No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

ANTOINE JONES, *Respondent*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* FOURTH AMENDMENT HISTORIANS IN SUPPORT OF RESPONDENT

FABIO ARCILA, JR.
Professor of Law
Counsel of Record
Touro Law Center
225 Eastview Drive
Central Islip, New York 11722
(631) 761-7111
farcila@tourolaw.edu

WESLEY M. OLIVER
Associate Professor of Law
Widener Univ. Law School
GEORGE C. THOMAS III
Professor of Law
Rutgers-Newark Law School

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions and statutes:

Miscellaneous:

INTEREST OF THE AMICUS CURIAE[1]

This amicus curiae brief supporting respondent Jones is submitted on behalf of a group of scholars with expertise in the Fourth Amendment and its history.

Professor Fabio Arcila, Jr. of Touro Law Center is interested in civil search jurisprudence and the implications that modern developments, such as the increasing interest in preventative searches for regulatory or national security purposes, have on it. The warrantless GPS tracking at issue in this case, though conducted for criminal law enforcement purposes, falls within this interest because it has significant implications for civil searches.

To date, his scholarship has focused upon an historical analysis of Fourth Amendment search and seizure law, with his most recent projects exploring the concepts of probable cause and suspicion under both the common law and early civil search statutes. This scholarship has been published in the *William & Mary Law Review*, the *Boston College Law Review*, the *University of Pennsylvania Journal of Constitutional Law*, and the *Administrative Law Review*, and has been extensively profiled and discussed in the *Michigan Law Review* and the *Tennessee Law Review*.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than himself and Touro Law Center, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for amicus represents that all parties have consented to the filing of this brief.

Associate Professor Wesley M. Oliver of Widener University Law School is a legal historian specializing in nineteenth and early-twentieth century American criminal procedure. Among his scholarship conducting historical analyses of the Fourth Amendment are publications in the *Rutgers Law Review*, the *Tennessee Law Review*, and forthcoming articles in the *Kentucky Law Journal* and the *Mississippi Law Journal*.

Professor George C. Thomas III is the Rutgers University Board of Governors Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers-Newark Law School. He is a prolific scholar whose expertise includes Fourth Amendment history, a subject about which he has published in the *Michigan Law Review*, the *Virginia Law Review*, the *Notre Dame Law Review*, the *Texas Tech Law Review*, and the *Rutgers Law Record*.

SUMMARY OF ARGUMENT

This amicus brief is filed to present the Court with a historical view of the Fourth Amendment. It emphasizes that, under both the common law and early civil search statutes, the government's search and seizure power was nearly always subject to constrained discretion, and instances of wholly unconstrained discretion involved inapposite regulatory activity rather than the type of criminal law enforcement at issue here. The Government's argument that it enjoys unconstrained discretion to engage in unlimited GPS installation and tracking of vehicle movements in public spaces to enforce the criminal law is in tension with this history.

The principle of constrained discretion is most notable in the common law, which is directly relevant because the common law controlled governmental search and seizure behavior in the criminal context. The common law concerned itself with search and seizure activity principally in the stolen goods context. It required governmental agents to operate under warrants—which constrained discretion—in virtually all instances. Warrantless search and seizure authority was rare, but when it existed the circumstances themselves served to limit governmental discretion. Early civil search statutes evince a similar concern for constraining discretion, as they usually required either a warrant or suspicion to justify the regulatory searches and seizures that they authorized.

With regard to the second question presented, an historical Fourth Amendment analysis indicates that both the common law and early civil search statutes recognized and respected an individual's possessory right to exclude. This is evident in notable British common law trespass trials, in which outrage was expressed at the manner of governmental seizure activity. Additional evidence is also found in early civil search statutes, which established processes that carefully guarded the possessory right to exclude.

ARGUMENT

The Court has repeatedly emphasized that Fourth Amendment history is to be the starting point when search or seizure practices are constitutionally challenged. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295,

299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). To understand how an historical analysis applies to GPS tracking, it is important to distinguish between two jurisprudential areas relevant to Fourth Amendment history: the common law, and early civil search statutes. The common law is particularly important because it regulated criminal law enforcement. Also relevant to an historical analysis are early civil search statutes, particularly because regulatory enforcement officers constituted the only law enforcement group in any way comparable to modern law enforcement officers (though there are significant differences between them, such as with regard to training, supervision, professionalism, and force size). At the same time, it must be kept in mind that civil search statutes are not directly apposite because they addressed regulatory matters rather than the sort of traditional criminal law enforcement interest involved in this case. They are, nonetheless, instructive in that they arguably establish minimum thresholds for governmental search and seizure standards.

A unified theme in both the common law and civil search contexts was that governmental search and seizure power was nearly always significantly constrained, particularly in regard to search discretion, and these constraints were incorporated into the Fourth Amendment. This priority was particularly evident in criminal searches under the common law. Additionally, both the common law and early civil search statutes carefully guarded an individual's possessory right to exclude. Despite this history indicating that unregulated governmental

search and seizure discretion was anathema to the Framers and the public when the Bill of Rights was ratified, the Government claims wholly unconstrained discretion to engage in GPS tracking of vehicles in public spaces and to invade possessory interests through installation of GPS devices onto those vehicles.

I. THE HISTORICAL FOURTH AMENDMENT PRINCIPLE OF CONSTRAINED SEARCH DISCRETION IS VIOLATED BY THE WARRANTLESS USE OF A GPS TRACKING DEVICE ON A PRIVATE VEHICLE TO MONITOR ITS MOVEMENTS IN PUBLIC SPACES

A. The Common Law and Constrained Search Discretion

The common law in the new nation severely curtailed search discretion as compared to search practices that had earlier prevailed in Great Britain and the colonies. These limitations on search discretion are evident in the Fourth Amendment's Warrant Clause, which was crucially important to the Framers. They included the Warrant Clause:

> to specify the limited grounds—probable cause, particularity, and oath or affirmation—upon which warrants can be granted, allowing future generations to weaken these restrictions only through the difficult constitutional amendment process. The Framers had multiple objectives in doing so. First, they constitutionalized the common law ban on general warrants to ensure that only *specific* warrants could issue, thereby ensur-

> ing that the general warrants that had been used to oppressive ends in Great Britain—most infamously in the [seditious libel case against Parliamentarian John Wilkes]—could not be used in the new nation. . . . Second, they sought to avoid any repeat of the colonial practice in which crown authorities had resorted to laxly issued writs of assistance to help justify their customs searches. Being familiar with the abuses that accompanied writs of assistance, the Framers believed that both probable cause and particularity should support any search authorized under legal process. The Framers' key concern behind their desire to ban general warrants and writs of assistance was to limit search discretion, and requiring both probable cause and particularity served that end. Third, the Framers sought to limit access to warrants because they immunized officers from suits challenging the propriety of their searches. The Framers accomplished this goal through the Warrant Clause's three requirements, all of which constitute obstacles that must be overcome before a warrant may issue.

Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1281-86 (2010) (citations omitted). The imperative of constraining discretion was a particularly powerful lesson from the Wilkes controversy, in which Lord Chief Justice Pratt emphasized that:

> defendants claimed a right . . . to force persons' houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where

> no offenders' names are specified in the warrant, and therefore *a discretionary power* given to messengers to search wherever their suspicions may chance to fall. *If such a power is truly invested . . . it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject*.

Wilkes v. Wood, 19 How. St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763) (emphasis added).

During the Framers' era, these warrant restrictions were successful in severely curtailing governmental search discretion because warrantless searches were much rarer than today. Under the common law, warrantless searches and seizures were authorized only in extremely limited circumstances where an immediate exigency or safety concerns justified abandoning a warrant, such as during a hue and cry pursuit, to quell a disturbance occurring in a law enforcement officer's presence, or during searches incident to arrest. *See* Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1286. These warrantless searches were limited to instances where the circumstances themselves could serve to delineate the outer discretionary search limits. Because all other common law searches had to be conducted under a warrant, the restrictions the Framers placed in the Warrant Clause for issuance of a search warrant very meaningfully constrained search discretion.

There were no circumstances in which the common law tolerated the government exercising its search power for traditional criminal law enforcement purposes absent any discretionary limits. To this extent, the Government's claim in this

case, that it enjoys complete and full discretion to enforce the criminal law through prolonged GPS tracking in public spaces without any oversight, is in severe tension with Fourth Amendment history.

B. Civil Search Statutes and Constrained Search Discretion

1. A warrant or suspicion requirement usually applied to limit search discretion

By far the most dominant search model under early civil search statutes is found in those concerning customs duties. One such statutory act, the 1789 Collections Act, was among the first pieces of legislative business in the new nation. It authorized warrantless but suspicion-based customs searches of maritime vessels, but required warrants for searches on land, such as of a "dwelling-house, store, building, or other place." Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43. This model became ubiquitous, being repeatedly followed.[2]

In a few instances, early federal legislation allowed warrantless but suspicion-based searches in the nation's interior, though this occurred infrequently and only in special circumstances. In two consecutive months in 1815, Congress authorized customs officials to stop and search for illegal goods, upon suspicion, "any carriage or vehicle . . . and . . .

---

[2] *See, e.g.*, Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 145, 170; *see also* Act of July 8, 1797, ch. 15, § 3, 1 Stat. 533, 534 (imposing duties on salt and incorporating penalties and forfeiture provisions of Act of August 4, 1790).

any person travelling on foot, or beast of burden." Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232; Act of Feb. 4, 1815, ch. 31, § 2, 3 Stat. 195, 195. It appears to have done so out of a desire to minimize the provisioning of hostiles in connection with the War of 1812,[3] and as extraordinary, time-limited search exceptions.[4] Nearly a decade later, Congress empowered "Indian agents" to conduct warrantless searches of traders "upon suspicion or information that ardent spirits are carried into the Indian countries." Act of May 6, 1822, ch. 58, § 2, 3 Stat. 682, 682.

Given these approaches to civil search power, the discretionary analysis is more nuanced in the context of the nation's early civil search statutes than it is under the common law. Usually, search discretion was limited through either warrant, or at least suspicion, requirements. Generally, suspicion-only searches were limited to maritime vessels, while land-based searches were subject to a warrant requirement. Later, a few instances occurred in which suspicion was deemed to be a sufficient basis for a search on land, including of carriages, vehicles, or beasts of burden.

---

[3] For example, the earlier act was entitled "An Act to Prohibit intercourse with the enemy, and for other purposes." Act of Feb. 4, 1815, ch. 31, 3 Stat. at 195.

[4] The earlier act was self-repealing, specifying that it was to continue in force only during the "continuance of the present war between the United States and Great Britain, and no longer." Act of Feb. 4, 1815, ch. 31, § 13, 3 Stat. at 200. The following month's act contained a self-repealing provision set at one year. Act of Mar. 3, 1815, ch. 94, § 8, 3 Stat. at 235. The following year Congress "revived" this act and extended it "until the end of the next session of Congress." Act of April 27, 1816, ch. 110, § 3, 3 Stat. 315, 315.

Notably, even these latter instances severely undermine the Government's argument. Given the strong analogy between a "carriage or vehicle" in the nation's first few decades and today's automobiles, the suspicion requirement that early legislation imposed for these searches calls into doubt the Government's position here, which claims an unlimited, fully discretionary right to engage in suspicionless searches of vehicle movements in public spaces through GPS tracking. Moreover, these early authorizations of suspicion-based "carriage or vehicle" searches were exceptional regulatory responses to unique wartime circumstances, rather than representing the quotidian approach to governmental search power in criminal law enforcement that is at issue in this case.

2. Maximal discretion was sometimes authorized through suspicionless regulatory ship searches, but is inapposite to the traditional criminal law enforcement involved here

Though, as explained in the preceding section, civil search statutes usually limited search discretion through either a warrant or suspicion requirement, exceptions existed. Sometimes customs searches of maritime vessels could be suspicionless. *See* Act of Mar. 3, 1815, ch. 94, § 1, 3 Stat. at 231; Act of Feb. 4, 1815, ch. 31, § 1, 3 Stat. at 195; Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85, 592 (1983) (discussing § 31 of the Act of August 4, 1790, the Court wrote "the First Congress

clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment").

These four acts admittedly authorized fully discretionary search power, but they concerned civil regulatory searches and thus do not provide the Government support for its suspicionless GPS tracking for criminal law enforcement purposes.[5] The distinction between regulatory and criminal searches is crucial in Fourth Amendment

---

[5] Because the acts were regulatory they primarily authorized civil in rem forfeitures for violators, as well as civil fines. However, as is common with many regulatory regimes, they also provided for some criminal consequences. Inclusion of some criminal consequences does not necessarily transform a regulatory regime into one that is treated primarily as criminal in nature. *See United States v. Ursery*, 518 U.S. 267, 288-92 (1996) (holding that provisions for civil in rem forfeiture did not render proceedings criminal in nature); *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979) (discussing jurisprudence used to distinguish regulatory restraints from criminal punishment). Thus, these four acts were primarily regulatory though they included some criminal sanctions: (1) the 1790 act subjected violators to a maximum of six months imprisonment, Act of Aug. 4, 1790, ch. 35, § 60, 1 Stat. at 174, and subjected any master of a vessel who falsely swore under the act to possible imprisonment of up to 12 months, *id.* § 66, 1 Stat. at 175; (2) the 1793 act subjected any person who knowingly and falsely swore or affirmed under the act to penalties for perjury, Act of Feb. 18, 1793, ch. 8, § 30, 1 Stat. at 316; (3) the February 4, 1815 act made offenses a misdemeanor, and also disallowed unauthorized movement between United States and enemy territory, both subject to imprisonment of up to three years, Act of Feb. 4, 1815, ch. 31, §§ 3, 10, 3 Stat. at 196, 199; and (4) the March 3, 1815 act made it a misdemeanor to refuse to join a posse to aid in the act's enforcement, subject to imprisonment of up to three months, Act of Mar. 3, 1815, ch. 94, § 4, 3 Stat. at 232.

jurisprudence. *See Ferguson v. City of Charleston*, 532 U.S. 67, 71-73, 81-82 (2001) (rejecting argument that public hospital's drug testing of pregnant patients had a civil regulatory purpose and thus was subject to lesser Fourth Amendment protections, instead ruling the searches unconstitutional because they were primarily criminal in nature given that prosecutors and police were integral in designing, implementing, and enforcing the policy). Because early suspicionless ship searches were civil and regulatory, they provide no support to the Government as it engages in criminal law enforcement. Rather, "[t]he Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to . . . a policy" that "was designed to obtain evidence of criminal conduct . . . that would be turned over to the police and that could be admissible in subsequent criminal prosecutions." *Id.* at 86. Thus, the few instances of early suspicionless civil ship searches do not undermine the fundamental point that completely discretionary search authority for criminal law enforcement purposes, similar to the type the Government claims here, conflicts with Fourth Amendment history.

II. THE HISTORICAL FOURTH AMENDMENT SEIZURE PRINCIPLE THAT POSSESSORY INTERESTS ENCOMPASSED THE RIGHT TO EXCLUDE IS VIOLATED BY THE WARRANTLESS ATTACHING OF A GPS TRACKING DEVICE TO A PRIVATE VEHICLE

Even after *Katz v. United States*, 389 U.S. 347 (1967), and its embrace of privacy as an organizing Fourth Amendment principle, property concepts continue to be germane to seizure analyses. *See United States v. Padilla*, 508 U.S. 77, 82 (1993) ("Expectations of privacy *and property interests* govern the analysis of Fourth Amendment search and seizure claims.") (emphasis added); *Soldal v. Cook County*, 506 U.S. 56, 62 (1992) ("our cases unmistakably hold that the [Fourth] Amendment *protects property* as well as privacy") (emphasis added). Building upon a property foundation, this Court defines seizures as instances when the government meaningfully interferes with an individual's possessory interests. *Soldal*, 506 U.S. at 61. The Government claims that it did not meaningfully interfere with Jones's possessory interest in his vehicle by placing a GPS tracking device on it. Pet. Br. 42-46. To the contrary, however, under an historical approach to the Fourth Amendment a seizure did occur because the founding generation recognized the right to exclude not just as a property interest, but as a possessory interest as well.

The venerable British search case *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765)—which was part of the famous litigation resulting from the issuance of general warrants targeted at Parliamentarian John Wilkes—provides a fundamental under-

pinning for the Fourth Amendment. *See, e.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Berger v. New York*, 388 U.S. 41, 49 (1967).[6] *Entick* emphasized the important role of property in search and seizure protections, with Lord Camden declaring that "[t]he great end, for which men entered into society, was to secure their property." 19 How. St. Tr. at 1066.[7] *Entick*'s concern with being "secure" was central to the Framers' views of the Fourth Amendment, as is evident in its textual protection that "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV (emphasis added); *see also* Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* § 3.1.2.2 (2008) (exploring founding generation's conception of word "secure"). Without the right to reasonably exclude, possessory interests safeguarding the right to be secure would be largely illusory.

An historical analysis shows that the Government violated this constitutional seizure protection. At the nation's founding being "secure" included the right to exclude and, crucially, this right extended to possessory interests, both under the common law

---

[6] "The Wilkes dispute resulted in important changes to the common law, was celebrated in the Americas, and had a strong influence on our search-and-seizure jurisprudence." Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 3 n.5 (2007) (citations omitted); *see also* Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1283 n.11.

[7] Different reports of this case, though addressing the same themes, do not contain the exact same language. *Cf.* 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817.

and in civil search statutes. The Government infringed on Jones's possessory right to exclude when it lacked a warrant to install the GPS device on his vehicle.

A. The Common Law Recognized a Possessory Right to Exclude

Numerous examples exist in the historical record of common law possessory interests encompassing the right to exclude. A primary example comes from the Wilkes dispute in Great Britain, which so profoundly influenced the Framers.[8] In a challenge to the general warrants that had authorized the searches, "[b]etween 1763 and 1769, Wilkes and about fifty other search targets lodged successful trespass actions, with British courts ruling such general warrants void and juries assessing significant damages." Arcila, *In the Trenches*, 10 U. PA. J. CONST. L. at 14 n.41; *see also* Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1281 n.11 (recounting damages granted in many of these lawsuits). Part of what was objectionable was that officials had engaged in illegal seizures when they violated the possessory right to exclude. In Wilkes's home, officials had "fetched a smith" after Wilkes refused to provide "the keys of his bureau"; after the smith "pickt the lock" the officials "swept away every paper . . . found," all of which they put into a sack. *Wilkes*, 19 How. St. Tr. at 1156, 98 Eng. Rep. at 491; *Addenda to the Cases Concerning Mr. Wilkes*, 19 How. St. Tr. 1382, 1407 (1813). This seizure and violation of Wilkes's possessory right to exclude was so

[8] *See supra* note 6 for evidence of the influence.

galling that the *Entick* court, in an entirely separate but related proceeding, noted the indignity that "Mr. Wilkes's private pocket-book filled up the mouth of the sack." *Entick*, 19 How. St. Tr. at 1065.[9] Akin to how the Government here commandeered Jones's vehicle for its own purposes by installing a GPS device, part of what made the *Wilkes* seizure objectionable was that the government had "improperly and illegally taken notice and made use of" Wilkes's papers. *Addenda to Wilkes Cases*, 19 How. St. Tr. at 1409. The *Entick* court expressed a similar concern for protecting the possessory right to exclude. *See* 19 How. St. Tr. at 1072 ("If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecutions.").[10]

Through "[t]he right . . . to be secure" in the Fourth Amendment, the Framers sought, among other objectives, to protect the possessory right to exclude that had developed in the common law. The common law concerned itself with seizures primarily in the context of stolen goods. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41-43, 47, 50, 55-81 (1983) (examining British criminal pretrial proceedings, including discussion of government's seizure authority in context of search warrants for stolen goods).[11] The common law relating to

---

[9] Different reports of the *Entick* decision do not report this same language. *See* 2 Wils. K.B. 275, 95 Eng. Rep. 807 (C.P. 1765).

[10] Again, different reports of the *Entick* decision do not report this same language. *See id.*

[11] The common law also concerned itself with seizures in the context of arrests. *See* Langbein, *Eighteenth-Century Crim-*

stolen goods operated principally under a specific warrant system. *See* Wesley M. Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 383-93 (2011).[12] Thus, the Warrant Clause's three conditions for issuance of a warrant (probable cause, particularity, and oath or affirmation) operated in part to protect the possessory right to exclude because they constrained seizure discretion. As with warrantless searches (*see supra* Part I(A) at 7), even in the extremely limited instances in which the common law tolerated warrantless seizures—for example, at the end of a hue and cry pursuit, or in conjunction with a search incident to arrest—the circumstances themselves significantly limited seizure discretion and thus also protected the possessory right to exclude. No circumstances existed in which the common law tolerated the government exercising its seizure power for traditional criminal law enforcement purposes, and thus broaching the possessory right to exclude, absent any discretionary limits.

---

inal Trial, 50 U. CHI. L. REV. at 55-81 (discussing detainee and arrestee examinations by justices of the peace). Those arrest principles, however, are not applicable here.

[12] Oliver asserts that a "very broad doctrine of search incident to arrest permitted an officer to search the arrestee's entire house for the stolen item." Oliver, *Modern History of Probable Cause*, 78 TENN. L. REV. at 383 n.14; *see also id.* at 389-90. Considerable uncertainty exists, however, as to the breadth of the search incident to arrest doctrine in the home. Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1305 & n.103.

B. Civil Search Statutes Recognized a Possessory Right to Exclude

Early civil search statutes jealously guarded the possessory right to exclude by consistently constraining seizure discretion. This is significant because customs duties provided a significant share of funding for the early federal government, and so the enforcement of these customs duties was a national priority, but one that had to contend with rampant smuggling and customs evasion. Thus, civil search statutes were consistent with the Fourth Amendment guarantee that the people were to "be secure" from unreasonable seizures.

Being regulatory in nature, these search statutes operated under a civil in rem forfeiture model. Balancing the private possessory interests in property with the governmental interest in enforcement, the statutes provided for seizures of nonconforming goods pending forfeiture. These seizures implicated the claimant's possessory interest, but not ownership interest, which would be later adjudged at a forfeiture proceeding that would decide which party—the claimant or the government—had a superior ownership interest. When a claimant prevailed in a forfeiture proceeding, he would be entitled to the return of the seized property, and possibly additional damages, costs, or both. *See, e.g.*, *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9-10 (1817). In this regulatory system, the possessory right to exclude played a crucial role and was protected in numerous ways.

The customs system provides the most prominent example of how our nation's early statutes were protective of possessory rights. These statutes showed sensitivity to the accompanying right to exclude by

requiring some objective justification for intrusions, which operated to constrain governmental discretion. Thus, land-based seizures, in which governmental agents took goods and held them pending forfeiture, often required a warrant.[13] Water-based seizures usually required suspicion or at least some objective indicia of wrongdoing, such as an invoice discrepancy.[14] In other instances, some objective indication of noncompliance with regulatory directives sufficed to justify a seizure.[15] In no circumstances were

---

[13] *See* Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. at 677; Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. at 170; Act of July 31, 1789, ch. 5, § 24, 1 Stat. at 43; *see also* Act of July 8, 1797, ch. 15, § 3, 1 Stat. at 534 (imposing duties on salt and incorporating penalties and forfeiture provisions of Act of August 4, 1790).

[14] *See* Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. at 677; Act of May 22, 1794, ch. 33, § 2, 1 Stat. 369, 369; Act of Feb. 18, 1793, ch. 8, §§ 18, 27, 1 Stat. 305, 312, 315; Act of Aug. 4, 1790, ch. 35, §§ 46-47, 1 Stat. 145, 169; Act of July 31, 1789, ch. 5, §§ 22-23, 1 Stat. 29, 42-43; *see also* Act of July 8, 1797, ch. 15, § 3, 1 Stat. at 534 (imposing duties on salt and incorporating penalties and forfeiture provisions of Act of August 4, 1790).

[15] *See* Act of Mar. 2, 1799, ch. 22, § 94, 1 Stat. 627, 699 (authorizing seizure of "useful beasts" that were imported to breed without a permit); Act of Mar. 2, 1799, ch. 22, § 82, 1 Stat. 627, 692 (providing for seizure of goods intended for export and thus subject to drawback of duties if instead they were relanded in the United States); Act of Mar. 2, 1799, ch. 22, § 50, 1 Stat. 627, 665 (authorizing seizure of goods improperly landed); Act of Mar. 2, 1799, ch. 22, § 43, 1 Stat. 627, 660 (authorizing seizure of any casks or other containers carrying spirits, wines, or teas that lacked required markings or certificates); Act of Mar. 3, 1795, ch. 43, § 12, 1 Stat. 426, 429 (providing for seizure of snuff that was exported and thus subject to drawback of duties if it was instead relanded in the United States); Act of June 5, 1794, ch. 51, § 10, 1 Stat. 384, 386 (providing that snuff and refined sugar was subject to seizure when applicable duties not paid); Act of Mar. 1, 1793, ch. 19, § 3, 1 Stat. 329, 329

governmental agents allowed to enforce customs duties by intruding upon possessory interests merely upon their own wholly unconstrained discretion.

Another important search and seizure paradigm evident in the early civil search statutes originated in Alexander Hamilton's 1791 Excise Act. "This statutory enactment sought to raise internal revenue by imposing excise taxes upon distillers." Arcila, *Death of Suspicion*, 51 WM. & MARY L. REV. at 1305 (citation omitted). To enforce the taxes, it required covered distillers to register with local authorities. Act of Mar. 3, 1791, ch. 15, § 25, 1 Stat. 199, 205. The Act also infringed upon such registered distillers' possessory right to exclude by requiring them to "write or paint . . . upon some conspicuous part outside and in front of each house or other building or place made use of . . . and upon the door or usual entrance of each vault, cellar or apartment . . . in which any of the said liquors shall be at any time . . . distilled, deposited or kept . . . the words 'Distiller of Spirits.' " *Id.* The possessory right to exclude was so highly valued that even this painting requirement was protested, with several southwestern Pennsylvania counties declaring in a resolution that "[i]t is insulting to the feelings of the people to have their . . . houses painted . . . ."[16] *Resolves of Southwestern Pennsylvania Delegates of Sept. 7, 1791 Re-*

Stat. 329, 329 (providing that every unlicensed person attempting to trade with Indian tribes, or found in Indian country with merchandise customarily traded with Indians, shall forfeit all merchandise).

[16] These same counties were the site of national insurrection a few years later during the Whiskey Rebellion, which President Washington quelled only after marching in with over ten thousand troops.

garding Hamilton's 1791 Excise Act, INDEP. GAZETTEER, Sept. 24, 1791, at 3.

The possessory right to exclude was also promoted through immunity doctrine, which gave revenue officers a strong incentive to respect the right. Customs officers could obtain immunity from both damages and costs in a subsequent lawsuit challenging a seizure if the court made a certification that "reasonable cause" had existed for the seizure. Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695; Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. 145, 176; Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47. Similarly, under Hamilton's 1791 Excise Act, each excise officer was entitled to "a verdict . . . in his favor" if he succeeded in "justify[ing] himself by making it appear that there was probable cause for making the said seizure." Act of Mar. 3, 1791, ch. 15, § 38, 1 Stat. 199, 208. Thus, these revenue officers were given a strong incentive to intrude onto the possessory right to exclude only in justifiable circumstances, thereby providing an incentive for them to exercise constrained seizure discretion.[17]

[17] It is true that the possessory right to exclude could be infringed for regulatory purposes, such as by requiring that casks and other containers be marked. Act of Mar. 2, 1799, ch. 22, § 39, 1 Stat. 627, 659; Act of Mar. 3, 1791, ch. 15, §§ 12, 19, 27, 1 Stat. 199, 202-03, 206. However, this regulatory intrusion provides no support for similar intrusive authority in the criminal realm, which was governed by the common law, which in turn was more protective of the possessory right to exclude, as described above in Part II(A).

CONCLUSION

In light of the pervasiveness of constrained search and seizure discretion at the time of the nation's founding, and the protections that existed for the possessory right to exclude, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

Fabio Arcila, Jr.
Professor of Law
Counsel of Record
Touro Law Center
225 Eastview Drive
Central Islip, New York
11722
(631) 761-7111
farcila@tourolaw.edu

OCTOBER 2011