home, compelled his wife to let them enter, and searched the entire house as well as his children's backpacks. Pet. App. at 4a-6a. Armed with their "anticipatory" warrant, these low-level officials literally created, and then ratified, their own power to search Grubbs' home and seize his property.[76]

This description of the facts of this case is sufficient in itself to establish that, in light of its profoundly discretionary character, the "anticipatory" warrant would have inspired the same revulsion on the part of the Framing generation that greeted such instruments of discretionary search authority as the general warrant and the writ of assistance. In order to be faithful to the essential purpose and design of the Fourth Amendment, the Court should hold that the "anticipatory" warrant is unconstitutional.

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76. Caselaw provides still more dramatic examples of officers' on-the-scene exercises of discretion pursuant to "anticipatory" warrants. *See, e.g., United States* v. *Rowland*, 145 F.3d 1194 (10th Cir. 1998) (warrant was to be served when package was brought into target's residence; after electronic beeper in package stopped functioning while package was at target's office, officers surmised that target took the package from his office into his home, served the warrant, and searched his home); *State* v. *Nusbaum*, 107 P.3d 768 (Wash. Ct. App. 2005) (warrant was to be served when delivery of package was accepted by person at target's residence; after target's fingers touched the package and delivery person yanked it back, agents arrested target in his front yard, served the warrant, and searched his home).

## CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the judgment below.

Respectfully submitted,

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