

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplemental Material

Chapter 2: The Colonial Era – Criminal Justice/Search and Seizure

*James Otis, "Against Writs of Assistance"*¹

James Otis (1725–1783) was a prominent lawyer in colonial Massachusetts. During the 1760s, Otis represented local merchants who objected to writs of assistance. These warrants enabled customs officials to search any private residence where they suspected they might find smuggled goods. Otis faced a particularly difficult task because a parliamentary enactment in 1662 seemed to authorize judges to grant customs officials such general search warrants. Wood and Carrington could claim no such legislative authority when they searched Wilkes and Entick, as reported in Wilkes v. Wood (1763) and Entick v. Carrington (1765). For this reason, Otis had to make two arguments. First, as did Wilkes and Entick, he had to demonstrate that writs of assistance violated common law rights. Second, he had to demonstrate that Parliament had no power to pass laws inconsistent with common law rights. Otis failed. The Superior Court of Massachusetts, relying on Parliamentary statutes and Court of Exchequer practice, granted Crown officials the warrants.

Otis's arguments inspired a generation of American revolutionaries. His rhetoric maintained that no governing official could violate certain fundamental rights. Parliamentary laws violating those rights proved only that Parliament had been corrupted. John Adams, who heard Otis challenge the constitutionality of writs of assistance and whose notes are the only extant copy of the speech Otis gave, declared that "American independence was then and there born."² Why does Otis object to writs of assistance? How are his arguments different from those advanced by Wilkes and Entick? Should we trust courts rather than elected officials to determine the rules for issuing warrants?

... 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 villainy on the other as this Writ of Assistance is.

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

...

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 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. 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. . . .

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

¹ "John Adams to WM Tudor, March 29, 1817," *Niles Weekly Register* (April 25, 1818).

² *Ibid.*

secure in his petty tyranny, and spread terror and desolation around him, until the trump of the Archangel shall excite different emotions in his soul. 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. . . .

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 everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

[In the rest of the speech, which is unreported, Otis explained why the Parliamentary Act authorizing writs of assistance was unconstitutional. In 1764, he developed that argument at greater length. We have excerpted portions of that argument in the headnote to Bonham's Case (1610) and in Volume I.]



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