

Against Writs of Assistance

James Otis

February 24, 1761

The "Writs of Assistance" were general warrants allowing officials to search for smuggled material within any suspected premises. James Otis was Advocate-General when the legality of these warrants was attacked, but promptly resigned his office when called upon to defend that legality. The Boston merchants then retained him as their counsel to oppose the writs before the Superior Court of Massachusetts. Otis refused the fee they offered, saying that in such a cause he despised all fees. In a five-hour speech, which was witnessed by a young John Adams, Otis argued that the writs were unconstitutional. He based his case on the rights guaranteed in English common law. The ultimate response to this abuse was the Fourth Amendment to the Constitution for the United States.

MAY it please your Honors: I was desired by one of the court to look into the books, and consider the question now before them concerning Writs of Assistance. I have accordingly considered it, and now appear not only in obedience to your order, but likewise in behalf of the inhabitants of this town, who have presented another petition, and out of regard to the liberties of the subject. And I take this opportunity to declare that whether under a fee or not (for in such a cause as this I despise a fee) I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is.

It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book. I must therefore beg your Honors' patience and attention to the whole range of an argument that may perhaps appear uncommon in many things, as well as to points of learning that are more remote and unusual, that the whole tendency of my design may the more easily be perceived, the conclusions better descend, and the force of them be better felt. I shall not think much of my pains in this cause, as I engaged in it from principle.

I was solicited to argue this cause as Advocate-General; and, because I would not, I have been charged with desertion from my office. To this charge I can give a very sufficient answer. I renounced that office and I argue this cause from the same principle; and I argue it with the greater pleasure, as it is in favor of British liberty, at a time when we hear the greatest monarch upon earth declaring from his throne that he glories in the name of Briton and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown; and as it is in opposition to a kind of power, the exercise of which in former periods of history cost one king of England his head and another his throne. I have taken more pains in this cause than I ever will take again, although my engaging in this and another popular cause has raised much resentment. But I think I can sincerely declare that I cheerfully submit myself to every odious name for conscience' sake; and from my soul I despise all those whose guilt, malice, or folly has made them my foes. Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy of a gentleman or a man are to sacrifice estate, ease, health, and applause, and even life, to the sacred calls of his country.

These manly sentiments, in private life, make good citizens; in public life, the patriot and the hero. I do not say that, when brought to the test, I shall be invincible. I pray God I may never be brought to the melancholy trial; but, if ever I should, it will then be known how far I can reduce to practice principles which I know to be founded in truth. In the meantime I will proceed to the subject of this writ.

Your Honors will find in the old books concerning the office of a justice of the peace precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses, specially named, in which the complainant has before sworn that he suspects his goods are concealed; and will find it adjudged that special warrants only are legal. In the same manner I rely on it, that the writ prayed for in this petition, being general, is illegal. It is a power that places the liberty of every man in the hands of every petty officer. I say I admit that special Writs of Assistance, to search special places, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself, before I proceed to other Acts of Parliament.

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, until the trump of the Archangel shall excite different emotions in his soul. In the third place, a person with this writ, in the daytime, may enter all houses, shops, etc., at will, and command all to assist him. Fourthly, by this writ not only deputies, etc., but even their menial servants, are allowed to lord it over us. What is this but to have the curse of Canaan with a witness on us: to be the servants of servants, the most despicable of God's creation?

Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and, when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day Acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, "Yes." "Well then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods" — and went on to search the house from the garret to the cellar; and then served the constable in the same manner!

But to show another absurdity in this writ: if it should be established, I insist upon it every person, by the 14th Charles Second, has this power as well as the custom-house officers. The words are: "It shall be lawful for any person or persons authorized," etc. What a scene does this open! Every man prompted by revenge, ill-humor, or wantonness to inspect the inside of his neighbor's house, may get a Writ of Assistance. Others will ask it from self-defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.

[The remainder of the speech exists only in the following summary by John Adams:]

A dissertation on the rights of man in a state of nature. He asserted that every man, merely natural, was an independent sovereign, subject to no law but the law written on his heart and revealed to him by his Maker, in the constitution of his nature and the inspiration of his understanding and his conscience. His right to his life, his liberty, no created being could

rightfully contest. Nor was his right to his property less incontestable. The club that he had snapped from a tree, for a staff or for defense, was his own. His bow and arrow were his own; if by a pebble he had killed a partridge or a squirrel, it was his own. No creature, man or beast, had a right to take it from him. If he had taken an eel or a smelt or a sculpin, it was his property. In short, he sported upon this topic with so much wit and humor, and at the same time with so much indisputable truth and reason, that he was not less entertaining than instructive.

He asserted that these rights were inherent and inalienable. That they never could be surrendered or alienated but by idiots or madmen and all the acts of idiots and lunatics were void and not obligatory, by all the laws of God and man. Nor were the poor Negroes forgotten. Not a Quaker in Philadelphia or Mr. Jefferson in Virginia ever asserted the rights of Negroes in stronger terms. Young as I was and ignorant as I was, I shuddered at the doctrine he taught; and I have all my life shuddered, and still shudder, at the consequences that may be drawn from such premises. Shall we say that the rights of masters and servants clash and can be decided only by force? I adore the idea of gradual abolitions! but who shall decide how fast or how slowly these abolitions shall be made? From individual independence he proceeded to association. If it was inconsistent with the dignity of human nature to say that men were gregarious animals, like wild geese, it surely could offend no delicacy to say they were social animals by nature, that there were natural sympathies, and, above all, the sweet attraction of the sexes, which must soon draw them together in little groups, and by degrees in larger congregations, for mutual assistance and defense. And this must have happened before any formal covenant, by express words or signs, was concluded. When general councils and deliberations commenced, the objects could be no other than the mutual defense and security of every individual for his life, his liberty, and his property. To suppose them to have surrendered these in any other way than by equal rules and general consent was to suppose them idiots or madmen whose acts were never binding. To suppose them surprised by fraud or compelled by force into any other compact, such fraud and such force could confer no obligation. Every man had a right to trample it underfoot whenever he pleased. In short, he asserted these rights to be derived only from nature and the Author of nature; that they were inherent, inalienable, and indefeasible by any laws, pacts, contracts, covenants, or stipulations which man could devise. These principles and these rights were wrought into the English constitution as fundamental laws. And under this head he went back to the old Saxon laws and to Magna Carta and the fifty confirmations of it in Parliament and the executions ordained against the violators of it and the national vengeance which had been taken on them from time to time, down to the Jameses and Charleses, and to the position of rights and the Bill of Rights and the revolution.

He asserted that the security of these rights to life, liberty, and property had been the object of all those struggles against arbitrary power, temporal and spiritual, civil and political, military and ecclesiastical, in every age. He asserted that our ancestors, as British subjects, and we their descendants, as British subjects, were entitled to all those rights by the British constitution as well as by the law of nature and our provincial character as much as any inhabitant of London or Bristol or any part of England, and were not to be cheated out of them by any phantom of "virtual representation" or any other fiction of law or politics or any monkish trick of deceit and hypocrisy.

He then examined the Acts of Trade, one by one, and demonstrated that, if they were

considered as revenue laws, they destroyed all our security of property, liberty, and life, every right of nature and the English constitution and the charter of the province. Here he considered the distinction between "external and internal taxes," at that time a popular and commonplace distinction. But he asserted that there was no such distinction in theory or upon any principle but "necessity." The necessity that the commerce of the Empire should be under one direction was obvious. The Americans had been so sensible of this necessity that they had connived at the distinction between external and internal taxes, and had submitted to the Acts of Trade as regulations of commerce but never as taxations or revenue laws. Nor had the British government till now ever dared to attempt to enforce them as taxations or revenue laws.

The Navigation Act he allowed to be binding upon us because we had consented to it by our own legislature. Here he gave a history of the Navigation Act of the first of Charles II, a plagiarism from Oliver Cromwell. In 1675, after repeated letters and orders from the King, Governor Leverett very candidly informs His Majesty that the law had not been executed because it was thought unconstitutional, Parliament not having authority over us.

[Text Version](#) | [Bill of Rights Contents](#)