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Financial-Capital-Equity-Commodity & Political Trends
History is a Catalogue of Solutions

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JOHN ADAMS (1735 – 1826) SECOND US PRESIDENT (1797–1801).

("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.")

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former Chairman of Princeton Economics International, Ltd.

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F all the case law I have ever read, there was no other decision that truly grasped the meaning of what it once meant to be American than **Boyd v. United States, 116 U.S. 616 (1886).**

America was the "Promised Land" to which people fled from tyranny elsewhere. Today, everyone has forgotten what US Constitution really stood for and how it was a major turning point in history along with the French Revolution. I doubt you can even find a member of Congress who appreciates how the

Revolution came about. There are a lot of listed rights that are just modern propaganda today with no substance remaining. My favorite case in history was always the **Boyd** decision. However, with the rise of government power, this landmark decision was overruled by the Supreme Court to allow the birth of the Police State. Nonetheless, it still stands forever as the hallmark of the country we once use to be, even though the judges refuse to follow its principles.

You may think the revolution was about taxes and draw parallels to the present. But this is not where it began, for there is a closer parallel we

must look at closely to understand where we are today. It was not even torture, denial of the right to trial by jury, nor the abuse of judges who crowned themselves with the privilege of kings that stirred the hearts of men to rise up and demand their rights that seem to have been forgotten today.

It all began with what would become the **FOURTH AMENDMENT**, the right to remain free from illegal search and seizures of your person and property (warrantless searches). When you go to the airport and they look at you and your wife along with your children naked through the x-ray machines this summer, perhaps you should realize that the Revolution was fought against this precise abuse of power – the wholesale searching of all people. If the government can search you at any time for one pretended excuse, whatever they find unrelated can be used against you. This warrantless search allowed the charging of citizens for whatever offense they desired usually instigated to raise money or for political purposes. In a civilized free society, there must be some prior **PROBABLE CAUSE** (*evidence you may have done something*) to invade your privacy of person, home, or property.

I have attached the full **Boyd** decision as an Appendix for it illustrates above all else, what we have truly lost. Bin Laden managed to strip us of all privacy and rights by opening the door to government officials who simply want to keep track of everything we do without limitation. Generations stood up against and encroachment upon such rights. But that is all swept aside. In the name of Bin Laden, our

world was changed forever and our way of life was lost including our liberty, freedom, and the essence of what it once meant to be American. Bin Laden in reality accomplished what NO standing army could ever do. He won for they say he hated our way of life, and he indeed changed that forever transforming it into precisely what so many your Arabs are rising up against today popularly known as the **Arab Spring**.

While the **Boyd** case took place in 1886, it drew upon **PRECEDENT** in law that is simply another word for **HISTORY**. It was about the **FOURTH AMENDMENT**, the right to remain free from wholesale *"unreasonable searches and seizures."* Today, government has succeeded in getting stupid Americans to relinquish all their rights under the pretense this makes the world safer. I went behind the Berlin Wall before in fell in the late 1970s with a friend who went there to visit his family. They had been stranded there when the Russians moved in to then wall-off the free zone. Walking East Berlin back then was not much different than walking in America today. Everywhere you went it became *"papers please!"* You had the burden of proving who you even were.

Try applying for a driving license. In New Jersey, you need so many documents, good luck if they were stolen or your house burnt down. In Pennsylvania, you have to fill out a form saying you don't have various medical problems, but like East Germany, you now have to prove it. You have to go to a doctor who then has to give you a medical exam in order to provide a letter.

DL-180 (7-10)

ALL INFORMATION IN THIS SECTION **MUST** BE COMPLETED IN FULL BY A HEALTH CARE PROVIDER

Please check any of the following that would prevent control of a motor vehicle.

<input type="checkbox"/> Neurological disorders	<input type="checkbox"/> Neuropsychiatric disorders	<input type="checkbox"/> Circulatory disorder	<input type="checkbox"/> Cardiac disorder	<input type="checkbox"/> Hypertension
<input type="checkbox"/> Uncontrolled Epilepsy	<input type="checkbox"/> Uncontrolled Epilepsy	<input type="checkbox"/> Cognitive impairment	<input type="checkbox"/> Alcohol abuse	<input type="checkbox"/> Drug abuse
<input type="checkbox"/> Conditions causing repeated lapses of consciousness (e.g. epilepsy, narcolepsy, hysteria, etc.)				

Specify: _____ If seizure disorder, date of last seizure: _____

Impairment or Amputation of an appendage. If so, list: _____

Other: _____

NOTE: Any recommendations/additional comments must accompany this certificate on a health care provider's letterhead.

PROVIDER INFORMATION (Please print or type) _____

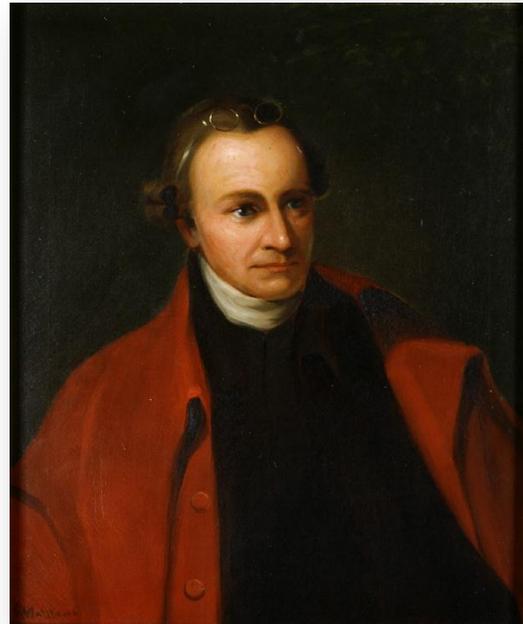
Pennsylvania Application for Driver's License

There is no presumption of innocence anymore. Instead, you are presumed to be a disciple of Bin Laden, a liar, and it has become just the same old thing I saw in Communism – PAPERS PLEASE! (*Sometimes without the “please”*). How has it come to this again?

The government has convinced everyone that you have to surrender your liberty to be safe. That is worse than socialism – it is plain totalitarianism. The country I grew up in no longer exists. Edward Gibbon in his **Decline and Fall of the Roman Empire** (Volume 6, Chapter LXXI), wrote:

The hill of the Capitol, on which we sit, was formerly the head of the Roman empire, the citadel of the earth, the terror of kings; illustrated by the footsteps of so many triumphs, enriched with the spoils and tributes of so many nations. This spectacle of the world, how is it fallen! how changed! how defaced!

This is what Patrick Henry meant when he said: “*Give me liberty or give me death!*” The true definition of **LIBERTY** is the right to be left alone. The right not to have to prove who you are to petty government officers. And the right not to have your wife and children looked at naked by government employees to get on a airplane for a vacation. This is amazingly, the very issue that inspired the rise of a nation and the overthrow of tyrannical monarchy. There were no rights, privileges, and certainly no immunities except for petty government officers who were ABOVE the law as they are again today. If a non-government employee were to strip your 8 year-old daughter, would this not be child molestation? The decision about the extent of your LIBERTY rested, then as now, solely in the hands of government employees. This above all else compelled the American people to resist, for they would no



PATRICK HENRY (1736 – 1799)

longer put up with their “*liberty of every man [being] in the hands of every petty officer.*” These government employees do as they like and interpret the laws to their benefit. Nothing ever changes.

Government employees can do as they like, for you have NO rights to be decided before they act. What is the difference if two men came up and took your wife and stripped searched her rather than look at her naked through a machine? If you resist, you go to jail, and ONLY then can you argue you have rights AFTER the harm has been done. You have to hire a lawyer and it will cost you a fortune, all to vindicate what was supposed to be a fundamental right secured by the Revolution and the Constitution. Where are these rights? To whom do we plead for **LIBERTY**? Surely you will find no judge to vindicate the rights of the people.



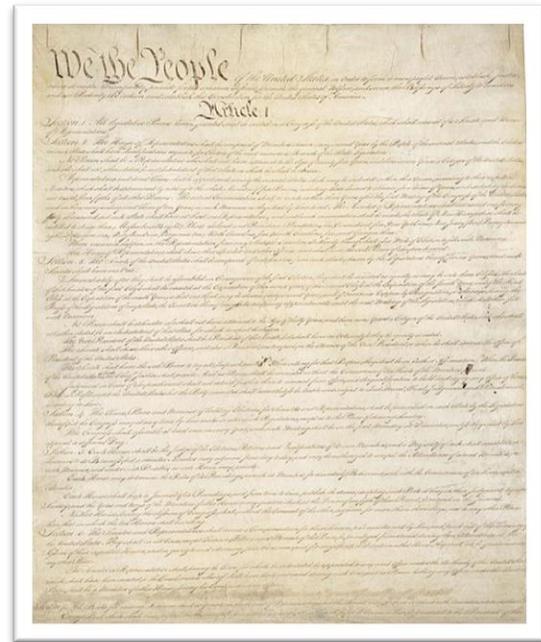
LORD CAMDEN
CHIEF JUSTICE (1718-1725)

It was Lord Camden who delivered one of the most celebrated cases in English History *Entick v. Carrington and Three Other King's Messengers*, 19 Howell's State Trials 1029. It was this case where Lord Camden made one of his most famous quotes:

"If it is law, it will be found in our books. If it not to be found there, it is not law."

This was the case that required a search warrant and probable cause before the government could take any action. By stacking the courts, it is a rare judge today who will defend the Constitution for the majority are former prosecutors. Obama made such a big deal out military tribunals used by Bush during the election. He put one terrorist on public trial in New York, and the jury found him innocent of about 80 charges, giving the government only one. After that fiasco, Obama decided like Bush that the American people cannot be trusted and

all future trials will be in a military tribunal where the people have no say. The soldier who gave files to WikiLeaks is being held in a cell all day, stripped naked, and facing death because he exposed how the government lies, not aided any enemy as required in the Constitution for treason expressed in Article III, §3.



UNITED STATES CONSTITUTION

"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

The Constitution no longer really has any force of law. Judges manipulate it to fit the desired outcome. Giving any information belonging to the government to the press is to be a crime. As they always said, **beware when the slave becomes king, for he will act far worse than the king ever did.** I fail to see why we have to give up everything. They vacuum in all emails and have computers scanning then searching for things they can prosecute. That is how they took down **Eliot Laurence Spitzer** former governor of the State of New York for paying hookers. Why were they searching? Oh ya! They check every dollar just in case it may have been going to Bin Laden. Oops! So it went to a hooker. Why that warrants prosecution precisely as was going on that inspired the people to rise up.

So you see, we have come full circle. The very abuse of power that inspired the Revolution has returned and it is far worse than the king ever managed to do. The slave has become king and we are in deep trouble. Thus, Lord Camden's words from **Entick** are worth reading. For they reflect more than anything, what we have truly lost.

"The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the

defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."



JAMES OTIS, SR. (1702–1778)

James Otis (1702–1778) was the lawyer who argued that case in Boston of which John Adams, after listening to his words, proclaimed gave birth to the Revolution. Those words are still commonly known today, yet remain lost as to their origin, Adams declared: ***"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."***

What were those words that moved men to give rise to a new form of government torn from the shackles of monarchy and to dream of equal justice and **LIBERTY**? He stated in part:

“A man’s house is his castle; and whilst 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 everything in their way; and whether they break through malice or revenge, no man, no court may inquire.”

James Otis was certainly perhaps the first voice to rise up against the practice of illegal seizures. Your right to privacy we once held so dear was set in motion by this man. The king’s desperate thirst for taxation came from a financial crisis not unlike that we are seeing today. Taxes were imposed and many New England merchants had resorted to various illegal activities in order to avoid the burdensome taxes imposed under the Acts of Trade. To collect its taxes, the king attempted to crack down on the violators giving broad powers just as the Patriot Act did after 911. These were called **Writs of Assistance**, and were general search warrants that enabled tax officials to do as they pleased. They could enter any business or home in the hope of finding vaguely defined contraband that would allow property to then be confiscated.

Otis accepted the case in 1761 from Boston merchants to represent them in a fight to

prevent the renewal of authority for the **Writs of Assistance**. The case was heard in February that year and Otis delivered a most eloquent five-hour argument in which he maintained that the **Writs** were a violation of the people’s **NATURAL RIGHTS** effectively to privacy and that any act of Parliament that abrogated those rights was null and void. It was there that the common term **“A man’s house is his castle”** was born. In attendance at court that day was a young attorney named John Adams. He was so moved, he would later attribute Otis’ speech to the birth of the very idea of a separation with England.

Otis lost the case just as judges today have a 99% conviction rate compared to 72% during the 1970s. Judges only rule in favor of government and no judge was about to declare the king’s Writs illegal when it is the king who pays their salary. Nevertheless, this case had thrust upon Otis the mantle of **LIBERTY**. The list of injustices continued to grow and in 1764, Otis became an increasing public figure speaking out for the rights of men. Just as that would be considered **LIBERAL** today, that was the same reaction back then. The government must always be right and to dare disagree is effectively treason.

James Otis is today largely an obscure figure who receives little credit for his role in creating the concept of human rights. He is certainly not considered among the ranks of the Founding Fathers, yet without his inspiration, it is highly debateable if the colonists would have just shut up and endured it like Americans do today. Yet James Otis is someone who perhaps needs to be rescued from history, lest his courage be forgotten.



OTIS BEATEN BY GOV'T AGENTS

The reason why Otis has been forgotten is because in 1769, when he was perhaps at the peak of his career and fame, he was beaten by a government tax official on the head with a cane severely. The battering was so bad, it caused brain damage and for the rest of his life, James Otis became insane, and the subject of jokes. So the man who truly inspired the American Revolution that in turn inspired the French, spent the remaining years of his life in ignominy, the subject of cruel jokes. Finally, in 1783, they claimed he was struck by lightning in May that year and died. The government tax official was never prosecuted.

Once again, history repeats for today, as back then, "*the liberty of every man [rests] in the hands of every petty officer.*" We should lament the obscurity of this man and we should not forget these principles that so many have died for over the course of so many generations. In light of the indignities of all who must suffer wholesale illegal searches today, we

should remember what James Otis once said about these practices that they were:

"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;"

I lost many friends in the 911 attack so many so I was denied by those modern petty officers the right to even know who died for several years. But that is no excuse to then rob the living of their **LIBERTY**. They did not die for the right of government to grab more power. There are some lines that cannot be crossed. This is why there are conspiracy theories and many ask if the US was not behind the 911 attack to get these arbitrary powers. Just like the banks who scared the hell out of Congress to get \$700 billion in TARP loans, the Executive have scared the hell out of the people to get these new powers turning back the clocks to the very age of tyranny at the beginning of the current 309.6 Year Major Wave on the Economic Confidence Model that peaks in 2032.

Today, they don't even have a general **Writ of Assistance**. Every petty officer can do as they like whenever they like. And if you resist, you will be imprisoned and perhaps beaten like James Otis. Everyone is not a potential terrorist. So why is everyone searched? Why those in government throughout record history are always out to oppress the people? That is the 64 million dollar question. Once they have power, they inevitably seek to expand that power regardless of the form of government they may claim to be. It simply seems that the maxim we all know, ABSOLUTE POWER CORRUPTS ABSOLUTELY, was forged with the blood of so many who resisted such power grabs. Unfortunately, monarchs are hardly to blame for they by no means possessed a monopoly over this maxim. It is true of republics as well.



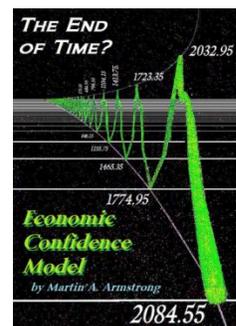
THE NEW WORLD ORDER



OME will argue that the old ways are dead, and we live in a world where we must give up all our rights to be safe. This is a very disturbing thought and it indeed vanquishes everything that made life worth living. First we had Marx take our **LIBERTY** arguing that government can be trusted with the affairs of men, not men. Now we have people like **Richard Bruce "Dick" Cheney** arrive at the same position, but from a different street claiming government must vacuum up every scrap of information on everyone to ensure we the people (government) remains safe. That is like saying we might as well commit suicide since we all dies anyway.

I for one prefer the old world order when rights existed, the police state was in fiction books like 1984, and if a kid got into some trouble, the police took him home to his father. In New Jersey, a couple of kids under the age of 12 had

a tube into which they put potatoes into to it. Using hair spray as fuel, they launched it as a projectile into a lake. The police showed up with a swat team and threw the two boys on the ground with guns drawn at their heads. After this treatment, will they grow up thinking there is *liberty and justice for all*? The old world is indeed dead. If Leonardo da Vinci were alive today, his picture of Mona Lisa might look different. This, unfortunately, is part of the cycle noted by so many as to the phases through which all civilizations must past. This is typical of the end times, not in a biblical sense, but in an economic-social perspective that will be dealt with in an upcoming report.





Finding Bin Laden going into this bottom of the **Economic Confidence Model** 2011.45 is actually typical. Even gold has declined after reaching almost the TOP of the Primary Channel. We are just in a period where there will be a shift in trend, and it is not always for the better. Yet with hindsight, these turning points at the bottom of the Wave represent shifts in general trends.

In 1985, it was the birth of the G5 at the **Plaza Accord**. The stock market blasted through the 1000 level on the Dow and gold began a rally. The dollar peaked and the rest of most major currencies reached historic lows, such as the British pound bottoming at \$1.03.

The next target, 1994.25 (April 1st, 1994), was the precise day of the low in the S&P 500 futures. In crude oil, the week of April 4th began the breakout rally that continued into December 1996. The peak in the Asian markets generally took place during the week of January 3rd, 1994. The Asian Currency Crisis took place in 1997 and while the Economic Confidence Model peaked July 20th, 1998 marking the precise day for the high in the US share market, Thailand share index bottomed the week of August 31, 1998 about 1 month later. Thus, these turning points are important even when

not operating precisely to the day for each market. 1994 was also the turning point when the **World Wide Web (WWW)** was born taking the internet global. The Mexican presidential candidate that year was assassinated (**March 23**) and the Rwandan genocide took place killing 800,000 for a 100 days starting **April 6th**. South Africa political reform also began at this time and the first interracial national election to place (**April 29**) where Nelson Mandela was elected president. This was the start of Clinton being accused of sexual harassment while governor of Arkansas, which began on **May 6th**. It was 1994 that marked the opening the rail tunnel between Britain and France and US troops invaded Haiti. A lot of things shifted in 1994.

The next bottom was 2002.85, November 6th, 2002. On **Nov. 3, 2002**, there was the **east-central Alaska earthquake** with a magnitude 7.9 damaging parts of the oil pipeline. On **Nov. 9–11**, there was a series of more than 70 tornadoes flattened homes and other buildings across 14 states similar to today. This was when gold broke out beginning a bullish trend in November 2002, although it had bottomed intraday in 1999 and traded largely sideways.

As we look ahead, this is more than just a market change. We are looking at political changes in the wind and the death of Bin Laden is typical of such turning points. In the weeks ahead we will be looking at specific market forecasts for the future.

The world we live in has changed and not for the better. We have the Arab Spring, the Sovereign Debt Crisis, and the shift in power from the West to the East. These are most certainly interesting times. It is not an occasion to despair. It is, nonetheless, an opportunity for those who can see the turning point and comprehend its true meaning.

U.S. Supreme Court

Boyd v. United States, 116 U.S. 616 (1886)

Boyd v. United States

Argued December 11, 14, 1886

Decided February 1, 1886

116 U.S. 616

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Syllabus

The 6th section of the act of June 22, 1874, entitled "An act to amend the customs revenue laws," &c., which section authorizes a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoice and papers, or else the allegations of the attorney to be taken as confessed: *Held*, to be unconstitutional and void a applied to suits for penalties or to establish a forfeiture of the party's goods, as being repugnant to the Fourth and Fifth Amendments of the Constitution.

Where proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the 12th section of said act: *Held*, That an order of the court made under said 5th section, requiring the claimants of the goods to produce a certain invoice in court for the inspection of the government attorney, and to be offered in evidence by him, was an unconstitutional exercise of authority, and that the inspection of the invoice by the attorney, and its admission in evidence, were erroneous and unconstitutional proceedings.

It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.

It is equivalent to a compulsory production of papers to make the nonproduction of them a confession of the allegations which it is pretended they will prove.

A proceeding to forfeit a person's goods for an offence against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case" within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself."

The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty or forfeiture, is equally within the prohibition of the Fifth Amendment.

Both amendments relate to the personal security of the citizen. They nearly run into, and mutually throw light upon, each other. When the thing forbidden in the Fifth Amendment, namely, compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an "unreasonable search and seizure" within the Fourth Amendment.

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Search and seizure of a man's private paper to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property is totally different from the search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law.

Constitutional provision for the security of person and property should be liberally construed.

This was an information against thirty-five cases of polished plate glass. The facts which make the case are stated in the opinion of the court. Judgment in favor of the United States. The claimants sued out this writ of error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an information filed by the District Attorney of the United States in the District Court for the Southern District of New York, in July, 1884, in a cause of seizure and forfeiture of property, against thirty-five cases of plate glass, seized by the collector as forfeited to the United States, under § 12 of the "Act to amend the customs revenue laws, and to repeal moiety laws," passed June 22, 1874, 18 Stat. 186.

It is declared by that section that any owner, importer, consignee, &c., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offence be fined in any sum not exceeding \$5,000 nor less than \$50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported

Page 116 U. S. 618

into the United States to the port of New York, subject to the payment of duties, and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause, it became important to show the quantity and value of the glass contained in twenty-nine cases previously imported. To do this, the district attorney offered in evidence an order made by the District Judge under § 5 of the same act of June 2, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice, and, when it was offered in evidence by the district attorney, they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void.

The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the thirty-five cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the Circuit Court, and the decision of that court is now here for review.

As the question raised upon the order for the production by the claimants of the invoice of the twenty-nine cases of glass, and the proceedings had thereon, is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen, we will set forth the order at large. After the title of the court and term, it reads as follows, to-wit:

"The United States of America"

"*against*"

"E. A. B., 1-35, Thirty-five Vases of Plate Glass."

"Whereas the attorney of the United States for the Southern

Page 116 U. S. 619

District of New York has filed in this court a written motion in the above-entitled action, showing that said action is a suit or proceeding other than criminal, arising under the customs revenue laws of the United States, and not for penalties, now pending undetermined in this court, and that, in his belief, a certain invoice or paper belonging to and under the control of the claimants herein will tend to prove certain allegations set forth in said written motion, hereto annexed, made by him on behalf of the United States in said action, to-wit, the invoice from the Union Plate Glass Company or its agents, covering the twenty-nine cases of plate glass marked G.H.B., imported from Liverpool, England into the port of New York in the vessel Baltic, and entered by E. A. Boyd & Sons at the office of the collector of customs of the port and collection district aforesaid on April 7th, 1884, on entry No. 47,108:"

"Now, therefore, by virtue of the power in the said court vested by section 5 of the act of June 22, 1874, entitled 'An act to amend the customs-revenue laws and to repeal moietyies,' it is ordered that a notice under the seal of this court, and signed by the clerk thereof, be issued to the claimants, requiring them to produce the invoice or paper aforesaid before this court in the courtrooms thereof in the United States post-office and courthouse building in the city of New York on October 16th, 1884, at eleven o'clock a.m., and thereafter at such other times as the court shall appoint, and that said United States attorney and his assistants and such persons as he shall designate shall be allowed before the court, and under its direction and in the presence of the attorneys for the claimants, if they shall attend, to make examination of said invoice or paper and to take copies thereof; but the claimants or their agents or attorneys shall have, subject to the order of the court, the custody of such invoice or paper, except pending such examination."

The 5th section of the act of June 22, 1874, under which this order was made, is in the following words, to-wit:

"In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any

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business book, invoice, or paper belonging to, or under the control of, the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper and setting forth the allegation which he expects to prove, and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served, and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant, or claimant, or his agent, may be present) of such entries in

said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

18 Stat. 187.

This section was passed in lieu of the 2d section of the act of March 2, 1867, entitled

"An act to regulate the Disposition of the Proceeds of Fines, Penalties, and forfeitures incurred under the Laws relating to the Customs and for other purposes,"

14 Stat. 547, which section of said last-mentioned statute authorized the district judge, on complaint and affidavit that any fraud on the revenue had been committed by any person interested or engaged in the importation of merchandise, to issue his warrant to the marshal to enter any premises where any invoices, books, or papers were deposited relating to such merchandise, and take possession of such books and papers and

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produce them before said judge, to be subject to his order, and allowed to be examined by the collector, and to be retained as long as the judge should deem necessary. This law, being in force at the time of the revision, was incorporated into § 3091, 3092, 3093 of the Revised Statutes.

The section last recited was passed in lieu of the the section of the act of March 3, 1863, entitled

"An act to prevent and punish Frauds upon the Revenue, to provide for the more certain and speedy Collection of Claims in Favor of the United States, and for other Purposes."

12 Stat. 737. The 7th section of this act was in substance the same as the 2d section of the act of 1867, except that the warrant was to be directed to the collector instead of the marshal. It was the first legislation of the kind that ever appeared on the statute books of the United States, and, as seen from its date, was adopted at a period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence.

The clauses of the Constitution to which it is contended that these laws are repugnant are the Fourth and Fifth Amendments. The Fourth declares,

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

The Fifth Article, amongst other things, declares that no person "shall be compelled in any criminal case to be a witness against himself."

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case as made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so, but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is

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tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of

actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and, to this extent, the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws -- is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the Constitution? or is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *consuetudo est optimus interpretis legum*, and another maxim that *contemporanea expositio est optima et fortissima in lege*. But we do not find any long usage or an contemporary construction of the Constitution which would justify any of the acts of Congress now under consideration. As before stated, the act of 1863 was the first act in this country, and, we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the

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search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued [[Footnote 1](#)] did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law, and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past, [[Footnote 2](#)] and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment. So also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law

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to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth v. Dana*, 2 Met. (Mass.) 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments.

But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and, until such duties are paid, has a right to keep them under observation, or to pursue and drag them from concealment, and, in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt, and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to

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recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The 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." [\[Footnote 3\]](#) 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. In the period from 1762, when the *North Briton* was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general

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warrants by the Secretary of State for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the *North Briton*, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libelous. By authority of the secretary's warrant, Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage, he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick v. Carrington and Three Other King's Messengers*, reported at length in 19 Howell's State Trials 1029. The action was trespass for interfering the plaintiff's dwelling house in November, 1762, and breaking open his desks, boxes, &c., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is

considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies, as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time. [[Footnote 4](#)]

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it a the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds

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of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment.

After describing the power claimed by the Secretary of State for issuing general search warrants and the manner in which they were executed, Lord Camden says:

"Such is the power, and, therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law."

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man, by common consent, gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass."

"Papers are the owner's goods and chattels; they are his

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dearest property, and are so far from enduring a seizure that they will hardly bear an inspection, and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal."

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176, and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description."

"If it should be said that the same law which has, with so much circumspection, guarded the case of stolen goods from mischief would likewise, in this case, protect the subject by adding proper checks would require proofs beforehand, would call up the servant to stand by and overlook, would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long

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since established by law if the power itself had been legal, and that the want of them is an undeniable argument against the legality of the thing."

Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add:

"Lastly, it is urged, as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law, such a proceeding was never heard of, and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust, and it would seem that search for evidence is disallowed upon the same principle. Then too, the innocent would be confounded with the guilty."

After a few further observations, his Lordship concluded thus:

"I have now taken notice of everything that has been urged upon the present point, and, upon the whole, we are all of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void. [\[Footnote 5\]](#) "

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The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.

Can we doubt that, when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

The views of the first Congress on the question of compelling

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a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The 15th section of that act introduced a great improvement in the law of procedure. The substance of it is found in § 724 of the Revised Statutes, and the section as originally enacted is as follows, to-wit:

"All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery*, and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit, and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default. [[Footnote 6](#)]"

The restriction of this proceeding to

"cases and under circumstances where they [the parties] might be compelled to produce the same [books or writings] by the ordinary rules of proceeding in chancery"

shows the wisdom of the Congress of 1789. The court of chancery had, for generations, been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime or to forfeit his property. [[Footnote 7](#)] And any compulsory discovery by extorting the party's oath, or compelling the production of his

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private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

It is proper to observe that, when the objectionable features of the acts of 1863 and 1867 were brought to the attention of Congress, it passed an act to obviate them. By the act of February 5, 1868, 15 Stat. 37, entitled "An act for the Protection in certain Cases of Persons making Disclosures as Parties, or testifying as Witnesses," the substance of which is incorporated in § 860 of the Revised Statutes, it was enacted

"that no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner

used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness."

This act abrogated and repealed the most objectionable part of the act of 1867 (which was then in force), and deprived the government officers of the convenient method afforded by it for getting evidence in suits of forfeiture, and this is probably the reason why the 5th section of the act of 1874 was afterwards passed. No doubt it was supposed that, in this new form, couched as it was in almost the language of the 15th section of the old judiciary act, except leaving out the restriction to cases in which the court of chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained, and that the law, though very speciously worded, is still obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth.

It has been thought by some respectable members of the profession that the two acts, that of 1868 and that of 1874, as being *in pari materia*, might be construed together so as to restrict

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the operation of the latter to cases other than those of forfeiture, and that such a construction of the two acts would obviate the necessity of declaring the act of 1874 unconstitutional. But as the act of 1874 was intended as a revisory act on the subject of revenue frauds and prosecutions therefor, and as it expressly repeals the 2d section of the act of 1867, but does not repeal the act of 1868, and expressly excepts criminal suits and proceedings, and does not except suits for penalties and forfeitures, it would hardly be admissible to consider the act of 1868 as having any influence over the construction of the act of 1874. For the purposes of this discussion, we must regard the 5th section of the latter act as independent of the act of 1868.

Reverting then to the peculiar phraseology of this act, and to the information in the present case which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the Fifth Amendment, and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that

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proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture, as declared in the 12th section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute, and it is declared, that the offender shall be fined not exceeding \$5,000 nor less than \$50, or be imprisoned not exceeding two years, or both, and, in addition to such fine, such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction, the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants -- that is, civil in form -- can he, by this device, take from the proceeding its criminal aspect

and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is, in substance and effect, a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey v. The United States*, ante, [116 U. S. 436](#), in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law are of this *quasi*-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling

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him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure -- and an unreasonable search and seizure -- within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives, but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the Circuit and District Courts sustaining the constitutionality of the law under consideration, as well as the prior laws of 1863 and 1867. The principal of these are *Stockwell v. United States*, 3 Clifford 284; *In re Platt and Boyd*, 7 Ben. 261; *United States v. Hughes*, 12 Blatchford 553; *United States v. Mason*, 6 Bissell 350; *United States v. Three Tons of Coal*, 6 Bissell 379; *United States v. Distillery No. Twenty-eight*, 6 Bissell 483. The first and leading case was that of *Stockwell v. United States*, decided by Mr. Justice Clifford and Judge Shepley, the law under discussion being that of 1867. Justice Clifford delivered the opinion, and relied principally upon the collection statutes, which authorized the seizure of goods liable to duty, as being a contemporaneous

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exposition of the amendments and as furnishing precedents of analogous laws to that complained of. As we have already considered the bearing of these laws on the subject of discussion, it is unnecessary to say anything more in relation to them. The learned justice seemed to think that the power to institute such searches and seizures as the act of 1867 authorized, was necessary to the efficient collection of the revenue, and that no greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing a search for the imported goods, and he concluded that, guarded as the new provision is, it is scarcely possible that the citizen can have any just ground of complaint. It seems to us that these considerations fail to meet the most serious objections to the validity of the law. The other cases followed that of *Stockwell v. United States* as a precedent, with more or less independent discussion of the subject. The case of *Platt and Boyd*, decided in the District Court for the Southern District of New York, was also under the act of 1867, and the opinion in that case is quite an elaborate one; but, of course, the previous decision of the Circuit Court in the *Stockwell* case had a governing influence on the District Court. The other cases referred to were under the 5th section of the act of 1874. The case of *United States v. Hughes* came up first before Judge Blatchford in the District court in 1875. 8 Ben. 29. It was an action of debt to recover a penalty under the customs act, and the judge held that the 5th section of the act of 1874, in its application to suits for penalties incurred before the passage of the act, was an *ex post facto* law, and therefore, as to them, was unconstitutional and void; but he granted an order *pro forma* to produce the books and

papers required in order that the objection might come up on the offer to give them in evidence. They were produced in obedience to the order, and offered in evidence by the district attorney, but were not admitted. The district attorney then served upon one of the defendants a subpoena *duces tecum* requiring him to produce the books and papers, and, this being declined, he moved for an order to compel him to produce them, but the Court refused to make such order. The books and

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papers referred to had been seized under the act of 1867, but were returned to the defendants under a stipulation to produce them on the trial. The defendants relied not only on the unconstitutionality of the laws, but on the act of 1868, before referred to, which prohibited evidence obtained from a party by a judicial proceeding from being used against him in any prosecution for a crime, penalty, or forfeiture. Judgment being rendered for the defendant, the case was carried to the Circuit Court by writ of error, and, in that court, Mr. Justice Hunt held that the act of 1868 referred only to personal testimony or discovery obtained from a party or witness, and not to books or papers wrested from him; and, as to the constitutionality of the law, he merely referred to the case of Stockwell, and the judgment of the District Court was reversed. In view of what has been already said, we think it unnecessary to make any special observations on this decision. In *United States v. Mason*, Judge Blodgett took the distinction that, in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the act of 1874 to testify or furnish evidence against themselves, because the suit is not against them, but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods, for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited, and to require such an owner to produce his private books and papers in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself. In the words of a great judge, "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." [\[Footnote 8\]](#)

The only remaining case decided in the United States courts

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to which we shall advert is that of *United States v. Distillery No. Twenty-eight*. In that case, Judge Gresham adds to the view of Judge Blodgett, in *United States v. Mason*, the further suggestion, that as in a proceeding *in rem* the owner is not a party, he might be compelled by a subpoena *duces tecum* to produce his books and papers like any other witness, and that the warrant or notice for search and seizure, under the act of 1874, does nothing more. But we cannot say that we are any better satisfied with this supposed solution of the difficulty. The assumption that the owner may be cited as a witness in a proceeding to forfeit his property seems to us gratuitous. It begs the question at issue. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him or to subject his property to forfeiture. *Queen v. Newell*, Parker 269; 1 Greenleaf on Evid., §§ 451-453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem* is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so after making claim and defence, and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence.

We find nothing in the decisions to change our views in relation to the principal question at issue.

We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that

The judgment of the Circuit Court should be reversed, and the cause remanded with directions to award a new trial.

[\[Footnote 1\]](#)

13 & 14 Car. 2, c. 11, § 5.

[\[Footnote 2\]](#)

12 Car. 2, c. 19; 13 & 14 Car. 2, c. 11; 6 & 7 W. & M., c.1; 6 Geo. 1, c. 21; 26 Geo. 3, c. 59; 29 Geo. 3, c. 68, § 153 &c.; and see the article "Excise, &c.," in Burn's Justice, and Williams' Justice, *passim.*, and Evans' Statutes, vol. 2, p. 221, sub-pages 176, 190, 225, 361, 431, 447.

[\[Footnote 3\]](#)

Cooley's Constitutional Limitations, 801-303 (5th ed. 368, 369). A very full and interesting account of this discussion will be found in the works of John Adams, vol. 2, Appendix A, pp 523-525; vol. 10, pp. 183, 233, 244. 256, &c., and in Quincy's Reports, pp. 469-482, and see *Paxton's Case*, do. 51-57, which was argued in November of the same year (1761). An elaborate history of the writs of assistance is given in the Appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

[\[Footnote 4\]](#)

See May's Constitutional History of England, vol. 3, (American ed., vol. 2) chap. 11; Broom's Constitutional Law 558; Cox's Institutions of the English Government 437.

[\[Footnote 5\]](#)

See further, as to searches and seizures, Story on the Constitution, §§ 1901, 1902, and notes; Cooley's Constitutional Limitations 299 (5th ed. 365); Sedgwick on Stat. and Const. Law, 2d Ed. 498; Wharton Com. on Amer.Law 560; *Robinson v. Richardson*, 13 Gray 454.

[\[Footnote 6\]](#)

Sixty-two years later, a similar act was passed in England, *viz.*, the act of 14 and 15 Vict., c. 99, § 6. See Pollock on Power of Courts to compel production of Documents 6.

[\[Footnote 7\]](#)

See Pollock on Production of Documents 27; 77 Law.Lib. 12[8].

[\[Footnote 8\]](#)

Vaughan, C.J., in *Sheppard v. Gosnold*, Vaugh. 159, 172, approved by Ch. Baron Parker in *Mitchell v. Torup*, Parker, 227, 286.

MR. JUSTICE MILLER, with whom was the CHIEF JUSTICE concurring:

I concur in the judgment of the court, reversing that of the Circuit Court, and in so much of the opinion of this court as

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holds the 5th section of the act of 1874 void as applicable to the present case.

I am of opinion that this is a criminal case within the meaning of that clause of the Fifth Amendment to the Constitution of the United States which declares that no person "shall be compelled in any criminal case to be a witness against himself."

And I am quite satisfied that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is, in effect, a subpoena *duces tecum*, and, though the penalty for the witness' failure to appear in court with the crinating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature taken for confessed and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself is, I think, quite clear.

But this being so, there is no reason why this court should assume that the action of the court below in requiring a party to produce certain papers as evidence on the trial authorizes an unreasonable search or seizure of the house, papers, or effects of that party.

There is, in fact, no search and no seizure authorized by the statute. No order can be made by the court under it which requires or permits anything more than service of notice on a party to the suit. That there may be no mistake as to the effect of the statute and the power to be exercised under it, I give the section here verbatim:

"SEC. 5. That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the Government, whenever, in his belief, any business book, invoice, or paper belonging to or under the control of the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper and setting forth the allegation which he expects to prove, and thereupon the court in which suit or proceeding is

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pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof or otherwise serving the same as original notices of suit in the same court are served, and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them except pending their examination in court as aforesaid."

18 Stat. 187.

Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court, and, when produced, the United States attorney is permitted, under the direction of the court, to make examination in presence of the claimant, and may offer in evidence such entries in the books, invoices, or papers as relate to the issue. The act is careful to say that

"the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

The Fourth Amendment says:

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

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The things here forbidden are two -- search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.

But what search does this statute authorize? If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses, is a search, then a change has taken place in the meaning of words which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses language carefully framed to forbid any seizure under it, as I have already pointed out.

While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence, it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants because they authorized searches in any place for anything.

This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.

I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party who has that evidence in his possession can be held to authorize an unreasonable search or seizure when no seizure is authorized or permitted by the statute.

I am requested to say that the CHIEF JUSTICE concurs in this opinion.