

*Revisiting Entick v Carrington:
Seditious Libel and State
Security Laws in
Eighteenth-Century England*

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I. INTRODUCTION

LIKE MANY GREAT cases, *Entick v Carrington* & three other *Messengers in ordinary to the King* (hereinafter *Entick v Carrington*), which is 250 years old this year, repays analysis from a variety of different perspectives: the protection of property, restriction of prerogative power, the emerging recognition of press freedom, the law of search and seizure and even, with justification, the evolving conception of the rule of law. Rather than adopting any of these perspectives, this chapter examines the case from the perspective of state security laws in the eighteenth century. It does so by locating the case in the context of the law of seditious libel, its function, development and practical operation. At the time of *Entick v Carrington*, the law of seditious libel was the principal tool available to the state not only to punish but also to deter and disrupt the dissemination of written material regarded as subversive of state institutions or of the King and his ministry.

Entick v Carrington is placed in this context in two principal ways. First, the chapter explains the importance of the law of seditious libel in the eighteenth century and the way in which it was developed by the courts, both in its substantive aspect and in relation to the powers of enforcement enjoyed by Secretaries of State, as a conscious judicial policy to aid the government in maintaining the security of the government and the state. Adopting this perspective sheds considerable light on the judgment of the Common Pleas

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in *Entick v Carrington*, embodied in the famous speech of Lord Camden CJ, by showing the degree to which the court departed from previous judicial policy and practice in interpreting the laws relating to seditious libel in a manner that enhanced their effectiveness for government purposes. This perspective also allows us to appreciate that the judgment of the court in *Entick v Carrington* was more limited in its legal consequences than has sometimes been thought. In particular, this chapter challenges the influential account of the case given by Sir William Holdsworth, which presented it as having decided that the Secretaries of State did not enjoy any power to arrest or commit for seditious libel, on the basis of which conclusion Holdsworth said the case stood alongside the greatest advances in the protection of individual liberty, such as the abolition of the Star Chamber and the Habeas Corpus Act 1679. In fact, as will be shown, *Entick v Carrington* actually affirmed the power of the Secretaries of State to arrest and commit for seditious libel. But in exposing how courts (and in particular the Court of King's Bench) had, over time, made substantial inroads into individual liberty, in cases that Lord Camden said he was nonetheless bound to obey, Lord Camden's judgment can be seen not only as a departure from previous judicial policy but also as a radical challenge to the legitimacy of existing (and no less binding) authority. Lord Camden justified his approach by saying that the public deserved that the court examine all the issues raised by the case to their foundations. In doing so, he explained to the public how their liberties had gradually been eroded by the courts without parliamentary approval.

The second way that this chapter places *Entick v Carrington* in the context of the law of seditious libel is by examining the manner in which the law of seditious libel was *actually used* by the government, through the adjectival powers of arrest, search and seizure. It does so by setting the case in its immediate factual context by explaining its relation to the action taken by the government against two anti-government periodicals, *The Monitor*, or *The British Freeholder* (hereinafter *The Monitor*), which was part-authored by John Entick, and *The North Briton*, the mouthpiece of John Wilkes. As will be explained, the action taken against the two publications was inextricably linked. Examining the action taken against these periodicals requires us to look beyond the narrow facts of Entick's case, and it provides a vivid insight into how the law of seditious libel was utilised by the government against its critics and the reality of the power afforded by the law.

These two perspectives converge in the examination of a series of celebrated legal proceedings which arose from the action taken against the publications, of which *Entick v Carrington* is but one. This immediate legal context, also explored in this chapter, is particularly significant because the timing of the litigation meant that Entick's case against the Messengers fell to be determined after most of the other claims had been tried and because Lord Camden, then Chief Justice Pratt, himself presided over most of the trials. It will be explained how these cases were influential in terms of the

way in which Lord Camden approached and decided *Entick v Carrington*, perhaps decisively so. For instance, it sheds light on Lord Camden's decision to rule on all the points of importance to the public, despite these going far beyond what was necessary to decide the case; and we are able to appreciate how Lord Camden was able so keenly to dissect the defence's arguments in *Entick v Carrington* by exposing the true implications of the claimed power of search and seizure of property, the extent to which such power was open to abuse by the government and the absence of protections for the individual.

Whether or not the reader ultimately agrees with the author that a sound understanding of Lord Camden's judgment in *Entick v Carrington* and its significance to our legal history requires an understanding of the context of the law of seditious libel, both its development and its use, it is hoped that it will at least have been shown that *Entick v Carrington* merits recognition as a case concerning state security powers in which the judiciary broke with the deferential and government-minded approach that had characterised the development of the law in that area.

II. SEDITIOUS LIBEL AND STATE SECURITY LAWS IN THE EIGHTEENTH CENTURY

A. The Law of Seditious Libel

In the first half of the eighteenth century, the law of seditious libel had become the most effective, or perhaps more accurately the least ineffective, tool at the government's disposal for controlling what it perceived to be threats to the realm from the dissemination of subversive writings.

For most of the seventeenth century, the government had had the benefit of prerogative and later statutory licensing laws that enabled prosecutions to be brought against the authors of critical material. Unlicensed publication was the essence of the crime under these laws and therefore there was no need to be troubled by whether seditious meaning was present or whether the facts alleged were true. But the licensing laws expired in 1695 and were not renewed.

The two other laws directed at the security of the state that were available for controlling seditious writing were the law of treason and the law of *Scandalum Magnatum*. Both were medieval in origin and had been the principal means for dealing with subversion before the sixteenth century.¹ But, for different reasons, neither provided a useful means of controlling subversive writing at the time of *Entick v Carrington*.

¹ RB Manning, 'The Origins of the Doctrine of Sedition' (1980) 12(2) *Albion* 99, 111.

The law of treason was based on the medieval statute 25 Edward III (1352), which rendered it treasonable to imagine or compass the death of the King or to aid his enemies. Whilst an overt act was required, extensions of the law made clear that this could include writing.² The law of treason was, however, blunt and unwieldy. Since it carried the penalty of death, it was far too heavy-handed to charge save in the most extreme cases. Moreover, the chances of embarrassing and problematic acquittals had been made more likely by the Treason Trials Act of 1696, which had granted rights to defendants in treason cases in particular permitting them defence counsel at trial.³ The law of treason was not therefore an effective means of curbing the forms of anti-government literature that had previously been capable of control under the licensing laws.

The law of *Scandalum Magnatum* was contained in a series of medieval statutes that criminalised the spreading of ‘false news’ that could lead to discord between the King and his subjects or lead to the overthrow of the Crown.⁴ The two main difficulties with this law were, first, that it could only be used in the case of ‘news’ and, second and far more significantly, that it was a defence to show that the news was true. This later defect raised the inevitability of trials of the accuracy of criticism levelled against the King or his Ministers or other great figures of state and even the prospect of acquittals by mischievous juries, none of which could be contemplated and which therefore rendered the laws effectively redundant as a state security power.

The ability to prosecute for seditious libel thus became by a process of default the main legal tool available to the government for preventing the dissemination of subversive material or subversive utterances. Seditious libel was centrally concerned with prohibiting dissent of government that challenged its authority, whether expressly or impliedly. It reflected the established and prevailing ideology that the ruler was ‘regarded as the superior of the subject as being by the nature of his position presumably wise and good’. As such, any dissent, however politely expressed, was to be viewed as subversive and dangerous.⁵

² Although seditious utterances and prophesies had been prosecuted under the medieval law, the Act of Treason 1534 (26 Hen 8 c 13) expressly extended the law to slanders and libels and the Act against Prophesies 1542 (33 Hen 8 c 14) did likewise for prophesies. See, eg, *R v Stayley* (1678) 6 St Tr 1501 and also Manning (n 1) 103–06.

³ (7&8 Will 3 c 3). See P Hamburger, ‘The Development of the Law of Seditious Libel and the Control of the Press’ (1985) 37 *Stanford Law Review* 661, 717–23, who argues that this put an end to the government’s flirtation with the idea of using the law of treason to fill the gap left by the demise of the licensing laws at a time when the Jacobite threat was substantial, something evidenced, Hamburger argues, by the successful ‘test case’ brought against William Anderton, a Jacobite writer, in 1693: *R v William Anderton* (1693) 12 St Tr 1245. On the act, see JH Langbein, *The Origins of Adversary Criminal Trial* (Oxford, Oxford University Press, 2003).

⁴ 3 Edw 1 c 34 (1275); 2 Ric 1 c 5 (1378); 12 Ric 2 c 11 (1388); 1&2 P & M c 3 (1554); 1 Eliz 1 c 6 (1559).

⁵ JF Stephen, *History of the Criminal Law of England*, (Macmillan & Co, 1883) ch XXIV 299–300; Sir WS Holdsworth, *A History of English Law* (London, Methuen & Co Ltd, 1924) vol VIII, 338; vol IV, 672–73.

The law of seditious libel is customarily traced back to the case of Lewis Pickering in the Star Chamber.⁶ Pickering had authored a derogatory rhyme about Archbishop John Whitgift which he provided to a friend, who copied it and had it sung at the Archbishop's funeral. The Star Chamber accepted that a libel against a magistrate or public person was 'a greater offence' than against a private person, for there could be no greater scandal of government than the imputation that the King had appointed corrupt or wicked men to govern his subjects. It was also said that whereas a man who finds a private libel may burn it, if a libel of a public official is found, it must be reported to a magistrate. Despite these distinctions between libel and seditious libel, the law of seditious libel was not articulated as a separate doctrine. The greater doctrinal innovations—themselves extraordinary—made in *Pickering's case* were the findings that: (1) an action for libel would lie irrespective of the truth of the words used; (2) it would lie even if the person defamed were dead (as Archbishop Whitgift obviously was); and (3) it did not matter that Pickering had not printed and distributed the libel—publication was established by mere provision to a third party. Each of these doctrinal innovations had obvious and deliberate advantages for the use of libel by the government as a means of controlling the dissemination of subversive writings: first, the prospect of trials of the truth of criticisms of public officers was negated; second, it was recognised that the interests of the state and the government were perpetual; and, third, critics of the government could not shelter behind the absence of publication or ferment their discontent in private.

The traditional account of the law of seditious libel found in Stephen, in Holdsworth and in Siebert is that seditious libel was thereafter widely used by the government and the common law's acceptance of Star Chamber doctrine reflected the acceptance of the prevailing political ideology that to criticise government, however respectfully, was a crime against the state.⁷ Philip Hamburger has, however, challenged the view that seditious libel was widely used before the eighteenth century, arguing that the availability of the licensing laws meant that seditious libel was only resorted to when

⁶ Reported by Edward Coke, who argued it as Attorney General, as the *Case de Libellis Famosis* (1605) 5 Coke 125; 77 ER 250.

⁷ Stephen (n 5) 313; Holdsworth (n 5) vol VIII, 340; F Siebert, *Freedom of the Press in England 1476–1776* (Champaign, IL, University of Illinois Press, 1952) 269. The principal reported cases in the seventeenth century were: *R v Dover, Brewster & Brooks* (1663) 11 St Tr 540 (a printer, bookseller and bookbinder prosecuted for publishing speeches of the regicides and a book called the *Phoenix*); *R v Pym* (1664) 1 Sid 110; 82 ER 1068 (a handwritten message to a parson asking him to bewail failings of the magistrate); *R v Barnardiston* (1684) 9 St Tr 1333 (a fine of £10,000 for critical opinion in a letter to a friend); *R v Baxter* (1685) 11 St Tr 494 (a theological book said to criticise the English bishops); *R v Eades* (1686) 2 Show 468; 89 ER 1046 (where the defendant pleaded guilty to verbally commending a book containing seditious libels); the *Seven Bishops' Case* (1688) 12 St Tr 183 (bishops prosecuted for challenging the King's right to suspend the laws in declaring toleration for Roman Catholics).

such laws were not available.⁸ He contends that the courts, particularly the King's Bench under Holt LCJ, in fact made significant doctrinal innovations in the early eighteenth century reflecting the new importance of seditious libel as a state security power after the demise of the licensing laws. As he states, 'The bench appears to have understood that the seventeenth century law, as inherited from Coke, would have to be modified if it were to suit its eighteenth century function' as the chief means of prosecuting the printed press.⁹ Several cases in this period did later come to be regarded as having significantly developed the law, although the degree to which they did so is a matter of debate.¹⁰ But from our perspective, the point is not of great consequence because there is no doubt that the law of libel was articulated and set out in a series of cases in a manner that was expressly linked to the judiciary's perceived need to ensure the law was suitable for the government as a state security tool given Parliament's refusal to renew the licensing laws. Furthermore, this pro-government approach had long been a facet of the law relating to seditious libel, as reflected in *Pickeringe's case* itself.

The most significant case in this period was *R v Bear* in 1702. Giving a special verdict, the jury acquitted Bear of all but writing down and collecting libellous poems. His counsel sought an arrest of judgment before the King's Bench on the basis that what had been found was folly rather than a crime. The court did not agree. Holt LCJ held that the writing-down and collecting of libels was 'highly criminal' and of 'dangerous consequence to the Government' because they could subsequently be published; even if the collector had no ill intent, they might 'fall into such hands as might be injurious to the Government; therefore men ought not to be allowed to have such evil instruments in his keeping'.¹¹ The reasoning was expressly based on policy and the need for the law of seditious libel to be an effective tool in protecting the government from abuse that might incite rebellion. This is shown with particular clarity in an unreported record of the case. Holt LCJ, seeking to address the objection that the judgment was not based on legal authority, stated:

[T]his Opinion that We now give is no Novelty in the World. It is founded upon the principle of the preservation of All Government, and Safety of all Civil

⁸ Hamburger contends that resort was only had to seditious libel actions proper when the licensing acts could not be relied upon, such as in periods when they were not in effect or in the absence of publication: Hamburger (n 3) 697–99 and Appendix.

⁹ *ibid* 725.

¹⁰ The degree to which the cases departed from rather than restated previously accepted law is disputed. *cf* *Stephen* (n 5) 316–43; *Hamburger* (n 3) 725–58.

¹¹ *R v Bear* (1702) Holt KB 422, 423; 90 ER 1132, (1702) Carthew 407; 90 ER 836; and (1698) 2 Salkeld 417; 91 ER 363. This had been prefigured in *R v Paine* (1696) 5 Modern 163; 87 ER 584, in which the court held the defendant guilty on a special verdict for having transcribed an epitaph on Queen Mary and fetched it to be read aloud with a friend. It was not clear from the report whether the court had rested its judgment on publication by reading aloud or the mere act of writing-down.

Society: And if it Should be no Crime to Write Libels, the Government & Magistrates, must be Exposed to the Malice & discontent of Disaffected persons.¹²

In *Entick v Carrington*, Lord Camden certainly regarded *R v Bear* as having been a significant case altering previous doctrine.¹³ He saw the justification for *Bear's case* in the Star Chamber principle¹⁴ that obliged individuals in possession of seditious libels to deliver them to a magistrate, reversing previous authority that held that this was only punishable in the Star Chamber¹⁵—which had been abolished in 1641. The case was undoubtedly informed by Star Chamber practice¹⁶ and probably owed something to this principle, but since writing down appeared still to be required if publication was not alleged, rather than mere collection alone, the explanation is incomplete.

The development of seditious libel as a separate law, based on broad policy concerns about the need to empower the government to prevent dangerous dissent, is also apparent from *R v Tutchin*. The defendant stood accused of seditious libel for alleging corruption in the army and navy, in a paper called 'The Observator'. Holt LCJ expressed the opinion that a seditious libel could be committed against the government in general and not just individual public officers.¹⁷ The reasons for this referred directly to the idea that the safety and wellbeing of a country depended upon the government being above reproach: 'If men should not be called to account for possessing the people with an ill opinion of the Government, no Government

¹² The unreported record is in Hardwick Papers BL Add MS 35981 f14 (with quote at f22). By reference to this report, Hamburger argues that there was no plausible precedent for the case: 'Holt deliberately allowed himself to depart from precedent in *Bear's case* because the law of libel of magistrates had always been designed to protect the government (albeit solely by protecting individual officials from defamation); and now that it was the only effective law against seditious libels of pamphlets, the reason for that law seemed all the more clear. It was the law for protecting the government from seditious writings, and that purpose, rather than the more precise requirements of precedent, shaped Holt's decision' (Hamburger (n 3) 741, also 731). In my view, Hamburger's view of Holt's methodology draws support from *Ashby v White* in which Holt LCJ famously stated that: 'the law consists ... not in particular instances and precedents, but on the reason of the law': (1703) 2 Ld Raym 938, 957; 92 ER 126, 138. The contrasting legal philosophy of Lord Camden in *Entick v Carrington* is clear: 'If it is law, it will be found in our books. If it is not to be found there, it is not law.' *Entick v Carrington* (1765) 19 St Tr 1029, 1066.

¹³ *ibid* 1072.

¹⁴ *Case de Libellis Famosis* (n 6); *Lake v Hatton* (1691) Hobart 252; 80 ER 398.

¹⁵ In *Anonymus* (1669) 1 Ventris 31; 86 ER 22.

¹⁶ Holt referred expressly to cases in the Star Chamber.

¹⁷ This was not entirely novel and was certainly a logical extension of existing law. In *R v Dover, Brewster & Brooks* (1663) 6 St Tr 564, Hyde LCJ had stated to the jury that publishing a reproach of King and government is a libel and in the *Seven Bishops' Case* (n 7) two judges, Wright LCJ and Allibone J, had accepted the government's argument that anything that shall disturb the government is a seditious libel, although this case was not regarded as a secure authority because of the extraordinary and political nature of the case: see *The Case of John Wilkes Esq, on a Habeas Corpus, Common Pleas* ('*Wilkes' habeas case*') (1763) 19 St Tr 981, 990 (Lord Camden); Holdsworth (n 5) vol VII, 344; Stephen (n 5) vol II, 315; Hamburger (n 3) 699.

can subsist; for it is very necessary for every Government, that the people should have a good opinion of it.’ No government, he said, can be safe unless expression of ill opinion against it is punishable.¹⁸

The preparedness of the courts to ensure that seditious libel was effective for use to curb dissent also underpinned the view in the judiciary as to the respective role of the judge and jury in relation to judging seditious meaning and intention. The point took on significance only after the demise of the Star Chamber, which operated without a jury, and after the ending of the licensing laws, under which seditious meaning and intention had been irrelevant. Holt LCJ took the view that the question whether the words were or were not seditious, from which malicious intent was inferred, was a matter of law for the trial judge rather than for the jury.¹⁹ The consequence was that whilst juries might be asked to determine the meaning of words used and any question of irony, they did not determine whether the words were seditious or malicious. The principal issues determined by the jury were authorship or publication and juries were therefore required to return a verdict of guilty even if they thought the writing harmless. But had seditious meaning and intent been an open matter for the jury, this would have meant that what constituted acceptable dissent of the government would have been left to the vagaries of juries, which, as the courts recognised, would have greatly reduced the utility of the law of seditious libel to the government as well as greatly weakening the courts’ own power over state security.

The courts followed Holt. Lord Mansfield (LCJ from November 1756 to 1788) is said to have regarded it as necessary ‘to avoid anarchy’ for the issue of sedition not to be put to the jury.²⁰ In *Dean of St Asaph’s Case, R v Shipley*, Lord Mansfield stated: ‘The licentiousness of the press is a Pandora’s

¹⁸ *R v Tutchin* (1704) Holt 424; 90 ER 1133.

¹⁹ *R v Bear*, accepting that the power to judge the effect of a man’s words must be left to the law and for this reason must be set out in the indictment—the alternative, it was contended, ‘would be of very dangerous consequence’; see also *R v Drake* (unreported), for which, see discussion in Hamburger (n 3) 729, 736–38. Hamburger argues convincingly that seditious intention and malice were rebuttable in the seventeenth century: Hamburger (n 3) 703–08; cf Holdsworth (n 5) 842–45. James Oldham has pointed out that Hamburger’s articulation of the law in the seventeenth century is supported by Helmholz’s work in the civil context: RH Helmholz, ‘Civil Trials and the Limits of Responsible Speech’ in RH Helmholz and TA Green (eds), *Juries, Libel, and Justice: The Role of English Juries in Seventeenth and Eighteenth Century Trials for Libel and Slander* (Los Angeles, University of California Press, 1984) 24–25; James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill, University of North Carolina Press, 2004) 215.

²⁰ Oldham (n 19) 219 and 221. NS Poser, *Lord Mansfield—Justice in the Age of Reason* (Quebec, McGill-Queen’s University Press, 2013) 244 states that: ‘As a prosecutor and then as a judge, Mansfield believed that vigorous enforcement of the seditious libel laws as a way of supporting the government and arresting what he saw as a decline in the moral condition of the country’. Heward criticised Mansfield’s contention that he was merely following established authority as having been cover for his judicial preference that it would be ‘safer to leave things ... in the hands of the judges’, as the question was one of judicial practice and not the subject of binding authority: E Heward, *Lord Mansfield* (Chichester, Barry Rose Law Publishers Ltd, 1979) (2nd impression, 1998), 133.

box, the source of every evil ... What is contended for? That the law shall be in every particular cause what any twelve men, who shall happen to be the jury, shall be included to think ... subject to no review, and subject to no control, and under all the prejudices of the popular cry of the day.²¹ The point, however, was not conclusively determined and defence counsel, including Charles Pratt before his elevation to the bench, continued to invite juries to acquit if seditious intention was not proved—and just occasionally the jury would do so.²²

B. Powers of Committal, Arrest, Search and Seizure

The preparedness of the courts to develop the law to provide an effective tool for the government to use against the dissemination of subversive writings can also be seen in the judiciary's approach to the powers of the Secretaries of State to arrest, seize and commit for seditious libel.

During the eighteenth century, the office of Secretary of State was shared between two of the King's Ministers. Foreign affairs were divided between them on a geographical basis, whereas domestic affairs were shared ad hoc. Although their domestic duties were not numerous, it has been said that a Secretary of State 'had the pulse of the people of this country in his hand', which if 'quicken'd to an unusual degree' would prompt him to take measures to restore tranquility.²³ By the eighteenth century, it had become established practice for Secretaries of State to issue warrants for the arrest of persons suspected of certain crimes against the state, namely, treason, coming out of France without leave and seditious libel, and for their committal to prison pending trial, although issuing such warrants was by no means

²¹ (1783–84) 21 St Tr 847, 1040.

²² *R v Owen* (1752) 18 St Tr 1203, in which defence counsel were Barnard Ford and Charles Pratt. This was a position Camden 'maintained ... throughout his life' and he argued it in the House of Lords during the passing of Fox's Libel Act 1792: Holdsworth (n 5) vol X, 681. In 1764 Serjeant Glynn at the trial of John Williams for republishing No 45 of *The North Briton* is said to have asserted that the jury had the full right to determine whether the defendant had published with intent. Lord Mansfield, presiding, interjected that: 'If Serjeant Glynn asserted that doctrine again, he [Lord Mansfield] would take the opinion of the twelve judges upon it.' Not wanting to lose the point, which he was sure to do, Glynn didn't press it. The jury returned the verdict of 'Guilty of publishing the North Briton 45', but Mansfield simply took this to be a verdict of guilty and Williams was put in the pillory. (The case is not reported, but James Oldham has identified an account in J Almon, *Biographical, Literary, and Political Anecdotes, of Several of the Most Eminent Persons of the Present Age*, 3 vols (London, TN Longman and LB Seeley, 1797) vol 1, 236–37 and in Lord Mansfield's manuscripts: Oldham (n 19) 224). Despite this, 10,000 people gathered to cheer Williams, shouting 'Truth in the Pillory', 'Wilkes and liberty!' (etc) and beheaded an effigy of Lord Bute: AH Cash, *John Wilkes—The Scandalous Father of Civil Liberty* (New Haven, Yale University Press, 2006) 179. Parliament eventually changed the law by Fox's Libel Act 1792.

²³ *Calendar of Home Office Papers, 1760–1775* (hereinafter *Cal HOP*) I, preface iv, Joseph Redington, 19 February 1878.

a regular part of their activities.²⁴ Since the days of the Star Chamber, the Secretaries of State had exercised responsibility for arrest and punishment of the authors, printers and publishers of seditious libels. Under the Licensing Act 1662 14 Car II, c 33, the Secretaries of State were conferred express statutory power of search and seizure. Having probable reasons to suspect an offence, they were empowered to instruct the King's Messengers, taking a constable with them, to search premises and seize property 'for the better discovering of printers in corners without licence' (s 15).²⁵

The process of issuing warrants against suspects worked in the following way. A warrant signed by a Secretary of State would be addressed to one or more of his Majesty's Messengers, who were usually acquainted with the printing shops and persons involved in the production of the seditious publication; indeed, the Messengers would often have been responsible for the intelligence on which the warrant was based. The Messenger was instructed to take named persons into custody (or in the case of 'general warrant' simply the authors, printers and distributors of a named publication) and bring them before the Secretary of State for examination together with their books and papers. The Secretary of State might also issue a warrant after, and occasionally before, examination directing a gaoler to commit the individual to prison. But practice varied, as did the regularity of the use of such warrants. From time to time, Secretaries of State had been subject to criticism for abusing the system and on occasion it was claimed that there was no authority for such powers as representing an illegitimate and unlawful interference with individual liberty.²⁶

The latter argument had been advanced before the courts in *R v Kendal & Row*²⁷ in 1700 on a return to a writ of habeas corpus by two prisoners committed to Newgate Prison under the warrant of Secretary of State William Trumbull. The prisoners were alleged to have aided the escape of Sir James Montgomery, who was himself being held by a Messenger under warrant of commitment for treason. Several exceptions were made to the return,

²⁴ MA Thomson, *The Secretaries of State 1681–1782* (Oxford, Clarendon, 1932) 112–13.

²⁵ See Lord Camden's discussion in *Entick v Carrington* (n 12) 1052 and 1069–70. On the Secretaries of State's role in clamping down on seditious writing and the use of warrants, see generally Thomson (n 24) 114–26.

²⁶ Sir John Trenchard, Secretary of State for the Northern Department in 1693–95, who had been accustomed to sending Messengers with blank warrants for names to be filled in, came in for criticism of both sorts: Thomson (n 24) 116–18; Sir J Trenchard, *History of Parliament Online*, accessed 14 February 2014. In 1731–32 the *Gentleman's Magazine* (GM) carried a lively and well-informed debate on the power of Secretaries of State to commit and of the Messengers (vols I–II, 477–78, 914–15).

²⁷ *R v Kendal & Row* (1700) 1 Ld Raym 65; 91 ER 304; Skin 596; 90 ER 267; 12 Mod 82; 88 ER 1178; Comb 343; 90 ER 517; also *R v Yaxley* (1693) Comb 224; 90 ER 443; Carth 291; 90 ER 772; Skin 369; 90 ER 164, in which it was argued that the Secretary of State had no power to commit as he was not a Justice of the Peace. The objection was overruled but perhaps because of statutory authority (35 Eliz c 2) for the accused refusing to answer whether he was a Jesuit, seminary or massing priest.

including that the Secretary of State had no power to commit but only the Privy Council acting in aggregate. Counsel argued that the Secretaries of State had no power to administer oaths and could not therefore be justices of the peace with power to commit. There were, however, authorities from Elizabeth I's reign in which it had been accepted that committals by Sir Francis Walsingham, Principal Secretary to the Queen and Privy Counsellor, constituted a good return to a writ of habeas corpus.²⁸ In addition, in 1591 the judges had given an extra judicial opinion to Elizabeth I after the Queen had inquired into the circumstances in which a prisoner taken into custody at her command or that of her Privy Counsellors would not be released by the courts. The judges responded, ambiguously, that in the case of commitment for high treason by Her Majesty, the Privy Council or any one or two of the Counsellors, a person should not be released in the absence of acquittal at trial. This carried the suggestion that in other cases a person could be committed, but might be bailed.²⁹

The King's Bench upheld the detention of Kendal and Row. Justice Rookby said that the Secretary of State was 'a centinel, who watches for the publick good, and of such authority that he was a conservator of the peace at common law'.³⁰ He considered that it had been settled in Elizabethan times that Secretaries of State had such power since, although no statute conferred the power, it was incident in the office of Secretary of State. Holt LCJ is reported to have said that it was 'clear law' and that in his memory he was aware of only one occasion the power had been doubted. He said that the power to commit was exercised at common law before there even were justices of the peace. Considerations of public interest were again central to the court's judgment, as well as usage and acceptance of the power.

Significant also was the court's rejection of the further exception taken to the return that Montgomery's own commitment had been unlawful and thus it had been no crime to help him escape. Dismissing the point, the court held that the Secretary of State had the authority to commit to a Messenger for examination or transfer to gaol.³¹

Two subsequent eighteenth-century cases, *R v Derby* and *R v Dr Earbury*, confirmed the authority of *Kendal & Row* as to the power of the Secretaries

²⁸ In *Hellyard's Case* (1887), a return by the Warden of the Fleet, to whom the Hellyard had been committed, was held to be insufficient as it did not show the cause of the commitment. But the power to commit was not doubted, nor was it suggested (although the report is scant) that the commitment had to have been qua Privy Counsellor, and the Warden was given an opportunity to amend his return. In *Howel's case* (1587) 1 Leonard 70; 74 ER 65, it was held that a return to a commitment by a single Privy Counsellor had to specify the cause of the commitment as well as the fact of it.

²⁹ 1 Anderson 297; 123 ER 482 (34 Eliz I); *Entick v Carrington* (n 12) 1054–55.

³⁰ *R v Kendal & Row* (n 27) Skin 596, 598–99.

³¹ One exception was allowed: that the warrant should have specified the treason Montgomery was charged with, since assisting him to escape fixed the offender with the same offence. However, the prisoners were bailed rather than discharged.

of State to arrest, and in *R v Derby*, this was expressly applied in a case of seditious libel. These cases are central to unpicking the holding in *Entick v Carrington* and therefore require further elaboration. A third case, *R v Erbury*, also referred to the King's Bench having bailed a person arrested for seditious libel and is a further record of that court accepting the legality of the power.³²

In *Derby's case*, a warrant issued by the Secretary of State in the court vacation authorised a Messenger to make a search for Derby the printer and 'to seize and secure him for publishing and vending a scandalous and seditious libel called the *Observer*, No 74, and to bring him before me to examine the premisses, and to be dealt with father according to law'. Derby appeared before the Lord Chief Justice and entered a recognisance to appear on the first day of Michaelmas Term 1711. He continued to be held by the Messenger and appears not to have been examined by the Secretary of State, as one of the exceptions raised, unsuccessfully, by his counsel on the return date was that the warrant was permitted at the Secretary of State's pleasure for an indefinite period and it should have been limited in time.³³ Counsel for Derby also argued that the Secretary of State had no power at all to commit a person other than for treason or felony, or at least no power before the person had been examined on oath. This was unanimously rejected. Parker LCJ held that the Secretary of State must have a power to seize a person, the implication being that otherwise the power to commit would be worthless since a person must be seized in order to be committed.

As to the question whether the Secretary of State could seize a person for the purposes of examination, both Parker LCJ and Powys J expressed the view that this was 'a privilege, and for the benefit of the innocent man'. Although it is not immediately apparent how the power could be said to *benefit* individuals, since it was used to hold people for days on end and pressure them to enter recognisances, there was also a logic in this point. Since a person would need to be seized before he could be committed to prison, a power to instruct a Messenger or other person to arrest a suspect is certainly a logical extension of, if not actually entailed in, the power to commit. And since it must be preferable that a person is given an opportunity to account for himself before being committed to prison, such a power was thought to mitigate rather than exacerbate the intrusion into individual

³² *R v Erbury* (1722) 8 Mod 177; 88 ER 130, which referred to the fact that the defendant had been arrested for seditious libel under warrant of the Secretary of State and bailed by the King's Bench.

³³ Rejecting this submission, Parker LCJ held that specifying the time a person could be held was 'never done in this world' and he suggested that it would not be in the interests of suspects, who would be held to the last day of any specified period. This reasoning was no doubt even more unconvincing to a man who was being indefinitely detained under such power than it is today. He also rejected the contention that the warrant had to set out the facts; it only had to set out the species of crime.

liberty. The problem is that recognising such a power also afforded the Secretary of State a means of intimidating suspects and of forcing them to enter recognisances and bind themselves to keep the peace under threat of commitment. In practice, as we shall see, the power to arrest for examination was open to abuse and was a great weapon in the hands of the Secretaries of State. The third member of the court, Justice Eyre, thought the matter clear and stated simply that the issue had been settled by *Kendal & Row* and the Elizabethan authorities, which was a reasonable view of those cases.³⁴

In *R v Dr Earbury*, the Duke of Newcastle had issued a warrant for seizure of the papers of Dr Earbury, for him and the papers to be brought before him on suspicion of authoring a treasonable paper, the Royal Oak Journal. Dr Earbury was brought before the Secretary of State's secretary, a justice of the peace, who, despite having failed to obtain a confession or examine any other witnesses, gave him a choice between entering a recognisance in the sum of £100 and an undertaking to appear before the King's Bench on an appointed day, or be committed to gaol. Unsurprisingly, Dr Earbury entered the recognisance. He then issued a motion for it to be discharged. Rejecting the motion, the Lord Chief Justice³⁵ stated that *Kendal & Row* 'settled upon solemn debate, 'that a Secretary of State might issue out his warrant to apprehend the person of any man on suspicion of treasonable practices'.

Objection was also taken to the seizure of Dr Earbury's papers, which his counsel noted raised an issue that 'never was yet resolved'. But on this point the court expressed no opinion 'whether it was legal, or not', as the point was not before it on the motion.³⁶ There is no record of any subsequent action in trespass and this issue lay dormant until it was finally argued out in *Entick v Carrington*.

These cases show that well before the events giving rise to *Entick v Carrington*, the authority for the Secretaries of States to issue warrants of arrest for seditious libel was established. The King's Bench had upheld the legality of warrants of arrest for treasonable writings and for seditious libel, and affirmed that this followed in principle from the recognition in *Kendal & Row* of the power of the Secretaries of State to commit for political crimes. The basic principle driving the cases was that a power of arrest was a logical and sensible corollary of a power to commit, as well as being an important tool for enabling Secretaries of State to keep peace and order in society. By placing these cases alongside those relating to the substantive law of seditious libel, the cases are seen to be reflective of a more general judicial tendency in the eighteenth century and before to mould the law of seditious libel into an effective tool in tackling anti-government writings. Moreover, the courts

³⁴ *R v Derby* (1711) Fort 140; 92 ER 794.

³⁵ Probably Raymond LCJ (the date of the case is unclear).

³⁶ *R v Earbury* (1733) 2 Barn KB 293; 94 ER 509; 2 Barn KB 346; 94 ER 544.

showed no concern for, or appreciation of, the improper or excessive use of the power to arrest and eschewed attempts to confine its use.

It can also be seen that the one point that the courts had not considered was the legality of searches and seizures of papers conducted under such warrants. Yet the fact that there was no authority approving such practices does not mean that they were not legal; it was simply that no one had ever challenged them in appropriate proceedings. The very same considerations that led the courts to uphold the power of committal and arrest applied to the case of seizure. It was a power exercised pursuant to the responsibilities of the Secretaries of State as ‘centinels of the publick good’ for preventing the dissemination of subversive writings. It was a power that was of obvious utility in identifying and successfully prosecuting seditious libels (possibly more so even than the ability to examine suspects since it would identify actual seditious writings or documentary evidence of involvement in the possession of suspects). And it was also a long-established practice the legality of which had never been doubted by any court. There was also a further point. If the mere writing and possession of a seditious libel was an offence because, as Holt CJ had held in *Bear’s case*, it was dangerous to the state for libels to be collected or kept, and if seditious libels had to be turned-over to a magistrate, it is hard to deny a power for the Government to search for and seize those that it discovered. We therefore find that directly analogous considerations, relating to custom and usage, public interest and principled extension of existing authorities relating to powers of committal and arrest, also supported a power of search and seizure of personal property. The Government could therefore have expected with some considerable justification that if the legality of the power of search and seizure ever fell to be decided by the courts, it would be affirmed, just as the powers to arrest and commit had been.

III. THE PRELUDE TO *ENTICK V CARRINGTON*

A. Action Taken against *The Monitor* and *The North Briton* on Allegations of Seditious Libel

Let us now consider how the law of seditious libel came to be used in events that form the immediate context of *Entick v Carrington*.

By 1762, there were a multiplicity of different forms of printed papers in circulation: newspapers, magazines, regular essay papers, occasional pamphlets and one sheet handbills. *The Monitor* was a political paper published every Saturday for almost a decade between 1755 and 1765. It took the form of a single six-page essay, usually in the form of a letter. Such essay papers are often regarded as forerunners to the modern editorial. *The Monitor* was financed by Lord Beckford, a radical whose family wealth came from West Indies sugar plantations. He had strong connections to the

City, which provided the main audience for *The Monitor*. The main editors and writers were the lawyer Arthur Beardmore and the schoolmaster and writer John Entick.

Upon becoming Prime Minister in May 1762, John Stuart, 3rd Earl of Bute, King George III's former tutor, was sufficiently concerned by the influence of *The Monitor* and the incessant criticism of the government in its pages that he immediately set up a competing paper called *The Briton*. In its first edition published on 29 May 1762, it described its purpose as to 'oppose and expose and depose The Monitor', which was described as 'incendiary' and libellous against the King and the government.³⁷

But the establishment of *The Briton* was ill advised and ill fated. It provoked an immediate response from the radical Member of Parliament John Wilkes and his sponsor Lord Temple. Both were supporters of Pitt (Temple was Pitt's brother-in-law) and opposed Lord Bute and his agenda of peace with France. Wilkes had been a contributor to *The Monitor* and is believed to have authored seven of the essays in 1762 and others before. He probably wrote two of the editions cited in the warrants at issue in *Entick v Carrington*, but since the authors were anonymous, we cannot be sure.³⁸ With the publication of *The Briton*, Wilkes saw an opportunity, and eight days after *The Briton* was first published, *The North Briton* appeared in the coffee shops, taverns and clubs of London. Written by Wilkes and the poet Charles Churchill and funded by Lord Temple, *The North Briton* gave Wilkes a platform for audacious attacks on the Ministry of Lord Bute, provoking a political crisis and legal firestorm that has left an indelible mark on the history of the country.³⁹

The King's Chief Messenger, Nathan Carrington, and three others arrived at John Entick's house on 11 November 1762 at 11 o'clock in the morning. Entick's door was open. Entering the house and finding Entick there, the Messengers took him into custody and searched the house for all of his books and papers, including by rifling through a bureau, a writing desk and several drawers. They took up books and papers, perused and read others, and continued to do so for four hours. The search was carried out pursuant to a warrant issued on 6 November 1762 by Lord Halifax, Secretary of State for the South. It was addressed to the Messengers and purported to:

[A]uthorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, intituled the Monitor, or British Freeholder, No. 357, 358, 360, 373, 376, 378, 379, and 380, printed for J. Wilson and J. Fell

³⁷ RD Spector, *Political Controversy—A Study in Eighteenth-Century Propaganda* (London, Greenwood Press, 1992) 35.

³⁸ *ibid* 35; Cash (n 22) 88.

³⁹ The government published a second pamphlet, *The Auditor*, to counter *The North Briton*: 'There followed in these weeklies a lively controversy that spread to the newspapers': PDG Thomas, *John Wilkes: A Friend to Liberty* (Oxford, Clarendon, 1996) 19.

in Pater Noster Row, which contains gross and scandalous reflections and invectives upon his majesty's government, and upon both houses of parliament; and him, having [been] found you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be examined concerning the premisses and further dealt with according to law.⁴⁰

Lord Halifax was identified as one of the Lords of His Majesty's Privy Council and principal Secretary of State.

The search of Entick's house was carried out without a constable present, as was required by the warrant (a stipulation carried over from the Licensing Acts regime). Entick was then taken together with his books and papers before Lovel Stanhope, law-clerk to the Secretaries of State and a justice of the peace, who was used by them to take depositions in cases involving the public.⁴¹

Halifax also issued three other warrants. One named Arthur Beardmore, another his law clerk, David Meredith. A fourth named the two publishers, Isaac Wilson and John Fell, as well as a printer John Medley and a former editor, Jonathan Scott. Scott may have been named as a formality, or possibly to permit his papers to be seized, since it was primarily upon his intelligence that the warrants had been made.⁴²

Beardmore had been apprehended about an hour before Entick. The Messengers read his private correspondence back to 1752, examined books and ledgers. They required Beardmore to open locked drawers and bureaus, and read and seized a good deal of private and even legally privileged correspondence. Beardmore and Meredith were taken and imprisoned at the house of the Messenger Blackmore. There Beardmore was subject to 'close' confinement, and for two days he was denied use of pen, ink and paper or to see a client. He was unable to work on various legal cases that he had on. Wilkes went and sat with him for a day.

Entick, Beardmore and Meredith were granted bail by the King's Bench after six days, and the other men who had been detained under the warrants were bailed a few days later.⁴³ Entick, Beardmore, Meredith, Wilson and

⁴⁰ *Entick v Carrington* (n 12) 1034 (spelling as reproduced in St Tr).

⁴¹ *ibid* 1035.

⁴² On 11 October 1762, he had made a declaration before a Justice of the Peace at Westminster that attested to his own involvement in the establishment of *The Monitor* and to Entick and Beardmore's authorship. His declaration is set out in *ibid* 1033. Peters (later Professor and biographer of Pitt the Elder), "The Monitor" 1755-1765: A Political Essay Paper and Popular London Opinion', a thesis presented for the Degree of Doctor of Philosophy in History (University of Canterbury, Christchurch, October 1974) states at 600 that Scott may have been named for appearances but also notes there is no evidence of him having been arrested. It is in fact difficult to see that Scott would have been named to prevent suspicion falling on him if, unlike the rest, he was not to be arrested but this may nevertheless be the explanation. (There is no complete account of the litigation arising from *The Monitor* and *The North Briton* affair and in piecing together the account here, I have been greatly helped by Peters' excellent account at Appendix IV of her thesis.)

⁴³ See *Beardmore v Carrington and others* (1764) 2 Wils KB 244; 95 ER 790; Annual Register (hereinafter AR) 1764, VII 73.

Fell were only released from their recognisances on 22 June 1763, over six months later, it being noted that no prosecutions had been brought against them.⁴⁴

The government might have had second thoughts about prosecutions that would have been highly unpopular with the public, but it is more likely that prosecutions were never intended.⁴⁵ The action against *The Monitor* was part of a concerted effort to intimidate *The Monitor* and *The North Briton* and put them out of print, at least temporarily.⁴⁶ They were not intended to lay the basis for prosecutions. A warrant relating to Nos 1–25 of *The North Briton* was issued on 18 November 1762. No 25 had not even been published, and a second warrant, bearing the same date, refers to Nos 1–26.⁴⁷ The warrants were general warrants in that they referred to ‘the Authors, Printers and Publishers of a seditious and scandalous weekly paper, entitled *The North Briton*’, but did not identify any suspects by name.

The question why the warrant for *The North Briton* was not issued until 18 November and for its character as a general warrant might partly be answered by the absence of any evidence equivalent to Jonathan Scott’s information in the case of *The North Briton*. Yet, as an explanation, this is incomplete as Scott named only Entick, Beardmore and Meredith and, as noted above, Halifax issued a fourth warrant naming others which was only indirectly supported by Scott’s information. The probable reason for issuing a general warrant is that they gave much greater power to the Messengers to investigate and intimidate those suspected of involvement in a publication. General warrants provided authority for the Messengers to detain anyone they suspected of involvement. They thus placed the Messengers in the position of a justice of the peace or a Secretary of State by allowing them to assess the strength of the evidence against individuals and decide who to arrest. A general warrant was a frightening piece of paper in the hands of skilful Messenger. The general warrant issued against *The North Briton* was never served and no arrests were made; instead, it was used to intimidate those involved.

The Messengers showed the first warrant to a bookseller who had been vetting drafts for Wilkes for libellous passages. He quit. They showed it to the printer, William Richardson, who also quit. Wilkes appealed to his friend Dryden Leach (who had an important role in a later legal action),

⁴⁴ AR 1763, VI 82. Cash (n 22) 88 erroneously states that Beardmore was let off easy.

⁴⁵ Cash (n 22) 88–89; cf M Peters (n 42) 601–602.

⁴⁶ Peters says that copies of *The North Briton* and *The Monitor* had been presented to the law officers for their advice at the same time: Peters (n 42) 599–600. I have not been able to verify this. The request for advice relating to *The Monitor* on 3 November 1762 and the reply the following day can be found at BL Add MS 22131 f4–f22; see also *Cal HOP* (n 23) I 201. Advice was received on *The North Briton* Nos 6, 8, 9, 10, 11, 12, 14, 20 and 23 (only) on 16 November: *Cal HOP* (n 23) I 203.

⁴⁷ BL Add MS 22131 f29–f32.

who managed to get No 26 printed, but then Leach's journeyman printer, Peter Cook, was also nobbled by Messengers who produced the second warrant naming No 26. Wilkes wrote to Churchill: 'I have seen Leach, whose printer, Peter Cook, had the terrors of the Lord-of the Isle [ie, Lord Bute], so strong before him, that he has fallen ill to avoid printing the paper.'⁴⁸ As in the case of *The Monitor*, the warrants were used as a means of harassment and disruption rather than to lay the ground for prosecutions for seditious libel. In the case of *The North Briton*, no arrests were even made.

The timing of the action against *The North Briton* and *The Monitor* is explained by the fact that on 3 November 1762, preliminary peace terms had been agreed with France and fell to be debated in Parliament before the end of the year.⁴⁹ Both publications were stridently opposed to a peace treaty. *The Monitor's* readership included merchants and City folk whose wealth was derived from colonial projects at the centre of the dispute with France and were especially opposed to concessions being made. The Bute ministry was attempting to silence the main opposition and ease the conclusion of the treaty.⁵⁰ But the attempt badly misfired. *The North Briton* managed to stay in print and *The Monitor* was back in print on 27 November 1762, having missed only two issues, immediately criticising the peace terms.⁵¹ But, more significantly, Wilkes and Churchill were incited to ever-more virulent and skilful assaults on the Bute ministry and what it saw as attacks on press freedom and personal liberty.⁵²

The events relating to *The Monitor* and *The North Briton* nonetheless demonstrate the manner in which the law of seditious libel could be used, and was at times used, as a means of disrupting and deterring the government's critics without any resort to actual prosecution. The government must have felt secure from adverse legal action. Although Wilkes sought to persuade

⁴⁸ 2 December 1762, BL Add MS 30878 f18. See further Thomas (n 39) 23 and Cash (n 22) 89.

⁴⁹ Indeed, *Cal HOP* (n 23) I 201 records Halifax's receipt of the provisional peace treaty immediately before his request for advice from the law officers on *The Monitor* on 3 November 1762. The connection was first suggested in *The North Briton* No 27, 4 December 1762, 170–71, and it is the explanation preferred by Thomas (n 39) 22–23; Cash (n 22) 88; Spector (n 37) 35–36. Peters (n 42) 599 has taken a slightly broader view: 'The warrants of 6 November 1762 certainly appear to be part of a tougher attitude of the government towards the press in response to the attacks on Bute and the controversy over the peace.'

⁵⁰ On 25 November 1762 Lord Bute was hissed and stoned by a mob outside the Houses of Parliament and troops had to be called. Lord Bute infamously bought the vote in the House of Commons, which voted 227 to 63 on 14 December 1762 in favour of the peace terms. John Almon described: 'A corruption of such notoriety and extent had never been seen before ... a shop was publicly opened at the Pay Office, whither members flocked' in exchange for their vote (cited in Cash (n 22) 91).

⁵¹ The essay opens with the statement that 'Whole Publication on the 13th and 20th was prevented by the Confinement of the Gentlemen concerned in the Monitor, and of the Printer and Publishers, taken up by Virtue of a Warrant issued from one of His Majesty's principal Secretaries of State.' Its content was an attack on the peace terms.

⁵² See, eg, Thomas (n 39) 24–26.

Beardmore to bring a claim for false imprisonment, he refused.⁵³ The fear of prosecution continued to hang over him and as a lawyer he must have doubted his chances of success. Of course, no claim could have been brought by Wilkes himself or those working for him on *The North Briton* as no one had actually been detained and no property had been seized. The basic legal preconditions for actions in trespass or false imprisonment were absent.

Peace with France was concluded in the spring of 1763, but it did not prevent the downfall of Lord Bute, who resigned on 8 April 1763, in part at least due to the unpopularity created by *The Monitor* and *The North Briton*.⁵⁴ Ironically this event led to the most famous of all the attacks on the government, No 45 of *The North Briton*. Written by Wilkes, No 45 was a sustained attack on the King's speech on the commencement of the new ministry. Wilkes adopted the device of attributing the content of the speech to the King's Ministers rather than to the King himself (to make a charge of treason more difficult to stick) and purported to question whether 'the imposition' of the speech was 'greater on the Sovereign, or on the nation'. But it was obvious that the King was the principal object of the attack, together with Lord Bute, who was now given the role of puppet-master. The King's reference to the need for 'that spirit of concord, and that obedience to the laws, which is essential to good order' provoked an impassioned rejoinder from Wilkes stating that the spirit of concord was not to be expected from persons whose private houses were now made liable to be entered and searched at pleasure. The 'spirit of liberty' of the people should, he wrote, arise in proportion to the 'weight of the grievance they feel'. The people too have prerogative, he said: 'Freedom is the English subject's Prerogative.' As George Nobbe has written, such passages 'stimulated the imaginations of men all over the world'.⁵⁵ But the King had had enough and considered the words treasonable.

On 26 April 1763, Lord Halifax issued another general warrant authorising his Messengers to search for the authors, printers and publishers of No 45 of *The North Briton*, which was described as a 'seditious and treasonable' paper. The inclusion of the word treasonable is notable, not only as an indication of the reaction of the government (which must have considered it justified) but also because it had the deliberate purpose of evading a defence of parliamentary privilege, which Wilkes was sure to raise. This time, it seems clear, the government intended to pursue Wilkes personally.⁵⁶

⁵³ Peters (n 42) 602; Cash (n 22) 88.

⁵⁴ See, eg, Cash *ibid* 97.

⁵⁵ George Nobbe, *The North Briton: A Study in Political Propaganda* (New York, Columbia University Press, 1939) 213; for other discussion, see Spector (n 37) 153–56; Cash (n 22) 100.

⁵⁶ Reference to treason was included at the request of the Attorney General Charles Yorke. Cash (n 22) 101 gives an account of the suggestion being made by the retired Chancellor Lord Hardwicke, Charles Yorke's father, whom he had approached for advice. Another exception to privilege was breach of the peace, but notably this was not expressly alleged. The warrant can be found at BL Add MS 22131 f37.

However, the Messengers first made a serious mistake. They broke into the house of Dryden Leach, who on the basis of faulty intelligence was thought to have printed No 45.⁵⁷ They pulled Leach from his bed, seized papers and took him and his servants to be held under guard. They detained him for four days. This mistake left the government vulnerable to a legal challenge to the practice of issuing general warrants which, given Leach's undoubted innocence, was particularly strong.

Other Messengers broke into the house of George Kearsley, the only person whose name appeared in *The North Briton* itself. Under interrogation by Lord Halifax himself on 29 April 1763, Kearsley provided the names of the printer, Richard Balfe, Churchill and Wilkes (he had, he said, let it be known that he would do so if ever examined).⁵⁸ The net tightened. Balfe and his apprentice Charles Shaw were also detained and under examination provided further evidence of Wilkes' involvement.⁵⁹ Wilkes himself was detained on Saturday 30 April 1763. His house was searched and papers seized.⁶⁰ The events ignited an incendiary series of legal proceedings, the most extraordinary that there had ever been, and which there may ever have been, of which Lord Camden's judgment in *Entick v Carrington* formed the coup de grâce.

B. *The Monitor* and *The North Briton* Cases

Wilkes' lawyers immediately applied for a writ of habeas corpus, but did so, unusually, in the Court of Common Pleas, where Pratt CJ was considered less government-minded than Mansfield LCJ, who presided in the King's Bench. Pratt CJ's initial reaction to the general warrant produced was that it was 'most extraordinary' and he ordered the issue of a writ of habeas corpus at lunchtime on the Saturday.⁶¹ But on this occasion the government was one step ahead of the game and Wilkes was committed to the Tower of London by a second warrant before the writ of habeas corpus had been served on the Messengers. Following the issue of a second writ on the Monday, Wilkes was finally brought before the court on 3 May 1763. The reporter noted that the court 'was crowded to such a degree as I never saw

⁵⁷ In fact, as we have seen, Leach printed only an earlier issue (he was in the process of printing a second). See *Leach v Money, Watson and Blackmore* (1765) 19 St Tr 1001, 1004.

⁵⁸ BL Add MS 22132 f35–f36.

⁵⁹ BL Add MS 22132 f39 f43.

⁶⁰ See further Cash (n 22) 102–09, which includes a hilarious account of the apprehension of Wilkes. Balfe's involvement appears to have come out during the course of cross-examination of Lord Halifax in *Wilkes v Wood* (1763) 19 St Tr 1153, 1160–61, where it was admitted that the warrant under which Wilkes was arrested had been made before they had evidence against him.

⁶¹ *Wilkes' habeas case* (n 17), 982.

it before'.⁶² Wilkes was allowed to give a speech to the assembled throng extolling the virtues of liberty, which, he said, were 'so sure of finding protection and support' in the court of Common Pleas. After an adjournment to 6 May and another speech by Wilkes to like effect, the court ordered Wilkes released, 'Whereupon there was a loud huzza in Westminster-hall'.

There was, however, no celebration about the contents of the judgment that Pratt CJ delivered on behalf of the court, which found for Wilkes only on the narrow ground of parliamentary privilege.⁶³ The court rejected arguments—albeit in line with prior authority⁶⁴—that the warrant should have set out the evidential basis for the allegation and should also have set out the allegedly seditious words. This gave great latitude to the Secretaries of State (as well as justices of the peace) to issue warrants to detain undesirables without needing to identify the reasons for suspecting that a person was guilty of seditious libel or even identifying particular seditious words. Moreover, assuming the validity of general warrants—which Wilkes decided not to challenge—anyone suspected of involvement could be rounded up. The latitude given to the government and its officers was certainly clear to Pratt CJ. He reached the conclusion that a warrant did not have to set out the grounds or the evidential basis for the allegation with reluctance. He noted that it could be said that 'every man's liberty will be in the power of a justice of the peace' and he would have found it 'very weighty and alarming' had the issue not been resolved by previous authority.⁶⁵ But his appreciation of the scope of the power to issue warrants later proved influential in his judgment in *Entick v Carrington*.

⁶² *ibid* 984.

⁶³ The government's approach to this issue is extremely puzzling. In the first place, the Crown allowed the point to be argued, although, having not issued any suit against Wilkes, he could not insist that it be determined at this stage. Then the Crown hardly pressed the point and refused to say that privilege could not be raised. This was despite the fact that reference to treason had been deliberately included in the writ by the Attorney General in order to preclude any issue of privilege arising (see n 56 above). Perhaps, on reflection and given the popular furore, the government was not prepared to allege treason. Interestingly, Cash recounts how after Pratt CJ had given judgment, Serjeant Nares, who had appeared for the King, jumped to his feet with a message that the Attorney General and the Solicitor General wished to be heard. It is interesting to speculate whether this belated intervention by the Attorney General was in order to raise treason as a bar to privilege. But whatever it was that they wished to say, Pratt CJ was having none of it. He said: 'It is too late': Cash (n 22) 116. Parliament later passed a resolution denying privilege for seditious libels, a point remarked upon by Lord Camden in *Entick v Carington* (n 12) 1065. After Balfe and Kearsley were questioned on 9 May 1763, informations were entered against Kearsley and Wilkes, although that against Wilkes was later dropped. Wilkes was later prosecuted for republishing No 45.

⁶⁴ *Wilkes' habeas case* (n 17), 988; *R v Wyndham* 1 Str 3; 93 ER 347. The Court held that the species of the offence must be recorded, a proposition which itself may have gone further than the law required. *cf R v Despard* (1798) 7 Term Rep 736; 101 ER 1226.

⁶⁵ *Wilkes' habeas case* (n 17), 988 and 991 (the latter quote appears in an extract from 'A Digest of the Law of Libels' reproduced in State Trials). Pratt CJ appears to have had less sympathy with the argument that the warrant should set out the seditious words. He could not see the point since the court could not adjudge whether they constituted a sedition because innuendo may be necessary to make the whole out: at 989.

Before that case, however, Pratt CJ was to be provided with plenty more evidence of the breadth of the power to issue warrants and the scope for abuse. Wilkes was formally charged with seditious libel (not treason) in the hope that he would lose his parliamentary privilege by expulsion or resolution of Parliament, but following the aphorism that attack is the best form of defence, Wilkes issued several claims for false imprisonment and trespass against the Messengers, the Under-Secretary of State Robert Wood, the Treasury Solicitor Phillip Webb and Lord Halifax personally.⁶⁶ He also organised over a dozen printers and apprentices, who had also been rounded up under the general warrant, to bring claims. Such suits, brought by ordinary people, were ‘unheard of’ at the time: ‘People of high station were shocked. People on the street were excited.’⁶⁷ There was widespread concern about the actions taken by the government under the general warrants.

The first trials came on in July 1763 before Pratt CJ. Two cases, one brought by William Huckell, a journeyman printer who had worked for Leach and been detained for six hours, were tried first. After a 12-hour hearing on 6 July 1763, the jury, after retiring for only a few minutes, returned a verdict of guilty and awarded Huckell £300 plus costs. The second claim by James Lindsay, another printer, the following day resulted in a judgment of £200. Following this, the Messengers agreed to verdicts in 12 other cases against printers for £200 each, subject to a motion for a new trial on the grounds that the level of damages was excessive.⁶⁸

Indeed, the government, which was indemnifying all the defendants in these actions⁶⁹ and running their defences, was shocked by the level of the awards. On the motion for a new trial, it was objected that Huckell had worked for only a guinea a week and in custody had been treated very civilly and been given ‘beef-steaks and beer, so that he suffered very little or no damage’. Pratt CJ held that the small injury done to Huckell and the ‘inconsiderateness of his situation and rank in life did not appear to [the jury] in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial’. He said that the jury had been struck by the Secretary of State ‘exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant’ and that the jury had been entitled to award exemplary damages.⁷⁰

⁶⁶ Thomas (n 39) 32–33.

⁶⁷ Cash (n 22) 123.

⁶⁸ *Addenda to the cases concerning Mr Wilkes* (‘*Addenda*’) 19 St Tr 1381, 1404–05; also AR 1763 VI 88; AR 1764 VII 81. These sources are not entirely clear as to whether there were 12 or 13 such cases but a list of damages awards prepared on behalf of the Treasury Solicitor and held at the National Archives identifies 12: TNA TS 11/3237. I am grateful for David Feldman for identifying this useful source.

⁶⁹ *Addenda*, *ibid* 1406 and 1415.

⁷⁰ *ibid* 1405.

These claims led to great celebration amongst the ordinary folk in London; in the light of public sentiment, the government decided it safer not to pursue a bill of exceptions in the King's Bench.⁷¹ The decision may also have been influenced by the fact that, despite Pratt CJ's clearly expressed views on the illegality of general warrants, the jury verdict had not established any proposition of law and their legality could be argued another day.

Actions by Entick, Beardmore, the clerk Meredith and the booksellers Wilson and Fell were notified to the government a few days after these awards, on 15 July 1763.⁷² The timing is unlikely to be a coincidence: *The Monitor* claims may well have been encouraged by the awards made in those concerning *The North Briton*. However, it is also significant that, as we have seen, the recognisances binding the men had been lifted in June and it was only after this that they would have felt safe from prosecution and willing to risk an action challenging the government.

On 6 December 1763, a claim for trespass that Wilkes had issued against Robert Wood came for trial before Pratt CJ. This was an audacious claim. Wood was an Undersecretary of State who had attended Wilkes' house whilst papers were seized by the Messengers, but he had not himself seized the papers and was not named in the warrant. Wood's presence and seeming influence over events was the basis for Wilkes to claim that Wood was a joint tortfeasor. Like *Entick v Carrington*, the claim only related to trespass and not false imprisonment. Rather than demur to the defence and put the legality of the general warrant and the legality of search and seizure in issue, Wilkes' lawyers chose to join issue and put the facts and issues before the jury. This was part of a strategy of forcing the claims to be presented on the facts to be determined by juries, rather than by judges on points of law, which was a strategy pursued in all the suits.⁷³ Wilkes and his lawyers surely recognised that they would have better chances of success in front of juries than judges. But more importantly, jury trial meant that the facts would be established and this meant witness evidence on both sides of the case. This provided a stage on which to present to the public how the warrant system led to unjustifiable invasions of personal privacy and individual liberty. One consequence of this strategy in *Wilkes v Wood*, no doubt intended, was that both Wood and Lord Halifax himself had to give evidence and could be, and were, subject to cross-examination.

Wood entered a general plea of not guilty and also a special justification that he had been sent with a message and played no part in the arrest. A second factual point at issue was Wilkes' authorship of No 45, which Wood

⁷¹ Cash (n 22) 133, note 33. A note in AR 1764 VII, 81 records final settlement on 21 June 1764 in 14 cases of £120 each and Huckell £175. In total, 26 claims resulting from the general warrants were commenced, although not all were determined: BL 41355 f1199.

⁷² *Cal HOP* (n 23) I, 295. The claims were commenced on 2 September 1763: AR VI 1763 98; GM 1763 XXXIII 462.

⁷³ See the account in the Martin Papers vol X, BL Add MS 41355 f194–f195.

pleaded in justification. The government may have thought that a favourable ruling on this point would have been of assistance in the prosecution of Wilkes, and Pratt CJ warned the jury to be particularly careful in finding Wilkes to be author for this reason.⁷⁴

The court heard evidence of how the Messengers executed the warrant against Wilkes by rummaging through all of his private papers that they could find and by piling them in a sack, without any kind of inventory being taken, and by the attendance of a smith to open bureaus and drawers that were locked. Under examination, Lord Halifax was forced to admit that he had issued the warrant three whole days before he had received any information at all against Wilkes and that the warrant 'lay dormant, whilst they were upon the hunt for intelligence'. Lord Halifax also resisted disclosing the evidence that had been obtained and upon which the arrest had been based, but upon being pressed by Pratt CJ, the statement of Walter Balfe (but not that of Kearsley) was produced.⁷⁵

Serjeant Glynn for Wilkes argued that the use of general warrants was contrary to liberty and the constitution and urged the jury to award exemplary rather than trifling damages. The Solicitor General, appearing for the defence, said that he was at a loss to understand what Mr Wilkes meant by bringing an action against Wood, who neither issued the warrant nor executed it. He said that this was the first time he ever knew a private action represented as the cause of all good people of England. In his summing up to the jury, however, Pratt CJ made it clear that he regarded the general warrant as unlawful and that if Wood had been involved damages should be awarded, pointing out that it resulted in a 'discretionary power given to messengers to search wherever their suspicions may chance to fall'. This, he said, would affect the person and property of every man in the kingdom and would be 'totally subversive to the liberty of the subject'. The jury found Wood to have been involved and acquitted Wilkes of authorship of No 45 into the bargain (thus scuppering his prosecution). The substantial sum of £1,000 damages was awarded against Wood. A bill of exceptions was denied as being out of time and therefore the general warrant issue and the power of search and seizure were given no further consideration in the case.⁷⁶

On 10 December 1763,⁷⁷ Dryden Leach's case against the Messenger Money for false imprisonment and trespass was heard, again presided over by Pratt CJ. The jury once again returned a verdict for the plaintiff, this time with £400 damages and costs. It was reported that the plaintiffs offered to

⁷⁴ *Wilkes v Wood* (n 60) 1168.

⁷⁵ *ibid* 1160–61.

⁷⁶ *ibid* 1154, 1159 and 1167.

⁷⁷ *Leach v Money, Watson and Blackmore* (n 57) 1006; AR 1764 VII 115. The case came back for judgment on 16 June 1674. The date of trial given in the report at 1 Blk W 555; 96 ER 320 seems to be wrong.

accept nominal damages—which carried an entitlement to cost—in this and the next five causes, which was ‘readily acquiesced in by the counsel for the crown, commended by the court, and applauded by the whole audience’.⁷⁸

A Bill of Exceptions *was* received in *Leach v Money*, and a number of other cases concerning printers detained under the general warrants, effectively maintaining that the claims were bad in law. *Leach’s case* was treated as the test case and came before the King’s Bench in 1765, shortly before *Entick v Carrington* was decided. Several important issues were raised, including the application of the Constables Protection Act 1750 (which was eventually determined in *Entick v Carrington*) and the legality of general warrants. The Solicitor General argued the case for the defence. On 18 June 1765, the matter was adjourned for further argument, but the court made comments which led to the appeal being dropped. Lord Mansfield expressed preliminary views on several aspects of the case, including that the protections of the Act could only apply to persons acting in obedience to the warrant. Most dramatically, he expressed the ‘clear opinion’—in accordance with the approach of Pratt CJ in the trials—that general warrants were unlawful. He said that ‘it is not fit, either upon reasons of policy or sound construction of law, that, where a man’s being confined depends on an information given, it should be left to the officer to ascertain the person’.⁷⁹ As to the argument of long usage, he said this ordinarily has ‘great weight’, but ‘will not hold against clear and solid principles of law, unless the inconvenience of overturning it will be of very ill consequence indeed’. The central objection was that general warrants placed Messengers in the position of justices of the peace (or Secretaries of State) as it fell to them to decide who to detain and on what evidence. Wilmot, Yates and Aston JJ expressed equally firm opinions.

When the matter came back to court on 8 November, the Attorney General himself appeared and stated that he had not been able to overcome the point that Leach, not having actually been a printer or publisher of the editions in question, could not have been seized within the terms of the warrant, which was only addressed to the printers etc., and therefore the Messengers had not been acting in obedience to it. He mentioned a case at Middlesex Sittings where a warrant requiring ‘loose and disorderly persons’ was held not to cover the taking up of a woman of character. This is puzzling since, while the point had been argued by the plaintiff, Lord Mansfield had previously seemed to indicate (at least as reported) that the Messengers had had probable cause for taking up Leach and this was sufficient. But Lord Mansfield recalled the case at Middlesex Sittings and agreed that it was conclusive of the matter.⁸⁰

⁷⁸ AR 1763 VI 115; *Leach v Money, Watson and Blackmore* (n 57), 1006.

⁷⁹ 1 Blk W 555, 562; 96 ER 320, 323.

⁸⁰ *Leach v Money, Watson and Blackmore* (n 57), 1028; also 1 Blk W 555, 563; 96 ER 320, 324. Leach recovered £400 and in linked claims four servants appear to have recovered £5 each (Treasury Solicitor’s list, n 68).

What was going on here is not easy to fathom. The Attorney General may have been seeking to keep the issue of general warrants alive, or perhaps avoid a more embarrassing or more wide-ranging judgment, such as that later given by Lord Camden in *Entick v Carrington*, and with the additional risk of it being in the King's Bench, which may not have felt so constrained to depart from previous King's Bench authority. Whether this was the case or not, general warrants could no longer safely be used and no more were ever issued.⁸¹

Whilst *Leach v Money* and the associated cases had been progressing through the courts, the actions brought by Entick, Beardmore and others relating to *The Monitor* had come on for trial. Arthur Beardmore's claim against Nathan Carrington and three other Messengers had come on for trial at the Guildhall on 5 May 1764, and again the trial was presided over by Pratt CJ. This case raised false imprisonment and seizure of papers and, in contrast with *The North Briton* cases, was not concerned with a general warrant. Pratt CJ was reported as having instructed the jury that both the detention of Beardmore and the seizure of his papers had been illegal, and that they had to assess damages on this basis, but he recommended moderation damages as the Messengers were only servants.⁸² The jury nonetheless awarded Beardmore £1,000 (although he had asked, unrealistically, for £10,000). Beardmore offered to forgo the verdict if Lord Halifax would consent to have the claim against him determined (Halifax had delayed the claim against him personally and the trial date had been put off), but this was not forthcoming.⁸³

The defence issued a motion for a new trial on the grounds of excessive damages and it was argued in Westminster Hall before all the judges of the Common Pleas. On 26 May 1764, the motion was rejected. In the court's judgment (presumably given by Pratt CJ), it is extremely forthright in making clear its view that the government's practices had been unconstitutional. It reasoned that since the liability was joint and several, the matter could properly be approached as if it were a judgment against Lord Halifax himself:

[A]nd can we say that 1000l are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and prys into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days. It is an unlawful power assumed by a great

⁸¹ Thomson (n 24) 124, who also points out that the utility of the general warrant was undermined just as much by concession that a person who was not actually the printer or publisher (etc) could not be lawfully apprehended (and the officer would not benefit from statutory protection) since the utility of the general warrant lay in the ability to apprehend a number of suspects without firm evidence and cross-question them for information.

⁸² AR 1764 VII 72–74; GM 1764 XXXIV 246; (1764) Wils Rep 244, 245; 95 ER 790, 791.

⁸³ AR 1764 VII 73; (1764) Wils Rep 244; 95 ER 790 (which appears to give an incorrect date of the trial).

minister of State. Can any body say that a guinea per diem is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects?⁸⁴

Since this was not a general warrant case, the court's certainty that the warrant was illegal, both in relation to the arrest and the seizure of papers, is striking, but the point was not put in issue by the defence and formed no part of motion for a new trial. The issue was not considered until *Entick v Carrington*.

By contrast with Beardmore, and although this is not entirely clear, *Entick*, *Wilson* and *Fell* appear to have brought claims against the King's Messengers in trespass only and not false imprisonment. Following a further trial on 21 June 1764, *Wilson* and *Fell* were awarded £600.⁸⁵ *Entick v Carrington* was heard in July 1764 and concerned search and seizure of *Entick's* property. The jury, exceptionally in all these cases, returning a verdict of not guilty but it was a special verdict setting out the facts and requesting the advice of the court as to whether the search and seizure was unlawful given the facts as they found them to be. In the event that the search and seizure was unlawful the jury assessed damages at £300. The matter rested until the following year.

Claims by *Entick*, *Beardmore*, *Meredith*, *Fell* and *Wilson* against Lord Halifax personally were tried on 11 and 12 December 1764. In those cases, which are not reported, the plaintiffs' lawyers chose not to challenge the legality of the warrants. In *Beardmore's* case, which was tried first, the case focused on the absence of evidence of probable cause, the fact that Lord Halifax's clerk, *Lovell Stanhope* detained him for six days before examining him, and the fact that he was not brought before Lord Halifax as the warrant had required.⁸⁶ Damages were awarded taking account of the recovery in previous actions. *Beardmore* was awarded £1,500 (this was intended to be inclusive of the previous £1,000),⁸⁷ *Entick* £20, *Wilson* £40 and *Fell* £10. *Meredith* (who may only have pursued this claim and therefore there was no reduction to prevent double recovery) was awarded £200. The fact that the

⁸⁴ *ibid* see also GM 1764 XXXIV 248.

⁸⁵ AR 1764 VII 80–81. This record of the case refers to the claim being in trespass but also refers to the detention of the men. False imprisonment claims were, however, brought against Lord Halifax as discussed in the main text.

⁸⁶ Accounts of the trials can be found at AR 1764 VII 112–13 and in the correspondence of the Duke of Newcastle BM Add MS 329 64 f273, f279, f281, f283, f289 and TNA TS 11/3237 Part 1. On 4 December 1764 William Samuel Powell wrote to Lord Newcastle that the jury's award reflected the fact that Lord Halifax had 'caused Beardmore to be taken into custody without proof or just suspicion of his guilt, to be confined an unreasonable time before examination, and then trusted the examination of him to a person who had no lawful authority. I hear the friends of Lord Halifax think the damages moderate, and given out, that there will be no farther contest in this cause'.

⁸⁷ See AR 1764 VII 112. Treasury Solicitor's list (n 68) is thus guilty of double counting as it lists these award cumulatively.

plaintiffs seem not to have challenged the legality of the warrants relating to their detentions may highlight the difficulty of sustaining any judgment on a bill of exceptions in the Court of King's Bench. It may also have been considered unnecessary given that damages had been recovered against the Messengers on this basis and it was certainly unnecessary given that there were other flaws in the execution of the warrants which enabled damages to be obtained against Lord Halifax. There was clearly canny litigation strategy at play, which, particularly at the distance of 250 years, can only be guessed at. It even puzzled onlookers at the time and the scant accounts are confused as to what, if anything, the cases had to say about the legality of the warrants.⁸⁸ It seems clear that the plaintiffs' lawyers in these cases, as well as those against the Messengers, chose to focus on their strongest points rather than the most constitutionally significant, as well as ensuring that the cases were decided by jury trial. The objective was to inflict embarrassing and politically significant defeats on the government, not to obtain reasoned judgments on lofty points of constitutional law.

This brings us, in our conclusion to this discussion of the litigation leading up to the judgment in *Entick v Carrington*,⁸⁹ to remark upon two features of the litigation which stand out. First, it is significant that there had not been a single reasoned judgment on the legality of either general or ordinary warrants or as to their use given following full argument. Formally at least, even the legality of general warrants remained open. Although the defendants and the government had suffered heavy defeats, and indeed had failed to land a single significant blow in all the litigation, their lawyers had at least managed to avoid the infliction of a knockout blow by the courts. That is not to underestimate the importance of comments of the King's Bench in *Leach v Money* in 1765 or of Camden CJ in *Wilkes v Wood* two years before on general warrants. But these were not binding precedents. Despite the constitutional importance of the series of cases following the action taken against *The Monitor* and *The North Briton*, there was no monument to the battles won in the pages of the case reports in terms of a reasoned judgment of a court on a point of law. But as we have seen, this was not the primary objective.

⁸⁸ See the correspondence at n 86 and Treasury Solicitor's notes, *ibid.* In general, the plaintiffs' lawyers picked their battles with care. The legality of general warrants was not challenged in *Wilkes' habeas case*, for example, and the issue of the legality of warrants to arrest and detain seems to have been deliberately avoided in both *The Monitor* and *The North Briton* claims. Dryden Leach's case was presumably put forward as the test case on general warrants because it was the strongest as Leach had been entirely innocent of involvement.

⁸⁹ It was only long after *Entick v Carrington* had been decided by the Common Pleas in November 1769 that Wilkes' own action against Lord Halifax was tried, Lord Halifax having long delayed it. Damages were awarded at £4,000, again much less than had been claimed and so disappointed the crowd—the jurymen were obliged to withdraw privately, for fear of being insulted—but a substantial sum nonetheless given the moderate injury. See *Addenda* (n 68) 1406–07. The excessive amount of £20,000 had been claimed; Wilmot CJ had urged moderation in his summing-up.

The legal monument resulting from these cases was eventually supplied by *Entick v Carrington*, but as we shall see this is in large part due to the fact that the court decided of its own initiative—and in contrast to the attitude of the King’s Bench—that the constitutional nettles should be grasped in the wider public interest.

A second important facet of the litigation is that the government’s use of warrants had been placed under the microscope and thoroughly discredited in a series of jury trials. The exorbitant nature of the power and the intrusion into the personal liberty of ordinary people had been exposed in open court in a number of cases, most of which had been presided over by Pratt CJ.

IV. LORD CAMDEN CJ’S JUDGMENT IN *ENTICK v CARRINGTON*

A. The Issue in *Entick v Carrington* and Lord Camden’s Approach to it

Entick’s case against the Messengers was a case in trespass for unlawful seizure of personal property. There was no element of false imprisonment in the suit. This was surely designed to test the issue left open by *Dr Earbury’s case* whilst avoiding a direct assault on the power of the Secretary of States to issue warrants and the precedents of *Kendal & Row*, *R v Derby*, *R v Erbury* and *R v Dr Earbury*.⁹⁰

The jury in *Entick v Carrington* had returned a special verdict that set out the facts as they had found them and asked for advice on whether the facts amounted to a trespass. In some of the previous cases the juries had declined judicial invitations to deliver special verdicts preferring to deliver general verdicts of guilty, thus making it more difficult for their views to be overturned by the judiciary.⁹¹ In *Entick v Carrington* the jury, finding the defendants not guilty took the opposite course and this brought the legality of the action under the warrant squarely before the court for determination as a matter of law.

After hearing argument on the special verdict twice in Easter Term 1765—on 13 May and 18 June 1765 (the latter being the date *Leach v Money* was argued in the King’s Bench and the *ex tempore* remarks of that court made, of course, just the other side of Westminster Hall)⁹²—Lord Camden CJ

⁹⁰ Why Entick rather than Beardmore or Meredith’s case was used as the test case is a mystery.

⁹¹ WJ Smith (ed), *The Grenville Papers: being the correspondence of Richard Grenville, Earl Temple, K.G. and the Right Hon. George Grenville, their friends and contemporaries* 4 vols (London John Murray, 1852–1853) vol ii, 71–76, (Wilkes to Temple) 9 July 1763.

⁹² AR 1765 VIII 88, 101; *Leach v Money*, *Watson and Blackmore* (n 57) 1012. The Court of Common Pleas and the Court of King’s Bench both convened in Westminster Hall.

indicated that he considered the case of utmost importance to the public and made clear to counsel that he desired to give judgment on every point and that they were to be ‘argued to the bottom’. There is here a striking contrast with the approach taken by the King’s Bench in *Leach v Money*, which had shown no inclination to examine the points to their roots. The precipitous intervention of the King’s Bench judges in that case led to its premature conclusion and raised the suspicion that the government had dodged the issue. Lord Camden’s approach was conspicuously different and contains an implicit criticism of the approach that had been taken across Westminster Hall. Argument was heard on one further occasion in Michaelmas Term and judgment delivered on 27 November 1765. Lord Camden said that ‘the public, as well as the parties, have a right to our opinion’.⁹³ His judgment could have rested on a narrow point—for example, that the Messengers had not acted in strict obedience to the warrants—but he chose to deal squarely with every question raised, as well as several others that were not.

B. Secretaries of State as Conservators of the Peace

The Messengers had claimed the protection of s 6 of the Constables Protection Act 1750 (24 Geo 2 c 44), which provides that no action shall be brought against any constable, headborough ‘or other officer’ for ‘any thing done in obedience to any warrant under the hand or seal of any justice of the peace’.⁹⁴ The first question identified by Lord Camden was whether Secretaries of State were ‘conservators of the peace’. A conservator of the peace is an ancient common law office referring to persons with special responsibility for keeping the peace. It pre-dates justices of the peace as judges of record appointed by the King. Had the Secretaries of State been conservators of the peace, they may have been within the equity of the statute, although they were not within its words.

In order to answer this first question, Lord Camden undertook a remarkable exercise in historical detective work, tracing the origin of the office of Secretary of State and of the practice of the Secretary of State to issue warrants for committal and arrest. The origin of the office of Secretary of State was found to lie in the role of the monarch’s private secretary rather than in any position with responsibility for conserving the peace. The conservators of the peace in past ages had been recognised as including the King, the

⁹³ AR 1765 VIII 146; *Entick v Carrington* (n 12) 1045.

⁹⁴ Section 6 is still in force today. It affords protection even if the warrant is illegal: ‘if the constable acts in obedience to the warrant, then, though the warrant be an unlawful warrant, he is protected by the Statute of 1750’: *Horsfield v Brown* [1932] 1 KB 355 per Macnaghten J. Actions against Messengers could be brought, but only on certain conditions that had not been fulfilled. On the broad meaning of ‘officer’, see citations in *Tchenguiz v Director of the Serious Fraud Office* [2013] EWCA 1578 [12].

Chancellor, the Treasurer, the High Steward, the Chief Justice, the judges of the several courts, sheriffs, and high and petit constables and even coroners, but not Secretaries of State.⁹⁵ Lord Camden then succeeded in showing that the practice of issuing warrants originated in a special and particular delegations of power from the King (which had been condemned by the Petition of Right) and later in the fact that Secretaries of State were members of the Privy Council and issued warrants in this capacity, as well as later under the powers granted by Parliament under the Licensing Acts.⁹⁶ Thus, Secretaries of State were not to be treated as conservators of the peace.

Once Lord Camden had concluded that Secretaries of State could not be regarded as conservators of the peace, he needed to go no further. However, he chose to proceed to consider the authority of the Privy Counsellors to issue warrants of committal and to ask on what authority this was based. The reason that he gave for doing this was, he said, that he wanted to examine the foundation for Lord Holt's judgment in *Kendal & Row*. He said that he would set out 'all that I have been able to discover touching the matter' and then, after declaring his opinion, 'leave others to judge for themselves'.⁹⁷ What he meant, I suggest, is for others to judge for themselves whether *Kendal & Row* had been correctly decided.

Lord Camden traced the authority of the Privy Council to commit to the Statute of Westminster I, 1275 (3 Ed 1), under which such commitment was recognised as being by 'command of the King' within the terms of the statute. But early authority holding that a single Privy Counsellor had power to commit in cases of high treason was found to be based on a confusion of statutory powers granted in Edward VI's reign for common law power, which meant that the authority 'stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it'.⁹⁸ The Elizabethan cases involving Sir Francis Walsingham compounded the mistake, he claimed, by accepting the power to commit, but they did not specify in what cause.⁹⁹ The opinion of all the judges in 1591 was found to be an example of studied obscurity reflecting the dangerous times, which (as well as being extra-judicial) actually left open every question other than a power in a single Privy Counsellor to commit for treason.¹⁰⁰ In the *Seven Bishops' case* in 1688, an objection had been taken to the warrant of commitment signed by 13 Privy Counsellors on the basis that it was not

⁹⁵ *Entick v Carrington* (n 12) 1046.

⁹⁶ *ibid* 1046–52. See on justices of the peace and conservators of the peace, R Burn, *The Justice of the Peace, and Parish Officer* (23rd edn by Sir G Chetwynd) vol III (London, Butterworths, 1820) 108–11 (also expressing the view that the status of conservator of the peace could be acquired by usage).

⁹⁷ *Entick v Carrington* (n 12) 1052.

⁹⁸ *ibid* 1053.

⁹⁹ *ibid* 1053–54.

¹⁰⁰ *ibid* 1054–55.

expressed to have been signed in Council. The objection was dismissed, the court presuming the warrant to have been executed in Council, but Lord Camden said that if any one of the Counsellors could have committed the bishops, ‘that would have been a flat answer’.¹⁰¹ Lord Camden concluded that the right of individual Privy Counsellors to commit in any case beyond treason had not been recognised. Therefore, he said, insofar as *Kendal & Row* recognised such a power beyond the case of treason, he would be ‘forced to deny’ Holt LCJ’s opinion in that case ‘to be law’.¹⁰² *Kendal & Row* had gone further—it had held Secretaries of State to be conservators of the peace with powers both to arrest and commit, and, albeit only implicitly, this was not limited to cases of treason.

Lord Camden’s judgment on the first issue, in many parts brilliant, is not convincing in every respect. On a fair reading of the Elizabethan authorities, a broader power vested in Privy Counsellors was implied. *Kendal & Row* had—perfectly reasonably—read the authorities in this way. *Kendal & Row* had also been based on other considerations, some of which had merit. In particular, regard was had to functions of the Secretaries of State not as the office had been hundreds of years before, but as it had evolved to be. The King’s Bench expressly recognised the Secretaries of State functioned as conservators of the peace. The reasoning of the court in *Kendal & Row*, as opposed to the authorities preceding it, was subjected to little analysis by Lord Camden. Nor did he consider the cases in the King’s Bench which had developed the line of jurisprudence further. In Lord Camden’s view the reasoning in such cases was erroneous if not based on existing and sufficiently clear prior authority. As others have remarked, this view of the common law, which precludes its evolution, is unduly narrow. It is a view that diverged markedly from the approach taken by Holt LCJ.¹⁰³

At this juncture, we must consider the analysis of Sir William Holdsworth. Holdsworth wrote that the most important question decided by *Entick v Carrington* had been ‘the power to arrest possessed by a Secretary of State’. He concluded that: ‘Lord Camden’s judgment ... settled that the only power to arrest which [the Secretary of State] possessed was a power, as Privy Counsellor, to arrest in cases of high treason.’ For this reason, he considered the judgment to be comparable in importance to the Act abolishing the Star Chamber and the Habeas Corpus Act 1679, ‘because in all cases, except in the case of high treason, it prevented arrests from being made at

¹⁰¹ *ibid* 1057.

¹⁰² *ibid* 1053.

¹⁰³ See n 12 above and reference to *Ashby v White*. In *R v Despard* (1798) 7 TR 735, 742; 101 ER 1226, 1230, Lord Kenyon CJ stated: ‘if that be true, farewell to the common law of the land’.

the discretion of the executive, and so gave abundant security that, if an arrest was made, it could only be made by regular judicial officers acting in accordance with known rules of law'. Holdsworth wrote that *Entick v Carrington* settled this issue as a matter of law.¹⁰⁴

Frederick Siebert, probably following Holdsworth, in his famous study of the law of the period regulating the press, analysed the case in the same way,¹⁰⁵ and Lord Diplock in *Rossminster* held the same view.¹⁰⁶

This analysis is not, however, accurate. Key to Holdsworth's analysis was the statement of Lord Camden that he was forced to deny the opinion in *Kendal & Row* to be law to the extent that it extended beyond committal for high treason.¹⁰⁷ There is no doubt that this statement does introduce a degree of opacity into Lord Camden's judgment, which is for the most part so admirably clear and incisive, but it did not determine that the power of Secretaries of State to arrest for seditious libel was unlawful.

It is important to recall that Lord Camden's analysis of the authority of the Secretaries of State to issue warrants was directed at answering what he presented as the 'first question', which was whether the Secretaries of State could be regarded as a conservator of the peace. What was relevant to this question was the *origin* of the power to commit and whether it revealed Secretaries of State to be conservators of the peace. The *extent* of the power to commit and arrest was not at issue and did not fall for determination. Indeed, Lord Camden went on to determine—the 'second question'—that even if Secretaries of State were to be regarded as conservators of the peace, they were not within the equity of the Constables Protection Act's protection of justices of the peace.¹⁰⁸ His remarks on *Kendal & Row* were therefore clearly *obiter dictum*.

Not only were the remarks *obiter dictum*, but in other parts of his judgment, Lord Camden made plain that he accepted that *Kendal & Row* and the later authorities of *R v Derby*, *R v Erbury* and *R v Dr Earbury* did provide lawful authority for the powers of Secretaries of State to arrest for seditious libel. Thus, he began his consideration of the first question by referring to the 'singular' power of Secretaries of State and stated that it was 'chiefly exerted against libelers, whom he binds in the first instance to their

¹⁰⁴ Sir WS Holdsworth, *A History of English Law* (London, Methuen & Co Ltd) vol X, 667 and 672.

¹⁰⁵ Siebert (n 7) 379-80.

¹⁰⁶ *Inland Revenue Commissioners v Rossminster* [1980] AC 952, 1009: 'a Secretary of State, it was held [in *Entick v Carrington*], did not have any power at common law or under the prerogative to order the arrest of any citizen or the seizure of any of his property for the purpose of discovering whether he was guilty of publishing a seditious libel'.

¹⁰⁷ Holdsworth (n 104) 666.

¹⁰⁸ *Entick v Carrington* (n 12) 1060-61.

good behaviour, which no other conservator ever attempted'. After noting the dark and obscure origins of this power, he stated:

Whatever may have been the true source of this authority, it must be admitted, that at this day he is in the full legal exercise of it; because there has been not only a clear practice of it, at least since the Revolution, confirmed by a variety of precedents; but the authority has been recognized and confirmed by two cases¹⁰⁹ in the very point since that period: and therefore we have not a power to unsettle or contradict it now, even though we are persuaded that the commencement of it was erroneous.¹¹⁰

Here, at the very outset of his judgment, Lord Camden states expressly that Secretaries of State enjoyed the 'full legal exercise' of a power to commit and arrest for crimes which he says in terms include seditious libel. He even identified the lawful authority for this power as deriving from its long usage and instances of judicial recognition. He went on to state that his enquiry into the origins of the power 'cannot be attended with any consequence to the public', but was relevant to the question of whether Secretaries of State were conservators of the peace. In other words he was not expounding the law as it was but seeking to search-out its origins.

Later in his judgment in the section considering the status and powers of the Secretary of State qua Secretary of State, Lord Camden referred to *Kendal & Row*, *R v Derby* and *R v Dr Earbury* and said that he would take no other notice of them on the point because they 'afford no light in the present inquiry by shewing the ground of the officer's authority, though they are strong cases to affirm it'.¹¹¹ Lord Camden thus repeated that the power claimed by Secretaries of State was confirmed by those authorities, despite the fact that they might have been built on dubious foundations, and noted that their status was of no consequence to his inquiry into the origin of the power. Then, at the end of his consideration of the first question, he returned to the point for a third time. After concluding that the Secretaries of State had 'assumed' the power to commit as a transfer of royal authority to themselves ('I know not how'), he stated that:

At the same time I declare, wherein all my brothers do all agree with me, that we are bound to adhere to the determination of the Queen against Derby, and to the King against Earbury; and I have no right to overturn those decisions, even though it should be admitted, that the practice, which has subsisted since the Revolution, had been erroneous in its commencement.¹¹²

¹⁰⁹ Lord Camden is probably referring to *R v Derby* and *R v Earbury* but he could be referring to *Kendall & Row* or *R v Erbury* as one of the cases. He refers to the first three at 1052 and to the first two at 1058.

¹¹⁰ *Entick v Carrington* (n 12) 1046.

¹¹¹ *ibid* 1052.

¹¹² *ibid* 1058–59.

The consequence of these statements is that Lord Camden did not hold that the Secretaries of State had no power to arrest for examination or to commit for seditious libel; but rather he accepted this power had been accepted by the King's Bench.

Holdsworth made no attempt to explain these passages in Lord Camden's judgment. There is, however, possibly an explanation that is consistent with Holdsworth's view. *Kendal & Row*, at least on Lord Camden's analysis, had identified the power to commit as vesting in the office of Privy Counsellor. The passages referred to above might then be thought to mean no more than that subsequent authorities extended *Kendal & Row* in holding that the power vested in Secretaries of State by virtue of that office, and that Lord Camden meant no more than that he was bound by authority to recognise that the power to commit now vested in the office of Secretary of State qua Secretary of State and not that it extended beyond committal for treason. He did not mean to say, on this view of the case anyway, that he accepted that the power extended to arrest for seditious libel. This argument draws some support from the fact that Lord Camden stated that he was examining the foundations of *Kendal & Row* because later authority had rested almost entirely on the authority of this case and from his comments that *Kendal & Row* should be interpreted strictly, to that which it was necessary to decide in that case, ie the case of treason.¹¹³ It suggests, perhaps, that if the authority of *Kendal & Row* was to be limited to the power to commit for treason, so should the later authorities that stood on its shoulders.

There are, however, real difficulties in reading the judgment in this way. First, Lord Camden expressly referred to arrest for seditious libel in the same passage as stating that the Secretaries of State were in the 'full legal exercise' of their asserted power. The power to which he was referring was therefore the power in its full breadth. It is notable that Wilson's report of the case supports this reading. It records Lord Camden as having stated that 'it must be admitted that he is in the full exercise of this power to commit, for treason and seditious libels against the Government, whatever was the original source of that power'.¹¹⁴

Second, there is the difficulty that Lord Camden said the court was bound by at least one case, *R v Derby*, that clearly recognised a power vested in the

¹¹³ *ibid* 1052.

¹¹⁴ *Entick v Carrington* (n 12) Wils Rep 288; 95 ER 807, 816, emphasis added. The State Trials report was based on Lord Camden's own notes of his judgment, although a copy of Lord Camden's originals. But it does not constitute an authoritative text and was never approved by Lord Camden. It may not be a completely accurate record of the terms in which judgment was delivered. Wilson's report may be more accurate on certain points and it provides an insight into the understanding of a contemporary lawyer present when judgment was delivered. Furthermore, Wilson's report is the only report that was available until the publication of the State Trials version in 1816 (although other private records no doubt existed: see eg TB Howell's comments, *Entick v Carrington* (n 12) 1029).

Secretaries of State to arrest for seditious libel.¹¹⁵ It is not easy to reconcile Lord Camden's statement that he was bound by this case irrespective of the merits of its legal premise with the idea that he would depart from it (effectively overruling it) insofar as it extended beyond committal or arrest for treason. Indeed, to assert that the authority of the case, insofar as it related to arrest for seditious libel, had been undermined by Lord Camden's restrictive view of *Kendal & Row* would be illogical, since its authority as a case about the powers of the Secretaries of State qua Secretaries of State had also been exposed as equally infirm and yet, on this analysis, Lord Camden said he was bound to accept the extension. It is difficult to see why he should be bound by it in one respect to follow an infirm precedent, but not in the other. We also should not lose sight of the fact that Lord Camden's comments on these points were *obiter dictum* and therefore he could not alter the status of previous authority in any event.

It may be said that the fact that Lord Camden expressed himself bound by *Dr Earbury's case*, which was not a seditious libel case, suggests that he was indeed only referring to the fact that the cases had recognised a power vested in Secretaries of State as opposed to Privy Counsellors. There is some force in this point. However, it also raises its own difficulties because *Dr Earbury's case* did extend to arrest for examination, and yet if restricted to the same extent as Lord Camden would have restricted *Kendal & Row*, to committal for treason, *R v Dr Earbury* like *R v Derby* would have to be, in effect, partially overruled in respect of the extent of the power it recognised. Indeed, Holdsworth appears to have assumed that the power to arrest (as opposed to commit) for treason survived Lord Camden's judgment.¹¹⁶

So, try as we might, there is no satisfactory way to reconcile Holdsworth's view with Lord Camden's reasoning. The final but perhaps most compelling point is that had Lord Camden's judgment limited the power of Secretaries of State to the power of arrest for treason, as Holdsworth claimed, Lord Camden could not have dealt with the issue of whether Secretaries of State had power to seize papers on suspicion of seditious libel in the way that he did. There would have been nothing at all in the assertion that the Secretary of State had jurisdiction to seize papers on such a charge if the Secretary of State did not even possess the power to arrest for it. Lord Camden would surely have made this point even if he had gone on to consider the other arguments in favour of the power on their merits. Not only did he not make this point, his reasoning assumed the power to arrest for seditious libel.

¹¹⁵ The view expressed in *The Oxford History of the Laws of England*, vol XI, 48 is that the Common Pleas was not strictly required to follow the King's Bench, but it was accepted convention that they would respect the decisions of the other benches.

¹¹⁶ Holdsworth (n 104) also contended that Lord Camden rejected arguments for the asserted power based on practice and public policy in the final part of his judgment dealing with search and seizure (667). But see n 122 below.

The question remains as to what precisely Lord Camden meant in saying that he denied Lord Holt's opinion in *Kendal & Row* to be law insofar as it recognised the power of Privy Counsellors to commit beyond the case of high treason. There is no doubt that some of Lord Camden's recorded reasons are difficult to reconcile with his clearly expressed view that the King's Bench authorities were good law. One possibility is that the report is not entirely accurate, and it is notable that Wilson's report of the case does not record Lord Camden denying *Kendall & Row* to be law if extended beyond treason. If such words were said, most probably Lord Camden meant that Holt LCJ's opinion would not have represented a true statement of the law as it had then stood, and the purpose of Lord Camden's exegesis was to identify the legal missteps on which the weight of precedent rested, rather than to suggest that any King's Bench authority (especially important for our purposes, *R v Derby*, but also *R v Dr Earbury* and *R v Erbury*) did not represent the law and should not be followed.¹¹⁷ In other words, Lord Camden was not expounding the law, but was revealing how successive court judgments had encroached on individual liberty without in his view having any proper legal foundation whether in prior authority or parliamentary sanction. He said that after he had declared his opinions on this issue, he would 'leave others to judge for themselves'.¹¹⁸ Indeed, he said—disingenuously in fact—that the task before him of uncovering the origin of the power to commit was not an agreeable one because it may tend to 'create, in some minds a doubt upon a practice which has been quietly submitted to', but which, he said, if properly regulated by law could have no significance for individual liberty since, if so regulated, it mattered not whether it was a Secretary of State or magistrate who exercised the law.¹¹⁹ These comments support the view that Lord Camden's opinion on *Kendal & Row* was not intended to have legal significance. His audience was the general public and Parliament rather than tenants of the Inns of Court.

On the basis of this analysis, we must conclude that Holdsworth's influential analysis of *Entick v Carrington* does not paint an accurate picture. Whilst Lord Camden's judgment is itself somewhat opaque on this issue, Holdsworth presented *Entick v Carrington* as a case that finally resolved whether Secretaries of State had the power to arrest and commit for seditious libel; he approached the case as if the issue was squarely raised; and he analysed it as if the point was a central issue in the case. But the point was not at issue. No complaint of false imprisonment was made in the suit and the issue of the power of Secretaries of State to arrest or commit for

¹¹⁷ At *Entick v Carrington* (n 12) 1052, Lord Camden justified his examination into the power of a single privy counsellor to commit on the basis that 'lord chief justice Holt has built all his authority upon this ground' and subsequent cases 'all lean upon and support them selves by my lord chief justice Holt's opinion'.

¹¹⁸ *ibid.*

¹¹⁹ *ibid* 1046.

sedition was of only indirect relevance to the question whether the Messengers were within the equity of the Constables Protection Act. Far from overruling or departing from established precedents recognising such a power, the precedents, and the power to commit and arrest for seditious libel, were *affirmed* by Lord Camden.

Comfort for our analysis can also be taken from the fact that in subsequent decades, leading texts continued to recognise the power of Secretaries of State to arrest beyond cases of treason. Hawkins' *Pleas of the Crown* continued to state that a Secretary of State could lawfully commit persons for treason 'and for other offences against the state, as in all ages they have done'.¹²⁰ And Blackstone continued to rely upon the authority of *Kendal & Row* for the proposition that a warrant of arrest could be granted in extraordinary cases by Secretaries of State.¹²¹

Lord Camden's judgment was therefore less significant in its legal consequences than is sometimes thought. But Lord Camden's acceptance that he was bound by King's Bench authorities renders his exposure of the inadequacies of those authorities more remarkable. As has been shown, this is an area in which the courts had consciously sought to make the powers of the government fit for purpose as state security powers. Lord Camden's judgment was thus also strikingly reactionary when viewed from the perspective of the long-standing judicial approach to the law of seditious libel.

C. The Power to Search and Seize Personal Property

The section of Lord Camden's judgment addressing the asserted power of Secretaries of State to issue warrants for the search and seizure of property in cases of seditious libel (the 'fourth issue') is more eye-catchingly anti-governmental in its content. The defence submitted that, irrespective of the Constables Protection Act, the seizure of Entick's papers had been carried out under lawful warrant issued by the Secretary of State. It is in this section of his judgment that Lord Camden made his oft-cited Lockean appeal to individual liberty and the right to property. It is also here that Lord Camden denounced the government's appeals to state necessity in explicit and forthright terms. It was said that 'it is necessary for the end of government to lodge such a power which a state officer; and that it is better to prevent the

¹²⁰ W Hawkins, *A Treatise of the Pleas of the Crown*, 8th edn by J Curwood (London, S Sweet, 1824) 175, footnotes omitted. It was noted that in *Entick v Carrington*, Lord Camden had 'inquired very critically into the source of this power to commit for libels and other state crimes', accepting that Lord Camden had done no more.

¹²¹ W Blackstone, *Commentaries on the Laws of England*, 1st edn (Oxford, Clarendon, 1769) bk IV, 287; and 16th edn (1825) 289. See also *Stephen's New Commentaries on the Laws of England*, 10th edn, vol IV (London, Butterworths, 1886) 351.

publication before than to punish the offender afterwards'. Lord Camden answered that, if the legislature were of that opinion, it 'will revive the Licensing Act'. And he also held that the common law did not recognise appeals to state necessity.¹²²

These sentiments could not be more at odds with the authorities that had developed the law of seditious libel, in both its substantive aspect and in relation to the associated powers of the Secretaries of State. It was precisely the concern for state necessity which had driven the development of the law, as our discussion has shown.

As has been explained, the weight of authority pointed to the courts recognising the power to seize property, and this represented, on one view at least, a limited and principled extension of, first, the power to arrest and, second, the duty to hand over seditious writings to the authorities. The most remarkable feature of this part of Lord Camden's judgment is the clarity with which he appreciated and exposed the true breadth and dangers of the power claimed, which he described as 'exorbitant'. In this he was fortunate since, as we have seen, the manner in which the claimed power was actually exercised had been demonstrated time and again in the trials relating to *The Monitor* and *The North Briton* over which he had presided.

Thus, Lord Camden understood what was involved in a suspect's belongings being ordered to be brought before the Secretary of State to be examined. He explained that giving effect to such a warrant involved a search of the house, the breaking open of 'every room, box, or trunk' and the seizure of all papers and books without exception. Nothing, he said, is left to the discretion or humanity of the Messenger: 'His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction...'.¹²³ Lord Camden referred to evidence given by the Messengers in *Wilkes v Wood* to the effect that they felt compelled to take everything—'sweep all'—and he invoked the vivid image of Wilkes' private pocket book filling up 'the mouth of the sack'.¹²⁴ Had Lord Camden not seen such evidence first hand, it is hard to imagine that counsel for the plaintiffs could have made such an impact on the court through submissions alone on the facts of Entick's case.

Lord Camden did not stop there. He went on to explain how the power could be exercised against an innocent person on the basis of secret evidence

¹²² *Entick v Carrington* (n 12) 1073. The defence had gone as far as to say that the power was 'essential to government, and the only means of quietening clamours and sedition' at 1064. Lord Camden also rejected the defence's appeal to long usage which, in the absence of any supporting authority, he found 'incredible' and incapable of establishing its legality (at 1068), citing the case of *Leach v Money*. Long usage and acceptance were, however, often accepted as part of a justification for recognising a power, as Lord Camden had himself done at 1046 (power of arrest and committal) and in *Wilkes' habeas case* (n 17) 991. See also *R v Despard* (1798) 7 Term Rep 736, 744; 101 ER 1226, 1231.

¹²³ *Entick v Carrington* (n 12) 1064.

¹²⁴ *ibid* 1065.

of undisclosed informers. This was in part a reference to Lord Camden's own previous judgment in *Wilkes' habeas case*, in which he had held that a warrant of arrest for seditious libel had to set out neither the libellous words nor the evidence on which it was premised. This gave great latitude to the government to issue warrants which would be good and valid, although the basis for them might not have been sufficient. Upholding the government's submissions in the former case had seemed a victory for the government, but now Lord Camden turned his judgment back on the Crown by limiting the authority to cases of committal and arrest.

Lord Camden identified other dangers and lack of safeguards. He explained how the Secretary of State had over time 'eased himself of every part' of his own responsibility for superintending the execution of the warrants, such that he had become used to doing nothing more than signing and sealing the warrant itself. The examination of suspects and their papers was left to his law clerks.¹²⁵ He explained how the search could be conducted without the presence of the suspect, a constable or any other witness as to what occurred on the premises and what was taken seized. He explained that the only witnesses would often be the Messengers themselves, which leaves the injured without proof. If, for example, a Messenger acted in excess of his authority, or stole a bank note, or ate a beefsteak, there would be nothing the individual could realistically do about it even if he suspected it had occurred.¹²⁶

Lord Camden was able to see that if such powers were valid innocent persons were 'as destitute of a remedy as the guilty'.¹²⁷ Unlike in the case of general warrants (*pace* the concession in *Leach v Money*), if an individual named in a warrant was apprehended but was in fact innocent, as long as the warrant had been faithfully executed, there would be no redress for the individual. Moreover, if a warrant had not been obeyed or if it had no adequate evidential basis, Lord Camden recognised that it was hardly open to most people to challenge the exercise of the power. In response to the defendants' submission that the power to search and seize had never been challenged, which supported, it was claimed, its legality, Lord Camden stated evocatively that: 'I answer, there has been a submission of guilt and poverty to power and the terror of punishment.'¹²⁸ History had shown that the guilty and innocent alike did not challenge the wide powers asserted by Secretaries of State, whether out of fear or poverty, or both. Lord Camden would have appreciated that *The North Briton* claims had been subvented by *The North Briton's* backer (Lord Temple), and perhaps also Entick's case, and that in the whole course of English legal history, cases such as

¹²⁵ *ibid* 1063.

¹²⁶ *ibid* 1065.

¹²⁷ *ibid*.

¹²⁸ *ibid* 1068.

these, brought against the King's officials by ordinary folk, had never been seen before.

Lord Camden was also concerned about the broad scope for the government to use the power of search and seizure given the expansive approach that had been taken to the law of seditious libel. Here again we see the influence of the wider context of the law of seditious libel in Lord Camden's judgment. In an important but rarely remarked upon part of his judgment, Lord Camden referred to the developments in the substantive law of seditious libel in cases such as *R v Bear*. He said that after that case, the mere possession of a libel, unpublished, in one's home was criminal. Likewise, any person who came into possession of a libel was required to disclose it. Lord Camden clearly disapproved of these developments, but said that he had no right to deny them as law in the case before him. He recognised and was troubled by the implications if a power of search and seizure was recognised on the basis of suspicion of guilt of an offence of seditious libel. He realised that given how widely framed the offence of seditious libel had become, including transcribing and failing to deliver-up seditious writings, 'whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal'.¹²⁹ Lord Camden again chose to illustrate his point provocatively by saying that if a popular libel was put about the country, the whole kingdom would soon be liable to having government agents rifling through their homes and private affairs. The offence of seditious libel had been widely defined to include possession of written words critical of the government in a private home. Had the Court of Common Pleas in *Entick v Carrington* recognised a power in the government to search and seize evidence of seditious libels, the King's officials would have been able to exercise the power not only against printers, publishers and authors, but also against anyone believed to have a seditious publication in their house.

The force of Lord Camden's judgment on the issue of the power to search and seize therefore lies not in his florid homage to personal property or in his bravado rejection of the reliance on state necessity, or even in his black-letter refusal to extend the law beyond what is laid down in authority and statute (the three aspects of his judgment that are generally fixed upon). The force and brilliance of Lord Camden's judgment is in the detail and in his appreciation of how the claimed power—for which there was a strong legal case on paper—was dangerous and ill-used. He understood how the law operated in practice in an excessive manner, how widely the claimed power could be deployed and how few safeguards existed against abuse, including the limited effectiveness of recourse to the courts themselves. These points were more influential on Lord Camden's decision and are still

¹²⁹ *ibid* 1072.

more persuasive today than the parts of his judgment that one finds recited in textbooks: his philosophies of law, liberty and property.

V. CONCLUSION

This chapter has attempted to shed fresh light on *Entick v Carrington* for the modern reader by explaining how the development of the law of seditious libel and the exercise of powers relating to seditious libel as disclosed in previous cases were highly material to the decision of the Court of Common Pleas and illuminate key aspects of the reasoning of Lord Camden. The only issue that was open to the court to determine in *Entick v Carrington*, both on the state of the authorities and given the scope of the suit, was the claimed power of search and seizure. But the court's reasoning ranged far and wide and in so doing exposed the degree to which the courts had developed government powers to tackle what were perceived to be threats to the government and the state without parliamentary sanction (although, we have seen how the case did not, as some have claimed, abolish the power to arrest for seditious libel). In doing so, as well as by refusing to endorse the power of search and seizure—despite a weight of reason and authority in favour of such a power—the case can be considered alongside other famous judicial stands against the encroachment of state security powers.¹³⁰

¹³⁰ Such as Lord Atkin's subsequently endorsed dissent in *Liversidge v Anderson* [1942] AC 206 and more recently the judgments of the House of Lords in *A (No1) v Secretary of State for the Home Department* [2005] 1 AC 68 and *AF (No 3) v Secretary of State for the Home Department* [2010] 2 AC 269.