The Early Days of the Right to Privacy

Even before the United States was an independent country, courts were protecting against government intrusions.

BY THOMAS J. SHAW

"Life must be lived forward but can only be understood backwards."

So said the philosopher Kierkegaard, in a phrase that aptly describes the "why" of my love of studying history. Love of history and love of the law led me to author a trilogy of books on the history of law during wartime. These books describe the legal issues that arose preceding, during, and after the three major global wars America has been involved in.

They also describe the lawyers and judges involved with these issues and the statutes and trials that shaped the law during wartime, which went on to shape the law in peacetime. Many of these issues and how they were dealt with continue to inform the thinking of today's lawyers and judges.

In this new column launching in this issue, I'll describe what happened in each war by highlighting one out of hundreds of legal issues. Here, I describe what happened just before the American Revolutionary War with the legal issue of privacy.

THE WEAKENING OF THE WRIT

Trials held during this period in both America and Great Britain helped to clarify the early rights to privacy. These judicial decisions, and many other events leading up to and during this war, contributed to the framing of the U.S. Constitution and the Bill of Rights, which still act as the foundation of American privacy law. Two cases from the years leading up to the war stand out as early influences on the right to privacy against governmental intrusions.

The first was *Lechmere*, which took place before the superior court in Massachusetts in 1761. A British statute from the time of Charles II a century earlier allowed customs officials, in the search for imported goods for which customs duties hadn't been paid, to:

> "enter, and go into any house, shop, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other package, there to seize, and from thence to bring, any kind of goods or merchandize whatsoever."

This authority required the customs officer to operate under a writ of assistance. Such a writ was a general power to enter any location to search for goods, without specification of the location, the goods to be searched, or a limit on the duration. The writs were held for life and could be used against anyone. Because the writs had to be renewed upon the death of the monarch (George II had recently died), several merchants in Boston tried to oppose the re-granting of these writs to local customs officials, including Thomas Lechmere.

Their counsel argued that the writs were unconstitutional under English law, but ultimately the court ruled the writs were valid. The reaction to the *Lechmere* decision led the Massachusetts assembly to pass a statute against general writs of assistance. The British-appointed colonial governor, however, vetoed this law.

The British solicitor general and attorney general were then asked to find a legal basis for using these general writs in America, but they could not. Instead, the British decided to provide legal certainty by enacting a clause within the Townshend Act of 1766. This provision stated:

> "it is doubted whether such officers can legally enter houses and other places on land, to search for and seize goods… To obviate which doubts for the future… be it enacted… such writs of assistance, to authorize and impower the officers of his Majesty's customs to enter and go into any house, warehouse, shop, cellar, or other place, in the British colonies or plantations in America, to search for

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and seize prohibited or uncustomed goods... shall and may be granted by the said superior or supreme court of justice having jurisdiction within such colony or plantation."

Despite now having the power of law, applications for such general writs were generally disfavored and not successfully granted by courts within the colonies over the next several years. The Townshend Act was to become irrelevant; it was no longer applicable in America after independence was declared 10 years later. Subsequent to the war, the Fourth Amendment to the U.S. Constitution specifically targeted these general writs of assistance.

The Fourth Amendment states:

> "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."

TODAY'S PRIVATE RECORDS

The British case *Entick*, a few years after *Lechmere*, again dealt with the right of privacy. In this case, officials in England operating under a warrant broke into the home of John Entick in search of evidence to use against him in a case of seditious libel.

Entick was being prosecuted for publishing allegedly seditious writings against the government. The officials, led by the chief messenger of the king, Nathan Carrington, entered Entick's house, broke open locked containers, and read and took away private papers.

The court summarized the actions of the defendants:

> "with force and arms broke and entered the dwelling-house of the plaintiff... and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, etc. thereto affixed, and broke open the boxes, chests, drawers, etc. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, etc. in his dwelling-house, and all the boxes, etc. so broke open, and read over, pryed into, and examined all the private papers, books, etc. of the plaintiff there found, whereby the secret affairs, etc. of the plaintiff became wrongfully discovered and made public."

Entick later brought suit against Carrington and the three others who entered his home. The plaintiff's counsel likened their actions to being "worse than the Spanish Inquisition; for ranksacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts."

The court, after finding the warrant invalid for technical reasons, held:

> "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have."

This case was also to be influential in the subsequent drafting of the Fourth Amendment.

Later courts have referred back to these two foundational cases. For example, in *Boyd v. U.S.* in 1886, the U.S. Supreme Court quoted John Adams stating, of *Lechmere*, "Then and there the child Independence was born." Referring to *Entick*, the court said, "The principles laid down in this opinion affect the very essence of constitutional liberty and security."

In 2014, in *Riley v. California*, the Supreme Court, quoting *Boyd*, noted that mobile phones hold "the privacies of life." The court ruled on what the government must do before invading these privacies:

> "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."

Stretching back to the days preceding the war that led to the founding of this new republic, American and British courts were addressing legal issues that would continue to guide the actions and decisions of American lawyers and judges today, including the emerging right to privacy. This would continue in future wars involving the soon-to-be founded United States.

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