AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 2: The Colonial Era – Judicial Power and Constitutional Authority

James Otis, **Part of Speech before the Superior Court of Massachusetts on the Writs of Assistance** (1761)[1]

In 1761, the Superior Court of Massachusetts heard arguments on whether it should issue writs of assistance to colonial custom officials who were attempting to enforce British trade laws against local merchants smuggling goods. The writs would provide legal authority for officials to conduct forcible searches, on their own initiative, of private property throughout the Boston area. Before the court, James Otis raised what quickly became famous objections to the legality and constitutionality of the writs.

The argument of Otis particularly stood out for its assertion that an act authorizing writs of general assistance would be unconstitutional and therefore void. In support of this assertion, Otis cited Dr. Bonham's Case (8 Co. 107a [1610]), in which the great English jurist Sir Edward Coke asserted that "in many cases, the common law will control acts of parliament, and sometimes adjudge them utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void." The argument was subsequently important for helping to lay the basis for the development of American judicial review after the Revolution.

The Superior Court did not rule immediately, but instead sought further information from England as to whether such writs were still in use there. Upon being informed that they were, the court issued the writ.[2] In February 1762, the Massachusetts assembly attempted to require special warrants for a specific search to be issued only upon a showing of probable cause, but the bill was vetoed by the governor as inconsistent with British law and subversive of the effective enforcement of the customs.

I was desired by one of the Court to look into the books, and consider the question now before them concerning the writs of assistance. I have accordingly considered it, and now appear, not only in obedience to your order, but likewise in behalf of the inhabitants of this town . . . and out of regard to the liberties of the subject. And I take this opportunity to declare . . . I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villany on the other, as this writ of assistance is.

It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book. I must, therefore, beg

[1] The argument was recorded by John Adams, who was present at the hearing.

[2] Thomas Hutchinson later recounted, "In the year 1761 application was made by the officers of the custom to the Superior Court, of which I was then Chief Justice, for writs of assistance. . Great opposition was made by some who professed themselves friends to liberty, and by others who favored illicit trade, and the court seemed inclined to refuse to grant them; but I prevailed with my brethren to continue the cause until the next term, and in the mean time I wrote to England, and procured a copy of the writ, and sufficient evidence of the practice of the Exchequer there, and the writs have ever since been granted here. . . . The Stamp duty, although I always feared the consequence of it would be bad, both to the nation & colonies, and privately & publickly declared my thoughts upon it, yet after the passing of the act I could not avoid considering it legally right, the Parliament being beyond dispute the supreme legislature of the British dominions; but our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is ipso facto void. . This, taken in the latitude the people are often disposed to take it, must be fatal to all Government & it seems to have determined great part of the colonies to oppose the execution of the act with force & to show their resentment against all in authority who will not join with them." Quoted in Horace Gray, "Appendix," in Josiah Quincy, ed., *Reports of Cases* (Boston: Little, Brown and Co., 1865), 415, 441.

your Honors' patience and attention to the whole range of an argument, that may perhaps appear uncommon in many things, as well as to points of learning that are more remote and unusual . . . . I was solicited to argue this cause as Advocate-General; and because I would not, I have been charged with desertion from my office.[3] To this charge I can give a very sufficient answer. I renounced that office, and I argue this cause, from the same principle; and I argue it with the greater pleasure, as it is in favor of British liberty, at the time when we hear the greatest monarch upon earth declaring from his throne that he glories in the name of Briton, and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown; and as it is in opposition to a kind of power, the exercise of which, in former periods of English history, cost one King of England his head, and another his throne. . . .

In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, etc. 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 is a power, that places the liberty of every man in the hands of every petty officer. . . . In the first place, the writ is universal, being directed "to all and singular Justices, Sheriffs, Constables, and all other offices 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 is 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, etc. at will, and command all to assist him. Fourthly, by this writ not only deputies, etc., 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. . . .

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. Let us see what authority there is for it. Not more than one instance can be found of it in all our law-books; and that was in the zenith of arbitrary power, namely, in the reign of Charles II, when star-chamber powers were pushed to extremity by some ignorant clerk of the exchequer. But had this writ been in any book whatever, it would have been illegal. All precedents are under the control of the principles of law. Lord Talbot says it is better to observe these than any precedents . . . . No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void. (vid. Viner.)[4] But these prove no more than what I before observed, that special writs may be granted *on oath and probable suspicion*. . . .

[3] Otis had been the advocate general for the vice-admiralty court, whose jurisdiction included the enforcement of the navigation acts that regulated colonial overseas trade. His father, the speaker of the house, had expected to be appointed to the Superior Court, but when a vacancy in the position of chief justice arose in 1760, the governor passed him over to appoint Thomas Hutchinson, fueling Otis's break with the colonial administration.

[4] The reference is to Bonham's case.