"A FLAME OF FIRE": THE FOURTH AMENDMENT IN PERILOUS TIMES

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The Fourth Amendment to the United States Constitution is, of course, one of the principal constitutional checks on any governmental inclination to overreach in its otherwise lawful and necessary crime-control and policing activity. What is more, the Fourth Amendment was fully intended to—and it actually *does*, at least to some modest if undeterminable degree—*prevent* law enforcement agents and others acting on their behalf from intruding unreasonably, without appropriate justification and legal process, into the lives of Americans and others living under our jurisdiction.

From this perspective, the Fourth Amendment is, appropriately, *an impediment* to some of the most zealous of law enforcement activities, and this is the case even when that activity is entirely innocent and well-intentioned, where the Government is acting strictly in an attempt to capture criminals and/or to deter criminal activity. This is also the case even when the result of the Fourth Amendment's application is that some guilty persons end up going free. As Justice Robert Jackson made this point for the Supreme Court in 1948, more than half a century ago,

> [i]t is said that if . . . arrests and searches cannot be made [whenever criminal activity is thought to be present], law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our

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> Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.[1]

Indeed, Justice Jackson, a former Attorney General and Solicitor General of the United States and a Supreme Court justice, who left the Supreme Court for its entire 1945 Term in order to serve by presidential appointment as Chief American Prosecutor at the Nuremberg Tribunal to try captured senior Nazi leaders for genocide and war crimes, had the following to say, after returning from Nuremberg, about the importance of Fourth Amendment freedoms to our American democracy:

> These . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[2]

The Warrant Clause of the Fourth Amendment, in particular, serves this purpose of attempting to assure us that law enforcement officers and agents will act *reasonably*, with appropriate antecedent justification and due legal process, before intruding into our lives or the lives of our neighbors. It provides simply that "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."[3]

The inclusion of this prohibitory language in the Fourth Amendment, creating severe restrictions on law enforcement behavior that are not found in most countries of the world, was, of course, not simply historical happenstance. To be sure, this is language that followed the English common law in existence at the time of the drafting of the Fourth Amendment and the adoption of the Bill of Rights. But, more important still, it is language that reflected—and continues to reflect, as Justice Jackson pointed out—our country's express and profound constitutional commitment to individual freedom from

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[1] United States v. Di Re, 332 U.S. 581, 595 (1948).

[2] Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

[3] U.S. CONST. amend. IV.

unjustified and unreasonable government searches and seizures.

The drafting and enactment of the Warrant Clause and the Fourth Amendment itself followed as the direct result of critically important events that took place in the American colonies, events that led to the Revolutionary War and to the birth of the United States of America, and events that took place, significantly, in perilous times.

One of the most important of the specific triggering events that led to the founding of our nation, forged out of the fires of the American Revolution, and that led to our constitutionalized commitment to individual rights and liberties took place more than two hundred-fifty years ago, in 1761, in the Massachusetts Bay Colony. On October 25, 1760, the English sovereign, King George II, died.[4] Under English law applicable to the American colonies at that time, the so-called "writs of assistance," used as general warrants by English customs officers in the colonies, expired six months after the reigning King or Queen died.[5] As a result, the customs officers in the Massachusetts Bay Colony had only until April 25, 1761 to obtain new writs of assistance, otherwise their power to execute such "general warrants" lapsed.[6]

A general warrant is a search warrant that essentially entitles its possessor to search whoever, wherever and whenever the possessor wants, without any necessity for a showing of probable cause or any other sort of antecedent justification for the search, without any particularized description of where the possessor of the warrant intends to search or for what he or she intends to search, without any judicial authorization or supervision of the execution of the warrant whatsoever, and without any right of refusal on the part of the individuals whose bodies or homes or possessions are the target of the warrant.[7]

The writs of assistance in colonial America were general warrants.[8] These writs were an adaptation of a form of general warrant then in common use in England, tailored for use in the American colonies principally to root out our forefathers' penchant for smuggling without paying the requisite steep and, in the colonists' view, profoundly unfair English taxes and

[4] William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791 763 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services).

[5] *Id.*

[6] *Id.*

[7] *Id.* at cii.

[8] *Id.* at 762-63.

import fees.[9] These writs empowered their authorized enforcing agents—usually, but not always, Customs officials in the colonies—to rummage through individuals' homes and offices and possessions, searching whenever, wherever, and whomsoever they desired.[10]

Suffice it to say that these writs were hated and reviled by the American colonists. Execution of these writs in the 1750s and 1760s in an attempt to enforce what were perceived in the Colonies to be profoundly unjust English trade laws resulted in, to put it mildly, anger, resentment and hostility on the colonists' part.[11]

But, as lawyers, would-be lawyers and judges, we all know that there must be, inevitably, another side to the story. To the English colonial authorities, the writs of assistance were viewed as critical and essential law enforcement tools.[12] In 1755, the Colonial Governor of the Massachusetts Bay Colony began the practice of issuing such writs of assistance to customs officers in an effort to seek to stem the torrent of smuggling by the colonists into the colonies from French Canada in violation of the existing criminal laws of the time.[13] Nothing else seemed to work to deter this lawlessness. Remember, however benign (or even noble, romantic and swashbuckling) such smuggling might appear today, viewed through the refracting prism of the subsequent revolutionary events, at the time, this was just plain criminal wrongdoing.

To deter such wrongdoing, five years prior to the time that King George II died in 1760, the English colonial authorities began a new and vigorous law enforcement campaign to stop the smuggling into the Colonies from the French West Indies.[14] The writs of assistance were deemed by the colonial government to be an absolutely critical part of undertaking that law-and-order campaign.[15] Indeed, if the campaign failed, the threat to English sovereignty over the American Colonies was viewed as being at risk.[16] With the benefit of hindsight, we now know that the belief that a risk of revolution existed was hardly a frivolous one.

When King George II died and the writs of assistance were slated soon to expire, the Surveyor General of Customs in the Massachusetts Bay Colony petitioned the Superior Court of the Colony to issue, as he put it, in the "usual" fashion, new writs of assistance for his use and for the use of his subordinate

[9] *Id.* at 762, 602-03.
[10] *Id.* at 762-63.
[11] *Id.* at 684-92, 721-46.
[12] *Id.* at 773.
[13] *Id.* at 758.
[14] *Id.* at 763.
[15] *Id.*
[16] *Id.* at 773.

officers.[17] A number of prominent merchants from the towns of Boston and Salem, however, got together to oppose that "usual" request, and, ultimately, the sides were drawn for a vigorous court challenge to, and a corresponding defense of, the English colonial authorities' use of the hated writs of assistance.[18]

Thus enter stage left, the young James Otis, Jr. These merchants opposed to the writs on behalf of themselves and the other colonists hired Otis, then a mere thirty-five years old, to argue their position in this pivotal case.[19] Born in 1725, Otis had studied as a boy with the minister of his parish, and subsequently he attended Harvard College from 1739 to 1743, starting when he was only fourteen years old and graduating at the ripe old age of eighteen[20]. Otis then served as a legal apprentice in Boston for a number of years, finally beginning his own legal practice in Plymouth in 1748 at the age of twenty-three.[21]

Having gained some prominence, Otis was also serving as Acting Advocate General for the Massachusetts Bay Colony in 1760.[22] But when he was asked to argue the writs of assistance case on the Colony's behalf as Advocate General, he not only declined, he responded by stepping down from that office.[23] Subsequently, Otis agreed instead to argue the case for the colonists in the same matter, the case *against* the writs of assistance.[24]

James Otis took a lot of political and personal heat as a result of this momentous decision.[25] It is well to bear in mind that what makes him appear heroic today, once again in the flattering light of hindsight and a successful revolution, was neither so self-evidently wise nor commendable to the entire community in which he lived at the time. But Otis himself had no doubts that he was doing precisely the right thing.[26] In

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[17] *Id.* at 764.
[18] *Id.*
[19] *Id.* at 765. It is unclear, parenthetically, what the actual name of this case was. *Id.* at 766 n.26. Various contemporaneous accounts lead us to believe that it was either *Paxton's Case*, *Cockle's Case*, or *Petition of Lechmere*. *Id.* The court records relating to this matter have never been found, and "in a fit of the mental disorder that overtook him in middle age [Otis] burnt all of his letters and papers he could lay his hands on." M. H. SMITH, THE WRITS OF ASSISTANCE CASE 312 (1978).
[20] SMITH, *supra* note 19, at 312.
[21] *Id.*
[22] *Id.* at 315.
[23] *Id.* at 316.
[24] *Id.*
[25] *Id.*
[26] *Id.*

explaining his conduct for the public record, he declared to the court hearing the writs of assistance case that

> I was sollicited [sic] to argue this cause as Advocate-General, and because I would not, I have been charged with a desertion of my office; to this charge I can give a very sufficient answer, I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure as it is in favour of British liberty . . . . And as it is in opposition to a kind of power, the exercise of which in former periods of English history, cost one King of England his head and another his throne. I have taken more pains in this cause, than I ever will take again: Although my engaging in this . . . has raised much resentment[,] . . . I think I can sincerely declare, that I cheerfully submit myself to every odious name for conscience sake . . . . Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy [of] a gentleman . . . are[] to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make the good citizen, in public life, the patriot and the hero.[27]

Of course, subsequent events proved him right and the argument that Otis made in this case has forever cast him as *both* a patriot and a hero, indeed, one of the first truly *American* patriots and heroes. It is also worthy of note that, although he was offered a large fee to argue the writs-of-assistance case, Otis declined to receive any payment at all.[28] Instead, he undertook the representation strictly on a *pro bono* basis.[29] "[I]n such a cause," he declared, "I despise a fee."[30]

The actual oral arguments in the writs of assistance case were heard in the Superior Court of the Colony for three days in February of 1761, and then again for one day in November of that same year.[31] The lawyers argued for and against the renewed issuance of the writs of assistance on any number of grounds: some statutory and some constitutional, some dry and technical and some eloquent and profound. However, it is the eloquence and profundity of James Otis Jr.'s *constitutional* arguments, with his dramatic appeals to notions of basic human rights and basic human entitlements, which struck a responsive chord in the colonies in 1761, and which cause him to be remembered and honored still today as a result of these events that took place in that case, argued more than two centuries ago.

Otis contended not only that the use of general warrants

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 233.

was inherently an unjust and an unconstitutional practice, but that such warrants were, moreover, in language subsequently quoted and followed by the United States Supreme Court, "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book . . . ."[32]

Execution of such writs, Otis added and the Supreme Court has seconded, in oft-quoted language, placed "the liberty of every man in the hands of every petty officer."[33] Indeed, Otis eloquently and forcefully continued:

> [O]ne of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.—This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.[34]

Even if the legislation creating writs of assistance had been enacted properly, Otis concluded, "[n]o Acts of Parliament can establish such a writ . . . . `[A]n Act against the [English] Constitution is void: an Act against natural Equity is void.'"[35]

Of course, to no one's surprise, James Otis lost these arguments.[36] He failed in his attempt to stave off the renewal of the writs of assistance. They were, in the event, renewed, and their oppressive use, and the colonists' abhorrence of them, continued. *But*, although Otis lost the battle, *we* ultimately won the war, quite literally. The arguments made by Otis had a dramatic, even a *cataclysmic*, effect on the colonies at the time and, in due course, on the path of our history.

John Adams, then a twenty-six year-old spectator, watching from the gallery as James Otis argued his—*our*—case against the writs of assistance, later recollected in his diary that:

> *[Otis] was a flame of Fire!* With the promptitude of Classical Allusions, a depth of Research, a rapid Summary of Historical Events and dates, a profusion of legal Authorities, a prophetic

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[32] Boyd v. United States, 116 U.S. 616, 625 (1886) (quoting COOLEY'S CONSTITUTIONAL LIMITATIONS 301-03).

[33] *Id.*

[34] SMITH, *supra* note 19, at 344.

[35] *Id.* at 364.

[36] Cuddihy, *supra* note 4, at 798.

> glare . . . of his eyes into futurity, and a rapid Torrent of impetuous Eloquence, he hurried away all before him; *American Independence was then and there born*. The seeds of Patriots and Heroes to defend . . . the vigorous Youth, were then and there sown. Every man of an [immense] crowded Audience appeared to me to go away, as I did, ready to take up Arms against Writts of Assistants [sic]. *Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born. In fifteen years, i.e. in 1776, he grew up to manhood, declared himself free.*[37]

Adams's "flame of fire" reference to James Otis's oratory is, parenthetically, somewhat ironic given the fact that Otis ultimately died as a result of being struck by lightning, a genuine "flame of fire."[38]

These heated atmospherics notwithstanding, more than a century after we won the American Revolution, the United States Supreme Court, in *Boyd v. United States,* an important 1886 decision of the Court establishing constitutional limits on the government's seizure of a person's papers, looked back upon these historical developments and noted that

> [t]he practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government.[39]

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[37] 2 LEGAL PAPERS OF JOHN ADAMS 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (emphasis added); *see also* CHARLES FRANCIS ADAMS, THE LIFE AND WORK OF JOHN ADAMS 276, 247-48 (Boston 1856), *quoted* in *Boyd*, 116 U.S. at 625; United States v. Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 119 n.10 (1993) (plurality opinion); Stanford v. Texas, 379 U.S. 476, 481-82 (1965).

[38] SMITH, *supra* note 19, at 497.

[39] *Boyd*, 116 U.S. at 625; *see also* Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

Much more recently, Justice Scalia made this point once again, more cogently and forthrightly, for the Supreme Court in 1989, acknowledging that "[t]he writs of assistance . . . were the principal grievance against which the Fourth Amendment was directed."[40]

Indeed, even before he was appointed to the Supreme Court, then New Hampshire Supreme Court Justice Souter had observed in 1990 for that state court that,

> [a]lthough litigation early in the reign of George III concentrated the opposition's scorn upon warrants to search for merely incriminating papers or other "mere evidence," the characteristic American antagonism to the warrant practice of the day condemned the excessive generality of non-returnable authorizations to search any place for evidence of criminal wrongdoing, as exemplified by the writs of assistance issued to advance the enforcement of the revenue laws, and anathematized by Otis . . . .[41]

Similarly, Chief Justice Rehnquist made clear for the Supreme Court in 1990 that

> [t]he driving force behind the adoption of the [Fourth] Amendment, . . . was widespread hostility among the former Colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel. The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government . . . .[42]

The moral of this historical story is hardly obscure. The Fourth Amendment was drafted in large part in direct and reflexive response to the arbitrary and oppressive use of search and seizure powers by the English government in the American Colonies.

Indeed, one of the Constitution's draftsmen, Patrick Henry, another American patriot and hero, felt so strongly about the need for the new Constitution of the fledgling United States to specifically address this subject that he urged his colleagues in

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[40] *Brower*, 489 U.S. at 596.

[41] State v. Tucker, 575 A.2d 810, 812 (1990) (citations omitted).

[42] United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (citations omitted).

Virginia to reject the proposed new Constitution in the Virginia ratification proceedings, *inter alia*, on the ground of the absence of such explicit individual protections against the use of general warrants.[43] Henry argued that unless and until such express protection of individual rights against unreasonable searches and seizures was constitutionally codified, "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power."[44] Moreover, he added, "[w]e have infinitely more reason to dread general warrants here than they have in England . . . . [H]ere a man living many hundreds [of] miles from the judges may get in prison before he can get [a habeas corpus] writ."[45]

Virginia ratified the new Constitution of the United States despite the objections of Patrick Henry and the many others who shared his point of view.[46] But it did so, as did some other ratifying states, while simultaneously insisting upon the adoption of constitutional amendments which included detailed, express, and strict search-and-seizure provisions, provisions profoundly restricting the use of warrants.[47] The drafting of such a provision, now an essential part of our Bill of Rights, which includes the Fourth Amendment and its Warrant Clause, became, accordingly, the very first order of business of the First Congress of the new United States.[48]

So why have I belabored all of this constitutional history? You probably knew all or most of this stuff, even if you did not remember all of the names and all of the dates. You took, and most of you (hopefully) passed, seventh grade civics. You heard about the infamous "writs of assistance." You read about some of the acts of opposition to them and to the unfair trade laws they helped to enforce, events like the Boston Tea Party that took place in Boston Harbor on December 16, 1773. Or, if you did not remember any of these things specifically, at least you must remember however vaguely, being taught something about the reasons for the American Revolution.

But the reason to stress this history, the reason to pull you back to some of your dim and probably scary middle-school memories, is simply this: the significance of the foregoing events

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[43] III THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 587 (Jonathan Elliott, ed., J.B. Lippincott Co. 1941) (1836).

[44] *Id.* at 588.

[45] *Id.*

[46] DOUGLAS W. KNIEC, ET AL., INDIVIDUAL RIGHTS AND THE CONSTITUTION 29 (2d ed. 2004).

[47] *Id.*

[48] *Id.*

relating to the founding of our country also relate, *directly, forcefully, and importantly*, to the resolution of contemporary questions concerning the significance and application of Fourth Amendment search-and-seizure law.

We fought and we won a Revoluntionary War in large part because of our forefathers' and foremothers' experience with, and their anger about, the arbitrary and oppressive use of general warrants. More than two hundred thousand Americans fought in that War, and more than four thousand Americans died in it.[49] The resulting constitutional restrictions on unreasonable searches and seizures generally, and the use of warrants specifically, that are memorialized in our Fourth Amendment reflect therefore an important, indeed a critical and a compelling, part of our history as a nation. These restrictions continue to play a particularly important role in defining our national identity and character and in guiding our interpretation of the meaning of our constitutional democracy.

This point, the importance of the Fourth Amendment to our history and to our national identity and character, was, perhaps, most compellingly made by Justice Felix Frankfurter. In a 1950 dissenting opinion, objecting to the Supreme Court majority's approval of the warrantless search of a small-time criminal's office, files and papers, Justice Frankfurter eloquently observed that

> [t]he old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise. Only thus can I account for [the majority's] disregard of the history embedded in the Fourth Amendment and the great place which belongs to that Amendment in the body of our liberties as recognized and applied by unanimous decisions over a long stretch of the Court's history.
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> It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them.
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> It is true . . . of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out in a case depends on where one goes in. It makes all

[49] U.S. Department of Veteran's Affairs, *America's Wars* (Oct. 2003), *available at* http://www1.va.gov/pressrel/amwars.pdf.

> the difference in the world whether one approaches the Fourth Amendment as the Court approached it in [its prior decisions on the importance of Fourth Amendment protections] or one approaches it as a provision dealing with a formality. *It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.*[50]

The Fourth Amendment is important not only because it is the law, and not only because it is a part of our Bill of Rights, but it is also important because it is a vital part of our history, our self-identity, our democracy, and our national culture.

Put another way, a more cynical way, perhaps, Americans—American judges, in particular—must not ignore the important themes, liberties, and rights, both express and inherent, contained in our Fourth Amendment protections simply in order to assure the conviction of "bad guys." Even if we *know* (or assume that we know) that such accused persons are truly, unquestionably, and without the slightest doubt, genuinely "bad guys." Our Constitution, our Bill of Rights, our history, our democratic character, and our national culture are simply too important to us and to that which makes us proud to be *Americans* to permit us to ignore or, worse, to trivialize the important human rights themes contained in the Fourth Amendment.

Of course, this argument is not very controversial. It is an easy point to make, at least in the abstract. *Everybody*, surely every American at least—Democrat or Republican, Liberal or Conservative—is *for* human rights and liberties, *for* the Constitution, *for* the Bill of Rights, *for* Old Glory and all of the rest of the American icons and virtues that we freely espouse (especially to others) and hold so dear, particularly when it does not "cost us anything" to be *for* them.

But, what happens when there is a cost? And what happens when these costs are high? To answer this question, let us drag Osama bin Laden out of his cave and put him on center stage for a moment. Let us talk about Osama and about other leaders and followers of Al Qaeda, and let us talk about their friends, their

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[50] United States v. Rabinowitz, 339 U.S. 56, 68-69 (1950) (Frankfurter, J., dissenting) (emphasis added) (citations omitted); *see also* Groh v. Ramirez, 124 S. Ct. 1284, 1290 (2004) (quoting McDonald v. United States, 335 U.S. 451, 455 (1948)) ("We are not dealing with formalities."); United States v. Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 118-19 n.10 (1993) (plurality opinion) ("[T]he misuse of the hated general warrant is often cited as an important cause of the American Revolution.").

supporters, their allies, and about all of the other assorted poseurs, wannabes, groupies, copycats, riff-raff, and hangers-on that surround or emulate them. To make this a complete picture, we also need to consider the group of individuals that our government suspects *might* be involved in one or more of these terrorism-related categories, but who are, in actual fact, not terrorists or associated with terrorists at all: the "false positives."

The important questions we need to ask and to answer, in the perilous times in which we now live, is this: Does and should and must the Fourth Amendment apply in the same fashion not just to run-of-the-mill criminals, but also to terrorists and suspected terrorists, individuals who are committing or who have committed, or who may be poised to commit, acts aimed at the destruction of extremely large numbers of people?

For many, if not most Americans, the answer to this question of the scope of the Fourth Amendment's putative applicability to terrorists, and to suspected terrorists, is absolutely clear and compelling. But, in my experience, there are two *entirely different*, although still absolutely-clear-and-compelling, answers to questions of this sort, both of which claim to be the *only* "true" answer, and each of which is, seemingly, the polar opposite of the other. The two answers go something like this:

- *Answer #1*: Of course, the Fourth Amendment applies to everyone (at least to every American or to any individual searched or seized on American soil) if they are suspected of any sort of crime, trivial or horrific. Remember the words of Justice Frankfurter who said that "[i]t makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution."[51] Enough said.

and

- *Answer #2*: Idealism is great, but dead people do not have the luxury of being idealistic. As Justice Jackson, a real advocate of Fourth Amendment values, nonetheless warned in a 1949 dissenting opinion, the Bill or Rights

[51] *Rabinowitz*, 339 U.S. at 69 (Frankfurter, J., dissenting).

> should not be converted into a "suicide pact."[52] We cannot allow terrorists to use our democratic strengths as weapons against us and harm or defeat us because of our own inability to act. Enough said.

In truth, there is nothing new in recognizing that these two competing points of view exist. As long ago as 1798, James Madison wrote in a letter to Thomas Jefferson that "[p]erhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."[53] Thomas Jefferson, in contrast, himself authored a letter in 1810, in which he warned that "[t]o lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."[54] These are the same conflicting points of view that we see evidenced so widely today.

How do we deal with such dramatically different points of view? What does—*what should*—the Fourth Amendment and the rest of the Bill of Rights mean in perilous times? In *real* perilous times. In times when the threat to our nation, and to our national identity and national security, are concrete and imminent, not speculative or distant?

Ignoring for the moment the significant undertones of political partisanship that questions of this sort carry—for Democrats and Republicans, for Liberals and Conservatives—I suggest that *both* of these pat and reflexive answers that I have posed may be correct. At least I would like to argue that they are correct in significant, if perhaps somewhat less rhetorical, ways.

I believe strongly and firmly that the Fourth Amendment is more than just *a simple legal interdiction*; it is more than just a sensible rule to be followed whenever it is convenient and useful. Fourth Amendment protections and values are an important part of our national fabric, and, as Justice Oliver Wendell Holmes reminded us in 1920, we dare not tolerate treating the express Fourth Amendment strictures as a mere "form of words."[55]

Instead, I believe—I *strongly* believe—that the Fourth

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[52] Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.").

[53] PHILLIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR xi (2003) (quoting letter of James Madison to Thomas Jefferson (May 13, 1778)).

[54] *Id.* (quoting letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810)).

[55] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

Amendment is critically important to our country in many important ways. The Supreme Court held in 1961, in its celebrated and seminal decision of *Mapp v. Ohio*, that if Fourth Amendment protections are not fully enforceable, then that constitutional provision is essentially

> valueless and undeserving of mention in a perpetual charter of inestimable human liberties, . . . [and it is] so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."[56]

I fully agree.

I believe, in short, that the Fourth Amendment *does*, and *must*, apply to everyone. *Everyone*. Whether they are terrorists or prom queens. Or even, you never know, if they are terrorist prom queens.

Moreover, it is absolutely clear that the Fourth Amendment was expressly *intended* to make it more difficult to fight crime. Fighting crime, terrorism or not, would certainly be easier, more convenient and more effective if no restraining rules at all existed on American law enforcement agents; if law enforcement agents today could once again use some form of "super writs of assistance," searching whoever, whenever and wherever they wanted; if they could seize whoever, whenever and wherever they wanted; and if they could interrogate and torture whoever for whatever length of time and in whatever way that they wanted.

But we have been down that road before and it is the wrong path. As Professor Philip Heymann of Harvard Law School has recently warned, "[e]ven what is effective in protecting the safety of American citizens and their property may be unwise because of its effects on the historic set of arrangements which have preserved our democratic liberties."[57] Frankly, I have done work for our government in countries where, regardless of those countries' supposed laws, all of what I just described was commonplace. Where torture was a standard and pervasive part of much law enforcement activity. Sadly, this kind of horrible inhumanity happens. But, of course, *our* laws, *our* Constitution, *our* history, *our* national character and identity, make that impossible. Impossible, lest we become something that we are not: another country with another culture and character,

[56] Mapp v. Ohio, 367 U.S. 643, 655 (1961).
[57] HEYMANN, *supra* note 53, at 87.

divorced from our history.[58]

With that said, and proudly and firmly said, I also believe, I *know*, that the Bill of Rights does not and was never intended to emasculate us. The Fourth Amendment was not intended, and it should not be interpreted, to make it impossible to protect ourselves from the very real and substantial threat that we face today from *real* terrorists and *real* terrorist groups, individuals and groups whose aim is sometimes genocidal and who appear bent upon our destruction as a culture and as a nation.

We can protect ourselves from cataclysmic threats of this sort. More important, we can do this and *still* maintain a fair and objective application of Fourth Amendment doctrine that respects our constitutional history. I really believe this. I do. And now I'll tell you why.

It is critically important, of course, not to sacrifice our constitutional heritage and constitutional structure to the perceived dangers of the moment. Just as the Constitution and the Fourth Amendment apply with full force to the small-time criminal (e.g., to the dope dealer, the burglar, and the car thief) they also apply with full force to the big-time criminal (e.g., to the murderer, the rapist, the kidnapper, and, yes, also to the terrorist). Once we start down the road of carving out categories of people or categories of crime to whom, or with respect to which, the full force of our Bill of Rights do not apply, we begin sliding down the notorious "slippery slope," headed toward the erosion of the rights of everyone, not just the "bad guys." This we cannot do. As Chief Justice Rehnquist warned in a recent book, it "is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[59]

Indeed, the Supreme Court recognized and responded in just this fashion to a similar slippery-slope problem when, in a 1978 decision, it rejected the State of Arizona's attempt to create a "murder-scene exception" to the ordinary search-and-seizure rules dictated by the Fourth Amendment.[60] Forget warrants and probable cause and all of those onerous requirements, the State of Arizona argued, in essence, this was *murder*![61]

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[58] This Lecture was delivered before the episodes of torture at Abu Ghraib Prison in Iraq came to light. *See, e.g.*, Josh White, *Ex-Guard to Face More Charges*, WASH. POST, June 9, 2004, at A16; Scott Higham, Joe Stephens & Josh White, *Dates on Prison Photos Show Two Phases of Abuse*, WASH. POST, June 1, 2004, at A1. If anything, what allegedly took place there, if true, only reinforces the points made herein.

[59] WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (Vintage Books 2000) (1998).

[60] Mincey v. Arizona, 437 U.S. 385, 392 (1978).

[61] *Mincey*, 437 U.S. at 392.

The Supreme Court made it clear, however, that the fact that a homicide had been committed, rather than some less heinous crime, made no difference to the appropriate Fourth Amendment analysis.[62]

> [T]he State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? "No consideration relevant to the Fourth Amendment suggests any point of rational limitation" of such a doctrine.[63]

Similarly, no consideration relevant to the Fourth Amendment suggests any point of rational limitation of a doctrine that creates exceptions to normal Fourth Amendment doctrinal analysis as applied to, for example, an individual who seeks to plant a bomb in order to make a political point, in contrast with an individual who seeks to plant a bomb in order to accomplish some purely criminal and entirely non-political goal.

In the USA Patriot Act (the 2001 "edition"),[64] Congress enacted an extremely broad definition of "terrorism," including, for example, violent acts intended "to influence the policy of a government by intimidation or coercion . . . ."[65] Does this broad definition mean then that Eric Rudolph, for example, the accused Atlanta 2000 Summer Olympics bomber, is a "terrorist"?[66] Or is he "merely" a "criminal"? Even if the Fourth Amendment permitted such fine distinctions, does it make sense to be more respectful of his constitutional rights if he is deemed to be only a common thug, than if he intended to make an

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[62] *Id.* at 393.

[63] *Id.*

[64] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

[65] § 802(a)(5)(ii), 115 Stat. at 760. Notably, related language prohibiting the provision of material support, including "expert advice or assistance" to designated terrorist organizations was held unconstitutional by a federal court as void for vagueness. Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004).

[66] *See, e.g.,* Patrick Jonsson, *How Did Eric Rudolph Survive?*, THE CHRISTIAN SCIENCE MONITOR, June 4, 2003, § USA, at 1; Daniel Levitas, *Our Enemies At Home*, N.Y. TIMES, Dec. 13, 2003, at A19; Michael A. Fletcher, *At Home, Rudolph Wins Sympathy; Distrust of Government Widespread in Area*, WASH. POST., June 4, 2003, at A2; Edward Walsh, *Ashcroft Weighs Where to Try Rudolph First: Atlanta, Birmingham Both Saw Deaths in Bombings*, WASH. POST, June 2, 2003, at A3.

uncommon political statement, planting his bomb to make a point, however perverse and demented, through his violent activity aimed at changing our national policy on abortions?

More important, *can we* be more respectful of Eric Rudolph's constitutional rights in the former situation than in the latter as a matter of law and still contend that we are applying the Fourth Amendment objectively? Remember Justice Frankfurter's point that "[i]t is a fair summary of [our constitutional] history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[67]

Furthermore, we have learned, or one would have hoped that we have learned, the terrible lessons of *Korematsu v. United States*,[68] when scores of people living in the United States, many of them Japanese-American citizens, were interned, "seized" in Fourth Amendment parlance.[69] This occurred, of course, at the beginning of World War II, out of stereotypic but unproven fears of the possible complicity of these individuals with a hostile power with which we were then at war. Such an extraordinary response, essentially suspending or ignoring the Fourth Amendment and other constitutional protections in perilous times, even in times of legitimate and serious threats to our national security, was not only *not* productive, it was instead *destructive* of our constitutional fabric, and of our self-congratulatory claims, trumpeted throughout the world, that we are a nation of democratic virtues governed by the fair and even-handed application of the rule of law.

As Justice Thurgood Marshall made the point,

> [h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases and the Red scare and McCarthy-era internal subversion cases[70] are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.[71]

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[67] United States v. Rabinowitz, 339 U.S. 56, 68-69 (1950) (Frankfurter, J., dissenting).

[68] 323 U.S. 214 (1944).

[69] *Korematsu*, 323 U.S. at 217; *see* Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (O'Connor, J., plurality opinion) (discussing *Korematsu* and its legacy).

[70] *See, e.g.,* Schenck v. United States, 249 U.S. 47 (1919); Dennis v. United States, 341 U.S. 494 (1951).

[71] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (citations omitted); *see also Hamdi*, 124 S. Ct. at 2635 (O'Connor, J., plurality opinion). Justice O'Connor made a similar point in *Hamdi*, stating:

> [A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present

Moreover, it is arguably even more difficult to hold the constitutional balance true when the most serious costs of our government's response to the fear and the actual specter of terrorism—costs like seizures and detentions on less than probable cause; prolonged, intensive and humiliating interrogations; and, unfortunately, physical degradation, including torture—are costs that generally *other* people, not ourselves, must bear. As the noted scholar and political commentator, Ronald Dworkin, has reminded us,

> [m]any Americans believe that . . . the attacks on September 11 require (as it is often put) "a new balance between liberty and security." That much-used expression suggests that we can properly judge the new policies by asking whether they are in our overall interest, as we might decide, for instance, whether to strike a new balance between road safety and the convenience of driving fast by lowering speed limits. But, with hardly any exceptions, no American who is not a Muslim and has no Muslim connections actually runs any risk of being labeled an enemy combatant and locked up in a military jail. The only balance in question is the balance between the majority's security and *other people's* rights, and we must think about that as a matter of moral principle, not of our own self-interest.
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> . . . [The] strategy of putting American safety *absolutely* first, a strategy that recommends any measure that improves American security against terrorism even marginally or speculatively, or that improves the cost-efficiency or convenience of America's anti-terrorism campaign, without counting the harm or unfairness of that measure to its victims [is the] strategy [we followed] in interning Japanese-Americans—the benefit to security of that wholesale detention was minimal and the damage it inflicted on its victims was enormous—and we look back on that episode with great

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that sort of threat.

Hamdi, 124 S. Ct. at 2635 (O'Connor, J., plurality opinion); *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting) ("Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber."); *Ex parte* Milligan, 71 U.S. 2, 125 (1866). This idea was recognized as early as 1860, when Justice Davis explained that

> [the Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen.

Ex parte Milligan, 71 U.S. at 125.

> national embarrassment. Of course every government has a special responsibility to look after its own citizens' safety, and a nation may, when necessary, use violence in self-defense. But the harm it deliberately inflicts on others must be comparable to the harm it thereby prevents to its own people, and when our government shows itself ready to impose grave harm on foreigners or on suspected Americans for only speculative, marginal, or remote benefits to the rest of us, its action presupposes that their lives count for nothing compared to ours.[72]

The question nonetheless recurs with a more modern twist. Is the situation we face today somehow *qualitatively different* from the perils faced by Americans in the past? Given concerns of the stature and significance of the current genocidal threats of terrorism, what weight, *if any*, does, or should, the seriousness of the crimes under investigation or the crimes feared to be imminent, play in Fourth Amendment analysis?

In three very recent decisions, all three handed down in the space of only a few weeks in the October 2003 Term, the Supreme Court has begun to signal its answer to this question. It is an answer, I think, that recognizes and accepts *both* of the competing views I earlier described (i.e., that the Fourth Amendment applies to everyone *and* that terrorism is different). And it is an answer, I also think, that sets the contours of the way in which the Supreme Court will, and lower courts must as well, deal with the terrorism-related Fourth Amendment cases that will eventually reach their dockets. To explain the significance of these three recent decisions, let me begin with a decision handed down three years ago.

In a 2001 decision, *Atwater v. City of Lago Vista*,[73] a narrow five-to-four majority of the Supreme Court, in an opinion authored by Justice Souter, ruled that the Fourth Amendment's probable-cause requirement applies in precisely *the same way* to *all* criminal offenses, whether they are major or minor, grave or trivial.[74] In fact, the *Atwater* Court specifically declined to craft

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[72] Ronald Dworkin, *Terror & the Attack on Civil Liberties*, 50 N.Y. REV. OF BOOKS, Nov. 6, 2003, at 37, 38 (emphasis added); *see also* HEYMANN, *supra* note 53, at 113 ("What we must do is assure than no one assumes the American people would willingly buy a small amount of increased safety in exchange for the torture, detention, or imprisonment of innocents abroad.").

> As long as others believe that the American people would willingly buy a small amount of increased safety in exchange for the torture, detention, or imprisonment of many innocents abroad, we cannot sustain any claim to moral leadership. And moral leadership has served us well for decades by eliciting popular support in nations around the world–i.e., in terms of freely given support for the policies of the United States.

HEYMAN, *supra* note 53, at 126-27.

[73] 532 U.S. 318 (2001).

[74] *Atwater*, 532 U.S. at 318.

any special Fourth Amendment rule for a minor offender like the defendant in that particular case.[75] That defendant, Gail Atwater, who, in the extensive media accounts of the case, was commonly referred to as a "soccer Mom" (and who may well have been a prom queen in her time), was arrested and then dragged off to jail because she and her two small children were observed by a police officer (who allegedly held a grudge against her) while she and her children were driving in her pick-up truck without wearing their seat belts.[76]

Not wearing a seatbelt is obviously not the same kind of offense as hijacking an airplane or planting a bomb. But it is nonetheless a crime in Texas, although a minor crime, punishable by only a small fine. Because it is a crime, minor or not, the bare five-justice majority of the Court in *Atwater* sternly admonished that

> the standard of probable cause "applie[s] to *all* arrests, without the need to `balance' the interests and circumstances involved in particular situations." . . . If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.[77]

In short, although she may have been just a no-seat-belt-wearing soccer Mom, at least in Texas, Gail Atwater was still a criminal. And criminals, *all* criminals, minor or not, can be arrested, and *all* criminals may be carted away to jail. To be fair, the *Atwater* majority thought that she *should not* have been taken to jail, but, nonetheless, it held that the State of Texas, in its wisdom, *could* lawfully do this under the Fourth Amendment.[78]

Notably, however, Justice O'Connor, dissented in *Atwater*.[79] Standing up for all of the criminal soccer Moms in America, undoubtedly a sizeable group, Justice O'Connor argued, along with the three other justices in dissent, that Gail Atwater's violation of a minor, "fine-only offense" like the Texas seat-belt law, indeed justified her *arrest*, but it did *not* justify a *full-custody* arrest.[80] In other words, four justices took issue with the *Atwater* majority's vision of an inflexible Fourth Amendment, a Fourth Amendment that permits the government to make a full

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[75] *Id.* at 323.
[76] *Id.*
[77] *Id.* at 354 (emphasis added) (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)).
[78] *Id.*
[79] *Id.* at 360 (O'Connor, J., dissenting).
[80] *Id.* at 365-66 (O'Connor, J., dissenting).

custodial arrest in any and all instances in which *any* criminal law, however trivial, was broken.

Justice O'Connor reasoned as follows:

> The majority insists that a bright-line rule focused on probable cause is necessary to vindicate the State's interest in easily administrable law enforcement rules. Probable cause itself, however, is not a model of precision. "The quantum of information which constitutes probable cause—evidence which would `warrant a man of reasonable caution in the belief' that a [crime] has been committed—must be measured by the facts of the particular case." The rule I propose—which merely requires a legitimate reason for the decision to escalate the seizure into a full custodial arrest—thus does not undermine an otherwise "clear and simple" rule.
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> While clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections.[81]

Of course, this language was written in dissent. It did not carry the day. *But* Justice O'Connor's point (i.e., that Fourth Amendment probable-cause analysis is not clear and simple, and that it does not, and should not, apply in precisely the same fashion in every case, major or minor), would appear to have been vindicated—albeit *de facto*, not *de jure*—in the unanimous decision of *Maryland v. Pringle*,[82] handed down on December 15, 2003.

The *Pringle* decision involved the following facts. At 3:16 a.m. on August 7, 1999, a Baltimore County Police officer stopped a Nissan Maxima for speeding and because the driver, just like Gail Atwater, was not wearing a seat belt.[83] There were three occupants in the car: the driver (who owned the car); Joseph Pringle, who was a front-seat passenger; and a third person, who was a back-seat passenger.[84] The officer asked the driver for his license and his vehicle registration.[85] When the driver responded by opening and reaching into the glove compartment to retrieve his registration, the officer kept his eye on him and observed a large amount of rolled-up cash stuffed into the glove compartment.[86]

The officer then returned to his patrol car with the license and registration to check the police computer system for

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[81] *Id.* at 366 (O'Connor, J., dissenting) (quoting Wong Sun v. United States, 371 U.S. 471, 479 (1963) (citation omitted)).

[82] 124 S. Ct. 795 (2003).

[83] *Pringle*, 124 S. Ct. at 798.

[84] *Id.* at 798.

[85] *Id.*

[86] *Id.*

outstanding violations.[87] The computer check revealed that nothing was wrong and, as a result, the officer returned to the stopped car, had the driver get out of it, and simply issued him an oral warning.[88]

Now the plot thickens. While all of this was going on, a second patrol car arrived, and the newly-arrived police officer asked the driver if he had any weapons or narcotics in his car.[89] The driver said that he did not, and, rather stupidly, as it turned out, consented to a search of his vehicle.[90] The search turned up $763, which was the rolled-up cash that had been viewed earlier in the glove compartment.[91] More important, it also turned up five plastic baggies containing cocaine, which were concealed behind the back-seat armrest.[92] When the second officer began his search, the armrest was in the upright position, flat against the rear seat.[93] The officer pulled it down and—*voila!*—found the cocaine, which had been stuffed between the armrest and the back seat of the car.[94]

The officer then questioned all three men about the ownership of the drugs and money, and he told them that if no one admitted to owning the drugs, he was simply going to arrest them all.[95] Unsurprisingly, none of the men had the foggiest idea where the drugs or money could possibly have come from.[96] All three men in *Pringle* were "shocked, *simply shocked*," to discover that there were drugs in the car. *Right*. Nonetheless, their protestations of innocence unavailing, all three men were immediately placed under arrest and taken to the station house.[97]

Later that morning, however, Pringle, the front-seat passenger, changed his story.[98] Waiving his *Miranda* rights, he confessed.[99] Pringle admitted that the cocaine belonged to him, that he and his friends were going to a party with it, and that he intended to either sell the cocaine there or Pringle, obviously a real charmer, planned to "[u]se it [in exchange] for sex."[100]

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[87] *Id.*
[88] *Id.*
[89] *Id.* at 798.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*

Pringle also maintained that both the driver and the other passenger in the car had absolutely no knowledge of these drugs, and, ultimately, in the absence of any additional evidence, both of these other individuals were in fact released by the police.[101]

Prior to trial, Pringle tried, unsurprisingly but unsuccessfully, to suppress his confession, arguing that it was the fruit of an illegal arrest since the officers did not have probable cause to arrest him and to take him into custody, where he subsequently confessed.[102] The trial court rejected this argument, ruling that the officers *did in fact* possess sufficient probable cause to arrest Pringle.[103] Thereafter, he went to trial and a jury convicted him of possession with one count of intent to distribute cocaine and one count of possession of cocaine.[104] He was subsequently sentenced to ten years in prison without any possibility of parole.[105] The Court of Special Appeals of Maryland affirmed his conviction.[106]

The seven-judge Maryland Court of Appeals, however, by a narrow four-to-three margin, reversed the Court of Special Appeals.[107] The Court of Appeals concluded that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, "the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner [was] insufficient to establish probable cause for an arrest for possession."[108]

As to the wads of money seen by one police officer and then found by the other officer stuffed into the glove compartment, the Maryland Court of Appeals ruled that although

> [t]he State points to the additional fact that the police officer saw a large amount of rolled up money in the glove compartment located in front of [Pringle, the presence of m]oney, without more, is innocuous . . . . There are insufficient facts that would lead a reasonable person to believe that [Pringle], at the time of his arrest, had prior knowledge of the money or had exercised any dominion or control over it. [A] police officer's discovery of money in a closed glove compartment and cocaine concealed behind the rear armrest of a car is insufficient to establish probable cause for an arrest of a front seat passenger, who is not the owner or person in control of the vehicle, for possession of the cocaine.[109]

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[101] *Id.*
[102] *Id.* at 799.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Pringle v. State, 805 A.2d 1016, 1027 (Md. Ct. App. 2002), *rev'd*, 124 S. Ct. 795 (2003).
[109] *Pringle*, 805 A.2d at 1028.

As a result of this ruling, Pringle's drug convictions were reversed. But, not for long.[110] The United States Supreme Court granted certiorari and, in December of 2003, it reversed the decision of the Maryland Court of Appeals.[111] Chief Justice Rehnquist, writing for the Court, observed that "[i]t is uncontested in the present case that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed. The sole question [remaining] is whether the officer had probable cause to believe that Pringle committed that crime."[112]

In answering this question, the Chief Justice, who had joined the five-justice majority in the *Atwater* decision, upholding Gail Atwater's custodial arrest for a minor, seat belt offense in large part because of the supposed *inflexibility* of Fourth Amendment probable cause, described in *Pringle* a rather more malleable probable-cause analysis, concluding as follows:

> The long-prevailing standard of probable cause protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while giving "fair leeway for enforcing the law in the community's protection" On many occasions, we have reiterated that the probable-cause standard is a "`practical, nontechnical conception'" that deals with "`the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."
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> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.[113]

Applying this "fluid" and open-ended conception of probable cause, the Chief Justice then concluded for a unanimous Court:

> In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was $763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat

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[110] *Id.* at 1033.
[111] *Pringle*, 124 S. Ct. at 802.
[112] *Id.* at 799 (citation omitted).
[113] *Id.* at 799-800 (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Illinois v. Gates, 462 U.S. 213, 231-32 (1983)).

> armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.
>
> We think it an entirely reasonable inference from these facts that *any or all three of the occupants* had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[114]

Additionally, Chief Justice Rehnquist added that

> [t]he Court of Appeals of Maryland dismissed the $763 seized from the glove compartment as a factor in the probable-cause determination, stating that "[m]oney, without more, is innocuous." The court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents. . . . We think it is abundantly clear from the facts that this case involves more than money alone.[115]

Now recall for one moment Justice O'Connor's observation, on behalf of the four dissenters in *Atwater*, that "[p]robable cause . . . is not a model of precision. `The quantum of information which constitutes probable cause evidence which would "warrant a man of reasonable caution in the belief" that a [crime] has been committed—must be measured by the facts of the particular case.'"[116] Compare the Chief Justice's observation for a unanimous Court in *Pringle*, handed down only two years later, that "`probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'"[117]

It would appear that, whatever the continuing validity of the *Atwater* majority's analysis, which treated the Fourth Amendment's probable-cause standard (for post-arrest custody purposes) as static and unchanging whatever the facts and circumstances in question, it is clear *today* that the Supreme Court views probable cause through a somewhat more pragmatic and flexible lens, in the Court's words, as a "`"practical, nontechnical conception"' that deals with `"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'"[118]

It is possible, of course, to distinguish *Atwater* from *Pringle*

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[114] *Id.* at 800-01 (emphasis added).
[115] *Id.* at 800 n.2 (citations omitted).
[116] *Atwater*, 532 U.S. at 366; *see supra* note 81 and accompanying text.
[117] *Pringle*, 124 S. Ct. at 799-800 (quoting Illinois v. Gates, 462 U.S. 213, 272 (1983)); *see supra* note 113 and accompanying text.
[118] *Pringle*, 124 S. Ct. at 799-800 (quoting *Gates*, 462 U.S. at 231).

by noting that the Court is unwilling to compromise the State's authority to detain and/or search apparent small-time criminals (while noting at the same time the imprudence of engaging in such a course of action in cases like that of Gail Atwater's), but the Court *is* willing to compromise the quantum of certainty required before Fourth Amendment activity is undertaken in cases where the apparent criminal conduct is more serious, like, for example, Joe Pringle's trafficking in cocaine.

But, in my view, I think Justice O'Connor simply "got it right" in *Atwater* and that the *Pringle* decision demonstrates why. A more significant showing beyond mere "probable-cause-that-a-crime-*any-crime*-has-been-committed" should be required under the Fourth Amendment before we permit the State to blithely toss all the seat belt criminals and their soccer-Momish ilk,—the evil litterers, for example, and their posses; the nefarious smokers huddled inside buildings criminally puffing away in restricted areas, and their tobaccan enablers; the wicked jaywalkers and their misdemeanant henchmen—more should be required than simply determining that there has been a violation of the law before we just let the State blithely toss them into jail, assuming, as in *Atwater*, that the criminalizing state has made clear the trivial nature of the offense by declining to permit it to be punished by any term of incarceration.

In short, more should be required before the police are entitled to make full custodial arrests. Bear in mind that, as an incident of such custody, police possess the concomitant right to use such intrusive investigative tools as prolonged detention and/or strip and body cavity searches. A humiliating and seemingly punitive body cavity search of Gail Atwater would have been very unlikely to have turned up a weapon, to put it mildly, or any evidence relevant to her criminal seat-beltless proclivities. There was not, after all, any question of whether or where the seat belt had been hidden.[119]

[119] There is another reason why such an intrusive search should not be permitted under the Fourth Amendment in minor cases like *Atwater* where there is no reasonable belief that additional physical evidence may exist. At this time, the reason does not command a majority of the Supreme Court, but it may well be accepted by a majority of the Court in the near future.

In a decision subsequently handed down in the 2003 Term, Thornton v. United States, 124 S. Ct. 2127 (2004), a majority of the Supreme Court held that the rule established in New York v. Belton, 453 U.S. 454 (1981), permitting a search of the "passenger compartment" of a vehicle incident to the lawful custodial arrest of an occupant, applies even when the searching officer does not begin to search until the person arrested has already left the vehicle. *Thornton*, 124 S. Ct. at 2137. Justices Stevens and Souter dissented. *Id.* at 2138 (Stevens, J.,

But, although I think he got it wrong in *Atwater*, where he joined the majority, I think that Chief Justice Rehnquist got it right in *Pringle* when he concluded for a unanimous Court that the quantum of suspicion necessary to effect a Fourth Amendment encounter needs to reflect the necessity for "protect[ing] `citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while [providing law enforcement, pragmatically,] with `fair leeway for enforcing the law in the community's protection.'"[120]

Indeed, there is nothing either new or shocking about the *Pringle* Court's recognition that the constitutional prerequisite of probable cause prior to making an arrest (a "seizure" under the Fourth Amendment) does not and should not require law enforcement officers to possess proof of the ultimate facts in question by a preponderance of the available evidence. The classic example demonstrating this point of criminal procedure is, oddly enough, often taken from the first Restatement of Torts published in 1934, and it goes as follows:

> A sees B and C bending over a dead man D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that *either* B or C killed D. A is privileged to arrest either or both.[121]

In other words, despite the fact that A cannot prove by a

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dissenting).

Significantly, however, Justice Scalia, joined by Justice Ginsburg, concurred only in the judgment of the Court, taking the position that the *Belton* rule should be "limit[ed] to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 2136 (Scalia, J., concurring). A plurality of the Court—but only a plurality—disagreed with the Scalia position. *Id.* at 2132 n.4. Justice O'Connor, who was the fifth vote for the majority result, concurred in every part of the majority opinion *except* the portion rejecting Scalia's position, adding that:

> I write separately to express my dissatisfaction with the state of the law in this area. As Justice Scalia forcefully argues, . . . lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception . . . . That erosion is a direct consequence of *Belton's* shaky foundation. While the approach Justice Scalia proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit.

Id. at 2133 (O'Connor, J., concurring).

The upshot of these competing points of view is that there is some significant chance, if not a likelihood, that in a future case, the *Belton* rule will be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 2136 (Scalia, J., concurring). If such a new rule applied to the hypothesized extension of the *Atwater* facts discussed in the text above, a body-cavity search (and probably a strip search) would surely be held to be unconstitutional.

[120] *Pringle*, 124 S. Ct. at 799; *see supra* note 113 and accompanying text.

[121] RESTATEMENT (SECOND) OF TORTS § 119, cmt. j, illus. 2, at 198 (1965) (emphasis added); *see also* RESTATEMENT (FIRST) OF TORTS § 119, cmt. j, illus. 2, at 254 (1934) (invoking the same example).

preponderance of evidence that either B or C killed D at this point in time, i.e., there is no proof of ultimate facts greater than fifty percent, A is nonetheless still privileged to arrest either, or both of them.

The *Pringle* Court cited this example and, similarly, held that probable cause to arrest existed in *Pringle* because there was significant and compelling evidence that *all three occupants* of the car were engaged in some sort of concerted activity, even though that fact could not be established, at that point in time, by a preponderance of the evidence, let alone by the beyond-a-reasonable-doubt standard needed to convict them at trial.[122] The three individuals' presence together in the car late at night, the wads of money stashed in the glove compartment, and the presence of the cocaine packaged individually, as if for resale and distribution, stashed covertly behind the armrest gave the arresting officers sufficient grounds to reasonably believe that Pringle and the other two occupants of the car were engaged in, at the very least, the joint possession of narcotics, if not in some sort of more serious ongoing drug sales enterprise.[123] The fact that none of the three could or would offer an innocent explanation for his presence in the car did not exonerate them all, but instead simply added to the suspicious atmosphere.[124] *Someone* must have known how the cocaine got there!

Moreover, the seriousness of the crime at issue, possible drug trafficking, was clearly relevant to the *Pringle* Court's Fourth Amendment probable-cause analysis.[125] If, for example, the facts in *Pringle* had involved three individuals observed in a no-smoking area, each standing next to a single burning cigarette butt lying on the ground (signaling that someone had clearly been smoking) but each of the three individuals, as in *Pringle*, could not fathom how that criminal evidence got there ("I'm `shocked' to find smoking here!"), it would appear to me that, recognizing the necessity for "protect[ing] `citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving `fair leeway for enforcing the law in the community's protection,'"[126] there would have been *insufficient* justification for making an arrest or a search of any or all of these individuals, despite the *Atwater* majority's professed (but now dated) disinclination to distinguish

[122] *Pringle*, 124 S. Ct. at 800-01.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Pringle*, 124 S. Ct. at 799; *see supra* note 113 and accompanying text.

major from minor crimes.

But, this conclusion should and would change once again I believe, when the smoking object on the floor is not a cigarette but transmuted instead into a smoking gun lying next to a dead body, with three individuals standing around, professing no knowledge whatever of what has occurred. In that case, it appears to me—and I am certain that the Supreme Court would agree, more certain than ever after *Pringle*, that there is more than sufficient lawful and constitutional justification for arresting any or all of these three individuals.

And the fact that I have argued that there was *insufficient* evidence of probable cause in the smoking cigarette hypothetical does not mean, I would contend further, that the Fourth Amendment has been applied in an inconsistent fashion when probable cause is deemed to exist with respect to a more serious crime. The Fourth Amendment has simply been applied, in the Supreme Court's phrasing, "practically," "nontechnically," and in a manner "that deals with `the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[127]

Let me add to this analysis a second recent Supreme Court decision, even newer than *Pringle*, to reinforce this point. Let me tell you about *Illinois v. Lidster*,[128] handed down by the Supreme Court on January 13, 2004.

The essential facts of *Lidster* are as follows. On Saturday, August 23, 1997, just after midnight, an unknown motorist traveling eastbound on a highway in Lombard, Illinois, struck and killed a seventy-year-old bicyclist.[129] The motorist then simply drove off into the night without identifying himself.[130] About one week later, at just about the same time of night and at just about the same place on the highway, local police set up a checkpoint designed to obtain more information about the accident from the motoring public.[131]

A number of marked police vehicles, lights flashing, partially blocked the eastbound lanes of the highway.[132] The blockage forced traffic to slow down, leading to lines of up to fifteen cars in each lane.[133] As each vehicle drew up to the checkpoint, an officer would stop it for ten to fifteen seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer.[134] The flyer said

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[127] *Pringle*, 124 S. Ct. at 799; *see supra* note 113 and accompanying text.
[128] 124 S. Ct. 885 (2004).
[129] *Lidster*, 124 S. Ct. at 888.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

"ALERT . . . FATAL HIT & RUN ACCIDENT" and requested "assistance in identifying the vehicle and driver in this accident which killed a 70 year old bicyclist."[135] The officer distributing the flyers did not ask for the driver's name, license, or insurance information, nor did he or she ticket anyone for plain-view infractions like seatbelt violations.

Robert Lidster drove his minivan toward the checkpoint.[136] But, just as he approached the checkpoint, he swerved suddenly, narrowly missing one of the officers who was manning the checkpoint.[137] After jumping out of the way, that officer approached the minivan to ask, reasonably enough, why the driver had almost hit him.[138] When Lidster answered, the officer smelled alcohol on his breath and noticed that his speech was slurred.[139] He then directed Lidster to a side street where another officer administered a sobriety test.[140] When he failed the test, Lidster was arrested, and he was subsequently tried and convicted in Illinois state court of driving under the influence of alcohol.[141]

Lidster challenged the lawfulness of his arrest and conviction, *inter alia*, on the ground that the government had obtained much or all of its relevant evidence of DUI as the fruits of the use of a checkpoint stop that violated the Fourth Amendment.[142] The trial court rejected this challenge.[143] But the intermediate Illinois appellate court reached the opposite conclusion,[144] reversing Lidster's conviction, and the Illinois Supreme Court agreed with the appellate court.[145]

The Illinois Supreme Court held, by another one of those narrow four-to-three votes that seem to flourish in this area of the law, that the United States Supreme Court's 2000 decision in the case of *Indianapolis v. Edmond*,[146] required the Illinois court to find that Lidster's stop at a police checkpoint, made without any individualized suspicion at all on the part of the officers manning the checkpoint, was unconstitutional.[147]

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[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*; *see* Illinois v. Lidster, 747 N.E.2d 419 (Ill. Ct. App. 2001), *aff'd*, 779 N.E.2d 55 (Ill. 2002), *rev'd*, 124 S. Ct. 885 (2004).
[145] *Lidster*, 124 S. Ct. at 888.
[146] 531 U.S. 32 (2000).
[147] *Lidster*, 124 S. Ct. at 888; *see* People v. Lidster, 779 N.E.2d 855 (Ill. 2002),

In *Edmond*, the Supreme Court had indeed previously found another checkpoint unconstitutional, one at which the Indianapolis police had stopped vehicles simply to look for evidence of any possible drug crimes that might have been committed by the occupants of those stopped vehicles.[148] After stopping a vehicle at the checkpoint, police would examine (from outside the vehicle) the vehicle's interior, walk a drug-sniffing dog around the exterior, and, if they found sufficient evidence of drug (or other) crimes, they would arrest the vehicle's occupants.[149] The Supreme Court found that police had set up this checkpoint primarily for *general* "crime control" purposes, i.e., "to detect evidence of ordinary criminal wrongdoing."[150] Accordingly, the *Edmond* Court held, since these checkpoint stops were made entirely without any individualized suspicion of criminal conduct (just as in *Lidster*), the checkpoints were unconstitutional.[151] The Fourth Amendment, the *Edmond* Court added, forbids such suspicionless stops, in the absence of "special circumstances."[152]

But, despite *Edmond*, the Supreme Court in *Lidster* reversed the reversal of Robert Lidster's conviction by the Illinois Supreme Court.[153] Justice Stephen Breyer, writing for a majority of the Court, reasoned that

> [t]he checkpoint stop here differs significantly from that in *Edmond*. The [*Lidster*] stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.
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> . . . .
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> . . . [U]nlike *Edmond*, the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.
>
> For another thing, information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens

rev'd, 124 S. Ct. 885 (2004).

[148] *Edmond*, 531 U.S. at 35.

[149] *Id.*

[150] *Id.* at 41.

[151] *Id.* at 44.

[152] *Id.*

[153] *Lidster*, 124 S. Ct. at 891.

> will often react positively when police simply ask for their help as "responsible citizen[s]" to "give whatever information they may have to aid in law enforcement."[154]

As a result of this analysis, the *Lidster* Court reasoned that while a suspicionless checkpoint stop is not usually constitutional, as the *Edmond* Court established only four years previously, a suspicionless *informational* checkpoint stop *could be* found to be reasonable under the Fourth Amendment, albeit in the appropriate circumstances.[155] In this case, the Court continued, the informational checkpoint stop *was in fact* reasonable and, hence, it *was* constitutional.[156] In Justice Breyer's words,

> *[t]he relevant public concern was grave.* Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort.
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> The stop advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred.
>
> Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds. . . . Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically. And there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops.[157]

Note just *how* the *Lidster* majority applied the Fourth Amendment. The Fourth Amendment applies to checkpoints, *all* checkpoints, as they are *all* "seizures." *But*, the touchstone of the Fourth Amendment is reasonableness. And it was, the Court

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[154] *Lidster*, 124 S. Ct. at 889 (quoting Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)).

[155] *Id.* at 888-89.

[156] *Id.*

[157] *Id.* at 891 (citations omitted) (emphasis added).

concluded, wholly and entirely reasonable for the police to use this sort of individualized-suspicion*less*, investigative-checkpoint technique as a matter of Fourth Amendment law since: the public concern was "grave"; the information sought related to a "specific and known crime, not . . . unknown crimes of a general sort"; the police appropriately tailored their Fourth Amendment activity to fit this important criminal investigatory need; the activity interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect; and there was neither evidence nor even an allegation that the police had acted in a discriminatory or otherwise unlawful fashion.[158]

As in *Pringle*, the seriousness of the crime at issue, *inter alia*, was clearly relevant to the *Lidster* Court's Fourth Amendment analysis. It was a significant component of the reasonableness inquiry. Moreover, *Pringle* and *Lidster* are not the only recent Supreme Court decisions that make it clear that the application of the Fourth Amendment depends closely upon the particular context in which the relevant law enforcement activities arise.

In one last and also very recent decision, in *United States v. Banks*,[159] handed down on December 2, 2003, the Supreme Court upheld the execution of a search warrant where the executing officers delayed *only* fifteen to twenty seconds after they had knocked on the search target's door and announced their presence.[160] Indeed, Lashawn Banks, who was inside, could not get to the door in time to respond to the knock and announcement, as he was in the shower when the officers pounded on the door.[161] When the officers actually broke his door down and rushed inside, they found Banks heading toward the front door to answer it, half-naked and dripping wet, partially covered by only a towel.[162] In response to Banks' argument that a delay of fifteen to twenty seconds was an insufficient and unconstitutional period of time for an appropriate delay under the knock-and-announce rules the Supreme Court previously held required under the Fourth Amendment,[163] a unanimous Supreme Court demurred.[164]

Writing for the whole Court, Justice Souter observed, once again, that the Fourth Amendment's key prescription is that of "reasonableness."[165] And, in his words,

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158 *Id.*
159 124 S. Ct. 521 (2003).
160 *Banks*, 124 S. Ct. at 523.
161 *Id.*
162 *Id.*
163 *See* Wilson v. Arkansas, 514 U.S. 927 (1995).
164 *Banks*, 124 S. Ct. at 523.
165 *Id.*

> [a]lthough the notion of reasonable execution must therefore be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones. We have, however, pointed out factual considerations of unusual, albeit not dispositive, significance.[166]

It should not surprise you at this point that the sorts of "factual considerations" the Court turned out to be talking about in *Banks* are "practical" and "commonsensical" things like the potential dangers posed to the executing officers by failing to delay, or by failing to delay for a substantial period of time, at the door and/or the reasonable possibility that undertaking such a delay might result in the destruction of evidence. As the Court explained further, "the crucial fact in examining [the] actions [of executing officers] is not [the] time [it would take for an occupant] to reach [and answer] the door but the particular exigency claimed."[167]

Accordingly, the *Banks* Court concluded that

> [o]n the record here, what matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain. That is, when circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks's. And 15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.[168]

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[166] *Id.* at 525 (citations omitted).
[167] *Id.* at 527.
[168] *Id.*

Different facts, a different demonstration of exigency or the lack thereof, would have led to a different result. Justice Souter acknowledged this point readily enough, pointing out, for example, the obvious, namely that "[p]olice [officers] seeking a stolen piano may be able to spend more time to make sure they really need the battering ram."[169] In short, Justice Souter was perspicacious enough to realize that the act of chopping up a stolen piano into slivers small enough to flush down the kitchen disposal or the powder room toilet would take somewhat longer than fifteen to twenty seconds. But, again, the real point of all of this is that the application of the Fourth Amendment depends closely upon the particular context in which it applies, including most particularly the gravity of the situation in which the relevant law enforcement conduct arises.

With these three very recent Supreme Court decisions in mind, let me return once again, and finally, to the question of the Fourth Amendment's application in perilous times, its nature in the face of real or perceived threats of terrorist activity.

If law enforcement authorities reasonably believe that a terrorist act is imminent, bringing explosives onto an airplane in an attempt to hijack it, for example, it would appear to be absolutely clear, bearing in mind, in particular, all of these recent decisions, that the requisite antecedent justification necessary (if any) to undertake law enforcement activity subject to the Fourth Amendment must be assessed with full consideration of that grave and cataclysmic context. Indeed, the *Edmond* Court had previously made clear, albeit in *obiter dictum*, that checkpoint stops that would otherwise be unconstitutional are nonetheless justified in "emergency" situations, including, the Court said expressly, presciently, more than a year *before* the September 11th attack, checkpoints established in response to "an imminent terrorist attack."[170]

We are simply not talking about unfastened seatbelts or littering or smoking or piano thieves or drunk driving any more. The Fourth Amendment should, the Fourth Amendment *must*, be applied, again in the *Pringle* Court's words, "practically," "nontechnically," and in a manner "that deals with `the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[171] Our "everyday life" in 2004 includes, most regrettably and tragically, but nonetheless "factually and practically," the specter of

[169] *Id.* at 528.
[170] *Edmond*, 531 U.S. at 44.
[171] *Pringle*, 124 S. Ct. at 799.

devastating acts of terrorist criminality raising the possibility of massive destruction and loss of life. The point is that we *can* apply the Fourth Amendment consistently, objectively, and fairly and *still* recognize the simple truth that some threats are graver than others.

To recognize this plain and common sense fact of life is not, however, to deny that the Fourth Amendment does and should apply to law enforcement search-and-seizure activities directed at everyone—*anyone*—suspected of committing a crime, *any crime*. The Fourth Amendment *does* apply the same to everyone. But, *when* the Fourth Amendment applies and *how* the Fourth Amendment applies, are separate questions the answers to which are, and must remain, extremely sensitive to the circumstances in which particular Fourth Amendment encounters are utilized and the way in which those encounters are made.

This is the point where the competing arguments about the application of Fourth Amendment principles in perilous times come together. The Fourth Amendment applies, it does and it must apply if we are to respect our own laws and our own constitutional history, to *every* search and seizure (including arrests) made by American law enforcement authorities or their agents. But, the Fourth Amendment does and must apply as well in a way that includes unblindered sensitivity to and awareness of the context in which the law enforcement activities in question arise. Indeed, it *must* apply in this way if we are to be able to respond appropriately and effectively to the threats that now imperil us.

As Professor Heymann has reminded us,

> the gravest danger to civil liberties and human rights emerging in the aftermath of September 11 is that leaders will think we are without concern for non-citizens within the United States, indifferent to the welfare of people repressed by despotic governments, prepared to accept without question unequal treatment based on ethnicity, and unable or unwilling to see that there must be trade-offs even among our own freedoms. An American people encouraged to earn the respect for our traditions and values will be left with very hard choices. That is inevitable. But we should seek to make those choices proudly and intelligently, and not out of fear and anger alone.[172]

The current wave of terrorist threats to the United States and to Americans and our allies is real; it is neither hypothetical

[172] HEYMANN, *supra* note 53, at 113.

nor imagined. The extraordinary scope of the potential disasters portended by some of these threats is also real; it is neither hypothetical nor imagined. In the course of the entire American Revolution, 4435 Americans lost their lives. But in one single terrorist attack, the attack on September 11, 2001, more than 3000 individuals, Americans *and* citizens of other countries, lost their lives in that one attack alone. When one recognizes that terrorist individuals and organizations undoubtedly seek to obtain chemical, biological and nuclear materials to assist in their assaults, the possibilities for even more dramatic loss of life are, of course, staggering and horrific. These grave threats to us and to our nation and to our national identity and character are, sad to say, not likely to diminish any time soon.[173]

Our response to such dire and dramatic threats should not be, our response *cannot be*, to ignore our own history, to ignore our own laws, or to ignore our own constitutional principles. What sense does it make to jettison our Constitution in order to preserve it, to ignore our own laws to uphold them, or to abandon our integrity in order to save it? As the Supreme Court opined in 1967, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[174] Justice Stevens has more recently, sensibly declaimed, "if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[175]

Justice O'Connor made virtually this same point at greater length in her recent plurality opinion in *Hamdi v. Rumsfeld*, handed down in June of 2004, wherein the Court made it clear that due process requires that American citizens designated "enemy combatants" by the Executive Branch nonetheless retain their constitutional rights to a meaningful opportunity to contest the factual basis for their detention:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat.

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[173] The deaths of Osama bin Laden, and the next leader who takes his place—and the next, and the next—and their followers, and the detentions of hundreds or thousands of additional individuals who are merely suspected of complicity will hardly diminish, let alone resolve, the root causes of terrorism. *Cf.* HEYMANN, *supra* note 53, at xiii ("Terrorism is almost always the tactic of those who feel powerless or purposely disempowered. Actions that restrain their dangerous activities are likely to increase their resentment at powerlessness or repression. Assassinating a terrorist leader may weaken management but, by creating a martyr, help recruitment."). Muslim fundamentalists are not, of course, the only groups who pose such a terrorist threat to Americans and American interests.

[174] United States v. Robel, 389 U.S. 258, 264 (1967).

[175] Rumsfeld v. Padilla, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting).

> But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[176]

Justice Scalia has similarly weighed in, underscoring the point that the Framers of the Constitution well understood the need to keep our constitutional balance true, even *in extremis*:

> The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,
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> "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free."
>
> The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.
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> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[177]

The burden of upholding our Constitutional principles, our laws and our liberties falls most heavily, of course, upon the shoulders of our judiciary. It is rarely, if ever, the "popular" thing to do to release a putative criminal, terrorist or piano thief,

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[176] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004).

> The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963).

[177] *Hamdi*, 124 S. Ct. at 2674 (Scalia, J., dissenting) (citation omitted).

even when the law commands it. But, as Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals recently concluded for that court, "even in times of national emergency—indeed, particularly in such times—it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike."[178]

This must be true for judges even if the cost of taking such positions is not simply unpopularity, but more significant personal and professional costs as well. As James Otis remarked of the calumny he faced when he resigned from public office to take up the writs-of-assistance case for the Massachusetts Bay colonists, "[t]he only principles of public conduct that are worthy [of] a gentleman . . . are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make the good citizen, in public life, the patriot and the hero."[179] Of course, today, we recognize that such courageous virtues as those described by Otis are not solely the characteristics of loyal and conscientious conduct by "gentlemen," lawyers and judges of only one gender.

As former Chief Judge Patricia Wald of the District of Columbia Circuit Court of Appeals, a "gentlewoman" who has also served her country as a Judge of the International Criminal Tribunal for the Former Yugoslavia at The Hague, made the point a number of years ago,

> [w]e do not believe that strict enforcement of the fourth amendment will cripple the police or preclude effective law enforcement. Candor compels us to acknowledge, however, that some crimes escape detection, and some criminals escape punishment, as a result of our vigilant commitment to constitutional norms. Enforcement of these norms is not, on such occasions, a pleasant duty; *but it is a duty from which judges may not shrink*.[180]

As odd and discomfiting as it may be to hear it said like this, it is nonetheless true that our American values are upheld and our constitutional history is reaffirmed each and every time a possibly guilty person is set free because evidence establishing his or her guilt was suppressed by a court seeking to insure that our Government and its agents respect and follow our laws and our basic constitutional principles.

Professor Heymann counsels that "the challenge is not to

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[178] Gherebi v. Bush, 379 F.3d 727, 730 (9th Cir. 2004).
[179] SMITH, *supra* note 19, at 316.
[180] United States v. Most, 876 F.2d 191, 201 (D.C. Cir. 1989) (emphasis added).

beat and stop terrorism. The trick is to do it in a way most consistent with the values of a democratic society."[181] To do that, we need the courage out of convictions, a courage not unlike that demonstrated by the young James Otis, a "flame of fire" when he took on the establishment and sought to protect and to vindicate our forefathers' and foremothers' basic human rights by arguing against the writs of assistance.[182]

At the same time, if less grandly, we need from our judges, *and from our leaders*, we need more just-plain-good-old common sense. We need the common sense to realize the enormity of the threats that face us, and we need the wisdom *not* to respond to these threats in a partisan fashion or simply with grand-sounding rhetoric, beautiful to the ear but insensitive to the realities (and the strategic nuances) of the dangers that we face. We need the wisdom and the common sense *not* to ignore these threats when there is neither cause nor doctrinal obligation to ignore them, but while, *simultaneously*, preserving our Fourth Amendment values and heritage.

Such a balancing act is, of course, a tricky one, and sometimes there will be elements of risk involved as well. But, fortunately, *most* criminal cases involving law enforcement officers' Fourth Amendment activity do not involve terrorists. They do not, thankfully, involve airplane highjackings or genocide or *jihad* or suicide bombers. The corollary of a Fourth Amendment reasonableness doctrine that permits us to consider the horror and enormity of such crimes in assessing, for example, the presence of probable cause to arrest or search as in *Pringle*, or the power to make suspicionless checkpoint encounters as in *Lidster,* or the amount of time necessary to delay after knocking and announcing with a warrant as in *Banks*, is that lawyers and judges (and policy-makers) must continue to respect the value of preserving Fourth Amendment rights and our constitutional traditions, even when it is painful to do so, even when it hampers some overzealous activities undertaken by law enforcement officers, actions that were genuinely and sincerely intended to fight crime . . . and terrorism.

We *can* do this. We *can* respect individual rights and we *can* protect ourselves, at the very same time, from the awful threats that now face us.

Indeed, not only *can* we do this, it is, as Americans, just precisely what we *must* do. We must keep the balance true, we

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[181] *See* HEYMANN, *supra* note 53, at 159.
[182] SMITH, *supra* note 19, at 316.

must keep the constitutional fire aflame even, *perhaps especially*, in perilous times.