Liberty Tree

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The FOURTH Amendment ENFEEBLED

Part I: Origins

As Frederic Bastiat so clearly elucidated in his essay *The Law*, the purpose of government is to make and enforce laws to protect life, liberty, and property. In reality, government officials inevitably use any power granted them to *violate* life, liberty and property. Thus, the purpose of the Bill of Rights of the Constitution, and similar provisions in the State Constitutions, is to secure rights and prohibit governmental abuse.

But immoral people inevitably rise to government positions, and it is the people themselves who must be aware of their rights, and be eternally vigilant to see that their rights are enforced at law.

Since ratification, the first ten amendments to the Constitution have been continually violated and attacked by the federal and State governments, with the result that many have been weakly applied. The Supreme Court all too often upholds and blesses governmental violations of these rights through sophistry.

In the case of the Fourth Amendment, the right of the people to be secure against warrantless and unreasonable searches and seizures has been so eviscerated by court opinions that the foundational historical reasons for the amendment have in practice been denied. The colonial abhorrence of general warrants allowing *revenuers* to search any place on their own initiative led to the formation of the Fourth Amendment, yet the Supreme Court has refused in certain cases to apply its limitations to revenuers.

Paul Revere engraving of the arrival of British troops in Boston to enforce the Townshend Acts, 1768.

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

In order to comprehend some of the *perversions* of the Fourth Amendment, however, an understanding of the experiences which impelled this guarantee of protection from unreasonable searches and seizures is in order.

The Writs of Assistance

It is widely understood that the Fourth Amendment originated as a reaction to the American colonies' experience with the tyrannical writs of assistance under English rule. The British attempted to control the economy of America to enrich British interests through legislation controlling trade (the Navigation Acts). The answer of the colonists was to avoid the regulations and duties imposed by the British as often as possible. Smuggling was a regular feature of colonial America.

Enforcement of the English revenue laws was fairly lax, but began to become more severe in the 1760s. During this time, writs of assistance were issued by judges of the provincial courts to custom-house officers, authorizing them to search vessels and houses for smuggled goods, without identifying any particular vessel or house or goods. Under these writs, authorities

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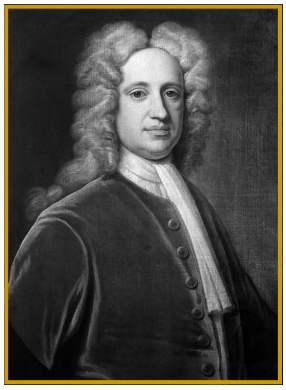
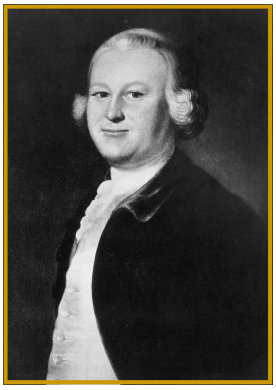
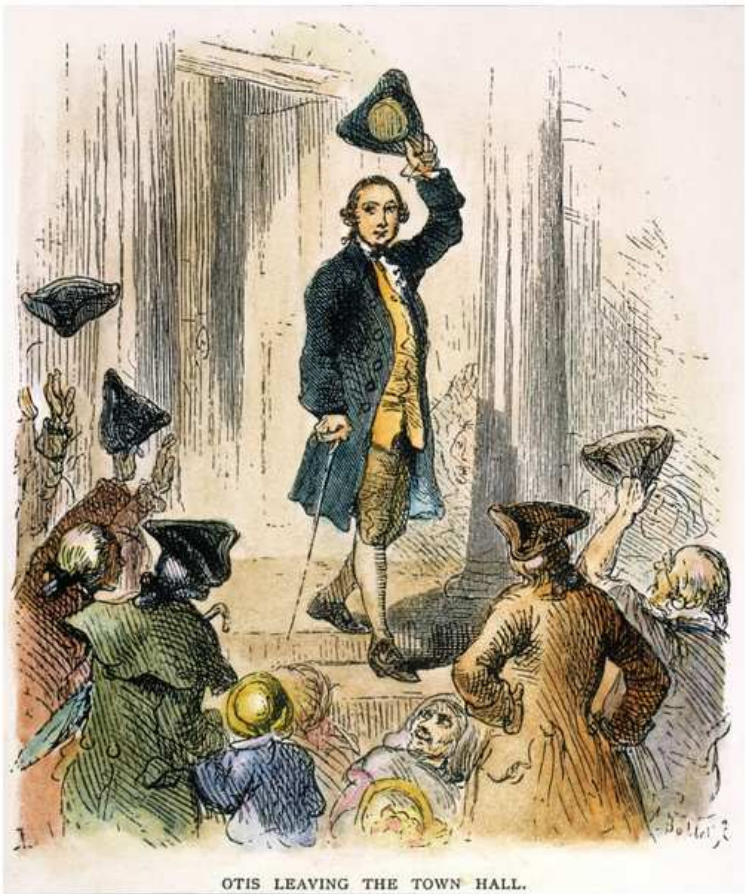
could enter any home without any advance notice, probable cause, or reason whatsoever.

The writs were effective from the time of their issuance until six months after the death of the King. In 1760, King George II died, necessitating the issuance of new writs of assistance. James Otis, Jr., a patriot lawyer in Boston (and mentor to Sam Adams), argued *Lechmere's Case*[1] in 1761, representing a group of merchants challenging the legality of the new writs of assistance. Although Otis did not succeed in challenging the writs at this time, when similar warrants were authorized by the Townshend Acts of 1767,[2] they were challenged for five years in every colonial superior court; the majority, eight colonies, ultimately refused to uphold them.





Jeremiah Gridley (left) a prominent lawyer, advocated for general writs of assistance, but his former legal apprentice James Otis, Jr. (right), defended the rights of the people in *Lechmere's Case*.



Colored engraving, *circa* 1877, of James Otis "Cheered On Leaving The Boston Town Hall After Protesting The Writs Of Assistance In 1761."

In favor of revenue collection!

In *Lechmere's Case*, Jeremiah Gridley argued the writs ought to be issued, quoting the English statute which authorized writs of extremely intrusive searches:

> And it shall be lawful to and for any person or persons authorised by Writ of Assistance under the Seal of his Majesty's Court of Exchequer to take a Constable, Headborough, or other public Officer, inhabiting near unto the place, and in the day time to enter and go into any house, Shop, Cellar, Warehouse, room, or any other place, and in case of Resistance, to break open doors, Chests, Trunks and other Package, and there to seize any kind of Goods or Mechandize whatever prohibited, and to put the same into his Majesty's Warehouse in the Port where Seisure is made.[3]

The superior court had exchequer jurisdiction, Gridley advised, and English law provided "all the Officers for collecting and managing his Majesty's Revenue, and inspecting the Plantation Trade in any of the said Plantations, shall have the same powers &c. as are provided for the Officers of the Revenue in England."

Gridley admitted that the common privileges of Englishmen — to be secure in their homes and shops against such government searches and seizures — were "taken away" in this case, but that they still had such privileges in the case of crimes and fines. It was the *necessity* and *benefit* of the Revenue which justified issuance of the general Writ:

> Is not the Revenue the sole support of Fleets and Armies abroad, and Ministers at home? without which the Nation could neither be preserved from the Invasions of her foes, nor the Tumults of her own Subjects. Is not this I say infinitely more important, than the imprisonment of Thieves, or even Murderers? yet in these Cases 'tis agreed Houses may be broke open.
>
> In fine the power now under consideration is the same with that given by the Law of this Province to Treasurers towards Collectors, and to them towards the subject. A Collector may when he pleases distrain my goods and Chattels, and in want of them arrest my person, and throw me instantly into Gaol. What! shall my property be

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1. Lechmere, Greene, and Paxton were parties to the case, which is also sometimes called *Paxton's Case*.
2. These Acts ushered in direct taxes on lead, glass, paper, paint and tea, and established a strict machinery for customs collection, including writs of assistance.
3. All quotes from the arguments made by Gridley and Otis, as reported by John Adams, can be found at the National Archives, see https://founders.archives.gov/documents/Adams/05-02-02-0006-0002-0003#LJA02d036n33. Emphases are in original, unless otherwise noted.

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wrested from me!—shall my Liberty be destroyed by a Collector, for a debt, unadjudged, without the common Indulgence and Lenity of the Law? *So it is established*, and the necessity of having public taxes effectually and speedily collected *is of infinitely greater moment to the whole, than the Liberty of any Individual.* (emphases added)

This argument, that collecting taxes must override the rights and liberties of the people, is echoed by the liberty thieves of today. Violence *against the people* to collect revenue is deemed just fine, because the government must fund armies to prevent violence *against the people*.

> THUS OUR HOUSES AND EVEN OUR BED CHAMBERS, ARE EXPOSED TO BE **RANSACKED**, OUR BOXES CHESTS & TRUNKS **BROKE OPEN RAVAGED AND PLUNDERED** BY WRETCHES, WHOM NO PRUDENT MAN WOULD VENTURE TO EMPLOY EVEN AS MENIAL SERVANTS; WHENEVER THEY ARE PLEASED TO SAY THEY **SUSPECT** THERE ARE IN THE HOUSE WARES &C FOR WHICH THE DUTYS HAVE NOT BEEN PAID.

In favor of the liberty of the people!

Warrants which particularly describe the place, person, and/or things to be searched or seized generally are returned to the court to make a record that they were properly executed, or to show that they were *not* executed within a specified time. James Otis argued that the writs of assistance were perpetual general warrants which "ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account."

Otis declared that he would "to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is. It appears to me ... the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book."

Otis argued that particularized warrants, which were established in English law and later came to be required by the Fourth Amendment, were the only legally valid writs for searches:

> I will admit, that writs of one kind, may be legal, that is, *special writs, directed to special officers,* and to search *certain houses*, &c. *especially set forth in the writ,* may be granted by the Court of Exchequer at home, *upon oath made before* the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH. ... Your Honours will find in the old book, concerning the office of a justice of peace, precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has before sworn he suspects his goods are concealed; and you will find it adjudged *that special warrants only are legal.* In the same manner I rely on it, that the writ prayed for in this petition being general is illegal. It is a power that places the liberty of every man in the hands of every petty officer. ...
>
> No more than one instance can be found of [a general writ of assistance] in all our law books, and that was in the zenith of arbitrary power, ... when Star-chamber powers were pushed in extremity by some ignorant clerk of the Exchequer. ... No Acts of Parliament can establish such a writ; Though it should be made in the very words of the petition it would be void, "AN ACT AGAINST THE CONSTITUTION IS VOID." Vid. Viner. But these prove no more than what I before observed, that *special* writs may be granted *on oath* and *probable suspicion.*

In his speech, which has been characterized as the opening gun of the controversy leading to the Revolution, Otis stated the doctrine which ultimately gained acceptance in the American legal system: that an act contrary to the Constitution is void, and a court should refuse to enforce it. He also asserted the right to freedom in one's own house, the "castle doctrine" articulated by the King's Bench in *Semayne's Case*, 1603:

> Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ [of assistance], if it should be declared legal, would totally annihilate this privilege.

John Adams later wrote of Otis' defense of liberty that, "Then and there, the child Independence was born."[4] That child grew up, and the Fourth Amendment eventually came into being.

Tyrannical intrusions of Liberty

In 1772, Sam Adams and the newly formed Committee of Correspondence drafted the Boston Pamphlet, listing the Rights of the Colonists and the Infringements and Violations of Rights for circulation among the towns of Massachusetts, agitating for Independence. The pamphlet charged Parliament with exerting an assumed power to raise "a Revenue in the Colonies without their consent," and complained that new revenue officers were commissioned with unconstitutional powers "more absolute and arbitrary than ought to be lodged in the hands of any man or body of men whatsoever." These officers were allowed to "at ... their wills and pleasures, as well By Night as by

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4. *See, e.g.,* https://www.mass.gov/guides/john-adams-the-massachusetts-constitution

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day to enter and go on board any Ship, Boat, or other Vessel ... and also in the day time to go into any house, shop, cellar, or any other place where any goods wares or merchandizes ... are suspected to lie concealed." As a result, the Committee said:

> Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they suspect there are in the house wares &c for which the dutys have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened ... Those Officers may under colour of law and the cloak of a general warrant, break thro' the sacred rights of the Domicil, ransack mens houses, destroy their securities, carry off their property, and with little danger to themselves commit the most horred murders.[5]

Guarding against general warrants

Just eleven years after the colonies won their Independence, the current U.S. Constitution was drafted and proposed to the States. Many advocates for freedom from British rule smelled a rat, however, and considered the proposed constitution as authorizing a despotic government. Mercy Otis Warren, the sister of James Otis, wrote an anonymous leaflet in 1788, *Observations on the New Constitution*, pointing out that explicit guarantees of individual rights were omitted, and particularly the right to be free from arbitrary searches and seizures:

> There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting *writs of assistance* in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure. ...[T]he rights of individuals ought to be the primary object of all government, and cannot be too securely guarded by the most explicit declarations in their favour.[6]


Mercy Otis Warren.

In June of 1788, New Hampshire became the 9th State to ratify, establishing the Constitution. By September of that year, only North Carolina and Rhode Island had not ratified. North Carolina abstained from ratification in hopes that a bill of rights would be added. Rhode Island's governor wrote to Congress in late 1789 explaining his State wanted still "further checks and securities" limiting federal power before "they could adopt" the Constitution.[7]

On June 8, 1789, James Madison gave an extended oration in Congress setting out why it was expedient to present a bill of rights to the States for ratification. While the Federalists held that no enumeration of rights was necessary because the Constitution granted limited powers to the federal government, Madison said that the *means* by which those powers could be implemented through "necessary and proper" laws might be abused, reason enough to adopt a bill of rights. Madison gave a well-understood example of such an *improper* law — prescribing *general warrants* as a means of aiding the collection of revenue:

> It is true the powers of the general government are circumscribed; they are directed to particular objects; but even if government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, ... there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof; ... Now, may not laws be considered necessary and proper by Congress, ... which laws in themselves **are neither necessary or proper**[?] ... I will state an instance which I think in point, and proves that this might be the case. The general government has a right to pass all laws which shall be necessary **to collect its revenue**; the means for enforcing the collection are within the direction of the legislature: **may not general warrants** be considered necessary for this purpose[?] ... [If the State governments are restrained by their consitutions from permitting such general warrants], there is like reason for restraining the federal government.[8] (emphases added)

Thus, throughout the formation of these United States, freedom from searches and seizures unsupported by probable cause, not only in the criminal context, but also in revenue collection, was considered a fundamental right never to be violated. In the next installment, we will begin to explore how the courts have sometimes upheld and strengthened that guarantee, but also in many instances *enfeebled* it.

5. *See, e.g.,* Schwartz, Bernard. *The Roots of the Bill of Rights, Volume 1* (1980), pp. 305-206.
6. For a copy of the pamphlet, visit https://www.gutenberg.org/ebooks/72627
7. See https://www.consource.org/document/rhode-island-governor-john-collins-to-the-president-and-congress-1789-9-26/20130122082406/
8. https://founders.archives.gov/documents/Madison/01-12-02-0126