

THE IMPORTANCE OF JAMES OTIS©



*Thomas K. Clancy**

I.

Historical analysis remains a fundamentally important tool to interpret the words of the Fourth Amendment,¹ and no historical event is more important than James Otis's argument in the *Writs of Assistance Case*² in 1761.³ The *Writs* case and the

* John T. Copenhaver Jr. Visiting Endowed Chair of Law, West Virginia University College of Law, 2012-13. Research Professor, University of Mississippi School of Law, and Director, National Center for Justice and the Rule of Law. (c) Copyright, Thomas K. Clancy, 2012. This essay is based on remarks made at search and seizure conferences for judges on the occasion of the 250th anniversary of the *Writs* case.

¹ *E.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012); *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 (2001).

² This litigation has many names but no formal designation.

³ *E.g.*, *Stanford v. Texas*, 379 U.S. 476, 482 (1965) ("Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance."); JACOB B. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19 (1966) (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."); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38 (1969) ("The writs of assistance were anathema in the colonies,

competing views articulated by the advocates continue to serve as a template in the never-ending struggle to accommodate individual security and governmental needs. In that case, James Otis first challenged British search and seizure practices and offered an alternative vision of proper search and seizure principles.⁴ No authority preceding Otis had articulated so completely the framework for the search and seizure requirements that were ultimately embodied in the Fourth Amendment.⁵ More fundamentally, Otis's importance, then and now, stems not from the particulars of his argument; instead, he played, and should continue to play, an inspirational role for those seeking to find the proper accommodation between individual security and governmental needs. In contrast to the statist views of Chief Justice Rehnquist, detailed elsewhere in this edition of the *Mississippi Law Journal*, Otis proposed a framework of search and seizure principles designed to protect individual security. James Otis, his vision, and his legacy have become largely forgotten outside a small circle of Fourth Amendment scholars.⁶ This essay is a modest attempt to recall his importance for contemporary construction of the Fourth Amendment.⁷

and Otis' argument against them was well known among the founding fathers.”). Numerous sources quote Otis's arguments. *E.g.*, *Payton v. New York*, 445 U.S. 573, 608-09 (1980) (White, J., dissenting); *Gerstein v. Pugh*, 420 U.S. 103, 116 n.17 (1975).

⁴ See M. H. SMITH, *THE WRITS OF ASSISTANCE CASE 7* (1978) (In that case, “the American tradition of constitutional hostility to general powers of search first found articulate expression.”).

⁵ *E.g.*, WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 382 (2009) (Otis's “proclamation that only specific writs were legal was the first recorded declaration of the central idea to the specific warrant clause.”).

⁶ The National Center for Justice and the Rule of Law sponsored the James Otis Lectures, with articles written by noted scholars. Please visit www.olemiss.edu/depts/ncjrl/FourthAmendment/fai_OtisLectures.html to access the articles.

⁷ 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.

U.S. CONST. amend. IV.

II.

Born in Great Marshes (now West Barnstable), Massachusetts, James Otis would devote his life to the law, as his father and grandfather had done before, becoming a revered trial advocate and legal orator in colonial Massachusetts.⁸ He was appointed to the coveted position of Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's use of writs of assistance.

Based on his argument in the *Writs* case in 1761, 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 Massachusetts House of Representatives.⁹ Thomas Hutchinson, who was the Chief Justice presiding at the *Writs* case and the author of an important historical account of Massachusetts, wrote that Otis's efforts encouraged those in opposition to the government and "taught" the people that the practices were "incompatible with English liberties."¹⁰ "According to John Adams, the case brought Otis Jr. boundless popularity."¹¹ For the next decade, Otis was a leader of the opposition, seeking to establish and protect the rights of the colonists. No one was more important in that era.¹² Otis was

⁸ See generally WILLIAM TUDOR, *THE LIFE OF JAMES OTIS, OF MASSACHUSETTS* (1823). There are several biographies of Otis. William Tudor, a near contemporary, used then available resources to write the first one. Other biographies often rely on Tudor's work. See, e.g., FRANCES BOWEN, *LIFE OF JAMES OTIS AND JAMES OGLETHORPE* (1844); JOHN C. RIDPATH, *JAMES OTIS: THE PRE-REVOLUTIONIST* (1898). Another important figure of the era, Samuel Adams, often worked together with Otis; early histories often confused their respective roles on various committees. For one instructive attempt to clarify those roles, see WILLIAM V. WELLS, *1 THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* (1865).

⁹ THOMAS HUTCHINSON, *THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY (FROM 1749 TO 1774)* 95 (1828).

¹⁰ *Id.* at 94-95.

¹¹ WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 402 (2008).

¹² John Adams summed it up in a letter to William Tudor written in 1818:

I have been young, and now am old, and I solemnly say, I have never known a man whose love of his country was more ardent or sincere; never one, who suffered so much; never one, whose services for any ten years of his life were so important and essential to the cause of his country, as those of Mr. Otis from 1760 to 1770.

repeatedly elected to the House of Representatives in Massachusetts and spoke and wrote forcibly on behalf of the rights of the colonists. He served in many other capacities, often at the head of town meetings and committees,¹³ leading the opposition to arbitrary British actions and legislation. Otis became widely known and admired in the American colonies¹⁴ and widely known but often hated in England.¹⁵

Otis's mental health declined as the decade progressed.¹⁶ He was physically attacked in 1769 by John Robinson, a customs

Letter from John Adams to William Tudor (Feb. 25, 1818), in 10 THE WORKS OF JOHN ADAMS 291 (Charles F. Adams ed., 1856); see also HUTCHINSON, *supra* note 9, at 292 (Otis had, for eight or nine years prior to 1772, "greater influence than any other member" of the Assembly.).

¹³ For example, at a meeting of the inhabitants of Boston on Nov. 2, 1772, a committee, including Otis, was appointed "to state the Rights of the Colonists." 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 466 (1865). 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. *Id.* at 467. 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 [sic] Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.

Id. at 467; see also *Warden v. Hayden*, 387 U.S. 294, 315 (1967) (Douglas, J., dissenting).

¹⁴ One of Otis's correspondents was John Dickinson. See, e.g., TUDOR, *supra* note 8, at 322. Appearing in the Philadelphia press in 1768, and subsequently widely available, were Dickinson's letters "by a Farmer in Pennsylvania," which criticized the writs of assistance as "dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's house as his castle, or a place of perfect security." SMITH, *supra* note 4, at 492-94.

¹⁵ See, e.g., TUDOR, *supra* note 8, at xviii, 172, 183-84 n.* (1823).

¹⁶ John Adams 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 270 (L.H. Butterfield, ed. 1961) (diary entry for December 23, 1765, recounting Otis's emotional instability and "inexplicable Passage in his Conduct"); 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 50 (L.H. Butterfield ed., 1961) (entry for Aug. 22 and 23, 1771, observing that "Otis' Gestures and Motions are very whimsical, his

official, suffering a serious head wound.¹⁷ By 1770, his mental health had so deteriorated that Otis's influence effectively ended. He withdrew to the country, where he spent most of the remainder of his life. In 1783, he was struck by lightning and died.¹⁸ With few notable exceptions, virtually none of his correspondence or written works survive.¹⁹ Otis's legacy—for the purpose of the Fourth Amendment—is the *Writ*s case, and it is to that importance I now turn.

III.

Law enforcement officials in America and in England in the period preceding the American Revolution did not have broad inherent authority to search and seize; such actions required authorization and the warrant system was the primary means to confer that authority.²⁰ Warrantless searches and seizures were rare.²¹ Only one type of warrantless seizure may have been common, the seizure of a suspected felon.²² Based on the lack of warrantless searches and seizures and the fact that the only

Imagination is disturbed—his Passions all roiled”); *id.* at 65. (diary entry for Oct. 27, 1772 describing Otis as “looking and acting as wildly as ever he did”).

¹⁷ TUDOR, *supra* note 8, at 362-65 (1823).

¹⁸ *Id.* at 474-85.

¹⁹ *Id.* at xviii. A few important publications survive. In 1765, Otis wrote *A Vindication of the British Colonies*. Otis identified in that document the “absolute” rights of men: “The absolute liberties of Englishmen, as frequently declared in Parliament, are principally three. 1. The right of *personal* security, 2. *personal liberty*, and 3. private property.” *Reprinted in* PAMPHLETS OF THE AMERICAN REVOLUTION 558 (Bernard Bailyn ed., 1965). A repeated theme of Otis was his opposition to arbitrary actions of the government. *See, e.g.*, TUDOR, *supra* note 8, at 127 (quoting from Otis's pamphlet entitled *A Vindication of the Conduct of the House of Representatives of the Province of Massachusetts Bay*).

²⁰ *E.g.*, Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 MICH. L. REV. 547, 627-34 (1999); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 294 (1984). *But see* Payton v. New York, 445 U.S. 573, 607-08 (1980) (White, J., dissenting) (arguing that constables had broad powers to arrest and that the warrant system acted to expand those powers).

²¹ *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 8 (1977) (explaining that colonials did not oppose warrantless searches in public places because such searches were not in issue at the time); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1133 (1992) (“[W]arrantless searches—other than [searches] incident to arrest, were not a fact of colonial life.”).

²² TAYLOR, *supra* note 3, at 27-28; *see generally* 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 85-104 (1847).

persons searched or seized without a warrant usually were suspected felons, those actions were not the cause of public outcry and litigation.²³

Several forms of warrants existed in England and in the American colonies in the decades preceding the American Revolution.²⁴ One form of practice included the common law warrant to search for stolen goods.²⁵ Another form of practice—general warrants and writs of assistance—came to be viewed as systematic exploitation of the warrant process, permitting the executive authorities to engage in wide-ranging suspicionless searches and seizures.²⁶ Of particular note was legislation enabling customs searches and seizures, authorizing searches without suspicion anywhere the searcher desired to look.²⁷ Pursuant to the statute, writs of assistance were issued. The 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

²³ TAYLOR, *supra* note 3, at 39; *see also* Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 621 (1982) (“[H]istory indicates that warrantless felony arrests did not cause consternation.”); *cf. Chadwick*, 433 U.S. at 8 (“The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.”).

²⁴ *See, e.g.*, TAYLOR, *supra* note 3, at 24 (observing that scholars seeking the origin of search and seizure warrants have traveled into a “foggy land” and that their origin seems based on several “fairly distinct forms of English legal practice”).

²⁵ SMITH, *supra* note 4, at 17; TAYLOR, *supra* note 3, at 24.

²⁶ *See, e.g.*, LANDYNSKI, *supra* note 3, at 19-41; NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13-78 (1937); TAYLOR, *supra* note 3, at 23-50.

²⁷ Section 5(2) of the Act of Frauds of 1662 provided:

And it shall be lawful to or for any Person or Persons, authorized by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable . . . or other publick Officer inhabiting near unto the Place, and in the Day-time to enter . . . any House . . . or other Place, and in Case of Resistance to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house.

SMITH, *supra* note 4, at 43, 535-36. The legislation did provide some limitations: the searcher had to be an authorized person and accompanied by a law enforcement officer; the search had to be performed during daylight hours; and only in the case of resistance could doors, chests, and other locked areas or containers be broken. *Id.* at 25-31.

customs man make his search.”²⁸ 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.”²⁹ The writs were akin³⁰ 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.”³¹

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.³² In 1760, new writs of assistance were requested following the expiration of the previously-issued writs due to the death of the King. A group of Boston merchants opposed the proposed writs, retaining James Otis to represent their cause. There were two hearings on the question. 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—as a species of “general warrants”³³—or whether it should limit the writs to a single occasion based on particularized information given under oath.³⁴

The courtroom was the Old State House in Boston. Thomas Hutchinson was the Chief Justice. James Otis and Oxenbridge

²⁸ *Id.* at 29.

²⁹ LASSON, *supra* note 26, at 54.

³⁰ Writs of assistance usually have been considered as general search warrants but some have disputed that characterization because the power to search inhered in the officers by virtue of their commission, and the writs were merely judicial orders empowering the customs officials to summon the sheriff or constable to keep the peace for the duration of the search. LANDYNSKI, *supra* note 3, at 32 n.53; see also *Berger v. New York*, 388 U.S. 41, 58 (1967) (equating the customs writs of assistance to general warrants). *But cf.* SMITH, *supra* note 4, at 37-39, 461, 520-21 (citing cases and a 1768 opinion of the English Attorney General and recognizing that a writ of assistance was not a search warrant but merely the vehicle by which statutory power to search was exercised).

³¹ LANDYNSKI, *supra* note 3, at 31 (footnote omitted); see also LASSON, *supra* note 26, at 53-54. The writs expired six months after the death of the sovereign. *Id.* at 57.

³² LANDYNSKI, *supra* note 3, at 30. See generally LASSON, *supra* note 26, at 51-78. Authorities in Massachusetts were more successful in obtaining writs of assistance than in other colonies. See, e.g., SMITH, *supra* note 4, at 96, 106-07, 115.

³³ HUTCHINSON, *supra* note 9, at 93-94 (1828).

³⁴ QUINCY, *supra* note 13, at 531-32.

Thatcher presented arguments in opposition to the issuance of the writs. Jeremiah Gridley, the attorney general of the Massachusetts Bay Colony, defended the general writs of assistance. John Adams,³⁵ then a young attorney, was in the audience, and wrote the most comprehensive summaries of the arguments.³⁶ After the first hearing,³⁷ the court made inquiries to

³⁵ Otis studied law in Gridley's office. TUDOR, *supra* note 8, at 14. 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 concerning Adams's qualifications to be sworn to practice in Boston as a lawyer, had, in 1758, given 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.

³⁶ There are four main sources of the arguments. Adams made contemporaneous notes and, a short time after the argument, he wrote an abstract. See Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS 121-23, (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (noting multiple sources of the abstract and reproducing it with notes on its variations); Petition of Lechmere, Adams' "Abstract of the Argument," in 2 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 134-35 n.103. Otis's own account came in an article published on January 4, 1762, in the Boston Gazette. Otis did not sign the article, but it has been attributed to him. QUINCY, *supra* note 13, at 488. The fourth significant source is the history book written by the Chief Justice. See THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY (FROM 1749 TO 1774) (1828). Adams provided additional materials in letters written toward the end of his life to William Tudor and more than 50 years after the *Writs* case. The letters are claimed recountings of the details of the argument, intermingled with Adams's comments on a variety of matters. 10 THE WORKS OF JOHN ADAMS, *supra* note 12, at 289-92, 314-62 (1856) (collecting letters from Adams to Tudor from the summer and fall of 1818). Adams wrote those accounts despite his repeated claims, in the letters and elsewhere during that same time period, that he could not accurately recollect Otis's arguments. *E.g., id.* at 314, 321, 355. Numerous authorities have examined the "inaccuracies and exaggerations of these letters." Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 107 (collecting authorities); QUINCY, *supra* note 13, at 469 n.1. 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. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 107. Nonetheless, there are a few comments that shed light. Otis, for example, in one Tudor letter is said to have insisted that the writs were "inconsistent with the fundamental law, the natural and constitutional rights of the subjects." Letter from John Adams to William Tudor (June 24, 1818), in 10 THE WORKS

England about the proper practice and, after learning that general writs were used in England, the court “judged sufficient to warrant the like practice in the province.”³⁸

Hutchinson succinctly wrote that the opponents of the writs attacked them as “of the nature of general warrants.”³⁹ Instead of that model, Hutchinson wrote, the opponents argued that the court should adopt what was claimed to be the more modern requirements for warrants to search for stolen goods: issued by a justice of the peace; limited to the places set forth in the warrant; and based on information supporting the search under oath.⁴⁰ Other sources for the arguments are more detailed. Those sources demonstrate that Otis offered a window into the nature of the individual interests affected by a search and provided a vision of proper search and seizure practices.

In his argument, Otis made a variety of points, such as the lack of statutory authority for issuing the writs.⁴¹ However, his

OF JOHN ADAMS, *supra* note 12, at 323 (1856). He later was said to observe that they were “the most tyrannical instruments that ever were invented.” *Id.* at 347.

³⁷ The *Writs* case was argued in Feb. 1761 and re-argued in Nov. 1761. Adams was present for only the first argument. Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 36, at 114-15. The Boston Gazette ran a few short accounts of the controversy but those accounts covered only the second argument in Nov. 1761 and the subsequent issuance of the writs. QUINCY, *supra* note 13, at 486-88.

³⁸ HUTCHINSON, *supra* note 9, at 94.

³⁹ *Id.* at 93.

⁴⁰ *Id.* at 93-94.

⁴¹ *E.g.*, Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 36, at 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 an undefined reasonableness standard apparently miss that distinction. *E.g.*, Davies, *supra* note 20, at 689-90. 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. 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

main focus was on the dangers to the security of each individual from the uncontrolled authority to search, that customs officials had as a result of the writs and on alternative criteria for the writs to issue.

A. *The Right to be Secure*

Otis characterized the nature of the individual interest that was implicated when the government searches, that is, the person's security:

[E]very householder 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 FORCEFULLY 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 anyone under *such* circumstance, ever again boast of *british* honor or *british* privilege?⁴²

Adams, in his notes of the argument, wrote that Otis spoke of the “fundamental principle” of the law that was “[t]he Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle[.]”⁴³

Adams and other contemporaries repeatedly used the concept of “security” to describe the quality of the right protected as to each person's life, liberty, and property.⁴⁴ Recalling Otis's

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.

⁴² QUINCY, *supra* note 13, at 489 (formatting in original).

⁴³ Petition of Lechmere, Adams' Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 36, at 125.

⁴⁴ Letter from John Adams to William Tudor (June 1, 1818), in 10 THE WORKS OF JOHN ADAMS, *supra* note 12, at 315-16 (1856).

argument many years later, Adams wrote 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.”⁴⁵ Another famous champion of liberty of the era, well known to the colonists, was John Wilkes.⁴⁶ After complaining of the seizure of all his papers under a general warrant seeking evidence of his seditious writings 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.”⁴⁷ That same concept—security—was utilized by Adams in Article 14 of the Massachusetts Declaration of Rights and is replicated in the Fourth Amendment.⁴⁸ 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.⁴⁹

The right to be secure was closely associated with property.⁵⁰ Houses in that era were repeatedly stated to be a man’s castle.⁵¹

⁴⁵ *Id.* at 316.

⁴⁶ Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1006-12 (2011).

⁴⁷ PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 32 (1996) (citation omitted).

⁴⁸ Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1027-29 (2011).

⁴⁹ For a discussion of the origin and meaning of the word “secure,” see THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 3.1. (2008); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property; Privacy; or Security?*, 33 WAKE FOREST L. REV. 307 (1998).

⁵⁰ *E.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012).

⁵¹ *E.g.*, CUDDIHY, *supra* note 5, at 185-88 (recounting numerous iterations of that principle); Davies, *supra* note 20, at 601-03 (same). 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). 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

Indeed, the physical entry into the home has been described as the “chief evil against which the wording of the Fourth Amendment is directed.”⁵² A person’s private papers were seen as almost sacred.⁵³ The Pennsylvania constitution, followed by Adams in Article 14 and only slightly modified in the Fourth Amendment, gave a list of four protected objects: persons, houses, papers, and effects.⁵⁴ Variations of this list appeared to be common in that era, stemming from Blackstone’s *Commentaries*, where he stated that the rights of Englishmen are primarily “the free enjoyment of personal security, of personal liberty, and of private property.”⁵⁵ 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.”⁵⁶

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’”).

⁵² *E.g.*, United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972).

⁵³ See CLANCY, *supra* note 49, § 3.1.2.2.

⁵⁴ 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 330 (Richard L. Perry & John C. Cooper eds., 1960), which states:

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, are contrary to that right, and ought not to be granted.

Id.

⁵⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *140; *see also id.* at *125 (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* (1765), *reprinted in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 558 (Bernard Bailyn, ed. 1965) (“The absolute liberties of Englishmen, as frequently declared in Parliament, are principally three: the right of *personal security*, *personal liberty*, and *private property*.”); Article in the New York Journal (Jan. 23, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 643 (John P. Kaminski & Gaspare J. Saladino, eds. 2004).

⁵⁶ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (1833).

It is notable that the modern Supreme Court has often 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; and a seizure occurs when there was some meaningful interference with an individual’s possessory interest; the third interest protected is a person’s “liberty interest in proceeding with his itinerary” unimpeded by the government.⁵⁷ Despite the Supreme Court’s mid-twentieth century attempt to substitute privacy for security as defining the person’s protected interest—and the subsequent erosion of the appreciation for the Fourth Amendment rights of individuals—the Court has sometimes forcefully returned to the origins of the Fourth Amendment and its concept of security.⁵⁸

Indeed, on occasion, the word “security” seemed to be studiously applied. For example, in *Terry v. Ohio*,⁵⁹ which involved the stop and frisk of a person, the Court acknowledged that it had recently held that the Amendment protected a person’s right to privacy. However, the Court instead emphasized the words chosen by the Framers, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”⁶⁰ Indeed, the Court said: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”⁶¹ The Court asserted that the issue in *Terry* was whether the person’s “right to personal security was violated” by the on-the-street encounter.⁶² In the

⁵⁷ *Soldal v. Cook County*, 506 U.S. 56, 63 (1992).

⁵⁸ *E.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012). Justice Brennan, a principal force in developing privacy as a centralizing role in Fourth Amendment analysis, noted later that, in addition to privacy in information, the Amendment “protects, in its own sometimes-forgotten words, [t]he right of the people *to be secure* in their persons, houses, papers, and effects.” *Illinois v. Andreas*, 463 U.S. 765, 775 (1983) (Brennan, J., dissenting). See generally Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property; Privacy; or Security?*, 33 WAKE FOREST L. REV. 307, 347-50 (1998).

⁵⁹ 392 U.S. 1 (1968).

⁶⁰ *Id.* at 8-9.

⁶¹ *Id.* at 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

⁶² *Id.*

balance of the opinion, the Court focused on the word security as defining the person's protected interest. In *Kyllo v. United States*,⁶³ the Court took a significantly different approach toward defining the interest protected by the Fourth Amendment from the framework that has prevailed since *Katz v. United States*.⁶⁴ The *Kyllo* Court was presented with the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constituted a "search" within the meaning of the Fourth Amendment.⁶⁵ The Court held that it did.⁶⁶ To reach that conclusion, *Kyllo* had to determine if the use of that technology invaded an interest protected by the Amendment.

The *Kyllo* majority opinion was authored by Justice Scalia, and his disdain for the expectations test and his affinity for anchoring Fourth Amendment analysis on the common law as it existed in 1791 was clearly evident. Indeed, in reaching the result in *Kyllo*, the Court did so without reliance on that test. The Court characterized *Katz* as involving "eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog ('persons, houses, papers, and effects') that the Fourth Amendment protects against unreasonable searches."⁶⁷ The Court observed that the "*Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable."⁶⁸

Kyllo acknowledged that "the degree of privacy secured to citizens by the Fourth Amendment" has been affected by the

⁶³ 533 U.S. 27 (2001). For commentary on *Kyllo*, see generally Symposium, *The Effect of Technological Change on Fourth Amendment Rights and Analysis*, 72 MISS. L.J. 1 (2002) (featuring articles by Professors A. Morgan Cloud, Tracey Maclin, David Sklansky, Christopher Slobogin, James Tomkovicz, Kathryn Urbonya, Thomas K. Clancy).

⁶⁴ 389 U.S. 347 (1987).

⁶⁵ *Kyllo*, 533 U.S. at 31-32.

⁶⁶ *Id.* at 34-35.

⁶⁷ The Court is arguably wrong on this point. *Katz* was protected because he was within the catalog: he was a "person" and that object on the list includes both physical (the body) and non-tangible (the voice) interests. The government may pry, that is, search, by use of any of the senses. When a person takes steps to exclude the government from prying into any of those interests, such as closing a door of a telephone booth to engage in a conversation, he has a protected interest.

⁶⁸ *Kyllo*, 533 U.S. at 34.

advance of technology, listing as an example “the technology enabling human flight[, which] has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private.”⁶⁹ The Court noted that *Kyllo* involved “more than naked-eye surveillance of a home” and asserted that it had “previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much.”⁷⁰

Rather than rely on *Katz*, the Court stressed the traditional importance of the home: “At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”⁷¹

While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” constitutes a search—at least where (as here) the technology in question is not in general public use.⁷² This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

The Court’s language is remarkable for its reliance on themes developed by the Court when property analysis was the applicable test: the common law; constitutionally protected areas; analogy to

⁶⁹ *Id.* at 33-34.

⁷⁰ *Id.* at 33.

⁷¹ *Id.* at 31 (citing *Silverman v. United States*, 365 U.S. 505 (1961)).

⁷² *Id.*

physical intrusions; and reliance on what was protected at the time of the framing. Yet, the Court retained the essential lesson of *Katz*, which is not that the Fourth Amendment protects privacy, but that the interests protected by the Amendment include tangible and intangible interests and that the mode of invasion into those interests is not limited to physical intrusions.

The Court used language supporting a security model for Fourth Amendment rights, grounded in language consistent with the meaning of the word “secure” that has prevailed since the time the Fourth Amendment was framed: the home is protected, the majority asserted, “because the entire area is held safe from prying government eyes.”⁷³ Indeed, the scope of protection afforded by the *Kyllo* Court to the home is remarkable for its breadth and the Court’s willingness to draw a firm and bright-line rule at the entrance of the house. As to what is learned, the Court asserted:

The Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman [v. United States]*, 365 U.S. 505 (1961), for example, we made clear that any physical invasion of the structure of the home, “by even a fraction of an inch,” was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details.⁷⁴

Thus, in *Kyllo*, “how warm—or even how relatively warm—*Kyllo* was heating his residence” was information about the interior of the home and was therefore protected.⁷⁵

After eliminating the gloss of the Supreme Court’s property and privacy analyses, the underlying common theme—that the Amendment protects the right to exclude—has appeared often in the Court’s opinions. Although the trespass theory of *Olmstead*⁷⁶ and its progeny protected only physical objects from physical

⁷³ *Id.* at 37.

⁷⁴ *Id.*

⁷⁵ *Id.* at 38.

⁷⁶ *Olmstead v. United States*, 277 U.S. 438 (1928).

invasions, the underlying rationale for that line of cases was the ability to exclude unreasonable intrusions. As the Court explained:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.⁷⁷

The post-*Katz* era Court confused the reasons for exercising the protected right with the right itself. A purpose of exercising one's Fourth Amendment rights might be the desire for privacy, but the individual's motivation is not the right protected.⁷⁸ Shortly after the *Katz* decision, one commentator wrote that the Fourth Amendment's operative function is exclusionary: it works negatively to keep out the unwelcome agencies of government. It logically follows, however, that where something is to be kept out, that from which it is barred deserves recognition in a positive sense. "It is for this reason that the fourth amendment should be looked upon as safeguarding an affirmative right of privacy."⁷⁹

⁷⁷ *Silverman v. United States*, 365 U.S. 505, 511 n.4 (1961).

⁷⁸ Indeed, one concept of privacy is simply the power "to control access by others to a private object (to a private place, to information, or to an activity). [It] is the ability to maintain the state of being private or to relax it as, and to the degree that, and to whom one chooses." STANLEY I. BENN, *A THEORY OF FREEDOM* 266 (1988), quoted in Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 855 (1989); see also Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 329 (1981) ("The essence of privacy is twofold: the ability to keep personal information unknown to others and to keep one's self separate from interaction with others."). Is this not to say that people have the power to exclude? If privacy is only the power to exclude, then there is no reason to refer to the concept, which serves only to confuse what the individual's right is, particularly given the many uses that "privacy" has. Cf. Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 284 (1993) ("Whatever privacy means, it surely must include the right to exclude others.").

⁷⁹ Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 968 (1968).

Within this syllogism is the flaw that has plagued courts and commentators. The Fourth Amendment does act negatively, to exclude. But that is also the essence of the right to be secure. To look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right.⁸⁰ Indeed, those attributes are mere motivations for exercising the right; they do not define it. The exclusionary function of the Amendment is so bound up with the right to be secure as to be equivalent to it: There is no security if one cannot exclude the government from intruding.

The right to be secure permits one to do as one wishes for whatever reasons that motivate the person.⁸¹ The Fourth Amendment is an instrument—a gatekeeper that keeps out the government. The gatekeeper does not ask why one desires to exclude the government; it simply follows orders.⁸² As a

⁸⁰ Cf. Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 827 (1989) (“An examination of [colonial and English] history and the literal language of the Amendment as well reveals that the Framers did not attempt to define the contours of a comprehensive right to privacy. Rather, they attempted to construct a restraint upon governmental action.”); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 364-65 (1993) (The foundation of some constitutional rights is to prevent abuse of power by government and that, rather than those rights forming “an independent limit on government power . . . anxiety about abuse of power generates rights.”); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989) (contrasting the right of privacy, which attaches to the rightholder’s own actions such as marriage and abortion, with expectations of privacy under the Fourth Amendment and “the right of privacy protected by tort law,” with the latter concept used to “govern the conduct of other individuals who intrude in various ways upon one’s life” and to “limit the ability of others to gain, disseminate, or use information about oneself”).

⁸¹ Cf. *Bowers v. Hardwick*, 478 U.S. 186, 206-08 (1986) (Blackmun, J., dissenting) (purpose of the Fourth Amendment protection of the home “is more than merely a means of protecting specific activities that often take place there”); *Warden v. Hayden*, 387 U.S. 294, 301 (1967) (“On its face, the [Fourth Amendment] assures the ‘right of the people to be secure in their persons, houses, papers, and effects’ . . . without regard to the use to which any of these things are applied.”); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 85 (1974) (“It would misconceive the great purpose of the amendment to see it primarily as the servant of other social goods, however large and generally valuable.”).

⁸² Cf. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (“Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.”).

gatekeeper, the Amendment permits other rights to flourish. However, the purpose of exercising one's Fourth Amendment rights neither adds to nor detracts from the scope of the protection afforded by the Amendment.

The ability to exclude is so essential to the exercise of the right to be secure that it is proper to say that it is equivalent to the right—the right to be secure *is* the right to exclude. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: no unjustified intrusions by the government. In other words, the Fourth Amendment gives the right to say, “No,” to the government's attempts to search and seize. Privacy, human dignity, a dislike for the government, and other states of mind may motivate exercise of the right to exclude, but they are not synonymous with that right or with aspects of the right. Defining security as having the right to exclude has historical roots and meaning; Otis and the Framers lived in a time that equated security with the ability to exclude. It provides an easily identified and applied rule designed to protect an individual's right to be safe as to his or her person, house, papers, and effects.

The concept of security cannot be divorced from the object protected. The meaning of security varies somewhat in relation to the protected interest specified by the Amendment: persons, houses, papers, or effects.⁸³ However, the core concept remains the right to exclude. Privacy analysis purported to abandon reliance on the principle of constitutionally protected areas, with *Katz* asserting that “the Amendment protects people, not places.”⁸⁴ Such a claim simply ignores the language and structure of the Amendment: People have the right to be secure only as to their

⁸³ Cf. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 672-73 (1995) (O'Connor, J., dissenting) (collection of urine to test for drugs is search of a person and thus one of the four categories of searches the Fourth Amendment lists by name); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (Although the Fourth Amendment protects people, not places, “[g]enerally . . . the answer to that question requires reference to a ‘place.’”); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 580 (1996) (noting that *Boyd* defined the “realm of personal autonomy” protected by the Amendment “largely in terms of property rights,” and arguing that that approach is “consistent with the text of the Amendment, which specifically links some aspects of liberty and privacy to property, and a person's relationship to it”).

⁸⁴ *Katz*, 389 U.S. at 351.

persons, houses, papers, and effects. *Kyllo*, and more recently *Jones*, by speaking of “constitutionally protected areas,”⁸⁵ signaled a repudiation of *Katz*’s framework. Security, liberty, privacy, and property rights stem from a common origin: the Framers’ intent to give persons the right to exclude the government from interfering with an individual’s person, house, papers, and effects.

As Otis recognized, the right to be secure must have a normative basis; otherwise, any definition will be subject to deprecation by interpretation favoring governmental needs. Along with a normative view, there must be an interpretation of the Amendment favorable to the promotion of individual rights.⁸⁶ Otherwise, a majority of the Court may use any definition of the individual’s protected interest, be it grounded in property, privacy, or security, in a way inimical to individual rights. The Fourth Amendment, at its most fundamental level, is designed to protect people from the government. It is no great leap to say that it should therefore be interpreted in a manner favorable to the enhancement of individual liberty. The inquiry in each case must examine the essence of what the Amendment seeks to protect: the right to be secure—that is, the ability to exclude others from prying.

B. Governmental Interests

Jeremiah Gridley defended the general writs of assistance, *inter alia*, as necessary to enforce the customs laws:⁸⁷

[T]he 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.

⁸⁵ *Kyllo*, 533 U.S. at 49.

⁸⁶ See, e.g., 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.”); Cloud, *supra* note 83, at 626-27 (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).

⁸⁷ See generally QUINCY, *supra* note 13, at 476-82.

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 [sic] and speedily collected is of infinitely greater moment to the whole, than the Liberty of any Individual.⁸⁸

Gridley conceded that the “common privileges of Englishmen” were taken away by the writs procedure but asserted that those benefits were also taken away in criminal cases.⁸⁹

No record indicates whether Otis addressed Gridley’s admittedly strong governmental interests. Instead, Otis outlined circumstances when the individual’s interest could be legally invaded: a person’s security in his home is “forfeited” only “in cases of the most urgent necessity and importance.”⁹⁰ Adams’s notes characterized the need that Otis urged as: “For flagrant Crimes, and in Cases of great public Necessity,” a person’s house may be invaded.⁹¹

From Gridley to the present, claims of necessity have often been invoked in justifying searches.⁹² However, what Gridley failed to do, and what Otis did do (as discussed in the next section), is distinguish between a strong governmental need and how to effectuate that interest. A pamphleteer in England, a short time after the *Writs* case, commenting on the use of general warrants to pursue persons suspected of seditious libel captured the essence of the argument: “No necessities of state can even be a reason for quitting the road of law in the pursuit of the libeller [sic].”⁹³ In other words, merely because the government has a

⁸⁸ SMITH, *supra* note 4, at 281.

⁸⁹ *Id.*

⁹⁰ QUINCY, *supra* note 13, at 490.

⁹¹ *Id.* at 471.

⁹² See, e.g., *Entick v. Carrington*, (1765) 19 Howell’s St. Tr. 1029 (K.B.) 1063-64 (Attorneys for Lord Halifax argued that the power of the executive to issue search warrants for papers in seditious libel cases was essential to the government.).

⁹³ FATHER OF CANDOR, LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS, AND SURETIES FOR THE PEACE OR BEHAVIOR 42 (5th ed. 1765). Referring to times of rebellion as illustrating an argument for true necessity for the use of general warrants, the writer observed that, in such situations, men may “wink at all irregularities.” *Id.* at 49. He added: “And yet, bad men . . . will be apt to lay stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to

strong interest does not mean that it can use any or all means to effectuate that interest. That confusion of ends and means has surfaced repeatedly in contemporary Fourth Amendment analysis.⁹⁴ Many cases fail to distinguish between the strength of the government interest⁹⁵ involved and the methods to search and seize needed to effectuate that interest.

C. Proper Procedure to Authorize and Conduct a Search

There is an intimate connection between a person's right to be secure and the procedures utilized by the government to investigate. Having acknowledged that the government could, under proper circumstances, invade a person's right to be secure, Otis offered criteria by which to judge the propriety of that invasion. The writs procedure, Otis maintained, made each person subject to "petty tyrants."⁹⁶ He emphasized the uncontrolled discretion of the customs officials: "[C]an a community be safe

gratify personal pique, and therefore such excesses of power are dangerous in example, and should never be excused." *Id.* He concluded that, even in cases of high treason where the persons could not be named, the use of general warrants would be "applied to his pardon, and not his justification." *Id.* at 50.

⁹⁴ See, e.g., *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (rejecting as sufficient to depart from individualized suspicion the "severe and intractable nature of the drug problem"); *Torres v. Puerto Rico*, 442 U.S. 465, 472-74 (1979) (rejecting suspicionless searches of luggage of persons coming to island from United States, despite recognition that the commonwealth had serious problems with "influx of weapons and narcotics" and stating that "we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement"); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 317 (1984) ("The 'general searches' which the framers sought to outlaw when they enacted the fourth amendment may well have been 'cost-justified,' and were defended on precisely this basis."). See generally CLANCY, THE FOURTH AMENDMENT, *supra* note 49, §§ 11.3.4.4.2.-4.3. (discussing role of necessity in measuring reasonableness in Supreme Court opinions); *id.* § 11.5.3.2. (discussing the role that necessity should have).

⁹⁵ See, e.g., *Edmond*, 531 U.S. at 44-47 (2000) (utilizing a programmatic purpose analysis to distinguish between permissible and impermissible suspicionless intrusions); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (stating that it was up to politically accountable officials to choose among reasonable alternative law enforcement techniques); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 639 (1989) (permitting substance abuse testing of all crew members of trains involved in an accident or in a rule violation because serious train accident scenes frequently are chaotic, making it "impractical" for investigators to determine which crew members contributed to the accident).

⁹⁶ QUINCY, *supra* note 13, at 490.

with an uncontroul'd [sic] 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?"⁹⁷

The writs of assistance were seen by Otis 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.⁹⁸ In addition, Otis criticized the manner in which the customs searches occurred: "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."⁹⁹ The writs, Otis asserted, "[I]s a power, that places the liberty of every man in the hands of every petty officer."¹⁰⁰ He detailed:

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

⁹⁷ *Id.* at 494.

⁹⁸ Petition of Lechmere, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 36, at 114.

⁹⁹ *Id.* at 319. This quote can be found at JUDSON STUART LANDON, THE CONSTITUTIONAL HISTORY AND GOVERNMENT OF THE UNITED STATES 240 (1889).

¹⁰⁰ 2 THE WORKS OF JOHN ADAMS, *supra* note 12, app. A at 524-25 (1850).

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.¹⁰¹

Otis cited one “wanton exercise”¹⁰² of the power of the writs, *Walley v. Ware*, a case where a magistrate had questioned Ware about a charge of breach of the Sabbath day acts or for profane swearing. In response, Ware, who was a customs official, demanded to search the magistrate’s home for uncustomed goods.¹⁰³ Ware then “went on to search his house from the garret to the cellar.”¹⁰⁴ Otis observed that Ware did not pretend to have any “suspicion of contraband goods as a reason for his conduct.”¹⁰⁵

Otis offered an alternative procedure—warrants for stolen goods,¹⁰⁶ which he called “special”¹⁰⁷ warrants. He characterized those warrants as “directed to special officers, and to search certain houses, &c. specially set forth in the writ,” issued based upon oath of the person who asked for the warrant “that he suspects such goods to be concealed in those very places he desires to search.”¹⁰⁸ He argued that the need for the invasion “always ought to be determin’d by *adequate* and *proper* judges.”¹⁰⁹ Otis detailed the criteria for the warrant to issue:

[S]pecial writs may be granted *on oath and probable suspicion*. . . . [A]n 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.¹¹⁰

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ QUINCY, *supra* note 13, at 476 n.29, 490.

¹⁰⁴ 2 THE WORKS OF JOHN ADAMS, *supra* note 12, app. A at 524-25 (1850).

¹⁰⁵ QUINCY, *supra* note 13, at 490.

¹⁰⁶ 2 THE WORKS OF JOHN ADAMS, *supra* note 12, app. A at 524-25 (1850).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ QUINCY, *supra* note 13, at 490.

¹¹⁰ 2 THE WORKS OF JOHN ADAMS, *supra* note 12, app. A at 524-25 (1850). 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.

Shortly after the *Writs* case, repeatedly expressed concerns about general warrant searches and seizures and the need to limit an officer's discretion arose in England.¹¹¹ The cases were extensively reported in the popular press in the colonies, including in Boston, and they were exploited to increase bad feelings against British rule and molded colonial sentiment to view general warrants as oppressive.¹¹²

One of the many disputes among contemporary legal scholars revolves around the meaning and significance of "probable cause" to the Framers.¹¹³ Yet, the concept of probable cause as a

See SMITH, *supra* note 4, at 336-39; *see also* Grumon v. Raymond, 1 Conn. 40, 43-46 (1814) (recognizing that a search warrant for stolen goods must limit search to particular places where reasonable to suspect goods are and to such persons reasonably suspected); Frisbie v. Butler, 1 Kirby 213, 215 (Conn. 1787) (same). The validity of Otis's claim as a matter of established English common law at that time is debatable. CUDDIHY, *supra* note 5, at 392. *Compare* HALE, *supra* note 22, at 150 (asserting that a "general warrant to search in all suspected places [for stolen goods] is not good, but only to search in particular places, where the party assigns before the justice of the justice his suspicion and probable cause thereof" and maintaining that general warrants were "dormant"), *with* MICHAEL DALTON, THE COUNTRY JUSTICE 418 (1746) (Warrant for stolen goods was a general one, permitting "*diligent Search in all and every such suspected Houses . . . as you and this Complainant shall think convenient.*"); *id.* at 419, 423-24 (setting out other general warrant forms to search after a robbery and for "rogues"). But it appears closer to the truth as to the then existing Massachusetts practice. *See* CUDDIHY, *supra* note 5, at 311-12, 340-41, 371-75, 386 n.54, 389 n.68 (discussing evolution of the history of stolen-goods warrants from general to specific and concluding that they were probably specific in Massachusetts by 1761).

¹¹¹ *See* Money v. Leach, (1765) 97 Eng. Rep. 1075 (K.B.); Entick v. Carrington, (1765) 19 Howell's St. Tr. 1029 (K.B.); Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.); Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.).

¹¹² *See* CUDDIHY, *supra* note 5, at 538-40, 847-50.

¹¹³ *See, e.g.,* Davies, *supra* note 20, at 629-40; David A. Sklansky, *The Fourth Amendment and the Common Law*, 100 COLUM. L. REV. 1739 (2000). My reading of history leads me to the conclusion that probable cause was the accepted standard. *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); HALE, *supra* note 22, at 91-92 (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); JAMES F. STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 191 (1883) (referring to the level of suspicion as "reasonable grounds" that the person has committed a felony); *see also* Samuel v. Payne, (1780) 99 Eng. Rep. 230 (K.B.) (recognizing as defense to false imprisonment

justification for a search or seizure was well known in the framing era: Thatcher, Otis, and Adams advocated such a standard. As noted, Otis contrasted “wanton” exercises of power under the writs of assistance where “[b]are suspicion without oath [was] sufficient.” 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,”¹¹⁴ “probable suspicion,”¹¹⁵ or “probable ground.”¹¹⁶ Contemporary variations of that wording were frequent.¹¹⁷ James Madison’s sole innovation in drafting the Fourth Amendment was to explicitly adopt probable cause as a required basis for a warrant to issue.¹¹⁸ He did not write those words in a vacuum. That standard was repeatedly referenced as a needed criterion. Merely because the meaning of probable cause was not fixed does not undermine its importance. Indeed, its meaning remains unfixed to this day.¹¹⁹

claim, stemming from constable’s arrest of plaintiff, fact that arrest was based on allegations that plaintiff had stolen goods). 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.” Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 J. CONST. L. 1, 4-5 (2007). Such claims, however, do not undermine the existence of the standard.

¹¹⁴ Petition of Lechmere, Adams’ Minutes of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 36, at 125-26.

¹¹⁵ 2 THE WORKS OF JOHN ADAMS, *supra* note 12, app. A at 525 (1850).

¹¹⁶ *Id.*

¹¹⁷ *E.g.*, Money v. Leach, (1765) 97 Eng. Rep. 1075 (K.B.) (attorneys for the defendant argued 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); 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 161 (1810) (asserting that an arrest must be based on “some probable ground”); HALE, *supra* note 22, at 91-92 (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); *see also* CUDDIHY, *supra* note 5, 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).

¹¹⁸ Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1047 (2011).

¹¹⁹ *See* CLANCY, *supra* note 49, § 11.3.2.1.1. (discussing Supreme Court’s treatment of the meaning of probable cause); 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.”).

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.¹²⁰ The Court's only acknowledged exception in those early cases was for searches incident to arrest, which had a strong historical pedigree.¹²¹ 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.¹²² 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.¹²³

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.¹²⁴ Some cases engage in a contemporary balancing of individual and governmental interests,¹²⁵ adopt the

¹²⁰ See *Taylor v. United States*, 286 U.S. 1, 6 (1932) (Failure to obtain warrant before searching garage, when there was "abundant opportunity" to do so, necessitated suppression of evidence.); *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."); *Amos v. United States*, 255 U.S. 313 (1921) (cannot search house without warrant); *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."); *In re Jackson*, 96 U.S. 727 (1878) (asserting that warrant based on probable cause necessary to search letter in mail).

¹²¹ See CLANCY, *supra* note 49, § 8.1.1.

¹²² See, e.g., *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *California v. Acevedo*, 500 U.S. 565, 580 (1991); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967).

¹²³ E.g., *United States v. Banks*, 540 U.S. 31 (2003) (rejecting lower court's categorical approach in favor of "totality of circumstances" principle" (this quote does not appear in the case) to measure reasonableness); *United States v. Knights*, 534 U.S. 112, 118 (2001) ("[G]eneral" approach to measuring reasonableness examines totality of circumstances.); *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.").

¹²⁴ See generally CLANCY, *supra* note 49, 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 (2004) (same).

¹²⁵ E.g., *Samson v. California*, 547 U.S. 843 (2006).

common law as of 1791 as dispositive,¹²⁶ or mandate some level of individualized suspicion.¹²⁷ 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.¹²⁸

The warrant and individualized suspicion models—both clearly evident in Otis's argument—limit not only the circumstances under which the government may initiate actions but also the scope and details of the search or seizure. When individualized suspicion or a warrant is absent, the Court at one time examined the procedures utilized in selecting the target of the search or seizure, and in executing the search or seizure as one of the elements of the balancing test to determine whether the intrusion is permissible.¹²⁹ Although the Court originally demanded tight reigns on discretion by officials executing suspicionless searches or seizures, executing officials in other cases have been permitted wide discretion.¹³⁰ Viewing the cases as a whole, the significance of this factor—and the criteria by which to measure the propriety of intrusions—has disappeared in more recent case law.

In my view, consistent with Otis's arguments, it should be shown as a precondition for abandoning a preferred model of reasonableness—such as a warrant or a showing of individualized suspicion—that utilizing such a model would not protect a vital

¹²⁶ *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295 (1999).

¹²⁷ *E.g.*, *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

¹²⁸ CLANCY, *supra* note 49, at 468.

¹²⁹ *Id.* § 11.3.4.4.

¹³⁰ *E.g.*, *Samson*, 547 U.S. 843.

governmental interest.¹³¹ This conception of necessity is reflected in the Court's initial departures from the individualized suspicion model; a similarly strong conception of exigency traditionally permeated the question whether the police could search without a warrant.¹³² However, any requirement for *any* showing of need to use the means chosen as a precondition for a suspicionless search or seizure has been worn away by more recent decisions.¹³³

¹³¹ CLANCY, *supra* note 49, § 11.5; *see also* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 458-59 (1990) (Brennan, J., dissenting) ("Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the 'minimally intrusive' seizures involved in this case."); O'Connor v. Ortega, 480 U.S. 709, 744-46 (1987) (Blackmun, J., dissenting) (Before warrant and probable cause standards are dispensed with, it must be established that no alternative is available.); United States v. Martinez-Fuerte, 428 U.S. 543, 575-76 (1976) (Brennan, J., dissenting) ("There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied."). *Cf.* Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion) (The concept that constitutional provisions against arbitrary governmental actions are "inoperative when they become inconvenient or when expediency dictates otherwise . . . if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."); United States v. Di Re, 332 U.S. 581, 595 (1948) ("[T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.").

¹³² *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 299 (1967) (No warrant required to enter house when police in hot pursuit of fleeing felon, with the Court noting: "Speed here was essential.").

¹³³ *E.g.*, Vernonia School District v. Acton, 515 U.S. 646, 663-64 (1995) (In discussing the "efficacy of this means" of addressing drug use by student athletes, the Court rejected the least intrusive means analysis and a suspicion-based testing scheme.); Sitz, 496 U.S. 444; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674-75 (1989) (No showing that the suspicionless urinalysis testing of certain customs service employees was needed to effectuate the governmental interest; the Court maintained that, where "the possible harm against which the Government seeks to guard is substantial," the government interest in preventing its occurrence alone furnishes "ample justification for reasonable searches" designed to further that goal.). The *Von Raab* majority illustrated its position by reference to the practice of searching all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, which was in response to "an observable national and international hijacking crisis." *Von Raab*, 489 U.S. at 676. The *Von Raab* majority believed that "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness," so long as the procedures utilized in executing the search were also reasonable. *Id.* It posited: "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from

Nothing remains of a requirement of a showing of ends and means. Indeed, many contemporary cases involve the simple balancing of the government's interests against the individual's, with not even a nod toward an additional requirement of a showing of a relationship with ends and means.¹³⁴

IV.

The use of the writs of assistance for customs searches and seizures "caused profound resentment" in the colonies,¹³⁵ and their use is considered to be "the first in the chain of events which led directly and irresistibly to revolution and independence."¹³⁶ After the Superior Court ruled in favor of the proponents of the writs in 1761, a series of steps were taken by opponents. The Massachusetts House of Representatives 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.¹³⁷ The bill was vetoed by the governor, despite his recognition that the bill was very popular and that the veto would cause a clamor.¹³⁸ Public reaction in Massachusetts and in other colonies against the writs was widespread and included rescuing

spreading to a particular context." *Id.* Thus, the validity of the searches was not impugned for a particular airport or airline, even though there was no demonstrated danger at the airport or for the airline. Nor did the validity of the screening program depend upon whether significant numbers of offenders were discovered. The Court opined that, when deterrence was the goal, a low incidence of the conduct sought to be prevented was a "hallmark of success." *Id.* at 677.

¹³⁴ *E.g.*, *Samson*, 547 U.S. at 846 (upholding suspicionless search of parolee by balancing competing governmental and individual interests and rejecting argument that the California law that permitted such searches permitted "unbridled discretion" by simply noting that the statute had been construed to prevent "arbitrary, capricious or harassing' searches"); *United States v. Knights*, 534 U.S. 112 (2001) (simple balancing of probationer's and government's interests).

¹³⁵ *LANDYNSKI*, *supra* note 3, at 31; *see also Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (The abuses surrounding searches and seizures "more than any one single factor gave rise to American independence."); Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. & CRIMINOLOGY, 393, 397 (1963) (Based on the history of abuses, the "chief concern in the colonists' minds was probably with the issuance of general warrants.").

¹³⁶ *LASSON*, *supra* note 26, at 51 (citation omitted).

¹³⁷ *SMITH*, *supra* note 4, at 567-68; *see also QUINCY*, *supra* note 13, at 495-96 (providing text of the bill).

¹³⁸ *SMITH*, *supra* note 4, at 425-28.

seized ships,¹³⁹ issuing town meeting promulgations, pamphleteering, publishing accounts of Otis's arguments in the *Writs of Assistance Case*,¹⁴⁰ and creating other writings and propaganda decrying the oppressive nature of the writs.¹⁴¹

In 1767, Parliament passed the Townshend Act to clarify existing statutory authority to issue the writs in the colonies.¹⁴² That Act, which authorized general writs of assistance, was ineffective, with most courts in the American colonies continuing to refuse to issue the writs.¹⁴³ Some colonial courts instead issued special writs.¹⁴⁴ 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.¹⁴⁵ Notably, Massachusetts continued to issue general writs of assistance.¹⁴⁶ This is to say that Massachusetts remained the main battleground in the colonies regarding British search and seizure practices,¹⁴⁷ although the Townsend Act kept the issue alive in other colonies for most of the period leading up to the Revolution.

¹³⁹ See, e.g., Sewall v. Hancock, Editorial Note, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 36, at 179-80.

¹⁴⁰ See, e.g., CUDDIHY, *supra* note 5, at 396, 544-45.

¹⁴¹ See generally QUINCY, *supra* note 13, at 436-38, 444-49, 458-59, 463, 488-94; SMITH, *supra* note 4, at 466-501, 562-66. 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. LASSON, *supra* note 26, at 68; QUINCY, *supra* note 13, at 416 n.2, 434 n.20; TAYLOR, *supra* note 3, at 38.

¹⁴² SMITH, *supra* note 4, at 438-60 (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 13, at 449-50.

¹⁴³ See generally QUINCY, *supra* note 13, at 500-11; O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 40-75 (Richard B. Morris ed., 1939) (summarizing colonial courts' reaction to petitions for writs of assistance between 1761 and 1776).

¹⁴⁴ QUINCY, *supra* note 13, at 510-11, 534-35; SMITH, *supra* note 4, at 2, 460, 469-70.

¹⁴⁵ SMITH, *supra* note 4, at 2-3, 461-62, 520-23.

¹⁴⁶ See generally QUINCY, *supra* note 13, at 401-35.

¹⁴⁷ Cf. CUDDIHY, *supra* note 5, at 327 ("Colonial Massachusetts, not Great Britain, formulated most of the ideas that formed the specific warrant clause of the Fourth Amendment.").

Inspired by Otis, Adams, throughout his life, repeatedly referenced the importance of Otis's arguments.¹⁴⁸ Adams later recounted that Otis's oration was so moving that then and there the American Revolution was born.¹⁴⁹ Notably, Adams distinguished between the war and the Revolution.¹⁵⁰ 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."¹⁵¹ In 1779, John Adams drafted Article 14 of the Massachusetts Declaration of Rights, which became the model for the Fourth Amendment.¹⁵²

¹⁴⁸ See Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979 (2011).

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 officials in America, to apply to the supreme courts of justice for writs of assistance to enable them to carry into a more rigorous execution of 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 Massachusetts Bay the question, whether the 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 the danger they were in, as made a deep impression upon the public, which never wore out.

Letter from John Adams to Mr. Calkoen (Oct. 4, 1780), *in* 7 THE WORKS OF JOHN ADAMS, *supra* note 12, at 266-67 (1852).

¹⁴⁹ LASSON, *supra* note 26, at 58-59 (citing Letter from John Adams to William Tudor (Mar. 28, 1817), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 12, 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).

¹⁵⁰ Letter from John Adams to H. Niles (Feb. 13, 1818), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 12, at 282 (1856).

¹⁵¹ *Id.* at 282-83; *see also* Letter from John Adams to Thomas Jefferson (Aug. 24, 1815), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 12, at 172 (1856) ("The revolution was in the minds of the people, and this was affected from 1760 to 1775 . . . before a drop of blood was shed at Lexington."); letter from John Adams to Dr. Morse (Nov. 29, 1815), *in id.* at 183-84 (stating that the "revolution in the principles, views, opinions, and feelings of the American people" began with Otis's argument); letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS, *supra* note 12, at 247 (1856) (stating that Otis's argument "breathed into this nation the breath of life").

¹⁵² *Cf.* Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (Because the Fourth Amendment was based on the Massachusetts model,

V.

Perhaps, in the end, the choices the Court must make come down to two: Is the Amendment designed to regulate law enforcement practices or is it designed to protect individuals from overreaching governmental intrusions? The first impulse is reflected in *California v. Hodari D.*,¹⁵³ where the Court sought to establish the point at which a seizure of a person occurred. The Court did not construe the word literally but chose instead the common law definition of an arrest to measure when a seizure has occurred; that definition requires physical touching or submission. Explaining its reasoning, the *Hodari D.* majority candidly stated: “We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.” Justifying its position, the *Hodari D.* majority added:

Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost

“[t]his is clear proof that Congress meant to give wide, and not limited, scope to [the] protection against police intrusion.”). Many of the state governments at the time of the American Revolution adopted legal protections against unreasonable searches and seizures. Those protections, embodied in the constitutions of the various states after declaring their independence, typically addressed only abuses associated with general warrants. The Massachusetts Constitution, drafted by John Adams in 1779 and adopted by the Commonwealth in 1780, offered a much different model. The constitution Adams created was preceded by a “Declaration of Rights,” including a search and seizure provision 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.

LASSON, *supra* note 26, at 82 n.15. The sole change made to Adams’s draft was to substitute the word “subject” for “man.” 8 PAPERS OF JOHN ADAMS: MARCH 1779 – 1780, 263 n.24 (Gregg L. Lint, Robert J. Taylor, Richard Alan Ryerson, Celeste Walker & Joanna M. Revelas eds., 1989).

¹⁵³ 499 U.S. 621 (1991).

invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command “Stop!” expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

The result of that decision has been to expand the zone of unregulated police activity, including coercive, deceptive, and intimidating activity directed at individuals.¹⁵⁴

The second view is illustrated by *Boyd v. United States*.¹⁵⁵ In discussing why it construed the concept of a search and seizure broadly, that majority opined:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet . . . it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* [“withstand beginnings”].¹⁵⁶

The court in the *Writs* case was faced with a similar decision. It chose the statist approach. That choice stood in stark contrast to Otis’s argument in favor of individual security. The tension between the two approaches will always remain. Although Otis

¹⁵⁴ See generally CLANCY, *supra* note 49, § 5.1.4.2.1.

¹⁵⁵ 116 U.S. 616 (1886).

¹⁵⁶ *Id.* at 635. Similar cautions have been made throughout history. See FATHER OF CANDOR, *supra* note 93, at 51 (“Every thing of this sort is practiced with some tenderness at first. Tyranny grows by degrees.”).

was certainly not the only source for search and seizure principles, he was the first American lawyer to offer a framework, which was a vision offering broad protection of the individual. That vision should continue to inspire and teach us today.

The modern era is not freed from making important decisions about the content of the Fourth Amendment by simply examining the past and seeking exact answers. Nor are we freed from the past by assertions that the Amendment's terms, specifically its concept of reasonableness, had no meaning to the Framers. Instead, we should be informed by the Framers' understanding that search and seizure principles were evolving and complex, as they are now. Yet, as illustrated by Otis's argument, in that era there was a quest to identify objective criteria outside the control of the government to serve as the measure of the propriety of a search or seizure to insure that each person would be "secure"; that methodology should inform us today as to how to measure reasonableness.

Sometimes there is a broader recognition that the Amendment was designed by the Framers to protect individuals from unreasonable governmental intrusion.¹⁵⁷ 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.¹⁵⁸ In other words, according to that

¹⁵⁷ 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 the 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); *Boyd*, 116 U.S. 616 (1886) (Asserting that the Fourth Amendment should be interpreted liberally in favor of the security of the person, the Court stated: "It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon.").

¹⁵⁸ See JOHN H. 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

view, the chief interpretative tool is to be consistent with the Framers' values but not mired in the details of the search and seizure practices of 1791. The *lessons* of history are not inconsistent with the belief that the Constitution is a living document. Historical analysis is arguably important primarily to identify the values of the Framers, which should be used to inform the Court's adaptation of the Fourth Amendment to modern conditions.

Otis's argument offers us continued guidance as to the identification of values, that is, what is protected and that search and seizure principles should be guided by the rule of law and not of men. What was protected was a fundamental, indefensible right.¹⁵⁹ Otis offered criteria for proper searches and seizures to implement the rule of law: establish objective criteria outside control of the government to measure propriety of search and seizure. Significant aspects of Otis' arguments became elements of Article 14 and Fourth Amendment structure and jurisprudence. They include: 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, should have continued importance in search and seizure jurisprudence of this era. Underlying all of those arguments and principles was a quest for objective criteria outside the control of the executive authority to measure the legitimacy of a search or seizure.

contemporary context . . . That the complete inference will not be 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 (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.).

¹⁵⁹ See QUINCY, *supra* note 13, at 483-85 (1865).

The Fourth Amendment is an instrument, that is, a gatekeeper, that keeps out the government. The gatekeeper does not ask why one desires to exclude the government; it simply follows orders. As a gatekeeper, the Amendment permits other rights to flourish. But those rights can only flourish if the gatekeeper performs its function—and that function should be informed by the spirit of James Otis.

