

# The Framers' Intent: John Adams, His Era, and the Fourth Amendment<sup>†</sup>

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## INTRODUCTION

Courts and scholars seeking the original understanding of the Fourth Amendment have confronted two fundamental questions: what practices was the amendment designed to regulate; and how should a constitution regulate such practices? To inform the answers to those questions, this Article offers a new perspective of, and information on, the historical record regarding the framing of the amendment. It also presents for the first time a detailed examination of John Adams's fundamental influence on the language and structure of the amendment and his knowledge of, and views on, how to regulate searches and seizures.

Most of the language and structure of the Fourth Amendment was primarily the work of one man, John Adams. Adams was an important person for many other reasons, including as the second President of the United States. His life is the subject of many biographies; his letters, works, and extensive writings are a rich source of material. Less studied and understood, however, are his knowledge of, and views on, search and seizure and his role in formulating the principles to regulate those governmental actions. Upon examination, Adams stands out in that era as having profound opportunities to examine search and seizure practices and as having the most important role in formulating the language and structure of the Fourth Amendment. If the intent of the framers is a fundamental consideration in

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construing the Constitution, as the Court has repeatedly told us it is, then John Adams's knowledge and views should be considered an important source for understanding the Fourth Amendment.

More fundamentally, Adams's appreciation of search and seizure principles reflects a broader mosaic that demonstrates that the Fourth Amendment was the product of a rich jurisprudence on search and seizure. That jurisprudence offered a structured series of principles to regulate the search and seizure activities of that era and the amendment was not merely a reaction to general warrants. Further, although the framing-era sources did not always agree on the details of the criteria for regulating searches and seizures, they were united in seeking objective criteria to measure the propriety of governmental actions. That quest was firmly embedded into the language and structure of the Fourth Amendment.

Rather than the broad currents of history, the events in England and in the American colonies during the period immediately preceding the American Revolution are viewed as the catalysts for the amendment's adoption.<sup>1</sup> It is the portion of the historical record that is most often recalled in Supreme Court opinions<sup>2</sup> and by leading commentators.<sup>3</sup> This is rightly so, given that the period of 1761 to 1791 was characterized by aggressive British search and seizure practices and was the era when the principles that found their way into the Fourth Amendment crystallized.

In 1761, James Otis first challenged British search and seizure practices and offered an alternative vision of proper search and seizure principles in the *Writs of Assistance Case*.<sup>4</sup> Shortly thereafter, a series of English cases condemned general warrants.<sup>5</sup> After declaring independence in 1776, numerous states drafted search and seizure protections in their own state constitutions.<sup>6</sup> Notably, in 1779, John

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1. *E.g.*, *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (“[T]he Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance . . . .”); Jacob W. Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation*, in 84 THE JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 1, 19 (1966) (explaining that the Fourth Amendment was “the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England”).

2. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 176–82 (1984); *Chimel v. California*, 395 U.S. 752, 760–61 (1969); *Stanford*, 379 U.S. at 481–85; *Marcus v. Search Warrant of Prop.*, 367 U.S. 717, 729 (1961); *Henry v. United States*, 361 U.S. 98, 100–01 (1959); *Harris v. United States*, 331 U.S. 145, 157–62 (1947) (Frankfurter, J., dissenting); *United States v. Lefkowitz*, 285 U.S. 452, 466–67 (1932); *Carroll v. United States*, 267 U.S. 132, 149–50 (1925); *Weeks v. United States*, 232 U.S. 383, 389–91 (1914); *Boyd v. United States*, 116 U.S. 616, 623–30 (1886); *see also* Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 393, 396 (1963) (“[Judicial] opinions are replete with reliance upon history.”).

3. *E.g.*, TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23–50 (1969); Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, in 55 THE JOHN HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 211, 223–88 (1937).

4. *See infra* notes 81–121 and accompanying text.

5. *See infra* notes 152–91 and accompanying text.

6. *See infra* notes 322–30 and accompanying text.

Adams drafted Article 14 of the Massachusetts Declaration of Rights.<sup>7</sup> In 1787, our present Constitution, without a Bill of Rights, was drafted. The absence of a Bill of Rights became a significant source of concern during the ratification process.<sup>8</sup> Several states requested that the new Constitution be amended to provide protection against unjustified searches and seizures.<sup>9</sup> In response, the first Congress sent to the states for ratification what is now the Fourth Amendment,<sup>10</sup> which became part of the Constitution in 1791.

These are the broad outlines of a complex story, set out in the Parts that follow. Part I summarizes the two predominant interpretative theories that stem from an examination of the era that are in fashion today. As will become obvious later in this Article, neither of those theories are well supported by the historical record.

Part II details the many sources that influenced John Adams's understanding of search and seizure principles. Certainly, some of those influences are well documented and understood—indeed, some are almost mythical. The *Writs of Assistance Case* in 1761 is familiar history to any student of the Fourth Amendment: Adams, as a young lawyer, sat in the courtroom as James Otis argued against arbitrary search and seizure practices and proposed an alternative model to measure the propriety of such intrusions. Adams took notes of the arguments and, a short time later, wrote an extended “abstract” of the case. Inspired by Otis, Adams throughout his life repeatedly referenced the importance of Otis's arguments. Almost twenty years after the *Writs* case, Adams drafted Article 14 of the Massachusetts Declaration of Rights, which embodied many of Otis's arguments, but also contained several of Adams's own innovations. If we look at Adams's summaries of—and comments on—Otis's argument in the *Writs* case as evidence of Adams's knowledge and intent, the primary concern is not whether the summaries are historically accurate. Rather, an examination of Article 14 demonstrates that Adams embraced the arguments he attributed to Otis. Hence, Otis's argument sheds light on Adams's beliefs as to core search and seizure questions.

There were other significant influences on Adams, including a number of court cases that Adams was involved in—either as an attorney or as an observer—that implicated search and seizure principles. Further, Adams set out to, and amassed, one of colonial America's best libraries. It contained the major treatises of the era and they set forth detailed views on how to regulate the searches and seizures of that era. He was also intimately involved in the broader political and social conflicts of the era and wrote extensively about governmental structures. As a litigator, observer, correspondent, and politician, Adams noted that others argued for, and he personally argued for, specific standards to measure the propriety of

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7. In Adams's draft, the search and seizure provision was numbered Article 15 but became Article 14 when adopted. See 4 THE WORKS OF JOHN ADAMS 226 (Charles Francis Adams ed., 1851). For convenience, it is referred to throughout this Article as Article 14.

8. See *infra* notes 338–93 and accompanying text.

9. See *infra* notes 352–93 and accompanying text.

10. The Fourth Amendment was originally numbered the sixth amendment when sent to the states for ratification. Two of the proposed amendments were not ratified, resulting in it being renumbered the fourth. For convenience, it is referred to throughout this Article as the Fourth Amendment, even in the drafting and pre-ratification stages.

searches and seizures. Adams lived in Massachusetts, which was the center stage for much of the controversial British search and seizure practices. From that broad range of experiences, Adams had a depth of knowledge and experience concerning search and seizure principles unmatched by his contemporaries.

Part III outlines the evolution of American search and seizure provisions. Throughout the period of 1761 to 1791, there were sporadic discussions of the need for protections against unjustified searches and seizures. Few persons focused on the details; typically, the discussion was on the abstract level of a need to regulate searches and seizures or, even more narrowly, on a need to ban general warrants. During the period of 1776 to 1780, two models of search and seizure regulation emerged: the predominant model that banned only general warrants and the distinctive model developed by Adams in Article 14 of the Massachusetts Declaration of Rights, which offered a broader protection against all unreasonable searches and seizures, including general warrants. The new federal Constitution was drafted in 1787 without a Bill of Rights, prompting another period of discussion on search and seizure principles, ending with the adoption of the Fourth Amendment in 1791.

During the crucial period of 1787 to 1789, those two models remained the options to choose from in drafting a search and seizure provision. The states that urged adoption of a search and seizure amendment all advocated the Adams model and Congress ultimately utilized that model. Hence, his draftsmanship of Article 14 made Adams an important figure in search and seizure jurisprudence. What is remarkable, however, is how little others contributed substantively to the final product. An obvious contributor was James Madison, who created the initial draft of the Fourth Amendment. But much of that draft can be traced to Article 14 and, in Congress, Madison's draft was modified to even more closely resemble Article 14. A few other men influenced the wording of the amendment but they appeared to be following Adams's model. The choice of the Adams model appears to have been a conscious one, which is a significant point in light of claims that the amendment was merely designed to prohibit general warrants. Consequently, it is fair to say that the single most important person responsible for the language of the amendment is Adams. His views and understanding of the complexity of search and seizure principles are therefore important. Although the depth of Adams's learning was unmatched, he provides a window to the wider intellectual developments of the era regarding search and seizure principles. That observation demonstrates that there was a shared goal of judges, commentators, treatise writers, and others to identify what objects were worthy of protection and to articulate the objective criteria that would justify a governmental intrusion.

#### I. THE STRUCTURE OF THE FOURTH AMENDMENT AND ITS DISPUTED HISTORICAL MEANING

The Fourth Amendment provides:

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.<sup>11</sup>

The amendment contains two grammatically independent clauses joined by the conjunction “and.” The first clause is called the Reasonableness Clause and merely specifies, without elaboration, that all searches and seizures must be reasonable. The second clause, commonly called the Warrant Clause, requires that warrants be under oath or affirmation, that the places to be searched and the persons and things to be seized must be particularly described, and that the intrusion be supported by probable cause.

Historical analysis remains a fundamentally important tool to interpret the words of the Fourth Amendment.<sup>12</sup> Despite its crucial role, there is no consensus regarding the details or meaning of the historical record. Broadly speaking, there are two fundamentally opposed views about the history and original purpose of the Fourth Amendment and the meaning of the reasonableness command. The first is the conventional view, whose main proponents include Lasson,<sup>13</sup> Landynski,<sup>14</sup> and Cuddihy;<sup>15</sup> they have examined the broad sweeps of history and have found much that is complicated and contradictory. Nonetheless, they believe that some overall conclusions can be ascertained. Hence, as Landynski stated:

The first clause—“[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated”—recognized as already existing a right to freedom from arbitrary governmental invasion of privacy and did not seek to create or confer such a right. It was evidently meant to re-emphasize (and, in some undefined way, strengthen) the requirements for a valid warrant set forth in the second clause. The second clause, in turn, defines and interprets the first, telling us the kind of search that is *not* “unreasonable,” and therefore not forbidden, namely, the one carried out under the safeguards there specified.<sup>16</sup>

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11. U.S. CONST. amend IV.

12. *E.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 n.14 (2001) (asserting that if a practice was established when the Fourth Amendment was adopted, a person challenging that practice as now constitutionally impermissible would bear a “heavy burden” of justifying a departure from the historical understanding” (quoting *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O’Connor, J., dissenting))).

13. Lasson, *supra* note 3.

14. Landynski, *supra* note 1.

15. WILLIAM JOHN CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* (2009).

16. Landynski, *supra* note 1, at 43 (alteration in original) (emphasis in original); *see also* CUDDIHY, *supra* note 15, at 739–82 (drawing multiple conclusions about the scope and meaning of the amendment from a comprehensive treatment of history and disparaging the Amar and Davies paradigms); Lasson, *supra* note 3, at 103 (the phrase “unreasonable searches” and seizures was “intended . . . to cover something other than the form of the warrant”).

Following this view, the Court sometimes asserts that the analysis of reasonableness “begins . . . with the basic rule that ‘searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”<sup>17</sup>

A second, opposing, view’s intellectual source is Telford Taylor’s 1969 book, *Two Studies of Constitutional Interpretation*.<sup>18</sup> Taylor maintained that the amendment was designed primarily as a limitation on the issuance of warrants and that the framers took for granted the existence of warrantless searches because experience had given them no cause to be concerned about them. Taylor maintained that the drafting process of the Fourth Amendment “reinforces the conclusion that it was the warrant which was the initial and primary object of the amendment.”<sup>19</sup> He opined that neither the legislative history of the amendment nor any other history “sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies.”<sup>20</sup> Taylor concluded that the amendment was designed to authorize warrants and was not a safeguard against oppressive searches. Therefore, in Taylor’s view, the amendment was not designed to make most searches regulated by warrants.<sup>21</sup>

Akhil Amar and Thomas Davies each produced influential articles in the 1990s on the role and meaning of history in interpreting the amendment. Each, however, are mutations of Taylor’s views. Amar adopts Taylor’s conclusion that reasonableness has no fixed meaning but rejects Taylor’s premise that the Fourth Amendment was designed to regulate general warrants. Davies accepts Taylor’s premise that the warrant requirement was designed solely to regulate general warrants but rejects Taylor’s conclusion that the modern concept of reasonableness is an undefined reasonableness analysis.

Amar’s principal article was published in the *Harvard Law Review* in 1994.<sup>22</sup> It has been cited by the Supreme Court on a few occasions<sup>23</sup> and by scholars and lower courts. Numerous scholars have felt it necessary to reply to him.<sup>24</sup> Amar

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17. *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

18. TAYLOR, *supra* note 3. Taylor’s book has been repeatedly cited by the Supreme Court. *See, e.g.*, *Virginia v. Moore*, 553 U.S. 164, 169 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 336 (2001); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). A standardless reasonableness test predates Taylor’s book. *E.g.*, *United States v. Rabinowitz*, 339 U.S. 56, 61–63 (1950). But Taylor’s work gave that test a plausible historical basis.

19. TAYLOR, *supra* note 3, at 43.

20. *Id.*

21. *Id.* at 46–47.

22. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *First Principles*].

23. *E.g.*, *Moore*, 553 U.S. at 170; *Atwater*, 532 U.S. at 332 n.6.

24. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Original Fourth Amendment*]; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). The historical summary contained in my treatise and my other writings is consistent with the

dedicated the article to Telford Taylor.<sup>25</sup> Yet, Amar differs from Taylor in that Amar did not draw the conclusion that the central purpose of the amendment was to ban general warrants; instead, Amar asserted that all warrants “were friends of the searcher, not the searched.”<sup>26</sup> Amar sees history simply and clearly and believes that general “reasonableness” is the proper measure of a search or seizure, not any warrant requirement.<sup>27</sup> He maintains: “We need to read the Amendment’s words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.”<sup>28</sup> For Amar, Fourth Amendment reasonableness has no fixed meaning.<sup>29</sup>

Thomas Davies’s principal article on the subject was published in the *Michigan Law Review* in 1999.<sup>30</sup> Consistent with Taylor, Professor Davies views the original purpose of the Fourth Amendment quite narrowly as solely a rejection of general warrants.<sup>31</sup> His views have been cited by numerous scholars and his work has even been described as the “leading originalist account.”<sup>32</sup>

Davies is in broad agreement with Taylor’s conclusion that the purpose of the amendment was solely to prohibit general warrants. Davies, however, refuses to take the next step that Taylor took. Instead, he maintains that his goal in the *Michigan* article is merely to show that the “original meaning” of the Fourth Amendment “does not fully endorse either the warrant-preference or generalized-reasonableness construction; in fact, it shows that neither is really equivalent to the framers’ understanding.”<sup>33</sup> Davies leaves the reader in a void: he does not purport to know the original meaning of reasonableness beyond negating the warrant

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conventional account but my conclusions do not fit within either of the two opposing camps. See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION*, at ch. 2 (2008). Neither do the views of some other contemporary scholars. *E.g.*, George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1478 (2005) (asserting that four principles emerge from the historical record: 1) the framers feared that governmental actors would abuse their offices; 2) “the Framers believed that searches (other than routine customs inspections) required individualized cause or suspicion”; 3) searches of structures required a warrant; and 4) the framers embraced some common law principles to regulate searches and seizures).

25. Amar, *First Principles*, *supra* note 22, at 757 n.\*.

26. *Id.* at 774.

27. *Id.* at 758–59.

28. *Id.* at 759.

29. *See id.* at 804–11.

30. Davies, *Original Fourth Amendment*, *supra* note 24; *see also* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1 (2007).

31. Davies, *Original Fourth Amendment*, *supra* note 24, at 551 (“[T]he evidence indicates that the Framers understood ‘unreasonable searches and seizures’ simply as a pejorative label for the inherent illegality of any searches and seizures that might be made under general warrants. In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment.”). *But see id.* at 570 n.43 (asserting that the framers believed that individualized suspicion was an inherent aspect of reasonableness).

32. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 J. CONST. L. 1, 4 (2007).

33. Davies, *Original Fourth Amendment*, *supra* note 24, at 736.

preference view and the competing view of Taylor. Taylor's view, in contrast, has more dramatic implications regarding the regulation of governmental intrusions. According to Taylor, the two clauses are distinct. The first clause substantively requires only that searches and seizures be "reasonable." The second clause addresses only those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or about what factors are to be examined to determine reasonableness.

The Supreme Court's collective opinion has for decades vacillated between the two competing views of the relationship of the clauses. The Court's initial cases were notable for their premise that a warrant complying with the specifications of the Warrant Clause was required for all searches.<sup>34</sup> The Court's only acknowledged exception in those early cases was for searches incident to arrest, which had a strong historical pedigree.<sup>35</sup> To this day, the Court sometimes states that all searches and seizures are per se unreasonable, subject to enumerated exceptions, in the absence of a warrant.<sup>36</sup> At other times, the Court has rejected a "categorical warrant requirement" and has looked to the totality of the circumstances to measure the validity of the government's activities.<sup>37</sup>

In more recent times, the competition between those two views has continued but has become more complex. The Court has developed numerous models and frameworks for measuring reasonableness, beyond the warrant preference and general reasonableness models, all of which uneasily coexist in current Supreme Court case law.<sup>38</sup> Some cases engage in a contemporary balancing of individual and

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34. *See In re Jackson*, 96 U.S. 727, 733 (1878) (asserting that a warrant based on probable cause was necessary to search a letter in the mail); *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution."); *Amos v. United States*, 255 U.S. 313, 315–17 (1921) (cannot search a house without a warrant); *Agnello v. United States*, 269 U.S. 20, 32 (1925) ("While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant . . ."); *Taylor v. United States*, 286 U.S. 1, 6 (1932) (finding that failure to obtain a warrant before searching a garage, when there was "abundant opportunity" to do so, necessitated suppression of evidence).

35. *See* CLANCY, *supra* note 24, § 8.1.1.

36. *See, e.g., Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009); *California v. Acevedo*, 500 U.S. 565, 580–81 (1991); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967).

37. *E.g., United States v. Banks*, 540 U.S. 31, 42 (2003) (rejecting lower court's categorical approach in favor of a "totality of circumstances" principle to measure reasonableness); *United States v. Knights*, 534 U.S. 112, 118 (2001) ("general" approach to measuring reasonableness examines totality of circumstances); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (rejecting "judicially created" preference for warrants and advocating Taylor's view); *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950) ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.").

38. *See generally* CLANCY, *supra* note 24, at ch. 11 (discussing the various models the Court uses to measure reasonableness); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 (same).



governmental interests,<sup>39</sup> adopt the common law as of 1791 as dispositive,<sup>40</sup> or mandate some level of individualized suspicion.<sup>41</sup> Thus, as I have said elsewhere:

There are at least five principal models that the Court currently chooses from to measure reasonableness: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model giving dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, the Court in any situation may choose whichever model it sees fit to apply. Thus, cases decided within weeks of each other have had fundamentally different—and irreconcilable—approaches to measuring the permissibility of an intrusion.<sup>42</sup>

Looking specifically at the role of history in Supreme Court opinions over the course of time, it takes no great insight to say that its treatment has varied. Occasionally, historical analysis has been outright rejected as a basis to interpret the amendment.<sup>43</sup> The Court has sometimes asserted that law enforcement practices are not “frozen” by those in place at the time the Fourth Amendment was adopted.<sup>44</sup> Hence, the Court has occasionally asserted that interpretation of the amendment evolves to permit modern developments<sup>45</sup> and that the amendment must be interpreted in light of contemporary norms and conditions.<sup>46</sup> Indeed, the

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39. *E.g.*, *Samson v. California*, 547 U.S. 843 (2006).

40. *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295 (1999).

41. *E.g.*, *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

42. CLANCY, *supra* note 24, § 11.1, at 468.

43. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 12–15 (1985) (changing the common law rule permitting police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry).

44. *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981); *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980).

45. *Cf.* *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). In applying the amendment to searches of school children by school authorities, the Court recognized that the government’s interest included contemporary needs: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.” *Id.*

46. *E.g.*, *Steagald*, 451 U.S. at 217 n.10 (“Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.”); *Payton*, 445 U.S. at 600 (stating that “custom and contemporary norms necessarily play” a “large role” in assessing reasonableness); *cf.* *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (utilizing contemporary considerations in the balancing test to measure the reasonableness of a search or seizure as an alternative if historical analysis does not produce a dispositive answer). *But cf.* *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997) (cautioning that “[i]t is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment,” given the Fourth Amendment’s purpose of preserving that degree of privacy that was afforded at the time it was adopted).

Warren Court era was known for a nonhistorical treatment of Fourth Amendment issues.<sup>47</sup>

On the other hand, the Supreme Court has often relied on the common law at the time of the framing in 1791 as an important guide. Exactly how that tool has been used, as with other interpretative techniques, varies with who wrote the opinion.<sup>48</sup> Using the common law as the measure of what the Fourth Amendment requires is distinct from using the common law as the measure of the framers' intent. As to the former, the common law rule as of 1791 defines Fourth Amendment terms, such as reasonableness, search, or seizure. As to the latter, the common law is consulted to ascertain the framers' intent, which is in turn used to justify reliance on some conception of what the amendment requires. Hence, sometimes there is a broader recognition that the amendment was designed by the framers to protect individuals from unreasonable governmental intrusion.<sup>49</sup> Such a view maintains that the framers intended not only to prohibit the specific evils of which they were aware but also, based on the general terms they used, to give the Constitution enduring value beyond their own lifetimes.<sup>50</sup> In other words, according to that view, the chief

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47. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

48. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 183–84 (1984) (finding that although “[t]he common law may guide consideration of what areas are protected by the Fourth Amendment,” common law rights are not coincident with the Fourth Amendment); *Payton*, 445 U.S. at 591 (common law view utilized to shed light on framers' intent); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1974) (common law acts as a guide to interpret the Fourth Amendment). *See generally* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (tracing Supreme Court treatment of the common law as an interpretative tool).

49. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (“What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.”); *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 313 (1972) (“Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.”); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (“If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.”); *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) (rejecting literal construction of words in favor of amendment's purpose); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974) (“The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents.”); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 626–27 (1996) (arguing that the values underlying the amendment, to protect individual rights, must be reflected in its application to modern conditions, where scientific invention has made it possible for government agents to violate privacy rights without employing physical power).

50. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1–2 (1980) (“[T]he Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context . . . . That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.”); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 620

interpretative tool is to be consistent with the framers' values but not mired in the details of the search and seizure practices of 1791.

## II. JOHN ADAMS AND THE HISTORICAL CONTEXT: 1761 TO 1780

### A. Historical Context

This Part examines the historical events between 1761 and 1780 and John Adams's role during that period. The year 1761 marked the beginning of the challenges to British search and seizure practices and 1780 is the year that Massachusetts ratified its constitution, written by John Adams. That twenty-year span is remarkable for the broad examination of and challenges to then-existing practices, the articulation of alternative principles, and the adoption of state constitutional protections against unjustified intrusions. It is also the period of history most relied on by the Supreme Court when construing the Fourth Amendment.

The longer historical record is complex, involving hundreds of years of evolution in the regulation of searches and seizures, with many contradictory developments.<sup>51</sup> Nonetheless, during the 1761 to 1780 time frame, life was fairly simple, as were most search and seizure principles. There were no organized police forces,<sup>52</sup> forms of criminal activity were straightforward, and investigations rudimentary at best. Only one type of warrantless seizure may have been common, that is, the arrest of a suspected felon.<sup>53</sup> Such seizures were rarely made except in hot pursuit of the felon.<sup>54</sup> "Those were simple times, and felons were ordinarily those who had done violence or stolen property."<sup>55</sup> Due to the lack of warrantless searches and seizures and the fact that the only persons searched or seized without a warrant usually were suspected felons, those actions were

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(1982) ("The underlying grievances are certainly relevant to the interpretative task, but constitutional provisions cannot be properly viewed simply as shorthand statements for the specific grievances that gave rise to them."); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1137 (1992) ("Constitutional analysts generally agree that the document was meant to be more than a mere catalogue of forbidden actions." The framers intended that the "underlying values" be honored. (emphasis in original)).

51. See generally CUDDIHY, *supra* note 15 (providing a comprehensive treatment of the complex history of search and seizure in England and its American colonies to adoption of the Fourth Amendment). Thus, for example, as Professor Sklansky has demonstrated, the common law—which was one important source of search and seizure rules—was not a "unified, systematic body of rules, constant across space and time." Sklansky, *supra* note 48, at 1795. Search and seizure rules "varied from colony to colony and from decade to decade." *Id.* Sklansky also observed that "in both England and America, theory and practice often diverged." *Id.* at 1795–96. That latter observation remains true to this day.

52. Although there was a loose system of justice, involving part-time constables and peace officers, "the mobilization of criminal justice depended almost entirely on private initiation of criminal prosecutions." Davies, *Original Fourth Amendment*, *supra* note 24, at 620–22.

53. TAYLOR, *supra* note 3, at 27–28. See generally 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 85–103 (1736).

54. TAYLOR, *supra* note 3, at 28 (citing 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 582–83 (2d ed. 1959)).

55. *Id.*

not the cause of public outcry.<sup>56</sup> This is not to say that there were no rules governing searches and seizures in that era. On the contrary, there was a vibrant common law tradition, and there were influential treatise writers who were articulating rules to address the needs of the times.<sup>57</sup>

The law relating to warrants was more complex. As Telford Taylor observed, scholars seeking the origin of search and seizure warrants have traveled into a “foggy land.”<sup>58</sup> One form of practice included the common law search warrant, which “crept into the law by imperceptible practice,”<sup>59</sup> and was a “hybrid criminal-civil process.”<sup>60</sup> Such warrants were well established by the middle of the sixteenth century.<sup>61</sup> Warrants to recover stolen goods were originally issued as general warrants but that practice was giving way to requiring special warrants by the middle of the eighteenth century.<sup>62</sup> As will be discussed, a central claim of James Otis in the *Writs* case in 1761 was that such warrants were “special,”<sup>63</sup> which came to mean in that era that the victim of a theft had to state under oath before a justice of the peace the basis for his belief that his goods would be found in a specified place; if probable cause was established, “the justice would issue a warrant authorizing the victim to go with a constable to the specified place and, if the goods were found, to return [with] the goods and the suspected felon before the justice, for . . . disposition of the matter.”<sup>64</sup> The validity of Otis’s claim as a matter of established English common law at that time is debatable<sup>65</sup> but appears closer to the truth as to the then-existing Massachusetts practice.<sup>66</sup>

56. *E.g.*, *United States v. Chadwick*, 433 U.S. 1, 8 (1977); TAYLOR, *supra* note 3, at 39; Davies, *Original Fourth Amendment*, *supra* note 24, at 578; Tomkovicz, *supra* note 50, at 1133.

57. *See infra* notes 196–231 and accompanying text.

58. TAYLOR, *supra* note 3, at 24.

59. *Entick v. Carrington*, (1765) 19 Howell’s St. Tr. 1029 (K.B.) 1067.

60. TAYLOR, *supra* note 3, at 24.

61. Lasson, *supra* note 3, at 17.

62. *See* M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 336–39 (1978); *see also* *Grumon v. Raymond*, 1 Conn. 40, 43–46 (1814) (recognizing that a search warrant for stolen goods must limit the search to particular places where it is reasonable to suspect goods are and to such persons reasonably suspected); *Frisbie v. Butler*, 1 Kirby 213, 215 (Conn. 1787) (same).

63. *See* Letter from John Adams to William Tudor (Aug. 11, 1818), *in* 10 *THE WORKS OF JOHN ADAMS*, *supra* note 7, at 345.

64. TAYLOR, *supra* note 3, at 25. *See generally* *Gerstein v. Pugh*, 420 U.S. 103, 116 n.17 (1975).

65. CUDDIHY, *supra* note 15, at 392. *Compare* 2 HALE, *supra* note 53, at 150 (asserting that a “general warrant to search in all suspected places [for stolen goods] is not good, but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof” and maintaining that general warrants were “dormant”), *with* MICHAEL DALTON, *THE COUNTRY JUSTICE* 418 (1746) (giving an example of a general warrant for stolen goods that permitted “diligent Search in all and every such suspected Houses . . . as you and this Complainant shall think convenient” (emphasis in original)); *id.* at 419, 423–24 (setting out other general warrant forms to search after a robbery and for “rogues”).

66. *See* CUDDIHY, *supra* note 15, at 311–12, 340–41, 371–75, 386 n.54, 389 n.68

There also existed a common law arrest warrant for felons.<sup>67</sup> An arrest warrant was a command to the sheriff of the county or the marshal of the court to apprehend a felon and bring the felon to court.<sup>68</sup> This warrant was issued upon a showing similar to that necessary for a search warrant.<sup>69</sup> Another form of practice evolved from the crown's issuance of warrants and writs of assistance. The authority to do so was found neither in the common law nor in any statute; instead, it was a manifestation of "residual police power untrammelled by doctrine or methodology and exercised at the royal discretion in the interest of good public order."<sup>70</sup> That form of practice was condemned in the 1760s in the English general warrant cases, which were influential with the leaders of the founding era and in subsequent Supreme Court case law.<sup>71</sup>

English practice also provided for statutory authorization for searches and seizures, which has been traced to the fourteenth century. Through the seventeenth century, the legislation was "uniformly characterized by the granting of general and unrestricted powers."<sup>72</sup> Legislation enabling customs searches and seizures was adopted in 1662, authorizing searches without suspicion anywhere the searcher desired to look.<sup>73</sup> Pursuant to the statute, writs of assistance were issued. Writs were not issued as a result of any information that contraband was stored at a specified place; instead, the customs officials could search wherever they chose. "The discretion delegated to the official was therefore practically absolute and unlimited."<sup>74</sup> A writ was a simple directive in the form of a document in the name of the king that "ordered a wide variety of persons to help the customs man make his search."<sup>75</sup> The writs were akin to "permanent search warrants placed in the hands of custom officials: they might be used with unlimited discretion and were valid for the duration of the life of the sovereign."<sup>76</sup> The man who did the seizing,

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(discussing evolution of the history of stolen goods warrants from general to specific and concluding that they were probably specific in Massachusetts by 1761).

67. 2 HALE, *supra* note 53, at 105–09.

68. *Id.* at 105.

69. *Id.* at 111.

70. SMITH, *supra* note 62, at 21. *See generally* Lasson, *supra* note 3, at 18–22 (tracing early history of search and seizure in England).

71. *See infra* Part II.C.

72. Lasson, *supra* note 3, at 23.

73. TAYLOR, *supra* note 3, at 26.

74. Lasson, *supra* note 3, at 54.

75. SMITH, *supra* note 62, at 29.

76. Landynski, *supra* note 1, at 31; *see also* Lasson, *supra* note 3, at 53–54. The writs expired six months after the death of the sovereign. *Id.* at 57. There is some dispute about whether the writs served to authorize the search or whether that power inhered in the officers by virtue of their commission, with the writs being merely "judicial orders which empowered the customs officials to summon the sheriff or constable . . . to keep the peace while the search was in progress." Landynski, *supra* note 1, at 32 n.53. Regardless of their formal characterization, the writs were regarded "as synonymous with the power to search itself." *Id.*; *see also* Berger v. New York, 388 U.S. 41, 58 (1967) (equating customs writs of assistance to general warrants). *But cf.* SMITH, *supra* note 62, at 37–39, 461, 520–21 (citing cases and 1768 opinion of the English Attorney General and recognizing that a writ of assistance was not a search warrant but the vehicle by which statutory power to search was exercised).

known as the informer, would initiate the proceedings to condemn the goods.<sup>77</sup> The successful informer would receive a portion of the goods condemned, making the informer the “beneficiary of a mode of law enforcement that was commonly resorted to” at a time when no regular police organizations existed.<sup>78</sup> It was that form of practice that Otis opposed in the *Writs* case.

*B. John Adams and the Writs of Assistance Case*<sup>79</sup>

Perhaps the single most significant influence on Adams’s views occurred when Adams was a young man, just beginning his legal career in Boston in 1761. Smuggling was a widespread practice in the American colonies, and writs of assistance were a principal means of combating the practice, at least in Massachusetts.<sup>80</sup> In 1760, new writs of assistance were requested following the expiration of the previously issued writs due to the death of the king.<sup>81</sup> A group of Boston merchants opposed the proposed writs, retaining James Otis to represent their cause.<sup>82</sup> The key issue at the first hearing on the proposed writs, and the question upon which the case ultimately turned, was whether the Superior Court should continue to grant the writs in general and open-ended form or whether it should limit the writs to a single occasion based on particularized information given under oath.<sup>83</sup> Otis’s argument has often been cited by the Supreme Court and many others as reflecting the framers’ intent and as an exposition of proper search and seizure practices.<sup>84</sup> Indeed, no authority preceding Otis had articulated so completely the framework for proper search and seizure practices that was ultimately embodied in the Fourth Amendment’s Warrant Clause.<sup>85</sup>

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77. SMITH, *supra* note 62, at 13. If the case were defended and went against the informer, he would be liable for damages at common law. *Id.* at 13, 310 (citing *Leglise v. Champante*, (1728) 93 Eng. Rep. 871 (K.B.)). The common law position was modified in England by statute in 1746; the statute provided that, if the court certified that probable cause for the seizure existed, the action for damages in effect would be barred. A similar limitation was introduced into the American colonies in 1764. *Id.* at 13 n.9.

78. SMITH, *supra* note 62, at 13.

79. This litigation has many names but no formal designation. Another common reference is *Paxton’s Case*; Charles Paxton was the customs official who sought the new writs.

80. Landynski, *supra* note 1, at 30. *See generally* Lasson, *supra* note 3, at 51–78. Authorities in Massachusetts were more successful in obtaining writs of assistance than in other colonies. *See, e.g.*, SMITH, *supra* note 62, at 96, 106–07, 115.

81. TAYLOR, *supra* note 3, at 36.

82. *Id.*

83. JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 531–32 (1865).

84. *See, e.g.*, *Frank v. Maryland*, 359 U.S. 360, 364 (1959); *Boyd v. United States*, 116 U.S. 616, 625 (1886).

85. *See* CUDDIHY, *supra* note 15, at 382 (“[Otis’s] proclamation that only specific writs were legal was the first recorded declaration of the central idea to the specific warrant clause.”); SMITH, *supra* note 62, at 7 (“[In that argument,] the American tradition of constitutional hostility to general powers of search first found articulate expression.”).

Three men have given accounts of what occurred in that courtroom: Thomas Hutchinson (the chief justice of the court that heard the arguments), Otis, and Adams.<sup>86</sup> Adams, in fact, gave several summaries at different times. The first was his contemporaneous notes, the second was an “abstract” written a short time after the argument, and the third significant summary was in a series of letters to William Tudor more than fifty years after the event. Except for Adams’s recollections in the Tudor letters, all of the accounts are broadly consistent with each other. In contrast, Adams’s account in the Tudor letters is generally discounted as an inaccurate recall of the details of the arguments.<sup>87</sup>

Hutchinson’s summary of the *Writs of Assistance Case* was succinct:

It was objected to the writs, that they were of the nature of general warrants; that, although formerly\*<sup>[88]</sup> it was the practice to issue general warrants to search for stolen goods, yet, for many years, this practice had been altered, and special warrants only were issued by justices of the peace, to search in places set forth in the warrants; that it was equally reasonable to alter these writs, to which there would be no objection, if the place where the search was to be made should be specifically mentioned, and information given upon oath. The form of a writ of assistance was, it is true, to be found in some registers, which was general, but it was affirmed, without proof\*<sup>[89]</sup>, that the late practice in England was otherwise, and that such writs issued upon special information only.<sup>90</sup>

Hutchinson recalled that he, as chief justice, sought information about the proper practice and that judgment was suspended pending receipt of that information. Upon learning that general writs were used in England, it “was judged sufficient to warrant the like practice in the province.”<sup>91</sup>

Otis’s own account came in an article published on January 4, 1762, in the *Boston Gazette*.<sup>92</sup> Otis did not sign the article but it has been attributed to him.<sup>93</sup> In that article, Otis alluded to legalistic arguments, such as the lack of statutory

86. The *Writs* case was argued in February 1761 and re-argued in November 1761. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS 106, 114–15 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Adams was present for only the first argument. *Id.* The *Boston Gazette* ran a few short accounts of the controversy but those accounts covered only the second argument in November 1761 and the subsequent issuance of the writs. See QUINCY, *supra* note 83, at 486–88.

87. See, e.g., QUINCY, *supra* note 83, at 469 n.1.

88. THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, FROM 1749 TO 1774, at 93–94 (1828). The star footnote in the original cites Dalton’s *The Country Justice*. DALTON, *supra* note 65. Adams had a copy of this treatise in his library. See *infra* note 200. Dalton was “widely used in America.” SMITH, *supra* note 62, at 336.

89. HUTCHINSON, *supra* note 88, at 93–94. The star footnote in the original states, “The authority was a London magazine.” See CUDDIHY, *supra* note 15, at 277, 387, 414 (discussing the magazine article); SMITH, *supra* note 62, at 537–39 (reproducing the article).

90. HUTCHINSON, *supra* note 88, at 93–94.

91. *Id.* at 94.

92. QUINCY, *supra* note 83, at 488.

93. See *id.*

authority for issuing the writs, but his main focus was on the dangers to the security of each individual posed by the uncontrolled authority to search that customs officials had as a result of the writs. He wrote:

[E]very hous[e]holder in this province, will necessarily become *less secure* than he was before this writ had any existence among us; for by it, *a custom house officer* or ANY OTHER PERSON *has a power given him, with the assistance of a peace officer, TO ENTER FORCEABLY into a DWELLING HOUSE, and rifle every part of it where he shall PLEASE to suspect uncustomed goods are lodg[e]d!*—Will any man put so great a value on his freehold, after such a power commences as he did before?—every man in this province, will be liable to be insulted, by a *petty officer*, and threat[e]ned to have his house *ransack'd*, unless he will comply with his unreasonable and *imprudent* demands: Will any one then under *such* circumstance, ever again boast of *british* honor or *british* privilege?<sup>94</sup>

Otis also cited *Walley v. Ware*, a case where a magistrate had questioned Ware about the charge of breach of the Sabbath day acts or for profane swearing.<sup>95</sup> In response, Ware, who was a customs official, demanded to search the magistrate's home for uncustomed goods.<sup>96</sup> Otis observed that Ware did not pretend to have any "suspicion of contraband goods as a reason for his conduct."<sup>97</sup>

The article acknowledged that a person's security in his home is sometimes "forfeited" but those instances were "in cases of the most urgent necessity and importance; and this necessity and importance always is, and always ought to be determin'd by *adequate* and *proper* judges."<sup>98</sup> The writs procedure, Otis maintained, stood in sharp contrast, with each person subject to "*petty tyrants*."<sup>99</sup> After arguing that there was no necessity for the writs, Otis concluded by emphasizing the uncontrolled discretion of the customs officials: "[C]an a community be safe with an uncontroul'd power lodg'd in the hands of *such* officers, some of whom have given abundant proofs of the danger there is in trusting them with ANY?"<sup>100</sup>

Adams's accounts of the *Writs* case were more detailed. Highlighted here are pertinent portions of the arguments of Jeremiah Gridley and Oxenbridge Thatcher, followed by an extended examination of Otis's argument.<sup>101</sup> Gridley, the attorney

94. *Id.* at 489 (emphasis in original) (quoting Otis's article in the *Gazette*).

95. *Id.* at 490; *see id.* at 476 n.29 (describing the facts of *Walley v. Ware*).

96. *Id.* at 476 n.29.

97. *Id.* at 490.

98. *Id.* (emphasis in original).

99. *Id.* (emphasis in original).

100. *Id.* at 494 (emphasis in original).

101. Gridley, Thatcher, and Otis became close friends of Adams, who later remarked that he remained friends with the three men "till their deaths." 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 273 (L.H. Butterfield ed., 1961). Indeed, their names appear frequently in Adams's extensive writings; in particular, Adams, Gridley, and Otis were often together in courtrooms, clubs, meetings, and other gatherings. Gridley, during an interview with Adams in 1758 concerning Adams's qualifications to be sworn to practice in Boston as a lawyer,



general of the Massachusetts Bay Colony, defended the general writs of assistance, among other things,<sup>102</sup> as necessary to enforce the customs laws.<sup>103</sup> As reported in Adams's abstract, Gridley argued that the writs were justified by

the necessity of the Case and the benefit of the Revenue . . . . [T]he Revenue [was] the sole support of Fleets & Armies, abroad, & 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. . . . 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.<sup>104</sup>

Gridley conceded that the "common privileges of Englishmen" were taken away but asserted that those benefits were also taken away in criminal cases.<sup>105</sup>

Gridley was opposed by two advocates: Thatcher and Otis. Thatcher's argument made little impression on Adams and has not served to influence subsequent development of search and seizure principles.<sup>106</sup> "The bulk of [Thatcher's]

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gave Adams some advice: "[P]ursue the Law itself, rather than gain of it. Attend enough to the profits, to keep yourself out of the Briars: but the Law itself should be your great Object." *Id.* at 272. Adams held Otis in high esteem; he described Otis as "by far the most able, manly and commanding Character of his Age at the Bar." *Id.* at 275. Adams also recounted in his diary the increasing mental problems of Otis in the years leading up to the Revolution. *E.g.*, 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, at 270–71 (diary entry for December 23, 1765) (recounting Otis's emotional instability and "inexplicable Passages in his conduct"); 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, at 50 (diary entry for August 22 and 23, 1771) (observing that "Otis's Gestures and Motions are very whimsical, his Imagination is disturbed—his Passions all roiled"); *id.* at 64–65 (diary entry for October 27, 1772) (describing Otis as "looking and acting as wildly as ever he did"). Otis was an important political figure for several years after the *Writs* case but ultimately was marginalized due to mental illness. *See generally* WILLIAM TUDOR, THE LIFE OF JAMES OTIS (1823).

102. He also discussed whether the court had jurisdiction to issue such writs. *E.g.*, Petition of Lechmere, Adams' "Abstract of the Argument," in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 134, 136–38.

103. *See generally* QUINCY, *supra* note 83, at 476–82. This necessity argument has often been invoked in justifying searches. *See, e.g.*, Entick v. Carrington, (1765) 19 Howell's St. Tr. 1029 (K.B.) 1063–64 (discussing the argument by attorneys for Lord Halifax that the power of the executive to issue search warrants for papers in seditious libel cases was essential to the government). *See generally* CLANCY, *supra* note 24, § 11.3.4.4.2–3 (discussing the role of necessity in measuring reasonableness in Supreme Court opinions).

104. SMITH, *supra* note 62, at 281.

105. *Id.*

106. This is not to say that Adams discounted Thatcher as a person or as an advocate. Adams referred to Thatcher as "an eminent barrister at law, in as large [a] practice as any one in Boston. There was not a citizen of that town more universally beloved for his learning, ingenuity, every domestic and social virtue, and conscientious conduct in every relations of life." Letter from John Adams to H. Niles (Feb. 13, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 285 (1856). Adams described himself as frequent visitor to

argument as recorded by Adams was addressed to the power of the Superior Court to act as the Court of Exchequer.”<sup>107</sup> Nonetheless, Thatcher addressed some search and seizure standards, raising concerns about the scope of the writs:

[A]ny other private Person may, as well as a Custom-House Officer, take an officer, a sheriff or Constable, &c. and go into any shop, store, &c. and seize; any Person authorized by such a Writ, under the seal of the Court of Exchequer, may, not custom-house officers only. Strange.<sup>108</sup>

He also noted the permanent nature of the writs and the fact that they were “not returnable.”<sup>109</sup> He added: “If such seizure were brot before your Honours youd often find a wanton Exercise of their Power. At home, the officers seize at their Peril, even with Probable Cause.”<sup>110</sup>

### 1. Adams’s Contemporaneous Notes of Otis’s Argument

Adams took notes of Otis’s argument as he sat in the courtroom on February 24, 1761.<sup>111</sup> In relevant part, Adams recorded that Otis asserted:

This Writ is against the fundamental Principles of Law.—The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle—notwithstanding all his Debts, & civil processes of any Kind.—But

For flagrant Crimes, and in Cases of great public Necessity, the Priviledge may be incrohd [encroached] on.—For Felonies an officer may break, upon Prossess, and oath.—i. e. by a Special Warrant to

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Thatcher’s home, until Thatcher’s death in 1765, where they discussed many intellectual subjects. *Id.* at 285–86; *see also* Letter from John Adams to Edmund Jenings (July 14, 1780), in 9 PAPERS OF JOHN ADAMS 588, 589 (Gregg L. Lint ed., 1996) (referring to Otis and Thatcher and remarking that he did not “know where to find greater or better Men”). For a brief summary of Thatcher’s life, *see* CLIFFORD K. SHIPTON, NEW ENGLAND LIFE IN THE EIGHTEENTH CENTURY: REPRESENTATIVE BIOGRAPHIES FROM SIBLEY’S HARVARD GRADUATES 443–49 (1995).

107. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106, 114.

108. Petition of Lechmere, Adams’ Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 123, 124.

109. *Id.* at 125.

110. *Id.*; *see also* Petition of Lechmere, Adams’ “Abstract of the Argument,” in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 134, 138–39. In 1765, Thatcher wrote *The Sentiments of a British American*, in which he observed that, if an admiralty court certified that there was “probable cause of seizure,” an action against a customs official would not lie. Oxenbridge Thacher, *The Sentiments of a British American*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 483, 495 (Bernard Bailyn ed., 1965); *see also* Stephen Hopkins, *The Rights of the Colonies Examined*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra*, at 516 (observing that probable cause certification by a judge prevented recovery for improper customs search).

111. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106, 114.

search such an House, . . . sworn to be suspected, and good Grounds of suspicion appearing.

Make oath cor[am]. Ld. Trea[surer], or Exchequer, in Eng. or a Magistrate here, and get a Special Warrant, for [the] public good, to infringe the Priviledge of House.

Gen. Warrant to search for Felonies. Hawk. Pleas Crown.—every petty officer from the highest to [the] lowest, and if some of ‘em are . . . comm[issioned] others are uncomm[issioned]. Gouv Justices used to issue such perpetual Edicts. . . .

. . . .  
If an officer will justify under a Writ he must return it. 12th Mod. 396.— perpetual Writ.

Stat. C.2. We have all as good R[igh]t to inform as Custom House officers—& every Man may have a general, irreturnable . . . Commission to break Houses.—

By 12. of C. on oath before Ld Treasurer, Barons of Exchequer, or Chief Magistrate to break with an officer.—14th C. to issue a Warrant requiring sheriffs &c to assist the officers to search for Goods not entrd, or prohibitd; 7 & 8th. W. & M. gives Officers in Plantations same Powers with officers in England.—

Continuance of Writts and Proccesses, proves no more nor so much as I grant a special Writ of aff. on special oath, for specl Purpose.<sup>112</sup>

## 2. The Abstract of Otis's Argument

Within a few weeks of the hearing, Adams created an “abstract” of the arguments,<sup>113</sup> which has been reproduced numerous times.<sup>114</sup> Others have questioned whether Adams “exercised artistic license” and mixed his own views with those of Otis, perhaps to create “a minor work of political propaganda.”<sup>115</sup> If

112. John Adams's Report of the First Argument in February 1761, in QUINCY, *supra* note 83, at 469, 471–75. The material quoted here omits the footnotes inserted by Quincy and substitutes the modern spelling of such words as “Houfe.” The notes are also reproduced in a variety of other works. *E.g.*, Petition of Lechmere, Adams' Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 123, 123–32 (modernizing spelling and punctuation, extending abbreviations, and adding explanatory footnotes). For discussion of the sources cited by Otis, see CUDDIHY, *supra* note 15, at 389–91; QUINCY, *supra* note 83, at 471–76, 483.

113. Adams noted in his diary some time shortly after April 3, 1761, that he had shown the abstract to “J.Q.,” who was apparently Joshua Quincy, and that Quincy remarked that Gridley “did not use that Language. He never was Master of such a style.” Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106, 122 (1850).

114. See Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106, 121–23; Petition of Lechmere, Adams' Abstract of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 134, 134–35 n.103 (noting multiple sources of the abstract and reproducing it with notes on its variations). Numerous sources quote the abstract. *E.g.*, Payton v. New York, 445 U.S. 573, 608–09 (1980) (White, J., dissenting); SMITH, *supra* note 62, at 331–79 (extensive analysis of Otis's argument); TAYLOR, *supra* note 3, at 36–37.

115. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra*

one views the abstract as a reflection of Adams's views on search and seizure—or at least his knowledge of search and seizure practices and preferred options as to principles—rather than for its historical accuracy, such arguments lose much of their force. Yet, as to historical accuracy, regarding the core concerns as to the standards by which the government should be able to exercise authority to search and seize, the notes, the abstract, the article attributed to Otis, and Hutchinson's account are very similar.<sup>116</sup>

According to the abstract, Otis made a variety of arguments as to the invalidity of the writs, including the ability of courts to question acts of Parliament.<sup>117</sup> Putting

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note 86, at 106, 123.

116. In his *Autobiography*, Adams discounted the accuracy of his contemporaneous notes:

I took a few minutes, in a very careless manner, which by some means fell into the hands of Mr. Minot, who has inserted them in his history. I was much more attentive to the Information and the Eloquence of the Speakers, than to my minutes, and too much alarmed at the prospect that was opened before me, to care much about writing a report of the Controversy.

3 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 276. Despite this disclaimer made late in life, the notes are remarkably consistent with the abstract, made shortly after the arguments. Adams's comments are also somewhat confusing. Minot reproduced Adams's abstract of the argument—not his notes. Minot dedicated the book to Adams and gave Adams a copy. See THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/book/?book=2347625Adams%20252.10%20v.2](http://www.johnadamslibrary.org/book/?book=2347625Adams%20252.10%20v.2).

Adams underlined and made a few comments in the margin of his copy of the book, labeling as “interpretation” the following parts of Otis's argument, as recounted by Minot:

Until the trump of the acrh-angel shall excite different emotions of his foul.

\* \* \*

What is this but to have the curese of Cannan with a witness on us; to be the servant of servants, the most despicable of God's creation.

See GEORGE RICHARDS MINOT, CONTINUATION OF THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY: FROM THE YEAR 1748 [TO 1765], at 95–96 (1798) (copy in Boston Public Library). Adams's copy, which is dated 1803, has two other minor comments: he crossed out the word “charge” and inserted “chance” in the margin, *id.* at 90, and struck out the word “decerned” and wrote that “the conclusions better descen'd,” *id.* at 92. Given the lack of comments regarding the rest of Minot's version, it is a fair conclusion that Adams viewed the summary as accurate. See also Letter from John Adams to John Tudor (Mar. 29, 1817), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 246 (1856) (noting that Minot's account contained “some interpolations”).

117. *E.g.*, Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106, 117–21 (analyzing Otis's arguments on the limits of judicial and legislative authority). This is an important point: Otis not only offered an alternative vision of the proper criteria for warrants to issue, he also argued that courts had the power to find illegal those warrants that did not meet that criteria. Advocates of the undefined reasonableness standard apparently miss that distinction. Hence, Davies argues that there was no meaning to the concept of reasonableness in part based on Otis's argument that the Writs were void as “against reason.” Davies asserts:

Coke's “against reason” dictum was the fulcrum for James Otis's 1761 argument during the *Writs of Assistance Case*. Of course, Otis denounced the general writ of assistance as a violation of American liberties. But the crucial point is that he leveled a constitutional attack against the *legislation* authorizing the writ.

those arguments aside and focusing on the pertinent question regarding the proper criteria to regulate searches and seizures, Otis maintained:

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. specially 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 it, that he suspects such goods to be concealed in those very places he desires to search. . . . And in this light the writ appears like a warrant from a Justice of the Peace to search for stolen goods. Your Honors will find in the old books concerning the office of a Justice of the 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 that 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

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Otis opened by developing and emphasizing the high level of protection the common law afforded the house under the “castle” doctrine. He then established that the common-law authorities had already condemned general warrants as illegal. From those premises, he concluded that any statute that authorized use of a general writ would be so contrary to the principles of common law as to be “void.”

Davies, *Original Fourth Amendment*, *supra* note 24, at 689–90 (emphasis in original) (citations omitted). He later continues:

Thus, John Adams likely had a ready-made qualifier for “searches and seizures” when he wrote the Massachusetts provision. Because “unreasonable” was a pejorative synonym for gross illegality or unconstitutionality, “unreasonable searches and seizures” simply meant searches and seizures that were inherently illegal at common law. As a result, the Framers would have understood “unreasonable searches and seizures” as the pejorative label for searches or arrests made under that most illegal pretense of authority—general warrants.

*Id.* at 693.

Davies misses the larger point. Otis was working within a legal regime where the notion that a court could void a statute as “against reason” was at best novel and had little support beyond what Coke had asserted in *Bonham’s Case*, (1610) 77 Eng. Rep. 646 (C.P.), 8 Co. Rep. 113b. That question today would be framed to ask whether the statute was constitutional. Otis, in that part of the argument that Davies relies on, was addressing whether the court had the *power* to strike down a defective writ. The Fourth Amendment and the concept of judicial review now gives courts such authority. The separate question concerns what criteria should be employed to assess the reasonableness of the search or seizure. Davies conflates the two questions to support his view that the framers had no criteria in mind when they inserted the word “unreasonable” in the Fourth Amendment. Ignored or at least dismissed by Davies is the part of Otis’s argument where he offered explicit criteria to measure the legality (now “reasonableness”) of a search. In that portion of his argument, Otis was not arguing for some undefined concept of “reasonableness” but, instead, articulated specific criteria to measure the propriety of the writs, that is, the requirements that regulated the issuance of a common law search warrant for stolen goods. That second question, the criteria that should be utilized to determine if an intrusion is justified, is the important one today.

is a power, that places the liberty of every man in the hands of every petty officer. I say I admit that special writs of assistance, to search special places, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself . . . . In the first place, the writ is universal, being directed 'to all and singular Justices, Sheriffs, Constables, and all other officers and subjects;' so, that, in short, it is directed to every subject in the King's dominions. Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner also may control, imprison, or murder any one within the realm. In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him. In the third place, a person with this writ, in the daytime, may enter all houses, shops, &c. at will, and command all to assist him. Fourthly, by this writ not only deputies, &c., but even their menial servants, are allowed to lord it over us. 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 whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses, when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient. This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of Sabbath-day acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, Yes. Well then, said Mr. Ware, I will show you a little of my power. I command you to permit me to search your house for uncustomed goods. And went on to search his house from the garret to the cellar; and then served the constable in the same manner. But to show another absurdity in this writ; if it should be established, I insist upon it, every person by the 14 Charles II. has this power as well as custom-house officers. The words are, 'It shall be lawful for any person or persons authorized,' &c. What a scene does this open! Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask it from self-defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.

Again, these writs 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 live forever; no one can be called to account. Thus reason and the constitution are both against this writ. . . . [Otis thereafter examined the legal authority for the writs, arguing that there was none.] But these prove no more than what I before observed, that special writs may be granted *on oath and*

*probable suspicion*. The act of 7 & 8 William III. that the officers of the plantations shall have the same powers, &c. is confined to this sense; that an officer should show probable ground; should take his oath of it; should do this before a magistrate; and that such magistrate, if he think proper, should issue a special warrant to a constable to search the places.<sup>118</sup>

### 3. The William Tudor Letters

Toward the end of his life and more than fifty years after the *Writs* case, Adams wrote a series of lengthy letters to William Tudor, purporting to describe the scene and the arguments.<sup>119</sup> The letters are claimed recountings of the details of the argument, intermingled with Adams's comments on a variety of matters.<sup>120</sup> Much of the length of the letters are reproductions of various English statutes and Otis's comments on them. Adams wrote those detailed accounts despite his repeated claims, in the letters and elsewhere during that same time period, that he could not accurately recollect Otis's arguments.<sup>121</sup> Numerous authorities have examined the "inaccuracies and exaggerations of these letters."<sup>122</sup> The Tudor letters are remarkable for what they omit: there is no recounting of Otis's arguments regarding proper search and seizure procedures. Instead, as others have observed, Adams "put into Otis' mouth the entire body of arguments against the power of Parliament developed" in the decade following the *Writs* case.<sup>123</sup>

Nonetheless, approaching the letters as evidence of Adams's knowledge and views about search and seizure practices, there are a few comments that shed light. First, Adams uses the word "security" repeatedly to describe the quality of the right protected as to each person's life, liberty, and property.<sup>124</sup> Thus, for example, Adams said that Otis examined the acts of trade and demonstrated that, if they were considered revenue laws, "they destroyed all our security of property, liberty, and

118. 2 THE WORKS OF JOHN ADAMS, *supra* note 7, app. A, at 524–25 (1850) (emphasis in original).

119. See 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 289–92, 314–62 (1856) (collecting letters from Adams to Tudor from the summer and fall of 1818).

120. In one aside, Adams observed that molasses was one of the principal commodities imported, the main use of which was to make rum. Adams noted that "[w]its may laugh at our fondness for molasses" but, for his part, Adams maintained: "I know not why we should blush to confess that molasses was an essential ingredient in American independence." Letter from John Adams to William Tudor (Aug. 11, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 345.

121. E.g., Letter from John Adams to William Tudor (June 1, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 314; Letter from John Adams to William Tudor (June 17, 1818) in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 321; Letter from John Adams to William Tudor (Sept. 13, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 355.

122. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106, 107 (collecting authorities).

123. *Id.*

124. Letter from John Adams to William Tudor (June 1, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 315–16 (1856).

life.”<sup>125</sup> That same concept—security—was utilized by Adams in Article 14 of the Massachusetts Declaration of Rights and is replicated in the Fourth Amendment. In addition, Adams had Otis noting the scope of the searches: “Houses were to be broken open, and if a piece of Dutch linen could be found, from cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty.”<sup>126</sup> Otis, according to one Tudor letter, insisted that the writs were “inconsistent with the fundamental law, the natural and constitutional rights of the subjects.”<sup>127</sup> He later observed that they were “the most tyrannical instruments that ever were invented.”<sup>128</sup>

#### 4. The Aftermath of the *Writs* Case

Hutchinson wrote that Otis’s efforts encouraged those in opposition to the government and “taught” the people that the practices were “incompatible with English liberties.”<sup>129</sup> Indeed, the use of the writs of assistance for customs searches and seizures “caused profound resentment” in the colonies<sup>130</sup> and their use is considered to be “the first in the chain of events which led directly and irresistibly to revolution and independence.”<sup>131</sup> After the Superior Court ruled in favor of the proponents of the writs, a series of steps were taken by opponents. The Massachusetts Assembly passed a bill requiring that writs of assistance be issued only when the customs officer possessed credible information, from a specified informant, that one of the acts of trade had been violated by a specified person at a specific place.<sup>132</sup> The bill was vetoed by the governor, despite his recognition that the bill was very popular and that the veto would cause a clamor.<sup>133</sup> Public reaction in Massachusetts and in other colonies against the writs was widespread and

125. *Id.* at 316.

126. Letter from John Adams to William Tudor (June 9, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 319.

127. Letter from John Adams to William Tudor (June 24, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 323.

128. Letter from John Adams to William Tudor (Aug. 16, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 347.

129. HUTCHINSON, *supra* note 88, at 94–95. The people perceived Otis’s actions as springing from a “sincere concern for the liberties of the people” and elected him as their representative in the next election to the general assembly. *Id.* at 95.

130. Landynski, *supra* note 1, at 31.

131. Lasson, *supra* note 3, at 51; *see also* *Berger v. New York*, 388 U.S. 41, 58 (1967) (claiming that the use of general warrants was a motivating factor behind the Declaration of Independence); *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (explaining that the revulsion was so “deeply felt by the Colonies as to be one of the potent causes of the Revolution”); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (arguing that the abuses surrounding searches and seizures “more than any one single factor gave rise to American independence”); Leagre, *supra* note 2, at 397 (claiming that, based on the history of abuses, the “chief concern in the colonists’ minds was probably with the issuance of general warrants”).

132. *See* SMITH, *supra* note 62, at 567–68; *see also* QUINCY, *supra* note 83, at 495–96 (providing text of the bill).

133. SMITH, *supra* note 62, at 425–28.



included rescuing seized ships,<sup>134</sup> issuing town meeting promulgations,<sup>135</sup> pamphleteering, publishing accounts of Otis's arguments in the *Writs of Assistance Case*,<sup>136</sup> and creating other writings and propaganda decrying the oppressive nature of the writs.<sup>137</sup>

In 1767, Parliament passed the Townshend Act to clarify existing statutory authority to issue the writs in the colonies.<sup>138</sup> That Act, which authorized general writs of assistance, was ineffective, with most courts in the American colonies continuing to refuse to issue the writs.<sup>139</sup> Some colonial courts instead issued special writs.<sup>140</sup> That interpretation of the Act was in direct conflict with its purpose and two different attorneys general of England issued opinions reminding the American courts that the writs authorized by the legislation were to be general.<sup>141</sup>

134. See, e.g., QUINCY, *supra* note 83, at 436–38, 445–46, 463; Sewall v. Hancock, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 179–80.

135. For example, at a meeting of the inhabitants of Boston on November 2, 1772, a committee was appointed “to state the Rights of the Colonists.” The committee report, published by order of the town, attacked the writs of assistance as giving “absolute and arbitrary” power to customs officials to search anywhere they pleased. The report concluded:

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests 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, [etc.] for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. . . . These Officers may under the color of Law and the cloak of a general warrant, break through 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 horrid Murders.

QUINCY, *supra* note 83, at 467 (emphasis in original) (quoting the Report of the Committee at 15–17); see also Warden v. Hayden, 387 U.S. 294, 315 (1967) (Douglas, J., dissenting).

136. See, e.g., CUDDIHY, *supra* note 15, at 396, 544–45.

137. See generally SMITH, *supra* note 62, at 466–501, 562–66; QUINCY, *supra* note 83, at 436–38, 444–49, 458–59, 463, 488–94. As an example of the contemporary reaction, Chief Justice Thomas Hutchinson's home was burned by arsonists during the Stamp Act riots of 1765. The then-governor of Massachusetts Bay Colony attributed the attack to Hutchinson's role in granting writs of assistance to customs officials. QUINCY, *supra* note 83, at 416 n.2, 434 n.20; TAYLOR, *supra* note 3, at 38; Lasson, *supra* note 3, at 68.

138. SMITH, *supra* note 62, at 438–60 (discussing how the Townshend Act was motivated by the recognition that there was no legal basis to issue writs of assistance in the colonies). The Acts of Trade created a new American Board of Customs to enforce the acts and authorized the highest court in each colony to issue writs of assistance. QUINCY, *supra* note 83, at 449–50.

139. See generally QUINCY, *supra* note 83, at 500–11; O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 49–75 (Richard B. Morris ed., 1939) (summarizing colonial courts' reaction to petitions for writs of assistance between 1761 and 1776).

140. QUINCY, *supra* note 83, at 510–11, 534–35; SMITH, *supra* note 62, at 2, 460, 469–70.

141. SMITH, *supra* note 62, at 2–3, 461–62, 520–23. Only South Carolina gave in. *Id.* at 3–4.

Notably, Massachusetts continued to issue general writs of assistance,<sup>142</sup> which played a large role in John Adams's cases. This is to say that Massachusetts remained the main battleground in the colonies regarding British search and seizure practices,<sup>143</sup> although the Townshend Act kept the issue alive in other colonies for most of the period leading up to the Revolution.

#### 5. Importance of the *Writs of Assistance Case* to Adams

Adams left a long record regarding the importance of the *Writs of Assistance Case* to him. In his *Autobiography*, Adams wrote:

A Contest appeared to me to be opened, to which I could foresee no End, and which would render my Life a Burden and Property, Industry and every Thing insecure. There was no Alternative left, but to take the Side, which appeared to be just, to march intrepidly forward in the right path, to trust in providence for the Protection of Truth and right, and to die with a good Conscience and a decent grace, if that Tryal should become indispensable.<sup>144</sup>

Without doubt, however, the most telling of his comments occurred on July 3, 1776, the very day that the Declaration of Independence was agreed to by Adams and the other delegates at the convention in Philadelphia, Pennsylvania. In a letter to his wife reflecting on the moment, Adams wrote:

Yesterday the greatest question was decided, which ever was debated in America, and a greater, perhaps, never was nor will be decided among men. A resolution was passed without one dissenting colony, "that these United Colonies are, and of right ought to be, free and independent States, and as such they have, and of right ought to have, full power to make war, conclude peace, establish commerce, and to do all the other acts and things which other States may rightfully do." You will see in a few days a Declaration setting forth the causes which have impelled us to this mighty revolution, and the reasons which will justify it in the sight of God and man. A plan of confederation will be taken up in a few days.

When I look back to the year 1761, and recollect the argument concerning writs of assistance in the superior court, which I have hitherto considered as the commencement of this controversy between Great Britain and America, and run through the whole period, from that time to this, and recollect the series of political events, the chain of causes and effects, I am surprised at the suddenness as well as greatness of this revolution.<sup>145</sup>

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142. See generally QUINCY, *supra* note 83, at 401–35.

143. Cf. CUDDIHY, *supra* note 15, at 327 ("Colonial Massachusetts, not Great Britain, formulated most of the ideas that formed the specific warrant clause of the Fourth Amendment.").

144. 3 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 276.

145. Letter from John Adams to Abigail Adams (July 3, 1776), in 9 THE WORKS OF JOHN

Can there be any clearer statement of the importance of the *Writs* case to Adams? Yet we have much more; throughout his life, Adams repeatedly made similar statements. For example, in 1780, Adams marked 1760 as the beginning of the dispute with Great Britain, when

orders were sent from the board of trade in England to the custom-house officers in America, to apply to the supreme courts of justice for writs of assistance to enable them to carry into a more rigorous execution certain acts of parliament called the acts of trade . . . by breaking open houses, ships, or cellars, chests, stores, and magazines, to search for uncustomed goods. In most of the Colonies these writs were refused. In the Massachusetts Bay the question, whether such writs were legal and constitutional, was solemnly and repeatedly argued before the supreme court by the most learned counsel in the Province . . . [T]he arguments advanced upon that occasion by the bar and the bench, opened to the people such a view of the designs of the British government against their liberties and of the danger they were in, as made a deep impression upon the public, which never wore out.<sup>146</sup>

Similarly, in a famous letter to William Tudor, in 1817, Adams wrote about the impact of Otis's argument:

Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.<sup>147</sup>

If we take Adams at his word, throughout his long life Adams held the belief that the *Writs* case was so important that it marked the beginning of the American Revolution. Notably, Adams distinguished between the war and the Revolution.<sup>148</sup> He saw the “the real American Revolution” as a “radical change in the principles, opinions, sentiments, and affections of the people” and “in the minds and hearts of the people.”<sup>149</sup>

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ADAMS, *supra* note 7, at 418 (1854).

146. Letter from John Adams to Mr. Calkoen (Oct. 4, 1780), *in* 7 THE WORKS OF JOHN ADAMS, *supra* note 7, at 267 (1852).

147. Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 247–48 (1856); *see* Lasson, *supra* note 3, at 58–59 (quoting 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 247–48 (1856)); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 286 n.8 (1990) (Brennan, J., dissenting) (citing Adams's assessment of Otis's argument); Payton v. New York, 445 U.S. 573, 583 n.21 (1980) (same).

148. Letter from John Adams to H. Niles (Feb. 13, 1818), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 282 (1856).

149. *Id.* at 282–83 (emphasis omitted); *see also* Letter from John Adams to Thomas Jefferson (Aug. 24, 1815), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 172 (1856) (“The revolution was in the minds of the people, and this was effected from 1760 to 1775 . . . before a drop of blood was shed at Lexington.”); Letter from John Adams to Dr. Morse (Nov. 29, 1815), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 183–84 (1856) (stating that the “revolution in the principles, views, opinions, and feelings of the American people”

Several themes that found later resonance in John Adams's views and in Fourth Amendment jurisprudence can be seen in Thatcher's arguments, including the acknowledgement of probable cause as a standard to measure the propriety of an intrusion, a concern with standardless discretion, and the temporary nature of warrants. Still, it was Otis who inspired Adams, and many of the principles that Otis advocated found a place in Adams's writings and subsequent search and seizure constitutional provisions. Specifically, significant aspects of Otis's arguments became elements of Article 14 and Fourth Amendment structure and jurisprudence. They include the following: identifying the right to be "secure" as the interest implicated by a search or seizure; listing the home as a protected place; utilizing the common law search warrant as a model for when warrants can issue; defining unjustified intrusions as "unreasonable"; and indicating that probable cause based searches and seizures are proper. More broadly, Otis's concerns about the need for certain procedures, the scope of intrusions, and the arbitrary use of authority, have had continued importance in search and seizure jurisprudence to this day. Underlying all of those arguments and principles was a quest for objective criteria to measure the legitimacy of a search or seizure.

### C. The English General Warrant Cases

Shortly after the *Writs of Assistance Case*, a series of general warrant cases were litigated in England. The principal case, *Wilkes v. Wood*,<sup>150</sup> has been considered by the Supreme Court as a fundamental driving force behind the adoption of the Fourth Amendment.<sup>151</sup> The case arose as a result of the publication of a series of pamphlets, called the *North Briton*, which were published anonymously.<sup>152</sup> The author, John Wilkes, used the pamphlets to deride government ministers and criticize governmental policies.<sup>153</sup> After an especially bitter attack in the *North Briton*, No. 45, the government decided to apprehend and prosecute the responsible party for seditious libel. A warrant was issued by Lord Halifax, the secretary of state, to four messengers, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend

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began with Otis's argument); Letter from John Adams to H. Niles (Jan. 14, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 276 (1856) (stating that Otis's argument "breathed into this nation the breath of life").

150. (1763) 98 Eng. Rep. 489 (K.B.).

151. *See, e.g.*, *Stanford v. Texas*, 379 U.S. 476, 484 (1965) (describing the *Wilkes* opinion as "a wellspring of the rights now protected by the Fourth Amendment"); *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (maintaining that it can be "confidently asserted" that the *Wilkes* case and its results "were in the minds of those who framed the Fourth Amendment"). *See generally* *Marcus v. Search Warrant of Prop.*, 367 U.S. 717, 724–29 (1961) (outlining the history of the relationship between the struggle for freedom of the press and the scope of the search and seizure power in England). *Cf.* 1 THE PAPERS OF GEORGE MASON 290 (Robert A. Rutland ed., 1970) (Edmond Randolph viewed the Virginia provision prohibiting general warrants as inspired by the seizure of Wilkes's papers in England under a general warrant).

152. *Lasson, supra* note 3, at 43–44.

153. *Id.*

and seize, together with their papers.”<sup>154</sup> This warrant was general as to the persons to be arrested, the places to be searched, and the papers to be seized. It resulted in the arrest of forty-nine persons in three days.<sup>155</sup> Eventually, the messengers located the printers and learned Wilkes’s identity. Wilkes and all of his private papers were then seized.<sup>156</sup>

The printers and Wilkes brought separate suits against the messengers for false imprisonment.<sup>157</sup> In *Wilkes*, Chief Justice Pratt (soon to be elevated and called Lord Camden) criticized the warrants for failing to specify the offenders’ names in the warrant and for giving the messengers the discretionary power to search wherever their suspicions chanced to fall.<sup>158</sup> Pratt maintained that if the power to issue such warrants existed, “it certainly [might] affect the person and property of every man in this kingdom, and [was] totally subversive of the liberty of the subject.”<sup>159</sup>

Adams purchased the 1771 edition of James Burrow’s *Reports of Cases Adjudged in the Court of King’s Bench*,<sup>160</sup> which contains the report of *Money v. Leach*,<sup>161</sup> including background information about the origins of the litigation involving the use of general warrants to locate the persons involved in publishing the *North Briton*, No. 45. Burrow’s report begins by summarizing the background facts. Money and two other King’s messengers entered Leach’s house to look for

154. *Id.* at 43 (quoting the warrant).

155. *Id.*

156. *Id.* at 43–44.

157. See *Money v. Leach*, (1765) 97 Eng. Rep. 1075 (K.B.); *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.); *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.).

158. *Wilkes*, 98 Eng. Rep. at 498.

159. *Id.*

160. 3 JAMES BURROW, REPORTS OF CASES ADJUDGED IN THE COURT OF KING’S BENCH SINCE THE TIME OF LORD MANSFIELD’S COMING TO PRESIDE IN IT (1771), available at [www.archive.org/details/reportsofcasesad03burr](http://www.archive.org/details/reportsofcasesad03burr) (scan of Adams’s copy). One cannot know for sure when Adams acquired the Burrow volume containing the *Wilkesite* litigation, but it is the original edition, published in 1771. Moreover, on April 20, 1771, Adams wrote about reading Burrow in his diary:

This mettlesome barrister gives us the best account of the unanimity of the King’s Bench, that I have ever heard or read. According to him, it is not uncommon abilities, integrity and temper, as Mr. Burrow would persuade us, but sheer fear of Lord Mansfield, the Scottish chief, which produces this miracle in the moral and intellectual world; that is, of four judges agreeing perfectly in every rule, order, and judgment for fourteen years together. Four men never agreed so perfectly in sentiment for so long a time before. Four clocks never struck together a thousandth part of the time; four minds never thought, reasoned, and judged alike before for a ten thousandth part.

2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 257 (1850). For Adams’s purchase, see THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/book/?book=2215967Adams%2082.1%20v.3%20Folio](http://www.johnadamslibrary.org/book/?book=2215967Adams%2082.1%20v.3%20Folio). Adams also makes reference to a case from Volume 2 of *Burrow’s Reports*, which was another opinion by Lord Mansfield, in a paper written by him in 1774. See 4 THE WORKS OF JOHN ADAMS, *supra* note 7, at 165 (1851).

161. (1765) 97 Eng. Rep. 1075, 3 Burr. 1742. In this Part, all quotations to *Money* are from the 1771 edition of *Burrow’s Reports*, rather than the English Reports, because this is the version that Adams used. I have preserved the original capitalization, spelling, and typeface.

the printer or publisher of the *North Briton*, No. 45, based on the general warrant issued by Halifax.<sup>162</sup> Although the information had not been used to support the issuance of the warrant, the authorities became aware of information that the *North Briton* had been written by Wilkes and that he had been seen frequenting Leach's home.<sup>163</sup> The messengers alleged as justification for their actions that Leach had printed the twenty-sixth edition and that, before executing the warrant, they received information that Leach was the printer of No. 45.<sup>164</sup> According to the messengers, when they entered Leach's home, which is where he conducted his printing business, they observed a newly printed copy of the *North Briton* and an unfinished part of a new edition that Leach was then reprinting.<sup>165</sup> Leach was seized and kept in custody for four days until Halifax could interrogate him. At the conclusion of that time period, it was concluded that Leach was not the printer of No. 45 and he was released.<sup>166</sup>

The case, tried before Judge Pratt, resulted in a jury verdict awarding Leach substantial monetary compensation.<sup>167</sup> The messengers appealed.<sup>168</sup> On appeal before Chief Justice Mansfield and a panel of other judges, counsel for the messengers argued, inter alia, that the warrant complied with "long Practice and Usage."<sup>169</sup> Responding to the assertion that it was a general warrant, counsel asserted that "it is legal to issue and execute a Warrant against a Person unknown, but *only described*."<sup>170</sup> Reciting the facts known to the messengers before executing the warrant, counsel also argued that the messengers had "*probable Cause*" to seize Leach.<sup>171</sup> He emphasized: "This Warrant was executed honestly, and upon a *probable Cause*."<sup>172</sup>

In response, Leach's counsel addressed the claim that there was probable cause to seize Leach:

Here is *no probable Cause*, nor any Reason for justifying the Officer *under a probable Cause*. . . . Here is only Information from One of their own Body, "That the Author of the Paper had been seen going into

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162. The warrant directed the messengers and their assistants to make strict and diligent search for the said Authors Printers and Publishers of the aforesaid seditious Libel intituled "*The North Briton* No. 45. April the 23rd. 1763:" And *them or any of them having found, to apprehend and seize, together with their Papers, and to bring in safe Custody before said Earl, to be examined concerning the Premises, and to be further dealt with according to Law . . . .*

(1765) 3 Burr. 1742 (K.B.) 1743.

163. *Id.* at 1748.

164. *Id.* at 1743.

165. *Id.* at 1743–44.

166. *Id.* at 1744, 1749.

167. *Id.* at 1745.

168. *Id.*

169. *Id.* at 1755.

170. *Id.* at 1756.

171. *Id.* at 1757.

172. *Id.* at 1757.

*Leach's* House; and that *Leach* was the Printer of the Composition *in general*," not of this particular Paper.

But though neither this Hearsay-Information was itself *true*; nor would the Consequence follow, if it had been true; yet they thereupon arrest and imprison an *innocent* Man.<sup>173</sup>

Counsel for Leach also attacked the legality of the warrant:

But THE WARRANT itself is *illegal*. 'Tis against the Author, Printer and Publisher of the Paper, *generally*, without naming or describing them; and not founded on any Charge upon Oath: It is also, "to seize his Papers"; that is, *All* his papers.

If "*Author, Printer, and Publisher*," without naming any particular Person, be sufficient in such a Warrant as this is; it would be equally so, to issue a warrant generally, "to take up *the Robber* or murderer of such a One." This is no Description of the *Person*; but only of the *Offence*: It is making the *Officer* to be Judge of the Matter, in the Place of the Person who *issues* the Warrant. Such a Power would be extremely mischievous, and might be productive of great Oppression.<sup>174</sup>

Leach's counsel added points about the warrant's lack of an oath and about its broad scope, that is, its authorizing the seizure of all papers.<sup>175</sup> He cited in support Hale's *History of the Pleas of the Crown* and Hawkins's *Pleas of the Crown*.<sup>176</sup>

In rebuttal, counsel for the messengers again asserted that they had probable cause to detain Leach: "They were reasonably satisfied, 'that *Leach* was the Printer.' And on Search, this *probable* Cause was *encreased* to a higher Degree: For, they found another fresh Sheet of the *same* Work, just printed off, and wet."<sup>177</sup>

Frankly, the arguments of the lawyers in *Money v. Leach* are quite familiar to us today—and that is my essential point. Adams was exposed to litigation that raised core themes debating the proper criteria to search and seize: the legality of general warrants; whether the person to be arrested must be identified in the warrant; whether the place to be searched must be specified; whether a warrant must be supported by an oath; what information sufficed to support the issuance of a warrant; and whether probable cause was required to search or seize. The concern with a "general warrant" was just a part of the broader mosaic. Of particular note are the competing claims about probable cause as a measure of justification and about certain that information did or did not meet that standard. Except for the peculiarities of punctuation and speech, the arguments on both sides of the *Leach* case could be easily made in twenty-first century America but are now grounded on Fourth Amendment principles.

173. *Id.* at 1761.

174. *Id.* at 1762.

175. *Id.* at 1762–63.

176. *Id.* at 1763. He also noted that Chief Justice Scruggs had been impeached for issuing warrants similar to the one in *Leach*. *Id.*

177. *Id.* at 1764.

The ruling in *Leach* also has a contemporary ring. The Chief Justice, Lord Mansfield, first determined that the question “[w]hether there was a *probable Cause* or Ground of Suspicion” was a jury question and not properly before the court.<sup>178</sup> Mansfield also stated that the warrant’s authorization that all papers could be seized had not been executed and was, therefore, not before the court.<sup>179</sup> As to the warrant being general because it failed to name or describe anyone, Mansfield opined:

It is not fit, that receiving or judging of Information should be left to the Discretion of the *officer*. The *Magistrate* ought to judge; and should give *certain Directions* to the Officer. This is so, upon Reason and Convenience.

Then as to *Authorities*—*Hale* and All Others hold such an uncertain Warrant *void*: And there is *no Case* or Book to the contrary.<sup>180</sup>

The three other judges also viewed the warrant as illegal and void.<sup>181</sup>

The *Wilkesite* cases are traditionally viewed as having had a significant influence on American thought about search and seizure practices in the era leading up to the adoption of the Fourth Amendment.<sup>182</sup> Amar, for example, views those

178. *Id.* at 1765.

179. *Id.* at 1766.

180. *Id.* at 1766–67.

181. *Id.* at 1767. The case was set for reargument, and, after hearing reargument, Mansfield stated that his opinion had not changed. *Id.* The other judges were said to be “assenting” in affirming the judgment. *Id.* at 1767–68. See *supra* note 160 for Adams’s comments on Burrow’s characterization regarding the unanimity of opinions of judges sitting with Lord Mansfield.

182. See *supra* note 151. Another contemporary English case, *Entick v. Carrington*, (1765) 19 Howell’s St. Tr. 1029 (K.B.), also has been repeatedly cited by the United States Supreme Court as a “‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law.’” *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)). *Accord* *Berger v. New York*, 388 U.S. 41, 49 (1967). Notwithstanding this confidence by the Supreme Court, I have found no reference to *Entick* at all by Adams or by anyone involved in the discussions between 1787 and 1791 regarding the need for a bill of rights, despite the voluminous commentary of the era regarding the adoption of the Constitution and proposed amendments. However, *Entick* was the subject of numerous London publications at the time of the decision, and the case found its way into numerous reports of cases. CUDDIHY, *supra* note 15, at 459, 481. Nonetheless, there were various versions of the case report, and the one most often cited, with the “more elaborate versions of Camden’s statements . . . was not published until 1781.” Davies, *Original Fourth Amendment*, *supra* note 24, at 566 n.25.

The *Entick* case stemmed from a warrant issued by the secretary of state to arrest Entick and to seize his books and papers, based on the charge that he was “the author, or one concerned in the writing of several weekly very seditious papers.” 19 Howell’s St. Tr. at 1031. Entick was arrested, and all of his papers were seized from his home. After his release, he sued the messengers in trespass. The jury returned a verdict for Entick, and the case was heard by Judge Pratt, who by then was called Lord Camden. *Id.* at 1044. Camden condemned the scope of the warrant, which had authorized seizure of all of Entick’s papers, comparing it unfavorably to the criteria for warrants for stolen goods. *Id.* at 1063. He also discussed the fundamental role that property rights played in society and outlined a hierarchy



cases as primarily responsible for most of the list of objects explicitly protected by the amendment.<sup>183</sup> William Cuddihy has documented that the cases were extensively reported in the popular press in the colonies, including in Boston, and that they were exploited to increase bad feelings against British rule and molded colonial sentiment to view general warrants as oppressive.<sup>184</sup>

Yet, remarkably absent from Adams's writing is any extended discussion of these English developments. He was clearly aware of them. Wilkes, after being charged with seditious libel in 1763 for his part in publishing the *North Briton*, No. 45, fled to the continent; he returned in the spring of 1768 and was elected to Parliament.<sup>185</sup> On June 6, 1768, as a member of the "Committee of the Boston Sons of Liberty," Adams sent a letter to Wilkes. It opened with this greeting: "The friends of Liberty, Wilkes, Peace and good order to the number of Forty five, assembled at the Whig Tavern Boston New England, take this first opportunity to congratulate your Country, the British Colonies and yourself, on your happy return to the land alone worthy of such an Inhabitant . . . ."<sup>186</sup> The Sons of Liberty in

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of property rights. Camden said that there was no right to seize or inspect papers, which were considered the owner's "dearest property." *Id.* at 1066. He distinguished the right to search for and seize stolen goods based on the property rights involved: in the case of stolen goods, the owner is permitted to recapture his own goods; the seizure of private papers, however, involved taking the owner's property by the government. *Id.* at 1066–68. Camden also rejected the government's right to search papers as a means of discovering evidence in either criminal or civil cases. *Id.* at 1073. Camden's hierarchy had a strong influence on early decisions of the Supreme Court, particularly *Boyd v. United States*, 116 U.S. 616 (1886). *See also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 310–26 (1998) (discussing *Entick*'s influence on the Supreme Court's interpretation of the Fourth Amendment).

183. In a lecture at Suffolk University Law School, Professor Amar asked:

[W]hy did both Massachusetts' Article XIV and the federal Fourth bother to specify "persons," "houses," and "papers"? Precisely to remind us, I suggest, of the heightened sensitivity government should show towards searches and seizures of these three specially-named items. Houses are often more private than other buildings; diaries and other private papers are often our dearest possessions (and raise large issues of free expression, as do all political papers); and searches and seizures of our bodies—our persons—obviously call for special sensitivity. Note how, in *Wilkes* and *Entick*, intrusions occurred against persons, houses, *and* papers—with bodily arrests and the ransacking of secret cabinets in homes in search of personal and political papers—and so here, too, we see the obvious prominence of these paradigm cases in both the Massachusetts and the federal Constitutions. (Personal and political papers were not really at issue in the Boston writs-of-assistance case; and the main focus of concern seems to have been searches of buildings rather than persons.)

Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 69 (1996) (emphasis in original).

184. *See* CUDDIHY, *supra* note 15, at 538–40, 847–50. As Cuddihy stated: "Massive coverage of the Wilkes affair by the colonial press sensitized readers not only to but against general warrants." *Id.* at 538; *see also* Davies, *Original Fourth Amendment*, *supra* note 24, at 562–65 (summarizing newspaper accounts and other sources of information about the general warrant cases).

185. 1 PAPERS OF JOHN ADAMS, *supra* note 106, at 215–16 n.1 (Robert J. Taylor ed., 1977).

186. *Id.* at 214. For subsequent correspondence between Wilkes and the Sons of Liberty, *see id.* at 216, 220–23, 232–34; R.W. POSTGATE, *THAT DEVIL WILKES* 173–78 (1929); PETER

Boston viewed Wilkes as a hero and “Wilkes and Liberty” and “45” were popular symbols.<sup>187</sup> More generally,<sup>188</sup> Wilkes was perceived throughout the American colonies as a champion of liberty.<sup>189</sup>

*D. John Adams’s Library*

“*I have spent an Estate on Books.*”<sup>190</sup>

“*[B]y degrees, I procured the best library of law in the State.*”<sup>191</sup>

Adams was not merely boasting; he read widely and acquired an extensive collection of books.<sup>192</sup> The importance of his library to him and to our

D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 161–62 (1996).

187. See, e.g., ESTHER FORBES, PAUL REVERE AND THE WORLD HE LIVED IN 120, 128 (1942). In one famous example, Paul Revere in 1768 was commissioned by fifteen Sons of Liberty to create a silver punch bowl in honor of the members of the Massachusetts legislature who refused to give in to the King’s request to rescind a letter that had been sent to other colonies, which had sought to generate opposition to the Townshend Acts. Engraving on the bowl included “No. 45,” “Wilkes and Liberty,” and a “torn document for general warrants.” *Id.* at 128–29. The bowl is now in the Boston Museum of Fine Arts and has been described as ranking with the Declaration of Independence and the Constitution as the nation’s “three most cherished historic treasures.” *Sons of Liberty Bowl*, MUSEUM OF FINE ARTS, BOSTON, <http://www.mfa.org/collections/object/39072>.

In his diary on August 14, 1769, Adams recounted dining with 350 Sons of Liberty under the Sign of Liberty Tree, followed by a variety of toasts. He noted that Otis and Samuel Adams promoted such occasions because they “impregnate [the people] with the sentiments of Liberty.” 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 341. Although Adams did “not see one Person intoxicated,” *id.*, the editor of his diary viewed that observation as “remarkable, considering that fourteen toasts were drunk at the Liberty Tree in Boston, followed by forty-five (in honor of John Wilkes’s *North Briton*, No. 45) at the dinner.” *Id.* at 342 n.2.

188. Adams was a member of the Bill of Rights Society. 1 PAPERS OF JOHN ADAMS, *supra* note 106, at xiv. That Society, begun in England in 1769, was largely designed to promote Wilkes’s views and pay his debts. THOMAS, *supra* note 186, at 111–15. Adams’s correspondence occasionally referenced Wilkes. In one letter, Adams observed that, during the period leading up to the Revolutionary War, “parties in England were as angry as in America. Wilkes and Junius agitated king, ministry, parliament, and nation.” 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 202 (1856). In a letter to John Taylor in 1814, Adams mentioned Wilkes’s being interrupted when writing an edition of the *North Briton* and attributed to Wilkes this comment: “I have been studying these four hours to see how near I could come to treason without committing it.” 6 THE WORKS OF JOHN ADAMS, *supra* note 7, at 490 (1851).

189. Wilkes was viewed by Americans as a friend of liberty and his name was known. Indeed, numerous towns and places were named after him (and Lord Camden). See, e.g., Amar, *First Principles*, *supra* note 22, at 65–66 (recounting locations).

190. Letter to Abigail Adams, June 6, 1774, in FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS DURING THE REVOLUTION 4 (Charles F. Adams ed., 1876).

191. 2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 50 n.\* (1850).

192. For an overview of his early readings and influences, see 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at liv–lvi, lxxiv–lxxvii. He was an avid reader and commented often about the course of his legal and other studies. For example, as a young lawyer, Adams borrowed Hale’s treatise from Otis and reported that he had read it three times. 1 DIARY AND

understanding of his knowledge and views cannot be overstated.<sup>193</sup> Adams began collecting books on law, history, and political systems by the early 1760s and amassed one of the largest libraries in New England, which is now housed at the Boston Public Library.<sup>194</sup> Adams was first and last a lawyer, with a deep love for learning and understanding the law.<sup>195</sup> He had access to a broad set of materials on search and seizure, including during the period of 1761 to 1779, which were the years that influenced Adams's views on search and seizure, culminating in his drafting of Article 14 of the Massachusetts Declaration of Rights.

*Treatises.* The Adams collection included the major treatises of the day that had detailed explanations of search and seizure principles.<sup>196</sup> His collection included: William Blackstone's *Commentaries on the Laws of England*,<sup>197</sup> Richard Burn's *The Justice of the Peace*,<sup>198</sup> Edward Coke's *Institute on the Laws of England*,<sup>199</sup>

AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 169, 173. He wrote that he had "read a Multitude of Law Books," including Coke, Hawkins's *Pleas of the Crown*, and others. *Id.* at 173.

193. *E.g.*, 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 220 (diary entry for August 1, 1761) (maintaining that the "English Constitution is founded, tis bottomed And grounded on the Knowledge and good sense of the people" and that the "very Ground of our Liberties, is freedom of Elections," but to decide who to elect, a person's mind has to be "opened and enlarged by Reading"); *id.* at 337 (diary entry for January 30, 1768) (observing that he had spent a great deal of money collecting a library but observing that "it is only a means, an Instrument" and pondering how he would use it).

194. The Boston Public Library has digitized many of his books and catalogues all of them at THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, <http://www.johnadamslibrary.org>.

195. His deep knowledge of the law and utilization of extensive citations to authority to support his views are illustrated in papers he wrote in 1773 on the independence of judges and on the rights of the province of Massachusetts. *See* 1 PAPERS OF JOHN ADAMS, *supra* note 106, at 252–345 (Robert J. Taylor ed., 1977). As a young attorney at their first meeting, Gridley grilled Adams on what law books Adams had read. *See* 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 54–55. Later, Adams joined a club that Gridley formed to read and discuss books on law and other subjects. *Id.* at 251–55.

196. For an examination of colonial knowledge of treatises discussing search and seizure principles, see generally CUDDIHY, *supra* note 15, at 188–90, 552–54. For a summary of the treatment of the general warrant in the major treatises of the era, see *id.* at 268–73, 28–83.

197. Adams had all four volumes of Blackstone's *Commentaries*. He had the third edition of volume 1, published in 1767. *See* THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, <http://www.johnadamslibrary.com/search/books/?author=blackstone>. There is little doubt when Adams obtained his copy of volume 4 of Blackstone, given that Adams is listed as one of the subscribers to the American printing, dated 1771–72. *Id.* That volume is particularly notable for citing *Money v. Leach* as support for Blackstone's assertion that general warrants were illegal. 4 WILLIAM BLACKSTONE, COMMENTARIES \*288 n.1. In his diary on June 7, 1771, Adams recounts a conversation where he suggested to a person that he purchase a copy of Blackstone to further his legal knowledge. 2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 271 (1850).

198. Adams owned the three-volume seventh edition, published in 1762, and volume 4 of the tenth edition, published in 1766. *See* THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/search/books/?author=burn](http://www.johnadamslibrary.org/search/books/?author=burn). Adams, for example, cited Burns in 1773. *See* 1 PAPERS OF JOHN ADAMS, *supra* note 106, at 295, 303 n.2 (Robert J. Taylor ed., 1977).

Michael Dalton's *The Country Justice*,<sup>200</sup> Matthew Hale's *Pleas of the Crown*,<sup>201</sup> and William Hawkins's *A Treatise of the Pleas of the Crown*.<sup>202</sup>

Those treatises were the major sources of understanding search and seizure principles; other parts of this Article demonstrate that Adams and his contemporaries routinely cited the treatises as authority for positions they advocated. This is not to say that search and seizure principles were either fully formed or that there was a consensus as to proper practices. If there had been consensus, modern analysis would have a firmer grounding and clearer basis. Nonetheless, claims that the concept of reasonableness had no meaning or that no objective criteria existed to guide the framers is belied by the treatment of search and seizure principles in the treatises of the era.

To illustrate the depth and scope of the era's treatment of search and seizure principles, and referencing only the books in Adams's library, the following highlights are offered. Blackstone discussed four ways in which an arrest could legally occur, including the need for probable cause and a particularized warrant.<sup>203</sup>

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199. See THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/search/books/?author=Coke](http://www.johnadamslibrary.org/search/books/?author=Coke). Adams repeatedly referenced reading Coke. *E.g.*, 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 133, 158, 174, 253, 273; 2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 103 (1850) (diary entry for November 26, 1760); 4 THE WORKS OF JOHN ADAMS, *supra* note 7, at 142–46, 160–65 (1851) (papers written in 1774); 1 PAPERS OF JOHN ADAMS, *supra* note 106, at 258, 262 (Robert J. Taylor ed., 1977) (on the independence of judges, written in 1773). In a letter to Jonathan Mason, Jr., on August 21, 1776, he requested Mason to “pursue my Lord Coke” and urged Mason, who had already read volume 1, to “study the second, third, and fourth Institutes with equal diligence. My lord Coke is justly styled the oracle of the law, and whoever is master of his writings, is master of the laws of England.” 9 THE WORKS OF JOHN ADAMS, *supra* note 7, at 432–33 (1854).

Adams had the 1644 edition of volume 4 of Coke's *Institutes*. In that volume, Coke discussed a variety of search and seizure topics, including warrants for stolen goods, the law of arrest, and under what circumstances the authorities could enter a person's home. 4 EDWARD COKE, INSTITUTE ON THE LAWS OF ENGLAND 176–78 (1644).

200. See THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/book/?book=2206347Adams%2042.1%20Folio](http://www.johnadamslibrary.org/book/?book=2206347Adams%2042.1%20Folio). Adams, for example, cited Dalton in 1773. See 1 PAPERS OF JOHN ADAMS, *supra* note 106, at 295, 303 n.2 (Robert J. Taylor ed., 1977).

201. Adams had the two-volume set of Hale published in 1736 with the Latin title: *Historia Placitorum Coronae*. Adams's signature appears on the first volume as follows: “John Adams 1760.” See THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/book/?book=2216444Adams%2092.10%20v.2%20Folio](http://www.johnadamslibrary.org/book/?book=2216444Adams%2092.10%20v.2%20Folio).

202. Adams had the fourth edition, dated 1762, and he signed his name inside the book. See THE JOHN ADAMS LIBRARY, BOSTON PUBLIC LIBRARY, [www.johnadamslibrary.org/book/?book=2223764Adams%20111.5%20Folio](http://www.johnadamslibrary.org/book/?book=2223764Adams%20111.5%20Folio). In his diary, however, Adams referred to reading Hawkins in 1760. See 2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 103 (1850) (diary entry for November 26, 1760). Adams, for example, cited Hawkins in 1773. See 1 PAPERS OF JOHN ADAMS, *supra* note 106, at 297, 303 n.3 (Robert J. Taylor ed., 1977).

203. 4 BLACKSTONE, *supra* note 197, at \*287–91. Blackstone's four methods were:

1. With a warrant. Blackstone cited Coke for the proposition that a justice of the peace could not issue one to “apprehend a felon upon bare suspicion” and Hale for the need to offer the justice of the peace “probability offered to him of such suspicion.” *Id.* at 287. He

He also detailed the rights of Englishmen.<sup>204</sup> Burn provided a list of “causes of suspicion” to justify an arrest.<sup>205</sup> He detailed when an arrest could be made with or without a warrant,<sup>206</sup> discussed the manner of arrest, such as nighttime arrests,<sup>207</sup> circumstances that justified breaking doors,<sup>208</sup> and the power to search pursuant to writs of assistance in excise and customs situations and, in the case of resistance, the permissibility of breaking open “doors, chests, and other package.”<sup>209</sup>

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added:

it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed.

*Id.* (emphasis in original). Blackstone rejected general warrants: “A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it’s [sic] uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge the ground of suspicion.” *Id.* at 288 (emphasis in original).

2. Arrests by officers without warrant. The standards for such arrests included that a constable could arrest, in the case of a felony actually committed, if the constable had “probable suspicion” as to that person. *Id.* at 289.

3. Arrests by private persons, Blackstone stated, could be made, inter alia, upon “probable suspicion” of the person, but the private person could not break open doors to do so. *Id.* at 290.

4. Upon hue and cry. The requirements included:

The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot: and in the prosecution of such hue and cry, the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace. But if a man wantonly or maliciously raises a hue and cry, without cause, he shall be severely punished as a disturber of the public peace.

*Id.* at 291.

204. *See infra* note 459.

205. 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 85 (7th ed. 1762). Burn’s list included:

1. “The common fame of the country; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground.” *Id.*

2. When the person is found in circumstances that “induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one’s hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them.” *Id.*

3. Flight or actions indicating a “consciousness of guilt.” *Id.*

4. Accompanying a known offender at the time of the offense. *Id.*

5. “The living an idle, vagrant, and disorderly life, without having any visible means to support it.” *Id.*

206. *Id.* at 86.

207. *Id.* at 87.

208. *Id.* at 88. He also noted the differences of opinion between Hale and Coke. *Id.* at 88–89.

209. *Id.* at 446.

Dalton addressed, among other principles, when an arrest is valid for affrays and breaches of peace<sup>210</sup> and when officials could break and enter a house.<sup>211</sup> He observed that a man's home is his castle except against the King,<sup>212</sup> that warrants for customs searches permitted entry into any house during the daytime "where the Goods are suspected to be concealed,"<sup>213</sup> and that differences exist between day and nighttime excise searches.<sup>214</sup> Dalton set forth standards for hue and cry<sup>215</sup> and detailed causes of suspicion that a person is a felon.<sup>216</sup> He addressed standards for warrants to issue,<sup>217</sup> including that it was "not safe" for a justice of the peace to issue a blank warrant,<sup>218</sup> and that one could not be issued "upon a bare Surmise to *break any Man's House* to search for a Felon."<sup>219</sup> He asserted that the liberty of a man "is a Thing specially favoured by the Common Law."<sup>220</sup> To arrest, Dalton stated, there "must be some just Cause, or some lawful and just Suspicion at the least."<sup>221</sup> He discussed causes of suspicion to arrest for felonies,<sup>222</sup> including permitting an arrest if in the "Company of the Offenders," if living "idly and vagrant,"<sup>223</sup> or if in possession of the stolen goods.<sup>224</sup>

Hale wrote about a broad variety of search and seizure topics, often citing Dalton and Coke to support his statements. He discussed the circumstances when an arrest warrant could be issued by the court: the requesting party usually should be examined under oath, that examination must be reduced to a writing concerning whether a felony had been committed and the party's grounds for suspicion,<sup>225</sup> and the person suspected of the crime had to be named.<sup>226</sup> A general warrant was condemned by Hale as "not a sufficient justification in false imprisonment."<sup>227</sup> He

210. DALTON, *supra* note 65, at 3–4.

211. *Id.* at 29, 299–300, 404.

212. *Id.* at 300.

213. *Id.* at 69.

214. *Id.* at 79.

215. *Id.* at 128–29.

216. *Id.* at 381–82.

217. *Id.* at 401–05.

218. *Id.* at 402.

219. *Id.* at 403 (emphasis in original).

220. *Id.* at 406.

221. *Id.* at 407.

222. *Id.*

223. *Id.*

224. *Id.* at 408.

225. 2 HALE, *supra* note 53, at 91–92, 111.

226. *Id.* at 112, 114.

227. *Id.* at 112; *see also* 1 HALE, *supra* note 53, at 580, 584. Hale stated that the general warrant to apprehend all persons suspected of committing a crime was void and was no defense to a suit for false imprisonment. *Id.* at 580; 2 HALE, *supra* note 53, at 112. Lasson has summarized Hale's views:

The party asking for the warrant should be examined under oath touching the whole matter, whether a crime had actually been committed and the reasons for his suspicion. The warrant should specify by name or description the particular person or persons to be arrested and must not be left in general terms or in blanks to be filled in afterwards. Upon the reasoning of the first rule, Hale held

discussed the circumstances when doors of a house could be broken to search or arrest.<sup>228</sup> A notable aspect of his writing was Hale's repeated recognition of probable cause as the standard to arrest or search.<sup>229</sup> Another theme was the difference between ex officio powers and those granted under a warrant.<sup>230</sup> He also outlined what could be done by hue and cry<sup>231</sup> and the standards for issuing and executing arrest and search warrants.<sup>232</sup>

*Reports of Cases.* Adams had numerous reports of cases. As discussed earlier, of particular significance regarding Adams's knowledge of search and seizure principles is his 1771 edition of James Burrow's *Reports of Cases Adjudged in the Court of King's Bench*, which included the case report of *Money v. Leach*.<sup>233</sup>

*History Books.* For the purpose of the present inquiry, the most important history book that Adams had was George Richard Minot's *Continuation of the History of the Province of Massachusetts Bay*.<sup>234</sup> Minot had obtained a copy of Adams's abstract of the 1761 *Writs of Assistance Case*, where James Otis famously offered a detailed alternative view to the abusive search and seizure practices engaged in by British colonial authorities. As noted previously, Adams inserted notes in the margins of the book, commenting on the accuracy of Minot's account.

*Theories of Government.* Of less direct relevance to search and seizure provisions, but undoubtedly a strong influence on Adams's views about the relationship of individuals to government, was Adams's extensive collection of books on the history and structure of government.<sup>235</sup> The collection was utilized by Adams in writing his own thoughts on the structure of government, including his lengthy *A Defence of the Constitutions of Government of the United States of*

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that warrants to search any suspected place for stolen goods were invalid (although he admitted that there were precedents of such general warrants) and should be restricted to search in a particular place suspected, after a showing, upon oath, of the suspicion and the "probable cause" thereof, to the satisfaction of the magistrate.

Lasson, *supra* note 3, at 35–36 (citations omitted).

228. See 1 HALE, *supra* note 53, at 582; 2 HALE, *supra* note 53, at 82, 92, 102–03, 116–17.

229. 1 HALE, *supra* note 53, at 579–80; 2 HALE, *supra* note 53, at 81–82, 85, 91–92, 103, 105, 110, 150, 152. Hale recognized that the grounds to establish probable cause were "very many" and listed "common fame," hue and cry, possession of stolen goods, and association with the known robber. *Id.* at 81.

230. *E.g.*, 2 HALE, *supra* note 53, at 85, 90.

231. *Id.* at 98–104.

232. *Id.* at 105–20, 149–52.

233. See *supra* notes 160–81 and accompanying text.

234. See *supra* note 116.

235. The learning that Adams received from his collection is reflected throughout his writings. For example, in 1774 and 1775, he wrote a series of papers signed *Novanglus* in the *Boston Gazette*, which are referred to collectively as *A History of the Dispute with America, from its Origin, in 1754, to the Present Time*. See 4 THE WORKS OF JOHN ADAMS, *supra* note 7, at 3–177 (1851). The papers are laced with copious references to historical and legal authorities.

*America*,<sup>236</sup> published shortly before the convening of the federal Constitutional Convention in 1787.<sup>237</sup>

### *E. Adams as Litigator and Observer*

#### 1. Customs Searches and Seizures

Adams litigated numerous cases in the Court of Vice Admiralty, most of which involved breaches of British Acts of Trade.<sup>238</sup> The Acts “regulated the flow of colonial trade, laid duties on some aspects of it, and established a system of enforcement.”<sup>239</sup> It was within that web of acts and enforcement that the *Writs* case arose in 1761. A few years later, Adams litigated two significant Admiralty cases. The cases illustrate Adams’s awareness of the British search and seizure practices, demonstrate his opposition to them,<sup>240</sup> and illuminate some of his views on proper search and seizure criteria.

The first, *Folger v. Sloop Cornelia*, is an interesting footnote to the *Writs* litigation. Adams was co-counsel with James Otis and they represented Timothy Folger, who was a “Searcher and Preventive Officer at Nantucket.”<sup>241</sup> Folger was sympathetic to the merchant interests; opposing him were the customs officials of the port of Boston.<sup>242</sup> Folger was, at best, lax in his enforcement of the acts and had been actively engaged in importation. He also had a store in which imported goods were sold and had extensive dealings with merchants, including John Hancock.<sup>243</sup> Folger’s presence in Nantucket thus created “a sizable loophole for evaders of the Acts of Trade” and “represented a threat to the security of the revenue.”<sup>244</sup> The

236. *Reproduced in* 4–6 THE WORKS OF JOHN ADAMS, *supra* note 7 (1851).

237. Adams’s *Defence* drew both praise and criticism during the time that the new Constitution was being debated. *See, e.g.*, 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 473, 474–75 (Merrill Jensen ed., 1978) [hereinafter DOCUMENTARY HISTORY] (quoting *Compo: To the Head of the Wrongheads of New Haven County*, CONNECTICUT COURANT, Nov. 26, 1787). Jefferson, for example, praised it, *see* 4 THE WORKS OF JOHN ADAMS, *supra* note 7, at 579 n.1 (1851), but Madison saw little value in it, *see* 2 WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 503–04 (1870).

238. Admiralty—Revenue Jurisdiction, Editorial Note, *in* 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 98; *see also id.* at 102–05.

239. *Id.* at 98.

240. Despite his opposition to the Acts of Trade, Adams also represented Crown officers in two cases in 1769. Adams later related that he had been asked to take the position of advocate general of the Admiralty but he declined “since he wished to be under no obligation to those whose political principles he opposed.” *Id.* at 102–03.

241. *Folger v. Sloop Cornelia*, Editorial Note, *in* 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 147; *cf.* QUINCY, *supra* note 83, at 450–51 (stating that Folger was removed from office in 1768 because he had voted in the Massachusetts House of Representatives for resolves favoring American manufacturers).

242. *See Folger v. Sloop Cornelia*, Editorial Note, *in* 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 147.

243. *Id.* at 149.

244. *Id.* at 148–50.



actual litigation, however, had little to do with the background. In January 1768, Folger seized the sloop *Cornelia*.<sup>245</sup> Thereafter, customs officials in Boston advised Folger that his commission was invalid and litigation ensued over who could validly seize the ship and receive the proceeds from the seizure.<sup>246</sup> The formal outcome of the case had nothing to do with the peculiarities of British search and seizure practices, although Folger's relationship with the antigovernment faction colored Folger's subsequent efforts to affirm the validity of his commission.<sup>247</sup>

The second, more significant, case resulted from the seizure of John Hancock's sloop *Liberty* in June 1768. John Hancock was an outspoken critic of British rule and a wealthy, influential merchant, who later became a signer of the Declaration of Independence and governor of Massachusetts. "The uproar over the *Liberty* led the Crown to send troops to Boston."<sup>248</sup> This in turn led to the Boston Massacre in March 1770,<sup>249</sup> with Adams representing British soldiers involved in that shooting. Adams represented Hancock in the *Liberty* litigation and, as "draftsman of political manifestos for the Town of Boston," commented on the event.<sup>250</sup> That case, *Sewall v. Hancock*, described as Adams's most politically significant case until the Boston Massacre trials, "played a leading part in the development of colonial opposition to the British customs system and Vice Admiralty courts."<sup>251</sup>

The *Liberty* was searched and seized "for violation of the statutory prohibition against unloading [goods] before entry."<sup>252</sup> The events that followed were as much political as judicial. The sloop was ultimately put up for sale and purchased by customs authorities, who fitted her out as a revenue cutter.<sup>253</sup> She was later seized by a mob in Rhode Island and burned.<sup>254</sup>

Adams, representing Hancock in the trial concerning his involvement in the unloading, drafted an "unusual"<sup>255</sup> argument in Hancock's defense; he challenged the statute as invalid because neither Hancock nor his representative had ever consented to it, in violation of his fundamental rights under Magna Carta, and that it also denied Hancock his right to a jury trial.<sup>256</sup> The popular aspect of the seizure is more telling. After the ship was seized, a series of town meetings were held in Boston.<sup>257</sup> Representatives of the town were appointed and Adams was charged

245. *Id.* at 151.

246. *Id.* at 152.

247. *Id.* at 156.

248. Admiralty—Revenue Jurisdiction, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 98, 103.

249. *Id.*

250. *Id.* at 102; *see also* Sewell v. Hancock, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 184–92.

251. Sewell v. Hancock, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 173.

252. *Id.* at 175.

253. *Id.* at 179.

254. *Id.* at 179–80.

255. *Id.* at 190.

256. *Id.*; Sewall v. Hancock, Adams' Copy of the Information and Draft of His Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 194, 198–207; *see also* QUINCY, *supra* note 83, at 457–63 (reproducing Adams's notes).

257. Sewall v. Hancock, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note

with drafting instructions for those representatives.<sup>258</sup> In his draft, which was approved by the town meeting, Adams asserted that the seizure of the *Liberty* had been unjustified because it was “without any probable cause of seizure that we know of, or indeed any cause that has yet been made known.”<sup>259</sup> “The statements on probable cause . . . by the Boston town meeting on the *Liberty*[,] saturated newspapers from Rhode Island to South Carolina.”<sup>260</sup> The *Liberty* incident thus represented another significant reference to probable cause as the proper measure of a search or seizure; both Thatcher and Otis had referenced that standard in the *Writs* case. With the *Liberty*, Adams became an advocate for that standard.

## 2. Familiarity with Search Warrants for Stolen Goods

In addition to Otis’s argument in the *Writs* case and the various treatises in his library, there is other evidence of Adams’s knowledge of search and seizure practices related to the recovery of stolen goods. Otis, it should be recalled, argued that warrants for stolen goods were “special,” that is, a magistrate issued them based on an oath, a showing of “good Grounds of suspicion,”<sup>261</sup> “probable suspicion,” or “probable ground,” and required a particular description of the place to be searched.<sup>262</sup> Contemporaneous with the *Writs* case, Adams served as an attorney in the case of *Hunt v. White*, which involved a “very slanderous, and malicious Lye, made and published to [Hunt’s] Damage.”<sup>263</sup> Although all the details are unclear, Adams prepared for his argument by writing in his diary:

Mr. Hunt, it seems sometime after last Thanksgiving Day, made his application to Mr. Justice Dyer, for a Warrant to search for stolen goods. The Justice administered an oath to him and he swore that on the Night after last Thanksgiving Day, his House was broken and 17£ of Money stolen from his Chest. A Warrant of search was granted and dilligent search was made, but the Money not found.<sup>264</sup>

According to Adams’s notes, White thereafter told a variety of false stories related to those events<sup>265</sup> and the litigation did not turn on the form the warrant took. Nonetheless, the warrant that Hunt obtained had many of the features of a “special” warrant and was based on criteria later embedded in Article 14 and the Fourth

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86, at 176.

258. *Instructions of the Town of Boston to Their Representatives, 17 June, 1768*, reprinted in 3 THE WORKS OF JOHN ADAMS, *supra* note 7, at 501.

259. *Id.* at 503.

260. CUDDIHY, *supra* note 15, at 590. Cuddihy cites additional authority of the period using the lack of probable cause to explain why certain notorious maritime seizures between 1761 and 1776 were unreasonable. *Id.* at 586–91. He observes that probable cause did not have an exact definitional content, but the controversies “had inserted ‘probable cause’ of seizure into the American legal vocabulary as a nebulous understanding that property could not be seized without substantial reason.” *Id.* at 591.

261. 2 THE WORKS OF JOHN ADAMS, *supra* note 7, app. A, at 522 (1850).

262. *Id.* at 525; see also *supra* text accompanying note 118.

263. 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 179.

264. *Id.* at 180.

265. See *id.*

Amendment: issuance by a magistrate; an oath; and a statement of facts to justify the issuance.<sup>266</sup>

### 3. The Home as a Castle

Otis's argument in the *Writs* case in 1761, as reported by Adams, emphasized that a man's home is his castle. Otis was, of course, not the first to make such observations, and the principle seems to have been generally accepted in the colonies.<sup>267</sup> In addition to the treatises he read, there is ample evidence indicating Adams's familiarity with this principle.

The years between the *Writs* case and the onset of the Revolutionary War were tumultuous ones in Boston. One notorious event occurred on February 22, 1770, when Ebenezer Richardson shot and killed an eleven-year-old boy.<sup>268</sup> Richardson had been widely rumored to be a member of the customs establishment and, hence, was the target of much criticism.<sup>269</sup> On that date, a Boston mob targeted the shop of Theophilus Lillie, who had refused to honor an agreement not to import British goods.<sup>270</sup> "[T]he technique used against men like Lillie had been the 'exhibition,' a sign or placard planted before the offending shop, carrying language whose general import was 'Don't Buy from the Traitor.'" <sup>271</sup> A gang of boys paraded in front of Lillie's shop and placed a sign in front of his door.<sup>272</sup> Richardson, observing the boys and the sign, at first attempted to persuade other bystanders to run their wagons over the sign; failing that, he took a cart and a horse and attempted to do so himself.<sup>273</sup> This led to a general tumult, with the crowd hurling missiles at Richardson, who retreated to his home, accompanied by a man named George Wilmot.<sup>274</sup> Witnesses at trial testified that stones shattered the windows of the house and, eventually, the crowd began to push at the doors.<sup>275</sup> As the "pelting continued . . . Richardson thrust a gun through the window, 'snapping' it at the mob. Finally, he fired a charge of bird shot," resulting in the boy's death.<sup>276</sup>

The crowd seized Richardson and Wilmot, much abused them, and dragged them through the town.<sup>277</sup> At Faneuil Hall, in the presence of a thousand people, justices of the peace examined Richardson and Wilmot and committed them to

266. See *supra* note 118 and accompanying text. I previously quoted that material and now highlight important aspects.

267. See, e.g., CUDDIHY, *supra* note 15, at 185–88 (recounting numerous iterations of that principle); Davies, *Original Fourth Amendment*, *supra* note 24, at 601–03 (same).

268. Rex v. Richardson, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 396.

269. *Id.* at 396–97.

270. *Id.* at 397.

271. *Id.* at 397–98.

272. *Id.* at 398.

273. *Id.*

274. *Id.* at 398–99.

275. *Id.*

276. *Id.* at 399.

277. *Id.*

jail.<sup>278</sup> The Sons of Liberty exploited the incident to their “utmost advantage” by publishing inflammatory newspaper reports and using the boy’s funeral to advance their cause.<sup>279</sup> Two thousand people reportedly attended the funeral.<sup>280</sup> The Boston Massacre occurred two weeks later. In this atmosphere, as the editors of Adams’s Legal Papers have observed, the chance of Richardson receiving “a fair trial [was] minimal and of acquittal zero.”<sup>281</sup>

The significance of the case, *Rex v. Richardson*, for present purposes, is not rooted in what happened to Richardson and Wilmot,<sup>282</sup> instead, it stands out due to the arguments of counsel for Richardson. Josiah Quincy eventually became Richardson’s attorney.<sup>283</sup> His principal defense was that Richardson could use all possible means to defend himself because his life was threatened while he was in his own home.<sup>284</sup> Adams’s papers contain notes from defense counsel, probably written by Quincy.<sup>285</sup> Those notes summarize the right of self-defense, including the following references to the importance of the home: “A Man’s house is his Castle and he may defend it by himself alone or with such as he calls to assist him. 1 H.H.P.C. 445. 487. 5 Coke Repts. 91b. Semane’s Case. 11 Coke Repts. 82b. Lewis Bowles Case.”<sup>286</sup>

Quincy’s references have been interpreted by Wroth and Zobel, the editors of Adams’s Legal Papers. The first reference, “1 H.H.P.C. 445. 487,” refers to the first volume of Hale’s *Pleas of the Crown*:

445: But if *A.* come to enter with force, and in order thereunto shoots at his house, and *B.* the possessor, having other company in his house, shoots and kills *A.* this is manslaughter in *B.*” I *id.* at 487: “[H]is house is his castle of defense, and therefore he may justify assembling of persons for the safeguard of his house.”<sup>287</sup>

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278. *Id.*

279. *Id.* at 399–400.

280. *Id.* at 400. Adams, in his diary, recounted that he attended the funeral. He remarked: “My Eyes never beheld such a funeral. The Procession extended further than can be well imagined. This [shows] there are many more Lives to spend if wanted in the Service of their Country.” 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 101, at 349–50 (diary entry for Feb. 26, 1770, or “thereabouts”).

281. *Rex v. Richardson*, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 400–01.

282. Wilmot was found not guilty and Richardson was ultimately pardoned. *Id.* at 405–11.

283. *Id.* at 402.

284. *Id.* at 404.

285. *Rex v. Richardson*, Defense Counsel’s Notes, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 411 & n.87.

286. *Id.* at 412. The prosecutor’s notes of the arguments are similar. See *Rex v. Richardson*, Paine’s Minutes of the Trial, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 422–23.

287. *Rex v. Richardson*, Defense Counsel’s Notes, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 412 n.91.

The second refers to “5 Coke Repts. 91b. Semane’s Case,” which is *Semayne v. Gresham*,<sup>288</sup> more often called *Semayne’s Case*.<sup>289</sup> That case has endured through time regarding the construction of search and seizure principles. It has been cited and debated in numerous Supreme Court opinions, with much of the discussion examining the circumstances in which the government may enter a person’s home.<sup>290</sup> The most famous aspect of the case, however, is Lord Coke’s assertion that “the house of every one is to him as his . . . castle.”<sup>291</sup> Relevant to the *Richardson* litigation was *Semayne’s* observations on the right of a person to use self-defense in one’s home:

“[T]he house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law . . . if

288. (1605) 77 Eng. Rep. 194 (K.B.); 5 Co. Rep. 91a; see 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 412 n.92.

289. See CUDDIHY, *supra* note 15, at 63.

290. See *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (referring to unannounced entries); *Georgia v. Randolph*, 547 U.S. 103, 123 (2006) (Stevens, J., concurring) (“At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a ‘house’ or ‘castle’ unless authorized to do so by a valid warrant.”); *United States v. Banks*, 540 U.S. 31, 41 (2003) (referring to unannounced entries); *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (“In 1604, an English court made the now-famous observation that ‘the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.’”); *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (“As far back as *Semayne’s Case* of 1604, the leading English case for that proposition . . . , the King’s Bench proclaimed that ‘the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house.’”); *id.* at 95 n.2 (asserting that *Semayne’s Case* “makes clear” that “the Sheriff may break the house, imply that at the suit of the party, the house may not be broken: otherwise the addition (at the suit of the King) would be frivolous.”); *id.* at 100 (Kennedy, J., concurring) (“Read narrowly, the protections recognized in *Semayne’s Case* might have been confined to the context of civil process, and so be of limited application to enforcement of the criminal law. Even if, at the time of *Semayne’s Case*, a man’s home was not his castle with respect to incursion by the King in a criminal matter, . . . [t]he axiom that a man’s home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one’s home, an assurance which has become part of our constitutional tradition.”); *Wilson v. Arkansas*, 514 U.S. 927, 931–32 (1995) (citing *Semayne’s Case* for the proposition that a man’s home is his castle and to support knock and announce rule); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 488 n.3 (1986) (the home is a castle); *Steagald v. United States*, 451 U.S. 204, 217–20 (1981) (discussing whether *Semayne’s Case* permitted forcible entry of third person’s home to arrest suspect but that the home remained a castle for residents); *id.* at 228–29 (Rehnquist, J., dissenting) (discussing *Semayne’s Case* and arguing that arrest warrant permitted entry into third person’s home to effectuate arrest); *Payton v. New York*, 445 U.S. 573 (1980) (extensive debate between the majority and dissent over whether *Semayne’s Case* permitted a warrantless arrest of a person in his or her own home); *Ker v. California*, 374 U.S. 23, 47–48 (1963) (Brennan, J., dissenting in part) (citing it for recognition of a requirement to knock and announce); *Miller v. United States*, 357 U.S. 301, 308–09 (1958) (same).

291. *Semayne’s Case*, 77 Eng. Rep. at 195.

thieves come to a man's house . . . to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . . . [E]very one may assemble his friends and neighbours . . . to defend his house against violence . . . .<sup>292</sup>

The third reference is to “11 Coke Repts. 82b. Lewis Bowles Case,”<sup>293</sup> which stated:

If a Man is in his House, and hears that others will come to his House to beat him, he may call together his Friends, &c. into his House to aid him in Safety of his Person; for as it has been said, A Man's House is his Castle and his Defense, and where he properly ought to remain.<sup>294</sup>

Taken together, the three authorities—Hale, Coke, and *Semayne's Case*—are important sources for the substantive aspect of search and seizure law because they shed light on which objects are protected. Consistent with those important predecessors, Adams in Article 14 specifically listed the house as one of the four objects protected; so does the Fourth Amendment. More broadly, the *Richardson* litigation evidences recognition of—and use of—those authorities as sources of a complex search and seizure jurisprudence that extended well beyond narrow concerns with general warrants.

In his own case preparation as a lawyer, Adams in 1774 addressed the protections afforded a person in his home. The case, *King v. Stewart*, was an instance of mob “violence which disturbed Adams deeply.”<sup>295</sup> On March 19, 1766, a mob broke into the home and store of Richard King, terrorized the family, caused significant damage, and burned some of his papers.<sup>296</sup> Protracted litigation followed and Adams became counsel for King in 1773.<sup>297</sup> In Adams's handwriting is “what appears to be a complete text of his address to the jury.”<sup>298</sup> In the course of that argument, Adams described “that strong Protection, that sweet Security, that delightful Tranquillity which the Laws have thus secured to [an Englishman] in his own House.”<sup>299</sup> He added:

An Englishmans dwelling House is his Castle. The Law has erected a Fortification round it—and as every Man is Party to the Law, i.e. the Law is a Covenant of every Member of society with every other Member, therefore every Member of Society has entered into a solemn

292. *Id.*

293. *Bowles v. Bury*, (1616) 77 Eng. Rep. 1252 (K.B.) 1258; 11 Co. Rep. 79, 82.

294. *Rex v. Richardson*, Defense Counsel's Notes, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 412 n.93 (quoting *Bowles*, 11 Co. Rep. at 82).

295. *King v. Stewart*, Editorial Note, in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 106.

296. *Id.*

297. *Id.* at 106–07.

298. *Id.* at 107.

299. *King v. Stewart*, Adams' Minutes of the Review, in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 137.

Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery. . . .

Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquillity which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave . . . .<sup>300</sup>

#### 4. Litigation on Arrest Warrants

Beginning in 1761, a series of events resulted in “complex litigation,” described as a “landmark in the history of Martha’s Vineyard, [which] arose out of an unhappy family situation.”<sup>301</sup> A series of warrants were issued to arrest various members of the Mayhew family, including Wadsworth Mayhew.<sup>302</sup> When Deputy Sheriff Cornelius Bassett sought to execute a warrant for the arrest of Mayhew, he enlisted the aid of a number of men.<sup>303</sup> Apparently, they set out at 9:30 p.m. for the house where Mayhew was supposed to be and surrounded it.<sup>304</sup> Bassett went to the front door and demanded entrance.<sup>305</sup> In response, he “received a charge of buckshot in the legs.”<sup>306</sup> He and his men then broke down the door and, after a struggle, seized Wadsworth.<sup>307</sup>

Numerous lawsuits resulted and Otis<sup>308</sup> and later Adams represented Bassett and another man.<sup>309</sup> Robert Treat Paine was the opposing attorney.<sup>310</sup> Adams and Paine both took notes. Adams scribbled that the “Turning Point” of the case was the “legality of [the] Warrant.”<sup>311</sup> He referred to the warrant as “General,” and added: “Void in itself. Broke open in the dead of Night.”<sup>312</sup> He also cited several authorities on the law of arrests that stand for the propositions that one coming to another’s door to make an arrest must announce his purpose and give those inside

300. *Id.*

301. *Id.* at 87; *see also* CUDDIHY, *supra* note 15, at 563–69 (providing additional details about the litigation and asserting that the litigation “defined Massachusetts as the first jurisdiction to complete the transition from general to specific warrants”).

302. Bassett v. Mayhew, Editorial Note, *in* 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 87–90.

303. *Id.* at 89.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 89–90.

308. CUDDIHY, *supra* note 15, at 565.

309. *Id.* at 567; Bassett v. Mayhew, Editorial Note, *in* 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 90.

310. Bassett v. Mayhew, Editorial Note, *in* 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 90.

311. *Id.* at 91.

312. *Id.*

the opportunity to admit the person before the breaking of the door was justified.<sup>313</sup> He thereafter wrote: “No Necessity. Late in the Night.”<sup>314</sup> Paine’s minutes also referenced the law pertaining to arrests and warrants<sup>315</sup> and listed the following “Objections to Warrant” at the end:

To search all suspected houses.  
Not for sufficient Cause to break house.  
If Warrant good, officer could not break in the night.<sup>316</sup>

Cuddihy notes the “foremost irony” of the litigation: “Adams and Otis, who had acquired reputations as opponents of general writs of assistance, had championed clients acting under close relatives of those writs.”<sup>317</sup> Irony aside, the detailed criteria for the issuance and execution of warrants that Adams and Paine recognized as controlling demonstrate detailed knowledge of search and seizure principles, including a distinction between general and specific warrants, limitations on nighttime searches, knock and announce principles, and the law of arrests.<sup>318</sup>

#### *F. Adams as Delegate to the Continental Congress*

In 1774, the American colonies created the First Continental Congress. John Adams was a delegate from Massachusetts, serving from September 5 to October 26.<sup>319</sup> In an address to the American people on October 21, 1774, and again in an address to the King on October 26, 1774, Congress “protested the power of the Commissioners of Customs ‘to break open and enter houses without authority of any civil magistrate founded on legal information.’”<sup>320</sup> Simultaneously, “Congress warned the inhabitants of Quebec that British legislation had exposed them to excises,” and that they should “expect entrance by ‘insolent’ excise-men into ‘houses, the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law.’”<sup>321</sup>

313. *Id.* at 99 nn.59–63.

314. *Id.* at 99.

315. Bassett v. Mayhew, Paine’s Minutes of the Referees’ Hearing, in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 101–05.

316. *Id.* at 105.

317. CUDDIHY, *supra* note 15, at 569.

318. *See id.* at 566–69.

319. Among Adams’s notes from that Congress is this reference to a speech by Lee: “Life, and liberty which is necessary for the security of life, cannot be given up when we enter into society.” Notes of John Adams, Sept. 8, 1774, in THE SPIRIT OF ’SEVENTY-SIX 51, 52 (Henry Steele Commager & Richard B. Morris eds., 1958).

320. CUDDIHY, *supra* note 15, at 543–44 (citing sources).

321. *Id.* at 544 (citing sources); *see also id.* at 779–80 (arguing that Professor Davies’s characterization of these addresses as referring to writs of assistance is inaccurate and asserting that Congress was referring to actions that did not require writs); 2 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 147 (Adams writing in his diary on October 4, 1774, that Lee showed him the address to the People of Canada).



## III. 1776 TO 1791: THE EVOLUTION OF SEARCH AND SEIZURE PROVISIONS

## A. Article 14 and Other Early Search and Seizure Provisions

Many of the state governments at the time of the American Revolution adopted legal protections against unreasonable searches and seizures.<sup>322</sup> Those protections, embodied in the constitutions of the various states after declaring their independence, typically addressed only abuses associated with general warrants.<sup>323</sup> The Massachusetts Constitution, drafted by John Adams in 1779 and adopted by the Commonwealth in 1780,<sup>324</sup> offered a much different model. The constitution

322. See CUDDIHY, *supra* note 15, at 603–13.

323. The Virginia, Maryland, and North Carolina constitutions only addressed and abolished general warrants. See VA. CONST. of 1776, Bill of Rights § 10, *reprinted in* SOURCES OF OUR LIBERTIES 311, 312 (Richard L. Perry & John C. Cooper eds., 1960); MD. CONST. of 1776, A Declaration of Rights § 23, *reprinted in* SOURCES OF OUR LIBERTIES, *supra*, at 346, 348; N.C. CONST. of 1776, A Declaration of Rights § 11, *reprinted in* SOURCES OF OUR LIBERTIES, *supra*, at 355, 355; *see also infra* note 346 (reproducing the Virginia provision). Pennsylvania offered a somewhat broader provision. Its statement of rights, Section 10, provided:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search in suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

PA. CONST. of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania § 10, *reprinted in* SOURCES OF OUR LIBERTIES, *supra*, at 328, 330. The first clause of this provision, although declaring the broader principle of freedom from searches and seizures, arguably served only as a premise for condemning general warrants, which were the only abuses prevented. Vermont adopted a constitution in 1777 with a search and seizure provision nearly identical to Pennsylvania's but Vermont was not admitted into the Union until 1791. See VT. CONST. of 1777, *reprinted in* SOURCES OF OUR LIBERTIES, *supra*, at 358, 366. With the exceptions of New Hampshire and Massachusetts, the remaining states did not address searches and seizures at all in constitutions they adopted. *See, e.g.*, SOURCES OF OUR LIBERTIES, *supra*, at 309–10.

Some other legal restraints were also adopted. For example, New Jersey passed a statute in 1782 to prevent illegal trade with the enemy. The act provided for the issuance of search and seizure warrants “as in the case of stolen Goods” by judges upon application made if “due and satisfactory Cause of Suspicion shewn,” and made upon written oath or affirmation, that goods are concealed in a house or other building. QUINCY, *supra* note 83, at 508–09 n.11 (quoting Statute of June 24, 1782, c. 317). In 1787, Connecticut recognized that general search warrants were illegal at common law. *See* *Frisbie v. Butler*, 1 Kirby 213, 215 (Conn. 1787).

324. *See generally* 3 ADAMS FAMILY CORRESPONDENCE 225–28 n.3 (L.H. Butterfield & Marc Friedlaender eds., 1963) (summarizing how Adams came to be the sole drafter). New Hampshire duplicated the Massachusetts provision in its bill of rights in 1784. N.H. CONST. of 1784, art. I, § 19, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 323, at 382, 384. For an excellent treatment of the evolution of the treatment of Article 14 by Massachusetts courts, see Joseph A. Grasso, Jr., “John Adams Made Me Do It”: *Judicial Federalism*,

Adams created was preceded by a “Declaration of Rights,” including a search and seizure provision<sup>325</sup> that ultimately became Article 14, which provided:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.<sup>326</sup>

Although Adams consulted other state constitutions,<sup>327</sup> Article 14 had significant innovations: the words “secure” and “unreasonable” to define the quality and scope of the right protected were new to search and seizure provisions; and the first sentence declared a broad right against unreasonable searches and seizures, not just a prohibition against general warrants. Other aspects of Article 14 were similar to provisions in other states. The first sentence contains a list of four objects protected, similar to the list in Pennsylvania’s Constitution, which was adopted four years before the Massachusetts provision.<sup>328</sup> The second sentence of Article 14 abolished general warrants, as had several previous state constitutions. Adams, consistent with the Pennsylvania constitution, required the foundation of the warrant to be specified and under an oath or an affirmation. Adams added some innovative language: (1) the warrant had to be “accompanied with a special designation of the person or objects of search, arrest, or seizure;” and (2) issued “with the formalities prescribed by the laws.”<sup>329</sup>

It is somewhat remarkable and certainly disappointing that Adams never seems to have commented on the Massachusetts search and seizure provision.<sup>330</sup> Nor is there any discussion—other than an ambiguous comment by a congressman whose

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*Judicial Chauvinism, and Article 14 of the Massachusetts’ Declaration of Rights*, 77 MISS. L.J. 315 (2007).

325. The sole change made to Adams’s draft was to substitute the word “subject” for “man.” 8 PAPERS OF JOHN ADAMS, *supra* note 106, at 263 nn.23–24.

326. MASS. DECLARATION OF RIGHTS of 1780, art. XIV, *reprinted in* Lasson, *supra* note 3, at 82 n.15.

327. *E.g.*, 2 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 391 (Adams’s diary entry for June 23, 1779, which disparages the Pennsylvania Constitution and notes that the Pennsylvania Declaration of Rights had been “taken almost verbatim” from Virginia’s); Letter from John Adams to Benjamin Rush (Sept. 10, 1779), *in* 8 PAPERS OF JOHN ADAMS, *supra* note 106, at 140 (stating that he had “many fine Examples” of other constitutions to examine in preparing the Massachusetts draft). I have found no record of Adams explicitly discussing how other search and seizure provisions influenced his draft. Nonetheless, as discussed in text, there are obvious influences.

328. *See* MASS. DECLARATION OF RIGHTS of 1780, *supra* note 326.

329. *Id.*

330. There appear to be only a few isolated comments by Adams about any aspect of the Massachusetts Constitution. *See, e.g.*, 9 THE WORKS OF JOHN ADAMS, *supra* note 7, at 505–09 (1854) (noting three letters written between 1779 and 1780).

identity is disputed—by any of the men who debated the structure of the Fourth Amendment as to why they were choosing Adams's model as the better of the two models. Nonetheless, as discussed in the next subparts, Adams's model became the preferred format during the crucial period that began with the drafting of the Constitution in 1787 and ended with the drafting of the Fourth Amendment in 1789.

### *B. The Constitutional Convention of 1787*

The United States Constitution resulted from a convention in Philadelphia in 1787. Almost none of the debate at the convention involved discussion of a bill of rights, and there is no record of any discussion of a search and seizure provision. The framers were concerned with the larger issues of the structure and powers of the federal government and its relationship to the states. In the final days of the convention, George Mason, a delegate from Virginia, proposed including a bill of rights. He argued: "It would give great quiet to the people, and, with the aid of the state declarations, a bill might be prepared in a few hours."<sup>331</sup> Elbridge Gerry of Massachusetts moved that a bill of rights be prepared, which was seconded by Mason. The very brief recorded debate that accompanied the motion only mentioned the necessity for juries and was not otherwise specific as to the elements of a bill of rights. The motion was defeated by an even vote among the states, with Massachusetts being absent.<sup>332</sup> Both Mason and Gerry ultimately declined to sign the Constitution at the conclusion of the convention but their influence on the process continued, with each playing a role in the subsequent evolution of the language of the Fourth Amendment.

Adams was in England at the time of the Constitutional Convention and the convention had adopted a code of silence.<sup>333</sup> Upon reviewing a copy of the proposed Constitution shortly after it had been made public, Adams wrote a letter to Thomas Jefferson stating that he hoped it would be adopted "and Amendments be made at a more convenient opportunity."<sup>334</sup> He then posed these questions to Jefferson: "What think you of a Declaration of Rights? Should not such a Thing have preceded the Model?"<sup>335</sup> As will be discussed, subsequent arguments, on

331. JONATHAN ELLIOT, 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 538 (Ayer Co., Publishers, Inc. reprint ed. 1987) (1845) (quoting George Mason).

332. *See id.*

333. *See, e.g.*, DAVID O. STEWART, THE SUMMER OF 1787, at 51 (2007) (discussing the "strict" adherence to the code of silence by the delegates).

334. Letter from John Adams to Thomas Jefferson (Nov. 10, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 210 (Lester J. Cappon ed., 1959).

335. *Id.* Although Jefferson did not reply directly on this point to Adams, he did write to Madison on December 20, 1787, that "no just government should refuse" a bill of rights. STEWART, *supra* note 333, at 227, 327 (quoting the letter); *see also* Letter from John Adams to Cotton Tufts (Jan. 23, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 237, at 778 (John P. Kaminski & Gaspare J. Saladino eds., 1998) (affirming support for the Constitution but indicating a need for future amendments); Letter from John Adams to Cotton Tufts (Feb. 12, 1788), in 4 DOCUMENTARY HISTORY, *supra* note 237, at 212 n.4 ("[A] Declaration of Rights I wish to see with all my Heart.").

either side of the debate over the inclusion of a bill of rights in the Constitution, were often not much more detailed than the sentiments expressed in Adams's letter.

*C. The Confederation Congress*

The proposed constitution was sent to the Confederation Congress. Cuddihy summarizes that body's actions:

On receiving the Constitution, the Continental Congress resolved to send it to the state legislatures but only after rejecting efforts by both its enemies and its friends to predetermine the result. Supporters of the Constitution wished it transmitted with a recommendation favoring adoption. On the other hand, Richard Henry Lee of Virginia and Melancthon Smith of New York proposed that Congress first attach a bill of rights to the Constitution. One article of Lee's bill of rights, which he excerpted from the Massachusetts Constitution of 1780, would have insulated citizens against "unreasonable searches [and] seizures of their persons, houses, papers or property." Congress rejected both proposals and forwarded the Constitution unanimously but without recommendation, either for or against acceptance.<sup>336</sup>

Cuddihy's point is an important one: Lee utilized the first sentence of Article 14 of the Massachusetts Declaration of Rights as the basis of his proposal. Moreover, Lee shared that model with many others, including George Mason, an important figure during the ratification debates in Virginia, and urged Mason to develop a plan for several states to ratify the Constitution with amendments.<sup>337</sup>

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336. CUDDIHY, *supra* note 15, at 671–72 (citations omitted). Lee's proposal in full read: "That the Citizens shall not be exposed to unreasonable searches, seizure of their persons, houses, papers, or property." 2 THE LETTERS OF RICHARD HENRY LEE 442 n.1 (James Curtis Ballagh ed., 1914); *see also* 8 DOCUMENTARY HISTORY, *supra* note 237, at 653 (John P. Kaminski & Gaspare J. Saladino eds., 1998) (same with minor stylistic changes).

337. In a letter to Mason from Richard Henry Lee, dated October 1, 1787, Lee commented on the proceedings in the confederation Congress and how it had sent the proposed Constitution without change to the States despite his attempts to amend it. He sent Mason a copy of his proposed amendments. Lee suggested to Mason that Virginia and other states join in creating amendments and approving the Constitution with the amendments. Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), *in* 2 THE LETTERS OF RICHARD HENRY LEE, *supra* note 336, at 438–40. A similar letter was sent to Samuel Adams, Elbridge Gerry, and numerous other influential men. *See* Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787), *in* 2 THE LETTERS OF RICHARD HENRY LEE, *supra* note 336, at 444–47. Lee's proposal was widely disseminated and "responses to Lee's letter and amendments were voluminous." 19 DOCUMENTARY HISTORY, *supra* note 237, at 463 (John P. Kaminski & Gaspare J. Saladino eds., 2003).

Lee's proposed amendment is linguistically broader than the initial views of the writer of a pamphlet that gained widespread circulation, *Letters of a Federal Farmer*. In letter number 4, dated October 12, 1787, the writer complained that several essential rights were omitted, including "freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers,

*D. The Ratification of the Constitution by the States*

After the Constitutional Convention, and during the period of time when the individual states were considering the proposed Constitution, thousands of letters, pamphlets, speeches, and other comments were generated, both for and against adoption.<sup>338</sup> There were extensive communications among the various factions throughout the states.<sup>339</sup> The omission of a bill of rights was a significant criticism of the proposed Constitution, but the surviving records

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property and persons.” Letter from the Federal Farmer no. 4, in NEIL H. COGAN, *CONTEXTS OF THE CONSTITUTION* 706, 710 (1999). However, in letter number 6, dated December 25, 1787, the writer listed among the “unalienable or fundamental rights in the United States” that “he is subject to no unreasonable searches or seizures of his person, papers or effects.” Letter from the Federal Farmer no. 6, in 17 *DOCUMENTARY HISTORY*, *supra* note 237, at 274 (John P. Kaminski & Gaspare J. Saladino eds., 1995). Giving more detail, in letter number 16, dated January 20, 1788, the writer stated:

[T]hat all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land.

Letter from the Federal Farmer no. 16, in COGAN, *supra*, at 717, 722. Some have attributed the *Letters* to Lee but others have doubted that attribution. *See, e.g.*, 14 *DOCUMENTARY HISTORY*, *supra* note 237, at 15–16 (John P. Kaminski & Gaspare J. Saladino eds., 1983). Lee was elected to the Senate after ratification of the Constitution and was a champion of amendments in the Senate. *See* 1 RICHARD H. LEE, *MEMOIR OF THE LIFE OF RICHARD HENRY LEE* 240–41 (1825).

Lee’s memoir and correspondence reflect some broader knowledge of search and seizure developments and related matters. In 1767, he received a letter from his brother, who made reference to the attempts to destroy Wilkes, to brand Wilkes with seditious libel, and of meeting Wilkes. Lee’s brother also sent him a copy of the *North Briton*. *Id.* at 56–62. In 1774, as a delegate to the Continental Congress, Lee was on the committee with John Adams that drafted an address to the King regarding American grievances. *Id.* at 111–16. He also drafted the letter to the people of Quebec, which referenced arbitrary British search and seizure practices. *See* 1. J. CONTINENTAL CONG. 104–05 (1774). Lee, as delegate to the Continental Congress in 1776, drafted the resolution calling for independence. *See* 1 LEE, *supra*, at 170.

Adams and Lee were frequent correspondents. In a letter dated November 15, 1775, Adams shared with him his outline of his plan for government. Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), in 4 *THE WORKS OF JOHN ADAMS*, *supra* note 7, at 185–87 (1851). In an interesting letter to John Adams on October 8, 1779, Lee stated that he was “much interested in the establishment of a wise and free republic in Massachusetts Bay” and expressed his desire to “finish the remainder of my days” in Massachusetts. Letter from Richard Henry Lee to John Adams (Oct. 8, 1779), in 2 *THE LETTERS OF RICHARD HENRY LEE*, *supra* note 336, at 155. On September 10, 1780, Lee wrote to Adams regarding his reading the draft of the Massachusetts constitution. 10 *PAPERS OF JOHN ADAMS*, *supra* note 106, at 141–42.

338. *See generally* *DOCUMENTARY HISTORY*, *supra* note 237.

339. *See generally* Lasson, *supra* note 3, at 83–100 (summarizing numerous letters).

indicate that the debate rarely involved delving into the details of an enumeration of a bill of rights. Instead, it was usually at a much higher level of generality, that is, whether to amend the Constitution or not to include a bill of rights.<sup>340</sup>

Notwithstanding this, there were numerous, isolated references concerning a need for protection against searches and seizures. Some have claimed that the commentary addressed solely a concern with general warrants.<sup>341</sup> The historical record, however, does not support that view. Instead, a variety of concerns were expressed. Most of the comments are themselves vague assertions, consisting of little more than a phrase or a sentence or two.<sup>342</sup> Some did involve complaints

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340. The argument against a Bill of Rights was straightforward: it was not needed. One delegate to the Pennsylvania ratifying convention stated the position succinctly: "What occasion for a bill of rights when only delegated powers are given? One possessed of 1000 acres, conveys 250. Is it necessary to reserve the 750?" Delegate Thomas McKean (Dec. 10, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 237, at 546–47 (Merrill Jensen ed., 1976). Similar comments, although perhaps more artfully stated, were repeatedly made. *See, e.g.*, Anti-Cincinnatus, HAMPSHIRE GAZETTE (Dec. 19, 1787), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 237, at 488 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (discussing such views); Remarker, INDEP. CHRON. (Dec. 27, 1787), *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 237 at 527, 529; Lasson, *supra* note 3, at 88–91.

For representative rejoinders by the Anti-Federalists, see Vox Populi, MASS. GAZETTE (Nov. 16, 1787), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 237, at 251–52 (John P. Kaminski & Gaspare J. Saladino eds., 1997); *see also* Portius, AM. HERALD (Nov. 12, 1787), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 237, at 216–18. The sentiments of those concerned with the absence of a bill of rights were well summed up by "One of the Common People," writing in the *Boston Gazette*, on Dec. 3, 1787. After rebutting the claim of another essayist that a bill was not needed because the Constitution was a limited grant of authority to the Federal government, the writer concluded:

I sincerely believe if the federal constitution which shall be *given*, be *clearly defined*, and a *boundary line* be marked out, declaratory of the extent of their jurisdiction, of the rights which the state hold unalienable, and the privilege which the citizens thereof can never part with, the republic of America will last for ages, and be free.

*See* One of the Common People, BOSTON GAZETTE (Dec. 3, 1787), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 237, at 367–69 (emphasis in original).

341. *See, e.g.*, Davies, *Original Fourth Amendment*, *supra* note 24, at 610–11.

342. *See* CUDDIHY, *supra* note 15, at 673–80, 686–91 (summarizing the pamphlets and essays). A notable exception was a "revised" constitution drafted by "The Society of Western Gentlemen." In early 1788, those Anti-Federalists circulated a draft constitution that included the following provision:

Every person has a right to hold himself, his house, papers, and possessions free from search or seizure, therefore general warrants to seize any person of his property, without evidence of an act committed, and a particular description of his offence, are grievous and oppressive and ought not to be granted.

9 DOCUMENTARY HISTORY, *supra* note 237, at 773 (John P. Kaminski & Gaspare J. Saladino eds., 1990). The draft was published in April and May of 1788 in the *Virginia Independent Chronicle*. *Id.* at 769–70.

about general warrants<sup>343</sup> but others addressed more broadly stated concerns about unjustified searches and seizures,<sup>344</sup> the unlimited power of new officers<sup>345</sup>—particularly excise officers,<sup>346</sup> or the protection of the home.<sup>347</sup> There are no tracts

343. Anti-Federalist attacks included the claim that general search warrants would be permitted. *See, e.g.*, Lasson, *supra* note 3, at 88 n.36, 93–94; *see also* Essay of Brutus No. 2, *reprinted in* COGAN, *supra* note 337, at 715; INDEP. GAZETTEER (Oct. 6, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 237, at 172 (Merrill Jensen ed., 1976); INDEP. GAZETTEER (Oct. 5, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 237, at 329–37 (John P. Kaminski & Gaspare J. Saladino eds., 1981); Centinel II, PHILA. FREEMAN'S J. (Oct. 24, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 237, at 457–68; A Son of Liberty, N.Y.J. (Nov. 8, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 237, at 481. One interesting criticism was written by Mercy Otis Warren, who was James Otis's sister:

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.

Mercy Otis Warren, *Observation on the Constitution* (Feb. 1788), *reprinted in* 2 BIRTH OF THE BILL OF RIGHTS: ENCYCLOPEDIA OF THE ANTIFEDERALISTS 143 (Jon L. Wakelyn ed., 2004) [hereinafter BIRTH OF THE BILL OF RIGHTS] (emphasis in original). Warren published the pamphlet under the name “A Columbian Patriot,” and it was for a long time thought to have been written by Eldridge Gerry. *See* 1 BIRTH OF THE BILL OF RIGHTS, *supra*, at 73. Warren's tract appears to be the only reference to Otis and the writs of assistance made during the period when the Constitution and proposed amendments were being debated. *See* Amar, *supra* note 183, at 76.

344. *See, e.g.*, An Old Whig V, PHILA. INDEP. GAZETTEER (Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 237, at 541 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (expressing view that, without a Bill of Rights, no persons' “houses and papers [would be] free from seizure and search upon general suspicion or general warrants”); Brutus II, N.Y.J. (Nov. 1, 1787), *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 237, at 135 (John P. Kaminski & Gaspare J. Saladino eds., 2003) (arguing that a bill of rights was necessary because of the power of the central government of “granting search warrants, and seizing persons, papers, or property”).

345. “New officers may be created, the duties of which you would shudder to hear named.—Your houses may cease to be your castles—the most unreasonable searches may be made on you, your papers, &c. &c.” *To the CONVENTION of MASSACHUSETTS*, AM. HERALD (Jan. 14, 1788), *quoted in* 5 DOCUMENTARY HISTORY, *supra* note 237, at 711 (John P. Kaminski & Gaspare J. Saladino eds., 1998).

346. *Compare* VA. INDEP. CHRON. (Nov. 28, 1787), *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 237, at 177, 178 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (arguing that there should be no concern about the federal government collecting excise taxes, given that Pennsylvania had long used such taxes and, in executing such taxes, “[n]o man's house was broke open. The rights and properties of the people were not outraged”),

or detailed discussions about a search and seizure provision. I repeat two points for emphasis: the commentary urging the adoption of a search and seizure provision was fragmentary and isolated within a vast ocean of discussion about the proposed Constitution; and the concerns expressed often extended beyond general warrants.

To illustrate these points, one of the most detailed comments consisted of a few sentences in a longer essay, published in a Massachusetts newspaper, expressing a concern about tax collectors, but touching on a broad range of search and seizure concerns:

According to the spirit of obedience which you manifest; to the ease with which you part with your money, so will the mode of assessing and collecting it be varied from time to time by your new masters. If one [collector] shall not be competent, he shall be attended with an host.—Whether that host shall be the posse of your country or a file of armed soldiers, shall depend upon circumstances. They are to determine, and you are to make no laws inconsistent with such determination, whether such Collectors shall carry with them any paper, purporting their commission, or not—whether it shall be a general warrant, or a special one—whether written or printed—whether any of your goods, or your persons shall be exempt from distress, and in what manner either you or your property is to be treated when taken in consequence of such warrants. They will have the liberty of entering your houses by night as well as by day for such purposes.—All these points are given in letter and in spirit to the New Constitution, and the

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with *The Impartial Examiner* I, VA. INDEP. CHRON. (Feb. 27, 1788), reprinted in 8 DOCUMENTARY HISTORY, *supra* note 237, at 420, 422 (arguing that the “new species of authority . . . may warrant the most flagrant violations of the sacred rights of habitation” in pursuit of excise taxes). See also Luther Martin: *Genuine Information* VI, BALT. MD. GAZETTE (Jan. 15, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 237, at 377 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“By the power to lay excises, a power very odious in its nature, since it authorises officers to go into your *houses*, your *kitchens*, your *cellars*, and examine into your *private concerns*, the Congress may impose *duties* on every *article* of use or *consumption*.” (emphasis in original)); *A Son of Liberty*, N.Y.J. (Nov. 8, 1787), reprinted in 19 DOCUMENTARY HISTORY, *supra* note 237, at 135 (John P. Kaminski & Gaspare J. Saladino eds., 2003) (arguing that, under the new Constitution, “[e]xcise laws established, by which our bed chambers will be searched by brutal tools of power, under pretence, that they contain contraband or smuggled merchandize, and the most delicate part of our families, liable to every species of rude or indecent treatment, without the least prospect, or shadow of redress, from those by whom they are commissioned”).

Concern about the scope of searches to enforce excise taxes was longstanding. See, e.g., CUDDIHY, *supra* note 15, at 300–02. The concerns expressed were particularly acute when the states were debating the proposed Constitution in 1787 to 1788. See, e.g., *id.* at 678–79, 742 n.272; see also 22 DOCUMENTARY HISTORY, *supra* note 237, at 1710–11 (John P. Kaminski & Gaspare J. Saladino eds., 2008).

347. Robert Whitehill’s numerous comments and speeches at the Pennsylvania convention were some of the broader observations. They included: “Houses may be broke open by officers of the general government.” Robert Whitehill, *Speech at Pennsylvania Convention* (Dec. 7, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 237, 514 (Merrill Jensen ed., 1976).



subject has not a shadow of security that they will not be executed.—Nay, if they ever should mean to exercise the right of taxation at all, I affirm it can be done with success by them in no other way, but in an arbitrary manner, and by previously subduing the spirit and strength of this Commonwealth.<sup>348</sup>

The essayist then referred to Article 14 to show that Massachusetts had “deemed it of consequence, to preface such powers, with the mode in which they should be exercised.”<sup>349</sup> After setting forth the provisions of Article 14, the essayist added:

These checks are omitted, however, in the present proceedings, and the sole reason why appears to be this, that the makers of them know the power itself to be improper, that the people would always be convinced of that impropriety, and would never submit, so long as they could resist.—That of course it must be collected without these checks, or not collected at all.<sup>350</sup>

Eventually, all of the original thirteen states ratified the Constitution.<sup>351</sup> It was, however, a close vote in several crucial states. To secure ratification, a strategy was developed of accompanying ratification with proposed amendments.<sup>352</sup> Virginia, North Carolina, Rhode Island, and New York each proposed amendments to the Constitution that included a search and seizure provision. But the actual process within each of those states demonstrates that only Virginia and New York had any real influence. North Carolina initially refused to ratify the Constitution unless its amendments were adopted but later reversed itself and approved of the Constitution unconditionally. Rhode Island’s ratification did not come until after the Constitution was in effect and the other states were in the process of ratifying the Fourth Amendment.<sup>353</sup> A search and seizure

348. John De Witt IV, *AM. HERALD* (Nov. 19, 1787), *reprinted in* 4 *DOCUMENTARY HISTORY*, *supra* note 237, at 269–70 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

349. *Id.* at 270.

350. *Id.*

351. The list is in 1 *ELLIOT*, *supra* note 331, at 319–37 (1836).

352. *See, e.g.*, 19 *DOCUMENTARY HISTORY*, *supra* note 237, at 294–96 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (discussing that strategy for New York).

353. Rhode Island, which ratified the Constitution on May 29, 1790, requested the following amendment:

That every person has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; and therefore, that all warrants to search suspected places, to seize any person, his papers, or his property, without information upon oath or affirmation of sufficient cause, are grievous and oppressive; and that all general warrants (or such in which the place or person suspected are not particularly designated) are dangerous, and ought not to be granted.

1 *ELLIOT*, *supra* note 331, at 335 (1836). The design of the Rhode Island proposal was virtually the same as New York’s, with the main difference being the substitution of “person” for New York’s “freeman.”

amendment was debated in Pennsylvania,<sup>354</sup> Maryland,<sup>355</sup> and Massachusetts,<sup>356</sup> but the proposals were rejected by those states' ratifying conventions.

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354. The absence of a bill of rights was a significant topic of debate at the Pennsylvania ratifying convention. *See, e.g.*, 2 ELLIOT, *supra* note 331, at 436–38, 454, 489–90 (1836). As to searches and seizures, Robert Whitehill on December 8, 1787, argued that the proposed Constitution offered “no security . . . for people’s houses or papers” and that “[t]he case of Mr. [John] Wilkes, and the doctrine of general warrants show that judges may be corrupted.” Notes of James Wilson’s of the Pennsylvania Ratification Convention (Dec. 8, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 237, at 526 (Merrill Jensen ed., 1976). He added: “A wicked use may be made of search warrants.” *Id.* A few days later, Whitehill proposed the following as part of a bill of rights:

That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.

Notes of Alexander J. Dallas (Dec. 12, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 237, at 597; *see also* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 421 (John B. McMaster & Frederick D. Stone eds., 1888). The convention rejected Whitehill’s proposal and then ratified the Constitution. *Id.* at 422–23. The dissenters thereafter widely circulated their reasons for rejecting the Constitution, which included Whitehill’s proposal. *E.g.*, 15 DOCUMENTARY HISTORY, *supra* note 237, at 7–34 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

355. A committee formed by the Maryland convention to consider amendments drafted the following proposal:

That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or the person in special, are dangerous, and ought not to be granted.

Address to the People of Maryland (Apr. 21, 1788), *in* 2 ELLIOT, *supra* note 331, at 551 (1836). That proposal tracks closely the Maryland Constitution, Declaration of Rights provision of the time period, which remains unchanged to this day as Article 26. *See, e.g.*, Thomas K. Clancy, *A Vision of Search and Seizure Protection*, 34 MD. BAR J. 11 (2001) (describing textual limitations of Maryland’s search and seizure provision). The report of the Maryland convention states:

This amendment was considered indispensable by many of the committee; for, Congress having the power of laying excises, (the horror of a free people,) by which our dwelling houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens. General warrants, too, the great engine by which power may destroy those individuals who resist usurpation, are also hereby forbidden to those magistrates who are to administer the general government.

Address to the People of Maryland, *in* 2 ELLIOT, *supra* note 331, at 551–52 (1836). Despite these sentiments, the committee chose not to submit any proposed amendments to the Maryland convention. *Id.* at 555. Existing records indicate that there was also some concern expressed about the “power of excise officers to search and seize.” Samuel Chase, *Notes of Speeches Delivered to the Maryland Ratifying Convention*, *in* 2 BIRTH OF THE BILL OF RIGHTS, *supra* note 343, at 197; *see also* John Francis Mercer, *Essays by a Farmer, I*, *in* 2 BIRTH OF THE BILL OF RIGHTS, *supra* note 343, at 191 (noting that, in England, it had become a maxim that juries would return “ruinous damages” for customs searches, although acknowledging that the damages were frequently paid by the government “upon a certificate of the judge that there was probable cause of suspicion”).

356. The journal notes of the Massachusetts ratification debates indicate that amendments were

Virginia's search and seizure proposal became the basis for the other states that did propose a search and seizure provision. The Virginia convention began on June 2, 1788, and it ratified the Constitution with recommended amendments on June 27, 1787.<sup>357</sup> In early June, the Anti-Federalist members of the convention agreed to a "Declaration or Bill of Rights."<sup>358</sup> Among those provisions was the following:

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proposed on January 31, 1788, by John Hancock. See 6 DOCUMENTARY HISTORY, *supra* note 237, at 1116–21, 1380–83 (John P. Kaminski & Gaspare J. Saladino eds., 2000). Those amendments did not include a search and seizure provision. On February 2, 1788, a committee was appointed to consider Hancock's amendments. *Id.* at 1405–06. It reported back on February 6. On that date, a motion was made to amend the committee report to add a provision that provided, *inter alia*, that the Constitution never be construed "to subject the people to unreasonable searches & seizures of their persons, papers, or possessions." *Id.* at 1453. That motion was defeated. *Id.* One of the delegates, Jeremy Belknap, took notes of the proceedings that day. He wrote that Samuel Adams proposed an amendment for "Protection of Persons & Property from Seizure &c," but that Adams subsequently withdrew the motion. Nonetheless, according to Belknap, another delegate renewed the motion, which was defeated (with even Samuel Adams voting against it). *Id.* at 1490. Massachusetts thereafter ratified the Constitution without a search or seizure provision as a recommended amendment. *Id.* at 1469–71. The convention had produced other requests for a bill of rights modeled on the Massachusetts Declaration of Rights, *id.* at 1450, including a reference to Article 14, that is, that the framers of the Massachusetts constitution had taken "particular care to prevent the [legislature] from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrants being granted," Speech of Abraham Holmes at the Convention Debates (Jan. 30, 1788), *reprinted in* 6 DOCUMENTARY HISTORY, *supra* note 237, at 1368 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

357. See 9 DOCUMENTARY HISTORY, *supra* note 237, at 897–900.

358. 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1068. Mason acted as chair of the group. See Letter from Patrick Henry to John Lamb (June 9, 1788), *in* 9 DOCUMENTARY HISTORY, *supra* note 237, at 817 (John P. Kaminski & Gaspare J. Saladino eds., 1990). During the Virginia convention, as he had at the Federal convention, Mason was a strong proponent of amendments to the Constitution. See, e.g., 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1062–68. Mason composed a list of objections to the Constitution, listing *inter alia*, the absence of a "Declaration of Rights." *Id.* at 991. Mason's views became well known, with Mason sending his list to many influential men. See generally 8 DOCUMENTARY HISTORY, *supra* note 237, at 40–42 (John P. Kaminski & Gaspare J. Saladino eds., 1988). That list included Elbridge Gerry, Letter to Elbridge Gerry from George Mason (Oct. 8, 1787), *in* 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1005–06; Thomas Jefferson, Letter to Thomas Jefferson from George Mason (May 26, 1788), *in* 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1045; and George Washington, Letter to George Washington from George Mason (Oct. 7, 1787), *in* 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1001. Washington, in turn, sent the list to James Madison. *Id.* at 1002. Washington also had a copy of Lee's objections to the Constitution and observed that Lee's and Mason's "political tenants" were "always in unison." Letter from George Washington to James Madison (Oct. 10, 1787), *quoted in* 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1002. Notably absent from Mason's list was any reference to searches and seizures. 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 991.

It is unknown who drafted the recommended amendment sent to Congress by the Virginia ratifying convention. Some maintain that Mason probably drafted it. *E.g.*, CUDDIHY, *supra* note 15, at 684–85 (arguing that Mason probably drafted the provision); see also KATE M. ROWLAND, 2 THE LIFE OF GEORGE MASON 444 (1892) (making the same argument and noting that the original manuscript is in the handwriting of Mason); 19 DOCUMENTARY HISTORY, *supra* note 237, at 43, 63 (John P. Kaminski & Gaspare J. Saladino eds., 1995)

That every free Man has a Right to be secure from all unreasonable Searches and Seizures of his Person, his papers, and his property. All Warrants therefore to search suspected places, or to seize any freeman, his papers, or Property, without Information upon Oath (or Affirmation of a Person religiously scrupulous of taking an Oath) of legal and sufficient Cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected Person, without specifically naming or describing the place or Person, are dangerous, and ought not to be granted.<sup>359</sup>

The records of the Virginia convention's debate have the most detailed comments concerning the need for a search and seizure provision of any of the ratifying conventions but the specific language of the Anti-Federalists' proposal was never examined. The speakers sometimes expressed a concern about general warrants but they also spoke more broadly about unjustified intrusions. Patrick Henry spoke frequently. On June 5, 1788, around the same date that the Anti-Federalists were drafting their search and seizure proposal,<sup>360</sup> Henry argued in the convention broadly about the concern that "excise men . . . may search at any time your houses and most secret recesses."<sup>361</sup> On June 16, 1788, he made extended

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(reproducing the draft and noting editorial changes in Mason's hand). There is, however, reason to doubt that Mason was the drafter. Mason's proposed amendments to the Constitution, circulated by him prior to the Virginia ratifying convention, did not include a search and seizure provision. Also, although Mason was the primary drafter of the Virginia Declaration of Rights in 1776, the general warrant provision was added by the convention; Mason disclaimed being the author and dismissed it as "not of fundamental nature." SOURCES OF OUR LIBERTIES, *supra* note 323, at 302 n.8; *see also* 1 THE PAPERS OF GEORGE MASON, *supra* note 151, at 290.

The authorship of the general warrant provision of the Virginia constitution is also unknown. *See* 1 THE PAPERS OF GEORGE MASON, *supra* note 151, at 279, 286. The evolution of the language of the Virginia Declaration of Rights is detailed in 1 THE PAPERS OF GEORGE MASON, *supra* note 151. Mason's initial draft made no reference to searches and seizures, with the exception of a note that it was "agreed to in committee condemning the use of general warrants." *Id.* at 278. A later draft also referred only to general warrants, *see id.* at 284, as did the final form, quoted in the text below, *infra* text accompanying note 368. *See also* 1 THE PAPERS OF GEORGE MASON, *supra* note 151, at 288. Edmond Randolph later stated that the Virginia provision had been inspired by the seizure of Wilkes's papers in England under a general warrant. *See id.* at 290.

359. 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1070. It is also quoted in 3 ELLIOT, *supra* note 331, at 658 (1836).

360. *See* Letter from Patrick Henry to John Lamb (June 9, 1788), in WILLIAM WIRT HENRY, 2 PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 342-43 (1891) (discussing how George Mason had agreed to act as chair of the Anti-Federalist group and that they had drafted amendments and a bill of rights that the group intended to introduce).

361. Patrick Henry, Debates, The Virginia Convention (June 5, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 237, at 963 (John P. Kaminski & Gaspare J. Saladino eds., 1990). George Mason, on June 11, struck a similar theme: "And as to excises—This will carry the exciseman to every farmer's house who distills a little brandy, where he may search and ransack as he pleases." George Mason, Debates, The Virginia Convention (June 11, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 237, at 1157 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

remarks about the proposed Constitution and returned to a concern about searches and seizures at least twice. At one point, he observed:

Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress? They will tell you, that he is executing the laws under the authority of the continent at large, which must be obeyed; for that the Government cannot be carried on without exercising severity. If, without any reservation of rights, or controul, you are contented to give up your rights, I am not.<sup>362</sup>

Later that same day, Henry argued:

In the present [Virginia] Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution:—For they have with the most cautious and enlightened circumspection, guarded those indefeasible rights, which ought ever to be held sacred. The officers of Congress may come upon you, fortified with all the terrors of paramount federal authority.—Excisemen may come in multitudes:—For the limitation of their numbers no man knows.—They may, unless the General Government be restrained by a Bill of Rights, or some similar restriction, go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink and wear. They ought to be restrained within proper bounds.<sup>363</sup>

In both passages, Henry pointedly addressed unrestrained, broad, suspicionless searches. At one point, he unfavorably compared the lack of restrictions that Federal agents would operate under to the prohibition against general warrants in the Virginia Constitution. Yet, both passages extend beyond the concern with regulating only that type of warrant to a broader concern with searches “by virtue of [their] office.”

However, Governor Randolph, in reply the next day, addressed only a concern about general warrants:

That general warrants are grievous and oppressive, and ought not to be granted, I fully admit. I heartily concur in expressing my detestation of them. But we have sufficient security here also. We do not rely on the integrity of any one particular person or body; but on the number and different orders of the Members of the Government: Some of them having necessarily the same feelings with ourselves. Can it be believed, that the Federal Judiciary would not be independent enough to prevent

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362. Patrick Henry, Debates, The Virginia Convention (June 16, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 237, at 1301 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

363. *Id.* at 1331–32 (footnote omitted).

such oppressive practices? If they will not do justice to persons injured, may they not go to our own State Judiciaries and obtain it?<sup>364</sup>

On June 24, 1788, Patrick Henry returned to the need for a bill of rights:

I feel myself distressed, because the necessity of securing our personal rights, seems not to have pervaded the minds of men: For many other valuable things are omitted. For instance:—General warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized; any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred, may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here, than they have in England; because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus*. But here a man living many hundred miles from the Judges, may rot in prison before he can get that writ.<sup>365</sup>

Randolph again replied, denying the power of the federal government to issue general warrants.<sup>366</sup>

History is not neat and even the limited comments extant from the Virginia convention contain ambiguity. Some of the comments by Henry addressed the wider concern with broad, suspicionless searches of excise officers “by virtue of [their] office.” Nonetheless, as demonstrated by the exchanges between Patrick Henry and Governor Randolph, a significant focus was also on general warrants.

The Anti-Federalist proposal was adopted by the Virginia convention on June 27, 1788, as a recommendation to the first Congress.<sup>367</sup> That recommendation differed notably from the search and seizure provision of the Virginia constitution of 1776, which provided: “That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.”<sup>368</sup>

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364. Edmund Randolph, Debates, The Virginia Convention (June 17, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 237, at 1351–52 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

365. Patrick Henry, Debates, The Virginia Convention (June 24, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 237, at 1474–75 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

366. See Edmund Randolph, Debates, The Virginia Convention (June 24, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 237, at 1484 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

367. 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1119; see also 10 DOCUMENTARY HISTORY, *supra* note 237, at 1515, 1550–52 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

368. VA. CONST. of 1776, Bill of Rights § 10, in SOURCES OF OUR LIBERTIES, *supra* note 323, at 312.

Instead, the Virginia proposal was demonstrably influenced by Article 14, largely adopting its structure and much of its language. The language of the first sentence was virtually a replication of Article 14, including Adams's first sentence declaring a right to be secure from unreasonable searches and seizures. That language had been used by Richard Henry Lee in his list of amendments, which he provided to Mason shortly after the conclusion of the federal convention.<sup>369</sup> The second sentence of the Virginia proposal prohibited general warrants, continuing the evolution of the language of such prohibitions; it added some new verbiage but maintained the essential historical lesson of seeking objective criteria for warrants to issue. However, a notable change from Article 14 was the exclusion of slaves from its protection. In sum, the Virginia convention had before it two types of search and seizure provisions, including its own narrow one banning only general warrants; the convention chose the Adams model.<sup>370</sup>

Virginia's proposed search and seizure provision was dispatched to the New York convention,<sup>371</sup> where it went through a peculiar evolution but ultimately emerged substantively unaltered. At the New York convention, the Federalists feared defeat and initially engaged in protracted discussions of the provisions of the proposed Constitution; the proceedings dragged on and no discussion of search and seizure principles occurred during that time.<sup>372</sup> Upon arrival of the news that Virginia had ratified the Constitution, the Federalists stopped "disput[ing] every inch of ground" and "quietly suffered [proposals made by the Anti-Federalists] without a word in opposition to them."<sup>373</sup> On July 7, 1788, John Lansing, Jr. proposed a declaration of rights, which included a provision substantively identical to Virginia's search and seizure recommendation.<sup>374</sup> It was part of a larger group of

369. *See supra* note 336.

370. During the course of the Virginia convention, there were general references to the Massachusetts Constitution but I have found no specific reference to Article 14. *E.g.*, 10 DOCUMENTARY HISTORY, *supra* note 237, at 1268–69, 1380 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

371. 3 THE PAPERS OF GEORGE MASON, *supra* note 151, at 1071; *see also* CUDDIHY, *supra* note 15, at 703 n.121 (citing sources for the transmission of the Virginia proposal to New York). There were extensive contacts between the Anti-Federalists in New York, Virginia, and other states during the period that the Constitution was before the states for ratification, and there were allegations that they were working in concert. *See, e.g.*, 9 DOCUMENTARY HISTORY, *supra* note 237, at 788–90, 811–13 (John P. Kaminski & Gaspare J. Saladino eds., 1990). The Virginia Anti-Federalists sent their amendments to New York on June 9, 1788. *Id.* at 813, 817–20.

372. *See generally* 22 DOCUMENTARY HISTORY, *supra* note 237, at 1670–72 (John P. Kaminski & Gaspare J. Saladino eds., 2008).

373. *Id.* at 1672 (quoting letter from Nathaniel Lawrence to John Lamb on July 3, 1788); *see also id.* at 2084–87 (summarizing impact of receipt of the news from Virginia of that state's ratification).

374. Lansing's July 7, 1788 proposal was:

That every Freeman has a Right to be secure from all unreasonable Searches & Seizures of his person, his papers & his property and that therefore all Warrants to search suspected places or to seize any Freeman his papers or property without Information upon Oath (or Affirmation of a person religiously scrupulous of taking an Oath) of sufficient Cause are grievous and oppressive

proposals and generated no recorded debate. Three days later, Lansing submitted a “new arrangement, and with material alterations,” of his previous plan.<sup>375</sup> Lansing’s new plan produced an almost incoherent search and seizure provision,<sup>376</sup> which was repeated by a proposal of Melancton Smith on July 17.<sup>377</sup> Two days later, Lansing introduced another version,<sup>378</sup> which restored the language to closely resemble Virginia’s proposal and that version, with some stylistic changes,<sup>379</sup> was agreed to on July 26 by the convention.<sup>380</sup> There was no recorded debate of the search or seizure provision at the convention.<sup>381</sup> As an indication of how little thought was given to the process in New York, the convention did not even change Virginia’s limiting the coverage of the provision to a free man.<sup>382</sup>

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and all general Warrants to search suspected places or to apprehend any suspected person without specifically naming or describing the place or person are dangerous & oppressive & ought not to be granted.

*Id.* at 2111–12.

375. *Id.* at 2118.

376. Lansing’s July 10, 1788 proposal was:

That every Freeman has a Right to be secure from all *unreasonable* Searches & Seizures of his person his papers & his property without Information upon Oath or Affirmation of sufficient Cause & that all general warrants to search suspected places or to apprehend any suspected person without specially describing or naming the place or person are dangerous & oppressive & ought not to be granted.

*Id.* at 2120 (emphasis in original). Lansing’s marginal notes indicated “See Virginia Plan.” *Id.* at 2127 n.4.

377. Smith’s proposal had only stylistic changes. See 23 DOCUMENTARY HISTORY, *supra* note 237, at 2201 (John P. Kaminski & Gaspare J. Saladino eds., 2009).

378. *Id.* at 2236.

379. See *id.* at 2306.

380. The final version on July 26 provided:

That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

*Id.* at 2328.

381. The records of the proceedings on July 19 state: “every freeman secure agt. Genl Warrants—agreed.” *Id.* at 2246; see also 2 ELLIOT, *supra* note 331, at 410 (1836) (noting that committee reported bill of rights to New York convention without any reported discussion).

382. In the South Carolina House of Representatives, during the debate on whether to call a convention to discuss ratifying the Federal Constitution, Charles Pickney (who had been a delegate to the Federal convention) reported that he initially had favored inclusion of a bill of rights but later became convinced that one was not necessary, given that the federal government had limited powers. See 4 ELLIOT, *supra* note 331, at 259–60 (1836). Pickney also observed that it would be “with very bad grace” for the delegates to advocate for a bill of rights because of the institution of slavery in South Carolina. *Id.* at 316. In the subsequent debates at the South Carolina ratifying convention, there were only brief references to the absence of a bill of rights, and no amendments were proposed. *Id.* at 317–42.



The North Carolina debate adds little more detail. On July 28, 1788, the North Carolina convention debated possible amendments.<sup>383</sup> Delegate Spencer at one point argued that there “ought to be a bill of rights.”<sup>384</sup> He asserted: “Our rights are not guarded. There is no declaration of rights, to secure every member of society those unalienable rights which ought not to be given up to any government.”<sup>385</sup> Another member replied that a bill of rights could not possibly list all of the rights and, if one was not listed, it would not be protected.<sup>386</sup> Thus, he asserted, “a bill of rights might operate as a snare, rather than a protection.”<sup>387</sup> And so it went. Members of the convention mentioned a few enumerated rights, such as trial by jury, but almost all of the discussion was on the level of generality as the comments just quoted indicate.<sup>388</sup> On July 31, 1788, the convention resolved to consider proposed amendments collectively and not individually.<sup>389</sup> It examined a long list of possible amendments, including a search and seizure provision similar to that proposed by the Virginia convention.<sup>390</sup> The convention thereafter dissolved, after agreeing not to ratify the Constitution until a declaration of rights and certain other amendments had been presented to Congress or until a subsequent national convention was called to consider amendments.<sup>391</sup> However, North Carolina

383. See PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA 129–77 (Hodge & Wills 1789).

384. Speech of Delegate Spencer (Jul. 28, 1788), in PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA, *supra* note 383, at 161.

385. *Id.*

386. See Speech of Delegate Iredell (Jul. 28, 1788), in PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA, *supra* note 383, at 168–74.

387. *Id.* at 173.

388. See *generally* PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA, *supra* note 383, at 129–77.

389. See *id.* at 268.

390. There appear to be two different versions of the North Carolina proposal. According to the official state records, the proposal provided:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property: all warrants therefore to search suspected places, or to apprehend any suspected person without specifically naming or describing the place or person, are dangerous and ought not to be granted.

22 THE STATE RECORDS OF NORTH CAROLINA 18 (Walter Clark ed., 1907). A second, longer version, also purporting to be the official state records, provided:

That every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property: all warrants therefore to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive, and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted.

18 DOCUMENTARY HISTORY, *supra* note 237, at 316 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

391. The First Ten Amendments to the Constitution, SOURCES OF OUR LIBERTIES, *supra* note 323, at 420.

“reversed this action” on November 21, 1788, and “ratified the Constitution unconditionally,” that is, without any proposed amendments.<sup>392</sup>

In aggregate, leading up to the first Congress, the need for a search and seizure provision was occasionally addressed but the comments tended to be terse. Nonetheless, the observations extended beyond merely regulating general warrants to broader concerns. Most states ratified the Constitution without reference to a bill of rights. Several states debated, but rejected, proposing a search and seizure provision. Virginia was the first state to propose one and the lineage back to Adams is clear: Lee utilized Adams’s model in his proposal to the Confederation Congress and shared that proposal with Mason and others. At the Virginia convention, the Anti-Federalists had Virginia’s own 1776 constitution and Adams’s model from which to choose. They chose the essential structure and language of the Adams model. The other three states that advocated a search and seizure provision were strongly—and seemingly viscerally—influenced by what Virginia had done. Hence, Virginia, New York, North Carolina, and Rhode Island each produced recommended provisions with a declaratory first sentence lifted almost verbatim from the Massachusetts Declaration of Rights, followed by a second, independent section condemning general warrants and setting forth criteria for a warrant to issue. Adams’s influence is undeniable, especially in light of the prevalence of the alternative model that typified state constitutions of the era, which banned only general warrants.

#### *E. The Drafting of the Fourth Amendment*

In response to the concerns regarding the absence of a bill of rights in the Constitution, the first Congress drafted a series of amendments, one of which ultimately became the Fourth Amendment. The initial draft was prepared by James Madison, who was a committed Federalist. He had been a delegate to the Constitutional Convention and was the primary author of *The Federalist*, which rejected the need for a bill of rights.<sup>393</sup> However, Madison’s position evolved over time.<sup>394</sup> After the Constitution was adopted and when seeking a seat in the new

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392. See 4 ELLIOT, *supra* note 331, at 240–51 (1836); see also The First Ten Amendments to the Constitution, SOURCES OF OUR LIBERTIES, *supra* note 323, at 420.

393. The primary *Federalist Paper* addressing whether a bill of rights should be included in the Constitution, and opposing such a bill, was Number 84, written by Alexander Hamilton. He asserted: “The truth is . . . that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Ian Shapiro ed., 2009). Hamilton also maintained that a bill of rights was not only unnecessary “but would even be dangerous. They would contain various exceptions to powers not granted . . .” *Id.* at 433. Madison wrote Number 38, in which he asserted that a bill of rights was not essential to liberty. See THE FEDERALIST NO. 38 (James Madison).

394. In a letter to Thomas Jefferson, dated October 17, 1788, Madison asserted that his “own opinion has always been in favor of a bill of rights” but that he believed that an omission of a bill was not a “material defect, nor [had he] been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 WRITINGS OF JAMES MADISON 271 (Gaillard Hunt ed., 1904) (emphasis in original). During the period of time when the House was debating amendments, Madison wrote that “many States” had ratified

Congress, Madison promised that, if elected, he would introduce amendments to the Constitution that included an enumeration of rights.<sup>395</sup> In Congress, Madison offered the following draft:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>396</sup>

Madison left a record of what he believed was the evil to be combated: general warrants. Shortly before introducing his proposed amendment in Congress, Madison wrote that he perceived the need to be “security against general warrants.”<sup>397</sup> Similarly, Madison detailed in a speech to the House of Representatives his reasons for proposing the amendments.<sup>398</sup> At one point he highlighted the need for a search and seizure provision:

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 . . . ; because in the Constitution of the United States, 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

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the Constitution “under a tacit compact” that amendments would be adopted and that the Constitution would not have been ratified in Virginia “had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* bound by this consideration.” Letter from James Madison to Richard Peters (Aug. 19, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 282 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (emphasis in original). Others have seen a different motivation for Madison’s proposals for a Bill of Rights: to undercut the challenge posed by the Anti-Federalists. See, e.g., CUDDIHY, *supra* note 15, at 724–27; see also 23 *DOCUMENTARY HISTORY*, *supra* note 237, at 2505 (John P. Kaminski & Gaspare J. Saladino eds., 2009) (quoting letter from James Madison to George Washington on August 11, 1788, stating concern about proposals regarding a second constitutional convention would have to “be parried”); *id.* at 2516 (summarizing Madison’s maneuvering in the House of Representatives and asserting that his introduction of his proposed amendments ended “any real chance that a second general convention would be summoned”).

395. Lasson, *supra* note 3, at 97–98.

396. *Id.* at 100 n.77 (quoting 1 *ANNALS OF CONG.* 452 (1789)).

397. Letter from James Madison to George Eve (Jan. 2, 1789), in 5 *WRITINGS OF JAMES MADISON*, *supra* note 394, at 319 n.I, 320; see also Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), in 11 *THE PAPERS OF JAMES MADISON* 416 (Robert A. Rutland & Charles F. Hobson eds., 1977) (listing as one of the “essential rights . . . exemption from general warrants, &c”); Letter from James Madison to a Resident of Spotsylvania County (Jan. 27, 1789), in 11 *THE PAPERS OF JAMES MADISON*, *supra*, at 428 (listing “Exemption from General Warrants, &c” as a needed provision (emphasis omitted)).

398. See James Madison, Speech at the First Congress, First Session: Amendments to the Constitution (June 8, 1789), in 5 *WRITINGS OF JAMES MADISON*, *supra* note 394, at 370.

Government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, . . . which laws in themselves are neither necessary nor 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, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.<sup>399</sup>

Hence, little is left to speculation as to what Madison meant: his intent was to ban general warrants and his draft was designed to accomplish that narrow objective.

Madison's draft is a compilation of sources. Without doubt, he was acquainted with the Virginia Declaration of Rights and with the recommended amendment that resulted from the Virginia ratifying convention.<sup>400</sup> What appears obvious is that, like the Virginia Declaration of Rights, Madison perceived general warrants as the evil to be avoided. However, instead of adopting that earlier formulation from Virginia, Madison adopted Adams's structure embodied in Article 14 of the Massachusetts Declaration of Rights, which had strongly influenced the Virginia ratifying convention's formulation of its recommended amendment. Madison copied almost verbatim Adams's declaratory statement containing four essential elements: (1) a right against searches and seizures; (2) limiting that right to be against only "unreasonable" intrusions; (3) defining a list of objects specifically protected, including persons, houses, papers, and "other property,"<sup>401</sup> and (4) defining the quality of the right protected as the right to be "secure."<sup>402</sup>

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399. *Id.* at 383–84; *see also id.* at 390 (indicating Madison's notes of his speech referenced general warrants).

400. Madison had been a delegate to the Virginia ratifying convention. 9 DOCUMENTARY HISTORY, *supra* note 237, at 908 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

401. The list of objects protected is identical to the Article 14 list, which was in turn derived from the Pennsylvania Constitution, *see supra* note 323, except for Madison's substitution of the phrase "other property" for "possessions." Madison's phrase was changed in the House consideration of the amendment to the word "effects," which remained in the amendment as adopted. *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984). "Effects" are limited to personal property and do not include real property. *See id.*; *see also Hester v. United States*, 265 U.S. 57, 59 (1924).

402. Madison, in his address to the House of Representatives, repeatedly used variations on the concept of "security" as the underlying concern. Hence, he asserted, amendments were needed to "expressly declare the great rights of mankind secured under this Constitution." James Madison, Speech at the First Congress, First Session: Amendments to the Constitution (June 8, 1789), 5 WRITINGS OF JAMES MADISON, *supra* note 394, at 374. As another example, he stated that the Bill of Rights would "provide those securities for liberty which are required by a part of the community" and that it would "incorporate those provisions for the security of rights." *Id.* at 374–75.

Madison, Adams, and the previous state constitutional provisions all condemned general warrants. The Madison draft differed from Article 14 in two significant ways: (1) linguistically, the draft only prevented general warrants;<sup>403</sup> and (2) Madison used substantially different language to articulate the criteria for a proper warrant to issue. As to the second point, the Adams formula for prohibiting general warrants was awkward, vague, and wordy. Instead, Madison substituted new phraseology, drawing on warrant issuance criteria in other provisions, including the requirement of an oath or affirmation,<sup>404</sup> a particular description,<sup>405</sup> and a requirement of some level of individualized suspicion.<sup>406</sup> The Madison draft's sole substantive innovation was to identify that level of suspicion as probable cause.

The congressional history concerning the evolution of the final form of the amendment's language is sparse and somewhat disputed. The provision generated very little recorded debate.<sup>407</sup> The Madison draft was referred to a Committee of

403. *E.g.*, *Payton v. New York*, 445 U.S. 573, 583–84 (1980). Lasson, for example, maintained that this draft of the amendment was

[a] one-barrelled affair, directed apparently only at the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc.

Lasson, *supra* note 3, at 103; *see also* *United States v. Rabinowitz*, 339 U.S. 56, 81 (1950) (Frankfurter, J., dissenting) (noting that the Fourth Amendment was framed with general warrants especially in mind); *Harris v. United States*, 331 U.S. 145, 191 (1947) (Murphy, J., dissenting) (stating that the Fourth Amendment was “designed in part, indeed perhaps primarily, to outlaw such general warrants”); TAYLOR, *supra* note 3, at 42 (indicating that Madison's draft only prohibited general warrants). *But see* CUDDIHY, *supra* note 15, at 695 (arguing that Madison's original draft “embraced the full breadth of the final version” but that general warrants, because they were “sufficiently egregious,” merited specific mention).

404. *See, e.g.*, PA. CONST. of 1776, art. X, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 323, at 330.

405. *See id.*

406. The Pennsylvania Constitution required a “sufficient foundation.” *Id.* Both the Virginia and North Carolina Constitutions required “evidence of the fact committed” to search suspected places and that seizures of persons be “supported by evidence.” VA. CONST. of 1776, § 10, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 323, at 311, 312; N.C. CONST. of 1776, art. X, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 323, at 355, 356. Massachusetts required specification of the “cause or foundation.” MA. CONST. of 1780 art. XIV, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 323, at 373, 376.

407. It appears that many members of Congress viewed the amendments as having little real significance. Congressman John Sherman of Connecticut commented: “The amendments reported are a declaration of rights; the people are secure in them, whether we declare them or not . . . .” 1 ANNALS OF CONG. 715 (1789). Two other congressmen uttered the view that, since four or five states had proposed amendments, they supported amendments to “gratify” the states. *Id.* at 732 (Aug. 15, 1789 comments of Mr. Hartley and Mr. Vining). Similarly, Congressman Fisher Ames wrote a letter on June 11, 1789, describing Madison's proposed amendments: “Upon the whole, it may do good towards quieting men who attend to sounds only, and get the mover some popularity—which he wishes.” Letter from Fisher Ames to Thomas Dwight (June 11, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note

Eleven, which was made up of one member from each state represented in Congress.<sup>408</sup> That committee reported a draft to the full House in the following form:

The rights of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.<sup>409</sup>

After this version was reported, the phrase “unreasonable searches and seizures,” inadvertently omitted in the committee’s draft, was inserted and the word “secured” was changed to “secure.”<sup>410</sup> Those changes restored the amendment to the Madison draft proposal, with the sole substantive change being a narrowing of the objects protected from “other property” to “effects.”

There was another—fundamentally important—change. After the Committee of Eleven reported its draft to the House, the phrase “by warrants issuing” was objected to by a member of Congress, who believed that “[t]his declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore [sought] to alter it [to] read ‘and no warrant shall issue.’”<sup>411</sup> The historical records do not further specify the basis of the objection. What is known is that the member appeared to recognize the amendment as declaratory of a right and that he sought to clarify that right by making the first clause linguistically independent of the second clause. The identity of the member is contested. The *Annals of Congress* lists the objector as Egert Benson of New York.<sup>412</sup> Relying on a newspaper

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394, at 247. Another Congressman, George Gale, sent a copy of Madison’s proposals to William Tilghman and commented: “I trust you will think most of them Innocent and were it not that the Opponents to the Government might exult perhaps insultingly would have little Objection to their being Adopted.” Letter from George Gale to William Tilghman (June 17, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS*, *supra* note 394, at 252. James Madison perhaps best summarized that view:

It is much to be wished that the discon[ten]ted part of our fellow Citizens could be reconciled to the Government they have opposed, and by means as little as possible unacceptable to those who approve the Constitution in its present form. The amendments proposed in the H. of Reps. had this twofold object in view; besides the third one of avoiding all controvertible points which might endanger the assent of 2/3 of each branch of Congs. and 3/4 of the State Legislatures. How far the experiment may succeed in any of these respects is wholly uncertain. It will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen.

Letter from James Madison to Tench Coxe (June 24, 1789), in 12 *THE PAPERS OF JAMES MADISON*, *supra* note 397, at 257 (Charles F. Hobson & Robert A. Rutland eds., 1979).

408. Lasson, *supra* note 3, at 100.

409. *Id.* at 100–01.

410. 1 *ANNALS OF CONG.* 754 (1789) (Aug. 17, 1789 comments and motion of Mr. Gerry).

411. Lasson, *supra* note 3, at 101 (quoting 1 *ANNALS OF CONG.* 754 (1789)).

412. *Id.*

account,<sup>413</sup> scholars have challenged the accuracy of the Congressional Record and have argued that Elbridge Gerry of Massachusetts made the motion.<sup>414</sup>

Gerry had been a member of the Constitutional Convention, where he had proposed a bill of rights and thereafter declined to endorse the Constitution. Prior to the Massachusetts ratifying convention, he explained in a letter to the Massachusetts legislature that he refused to sign the Constitution, *inter alia*, because the “system is without the security of a bill of rights.”<sup>415</sup> Gerry believed, however, that the proposed Constitution had “great merit, and by proper amendments may be adapted to the ‘exigencies of government and the preservation of liberty.’”<sup>416</sup> In a letter on June 22, 1788, Gerry observed that New York was going to adopt the Constitution conditionally by annexing a bill of rights; he believed that “removed all [the] objections.”<sup>417</sup>

After the Constitution had been ratified, Gerry stood for election to the House of Representatives. In an open letter to the citizens of his district, Gerry stated that he would “be desirous of such amendments as will remove the just apprehensions of the people, and secure their confidence and affection.”<sup>418</sup> In Congress, he helped Madison’s efforts to introduce a bill of rights.<sup>419</sup> Gerry was a long time intimate of Adams and, being from Massachusetts, he was undoubtedly familiar with Article 14.<sup>420</sup> If Gerry made the motion, it is reasonable to conclude that he did so to restore the structure set forth in Article 14 or at least to reflect the proposed provisions by Virginia and New York, which were in turn influenced by Article 14.<sup>421</sup>

413. See *Gazette of the United States* (Aug. 22, 1789), reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS*, *supra* note 394, at 179–82.

414. See CUDDIHY, *supra* note 15, at 694–95 n.89, 730–31; Davies, *Original Fourth Amendment*, *supra* note 24, at 716–19; see also Amar, *First Principles*, *supra* note 22, at 775 n.66 (criticizing accuracy of the House reporter).

415. Letter from Elbridge Gerry to the Senate and House of Representatives of Massachusetts (Oct. 18, 1787), in JAMES T. AUSTIN, 2 *THE LIFE OF ELBRIDGE GERRY* 42, 43 (1829).

416. *Id.*

417. Letter from Elbridge Gerry to General Warren (June 28, 1788), in AUSTIN, *supra* note 415, at 84, 85.

418. Letter from Elbridge Gerry to the Electors of Middlesex District, Massachusetts, in AUSTIN, *supra* note 415, at 91, 93.

419. CUDDIHY, *supra* note 15, at 693.

420. In a letter to Gerry shortly after he drafted the Massachusetts Constitution, Adams discussed its structure and his hope for its adoption. Letter from John Adams to Elbridge Gerry (Nov. 4, 1779), in 9 *THE WORKS OF JOHN ADAMS*, *supra* note 7, at 505–06 (1854). In a letter dated December 2, 1814, upon hearing of the death of Gerry, Adams remarked that they had been friends for over forty years. Letter from John Adams to Rufus King (Dec. 2, 1814), in 10 *THE WORKS OF JOHN ADAMS*, *supra* note 7, at 106 (1856).

421. During a debate in Congress, Gerry stated that the members of the Massachusetts delegation “were particularly instructed to press the Amendments recommended by the convention of that state at all times.” 1 *ANNALS OF CONG.* 662 (1789). However, a search and seizure provision was not among the amendments recommended by Massachusetts. See *supra* note 356. In a letter dated August 18, 1789, Congressman Frederick A. Muhlenburg wrote that the House had spent the day as a Committee of the Whole debating amendments.

In contrast, Benson had served on a Committee for Detecting Conspiracies, which Cuddihy has asserted “bombarde[d] the citizens of New York with general warrants during the Revolution.”<sup>422</sup> Nonetheless, Benson had been a member of the New York ratifying convention, which was one of the states urging adoption of a broad search and seizure provision. As a member of Congress from New York, it was plausible that he saw that model as the proper one.

Regardless of whether the objecting member was Benson or Gerry, the substance of the objection is telling: “[t]his declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore [sought] to alter it [to] read ‘and no warrant shall issue.’”<sup>423</sup> In other words, Madison’s draft failed as an insufficient declaration of the right protected and the amendment should return to the Adams model of a broad declaratory statement, with a second component condemning general warrants. Buttressing such a conclusion was the language chosen repeatedly by the Virginia and other state conventions and the stated goal of Gerry and others to support the amendments proposed by the state ratifying conventions.

The proposed revision appears to have been defeated by a “considerable majority.”<sup>424</sup> Several days later, Benson, acting as chairman of the committee appointed to arrange and report amendments, reported the clause as either he or Gerry had proposed it, notwithstanding its apparent rejection by the House.<sup>425</sup> At

Letter from Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS*, *supra* note 394, at 280. He observed: “Mr. Gerry & Mr. Tucker had each of them a long string of Amendts. which were not comprised in the Report of the special Committee, & which they stiled Amendments proposed by the several States.” *Id.* Cuddihy asserts that Gerry “had an established record of opposition to general searches and seizures.” CUDDIHY, *supra* note 15, at 695 n.90. In support of that claim, Cuddihy cites only the fact that Gerry had been a member of a committee in 1773 that had sent a copy of Otis’s arguments in the *Writs Case* to the Connecticut Committee of Correspondence. *Id.*

422. CUDDIHY, *supra* note 15, at 724.

423. Lasson, *supra* note 3, at 101 (quoting 1 ANNALS OF CONG. 754 (1789)).

424. Lasson, *supra* note 3, at 101, 102 n.84 (citing 1 ANNALS OF CONG. 754 (1789)). *But see* Davies, *Original Fourth Amendment*, *supra* note 24, at 719–20 (arguing that the motion passed, although acknowledging that the historical evidence “is inconsistent” and maintaining that a subsequent minor grammatical change in the language of the amendment made after the “no warrant shall issue” motion was made and supports his view).

425. Landynski, *supra* note 1, at 41–42; Lasson, *supra* note 3, at 101–02. It is unknown whether the change was due to Benson’s oversight, his unilateral action, or an unreported acceptance of Benson’s phrasing by the House. Lasson, *supra* note 3, at 102 n.84.

The committee consisted of three members: John Sherman of Connecticut, Theodore Sedgwick of Massachusetts, and Benson. *Id.* at 101 n.81. There is no evidence that Sherman or Sedgwick had any influence on the drafting of the amendment. At best they were disinterested. Sherman had performed distinguished service on behalf of the colonies and the newly independent United States, including being the only person to have signed the Declaration of Independence, the Declaration of the Rights of the Colonies, the Articles of Confederation, and the Constitution. *See* ROGER SHERMAN BOARDMAN, ROGER SHERMAN: SIGNER AND STATESMAN 122 (1938). Yet, there is little history of Sherman having any interest in search and seizure issues. As a delegate to the Constitutional Convention and during the subsequent attempts to ratify the Constitution, he was opposed to the inclusion of a Bill of Rights. *Id.* at 261–62, 267–73; *see also* CHRISTOPHER COLLIER, ROGER SHERMAN’S



this point, the historical record is barren of substantive comments about the meaning of the Fourth Amendment: the House version was accepted by the Senate, which was later formally enacted by both Houses of Congress and ratified by the states.<sup>426</sup> There are no records of any debate in the Senate on the Fourth Amendment and virtually no information appears to exist about ratification debates regarding the amendment in the individual states.<sup>427</sup>

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CONNECTICUT 242 (1971) (quoting Sherman as stating on September 12, 1787: "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."). Sherman had been an associate justice in Connecticut from 1768 to 1769 and had some involvement in the debate as to whether writs of assistance should be issued as general or specific writs. The Connecticut court apparently declined to issue general writs. See QUINCY, *supra* note 83, app. I, at 501–06. As a member of Congress, Sherman eventually came to see the amendments as harmless. See, e.g., Letter from Roger Sherman to Henry Gibbs (Aug. 4, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 394, at 271. Sherman wrote that the amendments "will probably be harmless & Satisfactory to those who are fond of Bills of rights." *Id.* His main contribution to the Bill of Rights was as an advocate for not interweaving them into the text of the original document. See BOARDMAN, *supra*, at 293–94 (citing 1 ANNALS OF CONG. 707–08 (1789)). Sherman did, however, maintain a long term friendship with John Adams. See *id.* at 123, 175; Letter from John Adams to Roger Sherman (July 17, 1789), in 6 THE WORKS OF JOHN ADAMS, *supra* note 7, at 427, 429 (1851) (describing Adams's "unalterable friendship" with Sherman). But I have found no indication that they specifically discussed search and seizure principles. Cf. Journal Entry of John Adams (Aug. 17, 1774), in 2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 343 (1850) (describing Adams's conversation with Sherman during the 1774 Continental Congress in which Sherman asserted that Otis's tract on the rights of the colonists had conceded too much authority to parliament); 6 THE WORKS OF JOHN ADAMS, *supra* note 7, at 427–42 (correspondence between Adams and Sherman on the structure of governments). In a debate at the Continental Congress regarding the composition of a statement of grievances against Great Britain, according to Adams's notes, Sherman observed: "The Colonies adopt the common Law, not as the common Law, but as the highest Reason." 2 DIARY AND AUTOBIOGRAPHY OF ADAMS, *supra* note 101, at 129.

Sedgwick was a strong Federalist and unlikely candidate for limiting the powers of the federal government. See generally M.E. Bradford, *High Federalist Teaching: Theodore Sedgwick of Massachusetts*, 25 INTERCOLLEGIATE REV. 31 (1990). Sedgwick had been a delegate to the Massachusetts ratifying convention and had served on the committee that was asked to prepare recommended amendments. *Id.* at 34. As discussed in note 356, a search and seizure amendment was not proposed by that committee; a subsequent attempt to add one was defeated. In a letter dated July 19, 1789, Sedgwick showed little respect for Madison or his "system of amendments." Letter from Theodore Sedgwick to Benjamin Lincoln (July 19, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 394, at 263–64. He did not want them to "shackle the operations of government," and he viewed the debate regarding the amendments as a "water gruel business." *Id.* Sedgwick wrote another letter on August 20, 1789, in which he commented that the House was "still engaged about the unpromising subject of amendments," and he predicted that their introduction at that time was "unwise and will not produce the beneficial effects which its advocates predicted." Letter from Theodore Sedgwick to Pamela Sedgwick (Aug. 20, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 394, at 283.

426. Lasson, *supra* note 3, at 102–03.

427. See CUDDIHY, *supra* note 15, at 712–23. Based on his examination of the state

## IV. ADAMS'S VIEWS AND INFLUENCE

Although the road is long and winding, Adams's imprint on the final product is clear. No other actor, drafter, or "framer" had any comparable influence on the language and structure of the Fourth Amendment.<sup>428</sup> Adams and his contemporaries were exposed to many sources of information about search and seizure practices and the criteria—or lack thereof—to regulate them. Adams had varied and unique experiences that informed his views.<sup>429</sup> Without doubt, Otis's arguments in the *Writs of Assistance Case* had a profound and lifelong influence on Adams. He lived in Massachusetts, which bore the brunt of the arbitrary customs search and seizure practices and generated a significant amount of other litigation on search and seizure principles. Adams, as a litigator, had numerous cases involving searches and seizures, including customs enforcement and general warrants, nighttime searches, and entries into the home. Regarding the *Liberty* seizure, Adams contributed to the popular conception of the proper criteria for a search or seizure by arguing in the press for the probable cause standard. He served in the Continental Congress, which warned Canada about British practices. Adams corresponded with virtually all of the leading figures of the day, exchanging ideas on the theories and structures of government.<sup>430</sup> Adams read extensively, including the major treatises of the era that addressed search and seizure principles. In addition to writing the Massachusetts Constitution, Adams wrote extensively on the structure of government. Finally, he examined other state constitutions when drafting the Massachusetts Constitution. Reflecting all of those influences, he created something unique: Article 14 of the Massachusetts Declaration of Rights.

Taylor, Amar, and those others who argue for a reasonableness standard without any objective criteria—general reasonableness—simply ignore or miss the rich search and seizure jurisprudence of the period leading up to the Fourth Amendment.<sup>431</sup> On the other hand, those advocating a warrant preference rule

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records regarding the ratification of the amendment, Cuddihy observed: "None of [the state legislative] journals preserves a single utterance by a state legislator on the right respecting search and seizure. . . . To the extent that the direct evidence indicates, the amendment's ratifiers took their thoughts about its original meaning to the grave." *Id.* at 713.

428. *Cf. Harris v. United States*, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (noting that because the Fourth Amendment was based on the Massachusetts model, "[t]his is clear proof that Congress meant to give wide, and not limited, scope to [the] protection against police intrusion").

429. Adams was certainly not without faults. For example, it was during his administration that the Alien and Sedition Acts became law. *See* DAVID McCULLOUGH, JOHN ADAMS 504–07 (2001).

430. Adams's correspondence is massive. *See, e.g.*, Letter from Patrick Henry to John Adams (May 20, 1776), in 4 THE WORKS OF JOHN ADAMS, *supra* note 7, at 201–02 (1851) (discussing their thoughts on government); Letter from John Adams to John Penn (Jan. 1776), in 4 THE WORKS OF JOHN ADAMS, *supra* note 7, at 203–09 (1851) (detailing a "sketch [of] the outlines of a constitution" for North Carolina at the request of delegates from that state).

431. Professor Davies asserts that the framers "would have understood 'unreasonable searches and seizures' as the pejorative label for searches or for arrests made under that most illegal pretense of authority—general warrants." Davies, *Original Fourth Amendment*, *supra* note 24, at 693; *see also id.* at 723 (implying that the framers were merely banning general

cannot reconcile that view with the rich variety of search and seizure practices of the era.<sup>432</sup> Many of the principles that remain today as core search and seizure concerns were being litigated at that time. Treatise writers, judges, and others were attempting to formulate objective criteria to measure the propriety of such intrusions. Those criteria extended well beyond the comparative worth of general or specific warrants.

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warrants and not creating a broad reasonableness standard). There are multiple problems with Davies's position. First, it ignores that portion of Otis's argument that set out detailed objective criteria for a warrant to issue. *See supra* notes 112, 118, 149 and accompanying text. Second, if the framers were concerned only with general warrants, the initial draft of the Fourth Amendment was clearly sufficient to address those concerns, as were its numerous state predecessors regulating only warrants. Third, if "reasonableness" is to be equated with the common law standards of the day, as Davies asserts, he fails to acknowledge that there were a series of common law rules that regulated (and limited) warrantless and warranted searches and seizures. This is to say, as Cuddihy has observed:

To Davies, "unreasonable searches and seizures" embrace little more than the declarations of the 81 members of the First Congress who framed the amendment and its immediate antecedents employing identical phraseology. Davies excludes, sidetracks, and otherwise minimizes unarticulated but palpable assumptions, documentation incompatible with his thesis, and most of the legacy of search and seizure before 1780. The reader is left with historical meaning without 99 percent of the history that vests meaning. Davies begins by quoting L.P. Hartley's aphorism that "the past is a foreign country: they do things differently there." Davies however, myopically narrows the "country" to which he takes us to little more than its preceding decade and views it only through the tunnel vision of textual literalism.

CUDDIHY, *supra* note 15, at 778. If the framers were referring to the common law in using the term "unreasonable," then it is just as likely that the framers were incorporating the common law standards for both warrants and warrantless actions. Finally, the word "reasonable" had many meanings at the time of the framing, ranging from connoting "logic or consistency" to "denoting unconstitutionality." Davies, *Original Fourth Amendment*, *supra* note 24, at 687–93; *see also* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1777–81 (2000) (examining various historical meanings of the word "reasonable" and observing that the term "unreasonable" in the late eighteenth century "almost always" meant "what it means today: contrary to sound judgment, inappropriate, or excessive"). Davies's choice of its meaning remains entirely speculative and, in my view, not well supported.

As for Amar and his inspiration, Taylor, *see, e.g.*, Davies, *Original Fourth Amendment*, *supra* note 24; Maclin, *supra* note 24; Steiker, *supra* note 24. I agree with the view that Professor Amar's account "offered little evidence for [his] central historical claims." *See* Davies, *Original Fourth Amendment*, *supra* note 24, at 576; *see also* CUDDIHY, *supra* note 15, at 776–77 (broadly criticizing Amar's work).

432. To be fair, there is some support in the framing era for the view that recourse to a magistrate was a favored procedure to pre-authorize a search. Otis, according to Adams's abstract, stated that an officer should state his grounds to search "before a magistrate; and that such magistrate, if he think proper, should issue a special warrant to a constable to search the places." 2 THE WORKS OF JOHN ADAMS, *supra* note 7, app. A at 525 (1850). In the article attributed to Otis, he maintained that the needed justification to invade a person's home "ought to be determin'd by *adequate* and *proper* judges." QUINCY, *supra* note 83, app. I at 490 (emphasis in original). Similar isolated comments were made by others, including Leach's counsel. *See supra* note 174.

For example, James Wilson delivered a series of lectures on the law between 1790 and 1792. Wilson was a strong Federalist and, among other accomplishments, was an important figure in the Constitution ratification debates in Pennsylvania.<sup>433</sup> In his lectures, Wilson covered a host of topics but several illustrate the then contemporary legal thought on search and seizure. He at one point discussed the importance of law books, asserting that “the law, particularly the common law, abounds in rich materials.”<sup>434</sup> He cited as examples Coke and James Burrow.<sup>435</sup> In organizing the materials and providing assistance to those studying law, Wilson pointed to Hale’s works as “a most valuable part” and also pointed to Blackstone.<sup>436</sup> Regarding the apprehension of criminals, Wilson noted that obtaining a warrant “is the first step usually taken” and that, “[b]y the constitution of Pennsylvania,<sup>[437]</sup> no warrant to seize persons shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”<sup>438</sup> He detailed some of the standards for arrests: when a felony was committed in one’s presence, all persons of age were “bound to apprehend the person who has done the mischief” but if the crime was “out of their view, they are, upon hue and cry, obliged to pursue with the utmost diligence, and endeavor to apprehend him who has committed it.”<sup>439</sup> Wilson added: “In all these cases, the doors of houses may, if necessary, be broken open for the apprehension of the offenders, if admittance is refused on signifying the cause of demanding it.”<sup>440</sup> Other contemporary<sup>441</sup> and near contemporary commentators<sup>442</sup> also saw the

433. *See generally* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788 (John B. McMaster & Frederick D. Stone eds., 1888).

434. 2 THE WORKS OF JAMES WILSON 254 (James DeWitt Andrews ed., 1896) (including his lectures as a professor of law from 1790 to 1792).

435. *See id.*

436. *Id.* at 255.

437. Pennsylvania amended its constitution in 1790 to closely resemble the Fourth Amendment. It provided:

That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures: And that no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

PA. CONST. of 1790, art. IX, § 8, *quoted in* Davies, *Original Fourth Amendment*, *supra* note 24, at 615 n.181. If the Fourth Amendment was viewed at the time as having no application beyond banning general warrants, then there was no reason to amend the Pennsylvania Constitution, given that the previous version had done so. *See supra* note 323.

438. 2 THE WORKS OF JAMES WILSON, *supra* note 434, at 445.

439. *Id.* at 446.

440. *Id.*

441. A recent article, David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527 (2009), sheds some additional light. St. George Tucker was a professor of law at William and Mary from 1790 until his appointment to the bench in 1804. *Id.* at 1527.

While at William and Mary, he produced an edition of Blackstone’s *Commentaries*, annotated in light of American law. The text became “the standard work on American law for a generation” and Tucker remained the most frequently cited American legal scholar for over two decades. Tucker’s

role in American legal scholarship was likewise striking. He has been termed “the first modern American law professor” and creator of the American law degree.

*Id.* (footnotes omitted). Tucker’s annotated Blackstone was cited by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008), to help interpret the Second Amendment. Hardy reproduced Tucker’s notes on the Fourth Amendment and argued that the notes “treat[] probable cause and warrant issuance as components of reasonableness.” Hardy, *supra*, at 1535. These are Tucker’s notes:

The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated—What shall be deemed unreasonable searches and seizures. The same article informs us, by declaring, “that no warrant shall issue, but first, upon probable cause—

which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly described the place to be searched; and fourthly—the persons, or things to be seized. All other searches or seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional. And herewith agrees our State bill of rights—Art. 10.

[Tucker note: “vi: Act concerning aliens—contra 5: Cong: c:”]

The case of general warrants, under which term all warrants except such as are above described are included, was warmly agitated in England about thirty years ago—and after much altercation they were finally pronounced to be illegal by the common law—see [Release?] of *Money v. Leach* 3 Burrow 1743. 1 Bl. Rep: 555; vi \_\_\_ 4 B.C. 291.

But this clause does not extend to repeal, or annul the common law principle that offenders may in certain cases be arrested, even without warrant. As in the case of riots, or breaches of the peace committed within view of a Justice of the Peace, or other peace officer of a county, who may in such cases cause the offender to be apprehended, or arrest him, without warrant.

Nor can it be construed to restrain the authority, which not only peace officers, but every private person possesses, by the common law, to arrest any felon if they shall be present when the felony is committed,

Hardy, *supra*, at 1535–36 (footnote omitted) (quoting Tucker’s lecture notes).

In addition to the lecture notes, Tucker’s commentary on Blackstone has a specific section on the Fourth Amendment. In that section, Tucker sets forth the language of the amendment, notes that general warrants were found to violate the common law in a series of English cases, and discusses at some length why the Alien Act of 1789, passed by the fifth Congress, violated the Fourth Amendment. *See* 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 301–04 (St. George Tucker ed., 1803); *see also* Hardy, *supra*, at 1535 n.34 (noting that Tucker’s commentary was cited by Justice Story in his treatise); *see supra* note 429.

442. Justice Story wrote a famous commentary about the Constitution some fifty years after the Fourth Amendment was ratified. His commentaries are often cited for the pithy statement that the Fourth Amendment “is little more than the affirmance of a great constitutional doctrine of the common law.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (1833). Story states that “its introduction into the amendments was doubtless occasioned by the strong sensitivities

amendment as extending protections beyond general warrants and did not see Fourth Amendment analysis as either some undefined reasonableness quest or cabined by a warrant requirement.

In notable contrast to some of the current claims about the history and meaning of the Fourth Amendment, the period between 1760 and 1791 offered many voices attempting to develop and articulate objective criteria by which to measure the propriety (“reasonableness”) of a search or seizure, including:

*Probable Cause.* One of the many disputes among contemporary legal scholars revolves around the meaning and significance of “probable cause” to the framers.<sup>443</sup> Yet, the concept of probable cause as a justification for a search or seizure was well known in the framing era: Thatcher, Otis, and Adams advocated such a standard.<sup>444</sup> Otis, for example, contrasted “wanton” exercises of power under the writs of

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excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution.” *Id.* Relying on these brief references, some draw support for the view that the amendment was merely designed to address the general warrant controversies or was not designed to address warrantless situations. *E.g.*, Davies, *Original Fourth Amendment*, *supra* note 24, at 618 n.190.

Story’s commentaries, read in full, simply do not support that view; in fact, they are inconsistent with it. First, in the quotation just reproduced, Story was merely observing that the amendment was “occasioned by” the general warrant controversies; he did not say that it was defined or limited by them. Second, Story provided a broad view of the amendment’s purpose: “This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property.” STORY, *supra*, § 1895, at 748. Third, Story cited two instances involving warrantless situations, which were viewed as being within the purview of the amendment. The first, during Adams’s administration, involved the Alien Act of 1798, which was viewed as a violation of the amendment because it authorized the President to order the removal of “such aliens, as he should judge dangerous to the peace and safety of the United States, or have reasonable grounds to suspect of any treasonable, or secret machinations against the government.” *Id.* at 749 n.1. The second event involved the seizure of two Americans by military force during Jefferson’s administration “without any warrant, or order of any civil authority,” from New Orleans to Washington for trial. *Id.* (citing *Ex parte Bollman*, 8 U.S. 75 (4 Cranch) (1807)). Story observed that the Supreme Court found that the seizures “wholly disregarded” the Constitution. *Id.* at 749–50 n.1. He added: “Without any warrant or lawful authority, citizens are dragged from their homes by military force . . . against the plain language of this very article.” *Id.* Finally, Story cited to *Sailly v. Smith*, 11 Johns. 500 (N.Y. Sup. Ct. 1814), which upheld the warrantless seizure of allegedly uncustomed goods against a claim, *inter alia*, that a warrant was needed. *Id.* at 749 n.1. It would make no sense for him to cite the case if he did not believe that the amendment applied only to regulate warrants.

443. *See, e.g.*, Davies, *Original Fourth Amendment*, *supra* note 24, at 629–40. *See generally* Sklansky, *supra* note 431.

444. The early Congresses passed several customs statutes that have been cited to support various points of view as to the need for warrants or individualized suspicion to justify searches. *See* CUDDIHY, *supra* note 15, at 735–39; Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1739–43 (1996) (book review); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 671 (1995) (O’Connor, J., dissenting) (referring to the Collection Act of 1789 to illustrate the First Congress’s desire to maintain individualized suspicion as a requirement even where the warrant requirement would be inapplicable). As Professor Cloud notes, the statutes had a mix of requirements depending upon the location and purpose of the search. Cloud, *supra*, at 1739–43.

assistance where “[b]are suspicion without oath [was] sufficient.”<sup>445</sup> Otis, in his famous oration, repeatedly argued in favor of the criteria to issue warrants for stolen goods, which required a showing of “good Grounds of suspicion,”<sup>446</sup> “probable suspicion,”<sup>447</sup> or “probable ground.”<sup>448</sup> Variations of that wording abound in treatises and commentaries.<sup>449</sup> Recall also the arguments in *Money v. Leach* that the search was justified because the authorities had probable cause at the time of the search, despite the fact that the authorities were acting under a general warrant. Madison’s sole innovation in drafting the Fourth Amendment was to explicitly adopt probable cause as a required basis for a warrant to issue. He did not write those words in a vacuum. In sum, and as noted throughout this article, that standard was repeatedly referenced as a needed criterion.<sup>450</sup> Merely because the meaning of probable cause was not fixed does not undermine its importance.<sup>451</sup> Indeed, its meaning remains unfixd to this day.<sup>452</sup>

*Certain procedures valued.* The era offered a rich set of other criteria to measure the propriety of a search or seizure, including a prohibition against nighttime

445. 2 THE WORKS OF JOHN ADAMS, *supra* note 7, app. A, at 524 (1850); *see supra* text accompanying note 118.

446. 2 THE WORKS OF JOHN ADAMS, *supra* note 7, app. A, at 522 (1850).

447. *Id.* at 525 (emphasis omitted).

448. *Id.*

449. *E.g.*, 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 85 (1762) (asserting that an arrest must be based on “some probable ground”); 2 HALE, *supra* note 53, at 91–92 (stating that when the constable ascertained that a felony had been committed and he had “probable grounds” that a specific person was the perpetrator, the constable could arrest the suspect without a warrant); *id.* at 103 (observing that an arrest based on hue and cry permissible when probable cause to arrest present); *accord* *Payton v. New York*, 445 U.S. 573, 605 (1980) (White, J., dissenting); *see also* CUDDIHY, *supra* note 15, at 413–14, 423–27, 642–45, 754–58 (tracing numerous instances of the use of probable cause or individualized suspicion as a needed requirement to justify a search or seizure).

450. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 418–19 (1976) (discussing “ancient” common law rule permitting arrests without warrant for misdemeanors and felonies committed in an officer’s presence and for felonies not in an officer’s presence for which there were reasonable grounds to arrest); *see also* *Payton*, 445 U.S. at 605 (1980) (White, J., dissenting); *Samuel v. Payne*, (1780) 99 Eng. Rep. 230 (K.B.) (recognizing as a defense to a false imprisonment claim, stemming from constable’s arrest of the plaintiff, the fact that the arrest was based on allegations that the plaintiff had stolen goods); 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883) (referring to the level of suspicion as “reasonable grounds” that the person has committed a felony). Nonetheless, there were numerous examples of suspicionless searches and seizures throughout England and its American colonies. *See, e.g.*, CUDDIHY, *supra* note 15, at 486–97.

451. *See* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 284 (2004) (“From its origins until the enactment of the Fourth Amendment, probable cause seems to have remained in a state of flux.”).

452. *See* CLANCY, *supra* note 24, § 11.3.2.1.1 (discussing the Supreme Court’s treatment of the meaning of probable cause). Others claim that, although probable cause was a requirement of legal doctrine, “judges in the Framers’ era did not widely engage in aggressive sentryship of probable cause.” Arcila, *supra* note 32, at 4–5. Such claims, however, do not undermine the existence of the standard.

searches;<sup>453</sup> a requirement to knock and announce for execution of a warrant at a home;<sup>454</sup> and a distinction between arrests in a house and in public.<sup>455</sup> In contrast, the writs of assistance were seen as deficient because, inter alia, they existed for an unlimited length of time, they were not returnable, no oath was required for one to issue, and no grounds were needed to justify the request. The era was characterized by repeatedly expressed concerns about the scope of searches and seizures and the need to limit an officer's discretion. Illustrative are the views expressed about the seizure of all of Entick's, Wilkes's, and Leach's papers, and Adams's recollection of Otis noting the scope of searches under writs of assistance as "[h]ouses were to be broken open, and if a piece of Dutch linen could be found, from the cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty."<sup>456</sup>

*Certain objects valued.* Houses were universally acknowledged as a man's castle.<sup>457</sup> Indeed, the physical entry into the home has been described as the "chief evil against which the wording of the Fourth Amendment is directed . . . ."<sup>458</sup> Camden in *Entick* emphasized the importance of a person's private papers. The Pennsylvania Constitution of 1776, followed by Adams's Article 14, which was only slightly modified in the Fourth Amendment, gave a list of four protected objects: persons, houses, papers, and effects. Variations of this list appeared to be common in that era, stemming from Blackstone's *Commentaries*, where he stated

453. See CLANCY, *supra* note 24, § 12.5.3 (analyzing legal status of nighttime execution of warrants under Fourth Amendment); CUDDIHY, *supra* note 15, at 747–48 (providing an overview of the legality of nocturnal searches); QUINCY, *supra* note 83, app. 1 at 450 (discussing how writs of assistance for customs searches were modified in 1768 to authorize day time only execution); *id.* at 448 (discussing how, in 1766, custom searchers withdrew from Daniel Malcomb's residence to avoid entering at night, recognizing that the writ would not justify a nighttime entry).

454. See CLANCY, *supra* note 24, § 12.5.4 (analyzing legal status of knock and announce requirement under Fourth Amendment); CUDDIHY, *supra* note 15, at 749–50 (providing historical analysis of unannounced searches of the home).

455. See *Payton*, 445 U.S. at 592–98 (discussing the common law views of the requirement of a warrant to arrest in-house); *Watson*, 423 U.S. at 418–19 (discussing "ancient" common law rule permitting arrests without warrant for misdemeanors and felonies committed in an officer's presence and for felonies not in an officer's presence for which there were reasonable grounds to arrest).

456. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 319.

457. The Supreme Court has been quite insistent in affording special protection for the home. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (collecting cases and emphasizing "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" as being at the "very core" of the Fourth Amendment protections (quoting *Kyllo v. United States*, 533 U.S. 27, 31 (2001))). That special protection has carried forward the framing era consensus. E.g., *Weeks v. United States*, 232 U.S. 383, 390 (1914) ("Resistance to these practices had established the principle which was enacted into the fundamental law in the 4th Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers."); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 365 (1921) (opining that it was "apparent" that the Fourth Amendment embodied the principle in English liberty that found "expression in the maxim 'every man's home is his castle'").

458. E.g., *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 313 (1972).



that the rights of Englishmen are primarily “the free enjoyment of personal security, of personal liberty, and of private property.”<sup>459</sup> It is notable that the Supreme Court has similarly construed the Fourth Amendment as protecting three interests: “two kinds of expectations” in property, one involving searches and the other involving seizures; a search occurs when a reasonable expectation of privacy is infringed; a seizure occurs when there was some “meaningful interference” with an individual's possessory interest; the third interest that the Fourth Amendment protects is a person's “liberty interest in proceeding with his itinerary” unimpeded by the government.<sup>460</sup> Similarly, Justice Story, in his famous commentaries observed that the Fourth Amendment “seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property.”<sup>461</sup>

*Certain qualities in those objects valued: the right to be secure.* Adams and his contemporaries repeatedly used the concept of “security” to describe the quality of the right protected as to each person's life, liberty, and property.<sup>462</sup> Otis, in the article attributed to him, argued that the writs of assistance made “every householder . . . less secure.”<sup>463</sup> Recalling Otis's argument many years later, Adams said in a letter to William Tudor that Otis examined the acts of trade and demonstrated that “they destroyed all our security of property, liberty, and life.”<sup>464</sup> After complaining of the seizure of all his papers under a general warrant and receiving the reply from the authorities that such papers that did not prove his guilt for seditious libel would be returned, Wilkes countered: “I fear neither your prosecution nor your persecution, and will assert the security of my own house, the liberty of my person, and every right of the people, not so much for my own sake, as for the sake of every one of my English fellow subjects.”<sup>465</sup> That same concept—security—was utilized by Adams in Article 14 of the Massachusetts Declaration of Rights and is replicated in the Fourth Amendment. More broadly, the concept of security, in contradistinction to the modern notion of privacy, was repeatedly referenced in the framing era as defining the nature of the right that was to be protected in each of the objects ultimately listed in the amendment.<sup>466</sup>

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459. 1 BLACKSTONE, *supra* note 197, at \*143; *see also id.* at \*129 (stating that the three rights are: “the right of personal security, the right of personal liberty and the right of private property”). For representative references to Blackstone's list, see James Otis, *A VINDICATION of the British Colonies Against the Aspirations of Halifax Gentleman, in His Letter to a Rhode Island Friend* (1765), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 110, at 558 (“The absolute liberties of Englishmen, as frequently declared in Parliament, are principally three: the right of *personal* security, *personal liberty*, and private property.” (emphasis in original)); Article in the New York Journal (Jan. 23, 1788), reprinted in 20 DOCUMENTARY HISTORY, *supra* note 237, at 643 (John P. Kaminski & Gaspare J. Saladino eds., 2004).

460. *Soldal v. Cook County*, 506 U.S. 56, 63 & n.8 (1992).

461. 3 STORY, *supra* note 442, § 1895, at 748.

462. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 86, at 315–16.

463. QUINCY, *supra* note 83, app. I at 489 (emphasis in original).

464. Letter from John Adams to William Tudor (June 1, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 7, at 314, 316 (1856).

465. PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 32 (1996) (citation omitted).

466. For a general discussion of the origin and meaning of the word “secure,” see

## CONCLUSION

Knowledge of the past is always incomplete. Nonetheless, lawyers are taught about the need to make inferences and to draw conclusions from incomplete sets of facts. Thus, for example, it is disappointing that Adams never commented specifically on the structure and meaning of Article 14. It is also disappointing and puzzling that no one ever stated that the Fourth Amendment's first clause was designed to broadly regulate all types of governmental searches and seizures or that no one ever rejected that view and said that the amendment was designed to address only general warrants. Instead, one must draw the conclusions that appear the most sound, based on what is known. In this regard, John Adams offered some advice:

In unforeseen cases, that is, when the state of things is found such as the author of the disposition has not foreseen, and could not have thought of, we should rather follow his intention than his words, and interpret the act as he himself would have interpreted it, had he been present, or conformably to what he would have done if he had foreseen the things that happened. This rule is of great use to Judges.<sup>467</sup>

It demeans him and fails to acknowledge the depth of his learning, experience, and knowledge of search and seizure principles to say that Adams had no concept of reasonableness, that he had no criteria by which to measure it, and that, in drafting Article 14, his carefully crafted language reflected solely a concern with general warrants. Linguistically, it does not and the historical record belies such claims. Indeed, the record demonstrates that Adams had experiences examining a rich variety of proper search and seizure practices. He was concerned with criteria and he articulated that criteria: a suspicion-based regime; limitations on the scope of warrants; and standards for warrants to issue. Obviously drawing from the 1776 Pennsylvania Constitution, Adams identified four objects as protected: people, houses, papers, and possessions. He defined the quality of the right to be protected in those objects as the right to be "secure." He limited those protections to be against "unreasonable" searches and seizures.

The men more directly involved in the drafting of the Fourth Amendment were strongly influenced by the Massachusetts model. During the crucial period from 1787 to 1789, when the various state conventions debated the need for a search and seizure provision, there were two models: the model prohibiting general warrants and Article 14. Virginia, taking the lead, chose the Massachusetts model, as did New York, North Carolina, and Rhode Island. None chose the general warrant model, even though it had been the prevalent one in state constitutions. Madison, in his draft, conflated the two models. The House of Representatives, however, recognized that Madison's draft was inadequate and changed the Fourth Amendment to closely resemble the structure of Article 14.

Even if one rejects my view as to the strong historical links between Adams, Article 14, and the Fourth Amendment, thus discounting the importance of Adams's views and role, there remains abundant evidence that the framers were

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CLANCY, *supra* note 24, § 3.1; Clancy, *supra* note 182.

467. Journal Entry of John Adams (Dec. 27, 1765), in 2 THE WORKS OF JOHN ADAMS, *supra* note 7, at 166 (1850) (citations omitted).

concerned with more than general warrants. It is neither historically accurate to say that the Reasonableness Clause had no meaning to the framers nor that the amendment was designed solely to ban general warrants. During the 1761 to 1791 time period, there was a vibrant jurisprudence seeking to establish the primacy of objective criteria to measure the legitimacy—that is, the reasonableness—of governmental searches and seizures. Admittedly, discussion about the details of a desirable search and seizure provision was sparse. Yet, the comments that are extant show a wide range of search and seizure issues on the minds of the people. Clearly, there were concerns about general warrants but there were many other comments about broader issues: worry about unreasonable searches and seizures; about the unlimited power of new officers (particularly excise officers); about nighttime entries; and about protection of the home. Looking even more widely, the treatise writers of the era offered detailed criteria for measuring the propriety of searches and seizures. Adams and others utilized those treatises and common law cases to argue for the primacy of measurable criteria: no nighttime searches; a need to knock and announce before entering; and probable cause to justify a seizure, among other criteria. Although Adams and our other forefathers struggled to establish exactly what the proper standards were, objective criteria to measure the propriety of a search and seizure that persisted from case to case was the goal.

As Adams teaches us, the modern era is not freed from making important decisions about the content of the Fourth Amendment's "reasonableness" command by simply examining the past and seeking exact answers. Instead, we are informed by the framers' understanding that search and seizure principles were evolving and complex, as they are now. Yet, in that era there was a quest to identify objective criteria outside the control of the government that served to measure the propriety of a search or seizure to insure that each person would be "secure." It is that methodology that should inform us today as to how to measure reasonableness.

