The Framers' Intent: John Adams, his Era, and the Fourth Amendment

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

Most of the language and structure of the Fourth Amendment was primarily the work of one man, John Adams. Adams was an important person for many other reasons, including as the second president of the United States. His life is the subject of many biographies; his letters, works, and extensive writings are a rich source of material. Less studied and understood, however, are his knowledge of, and views on, search and seizure and his role in formulating the principles to regulate those governmental actions. Upon examination, Adams stands out in that era as having profound opportunities to examine search and seizure practices and as having the most important role in formulating the language and structure of the Fourth Amendment. If the intent of the Framers is a fundamental consideration in construing the Constitution, as the Court has repeatedly told us it is, then John Adams’ knowledge and views should be considered an important source for understanding the Fourth Amendment.
More fundamentally, Adams’ appreciation of search and seizure principles reflects a broader mosaic that demonstrates that the Fourth Amendment was the product of a rich jurisprudence on search and seizure. That jurisprudence offered a structured series of principles to regulate the search and seizure activities of that era and the Amendment was not merely a reaction to general warrants. Further, although the framing era sources did not always agree on the details of the criteria for regulating searches and seizures, they were united in seeking objective criteria to measure the propriety of governmental actions. That quest was firmly embedded into the language and structure of the Fourth Amendment.

I.

Introduction

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

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1. 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.”).
3. E.g., NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (1937) [Hereinafter LASSON]; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL
In 1761, James Otis first challenged British search and seizure practices and offered an alternative vision of proper search and seizure principles in the *Writs of Assistance Case.*\(^4\) Shortly thereafter, a series of English cases condemned general warrants.\(^5\) After declaring independence in 1776, numerous states drafted search and seizure protections in their own state constitutions.\(^6\) Notably, in 1779, John Adams drafted Article 14 of the Massachusetts Declaration of Rights.\(^7\) In 1787, our present Constitution, without a Bill of Rights, was drafted. The absence of a Bill of Rights became a significant source of concern during the ratification process.\(^8\) Several states requested that the new Constitution be amended to provide protection against unjustified searches and seizures.\(^9\) In response, the first Congress sent to the states for ratification what is now the Fourth Amendment,\(^10\) which became part of the Constitution in 1791.

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

Section III details the many sources that influenced John Adams’ understanding of search and seizure principles. Certainly, some of those influences are well documented and

\(^4\) See ___ infra.
\(^5\) See ___ infra.
\(^6\) See ___ infra.
\(^7\) In Adams’ draft, the search and seizure provision was numbered Article 15 but became Article 14 when adopted. See 4 *The Works of John Adams* 226 (Charles F. Adams ed., 1856) [Hereinafter *WORKS OF JOHN ADAMS*]. For convenience, it is referred to throughout this article as Article 14.
\(^8\) See ___ infra.
\(^9\) See ___ infra.
\(^10\) The Fourth Amendment was originally numbered the sixth amendment when sent to the states for ratification. Two of the proposed amendments were not ratified, resulting in it being renumbered the Fourth. For convenience, it
understood—indeed, some are almost mythical. The *Writs of Assistance Case* in 1761 is familiar history to any student of the Fourth Amendment: Adams, as a young lawyer, sat in the courtroom as James Otis argued against arbitrary search and seizure practices and proposed an alternative model to measure the propriety of such intrusions. Adams took notes of the arguments and, a short time later, wrote an extended “abstract” of the case. Inspired by Otis, Adams throughout his life repeatedly referenced the importance of Otis’ arguments. Almost 20 years after the *Writs* case, Adams drafted Article 14 of the Massachusetts Declaration of Rights, which embodied many of Otis’ arguments, but also contained several of Adams’ own innovations. If we look at Adams’ summaries of—and comments on—Otis’ argument in the *Writs* case as evidence of Adams’ knowledge and intent, the primary concern is not whether the summaries are historically accurate. Rather, an examination of Article 14 demonstrates that Adams embraced the arguments he attributed to Otis. Hence, Otis’ argument sheds light on Adams’ beliefs as to core search and seizure questions.

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

is referred to throughout this article as the Fourth Amendment, even in the drafting and pre-ratification stages.
Adams lived in Massachusetts, which was the center stage for much of the controversial British search and seizure practices. From that broad range of experiences, Adams had a depth of knowledge and experience concerning search and seizure principles unmatched by his contemporaries.

Section IV outlines the evolution of American search and seizure provisions. Throughout the period of 1761-91, there were sporadic discussions of the need for protections against unjustified searches and seizures. Few persons focused on the details; typically, the discussion was on the abstract level of a need to regulate searches and seizures or, even more narrowly, on a need to ban general warrants. During the period of 1776-80, two models of search and seizure regulation emerged: the predominant model that banned only general warrants and the distinctive model developed by Adams in Article 14 of the Massachusetts Declaration of Rights, which offered a broader protection against all unreasonable searches and seizures, including general warrants. The new federal Constitution was drafted in 1787 without a Bill of Rights, prompting another period of discussion on search and seizure principles, ending with the adoption of the Fourth Amendment in 1791.

During the crucial period of 1787-89, those two models remained the options to choose from in drafting a search and seizure provision. The states that urged adoption of a search and seizure amendment all advocated the Adams model and Congress ultimately utilized that model. Hence, his draftsmanship of Article 14 made Adams an important figure in search and seizure jurisprudence. What is remarkable, however, is how little others contributed substantively to the final product. An obvious contributor was James Madison, who created the initial draft of the Fourth Amendment. But much of that draft can be traced to Article 14 and, in Congress,
Madison’s draft was modified to even more closely resemble Article 14. A few other men influenced the wording of the Amendment but they appeared to be following Adams’ model. The choice of the Adams model appears to have been a conscious one, which is a significant point in light of claims that the Amendment was merely designed to prohibit general warrants. Consequently, it is fair to say that the single most important person responsible for the language of the Amendment is Adams. His views and understanding of the complexity of search and seizure principles are therefore important. Although the depth of Adams’ learning was unmatched, he provides a window to the wider intellectual developments of the era regarding search and seizure principles. That observation point demonstrates that there was a shared goal of judges, commentators, treatise writers, and others to identify what objects were worthy of protection and articulate the objective criteria that would justify a governmental intrusion.

II.

The Structure of the Fourth Amendment and its Disputed Historical Meaning

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment contains two grammatically independent clauses joined by the conjunction “and.” The first clause is called the Reasonableness Clause and merely specifies, without elaboration, that all searches and seizures must be reasonable. The second clause, commonly called the Warrant Clause, requires that warrants be under oath or affirmation, that the places to be searched and the persons and things to be seized must be particularly described, and that the intrusion be supported by probable cause.
Historical analysis remains a fundamentally important tool to interpret the words of the Fourth Amendment. Despite its crucial role, there is no consensus regarding the details or meaning of the historical record. Broadly speaking, there are two fundamentally opposed views about the history and original purpose of the Fourth Amendment and the meaning of the reasonableness command. The first is the conventional view, whose main proponents include Lasson, Landynski, and Cuddihy; they have examined the broad sweeps of history and have found much that is complicated and contradictory. Nonetheless, they believe that some overall conclusions can be ascertained. Hence, as Landynski stated:

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

Following this view, the Court sometimes asserts that the analysis of reasonableness “begins . . . with the basic rule that ‘searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment–subject only to a

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11 E.g., Atwater v. City of Lago Vista, 532 U.S. 318, 346 (2001) (asserting that if a practice was established when the Fourth Amendment was adopted, a person challenging that practice as now constitutionally impermissible would bear a “‘heavy burden’ of justifying a departure from the historical understanding”).
13 JACOB B. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966) [Hereinafter LANDYNSKI].
15 LANDYNSKI, supra note __, at 43. See also LASSON, supra note __, at 103 (the phrase “unreasonable searches and seizures was “intended . . . to cover something other than the form of the warrant”); CUDDIHY, supra note __, at 739-82 (drawing multiple conclusions about the scope and meaning of the Amendment from a comprehensive treatment of history and disparaging the Amar and Davies paradigms).
few specifically established and well-delineated exceptions.”

A second, opposing view’s intellectual source is Telford Taylor, in his 1969 book, Two Studies of Constitutional Interpretation. Taylor maintained that the Amendment was designed primarily as a limitation on the issuance of warrants and that the Framers took for granted the existence of warrantless searches because experience had given them no cause to be concerned about them. Taylor stated:

While the colonists did not object to warrantless searches, the reason for the absence of such objection was that such searches, except perhaps in the context of lawful arrests, simply did not exist. The power to search required authorization, and for this reason, the English created writs of assistance, which authorized searches that otherwise could not have taken place . . . . [N]o evidence has been found to suggest that searches, except in the context of an arrest, occurred in eighteenth century England or America without the authorization of some kind of warrant.

Taylor added that the drafting process of the Fourth Amendment “reinforces the conclusion that it was the warrant which was the initial and primary object of the amendment.” He opined that neither the legislative history of the Amendment nor any other history “sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies.” Taylor concluded that the Amendment was designed to authorize warrants and was not a safeguard against oppressive searches. Therefore, in Taylor's

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18 TAYLOR supra note __, at 39.
19 Id. at 43.
20 Id.
view, the Amendment was not designed to make most searches regulated by warrants.21

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

Amar’s principal article is in the *Harvard Law Journal*, published in 1994.22 It has been cited by the Supreme Court on a few occasions and by scholars and lower courts.23 Numerous scholars have felt it necessary to reply to him.24 Amar dedicated the article to Telford Taylor.25 Yet, Amar differs from Taylor in that Amar did not draw the conclusion that the central purpose of the Amendment was to ban general warrants; instead, Amar asserted that all warrants “were friends of the searcher, not the searched.”26 Amar sees history simply and clearly and believes that general “reasonableness” is the proper measure of a search or seizure, not any warrant

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21 Id. at 46-47.
24 *See*, *e.g.*, Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994); Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). The historical summary contained in my treatise and my other writings is consistent with the conventional account but my conclusions do not fit within either of the two opposing camps. *See* THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* Ch. 2 (2008) [hereinafter CLANCY, *THE FOURTH AMENDMENT*]. Neither do the views of some other contemporary scholars *E.g.*, George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005) (asserting that four principles emerge from the historical record: 1) the Framers feared that governmental actors would abuse their offices; 2) “the Framers believed that searches (other than routine customs inspections) required individualized cause or suspicion”; 3) searches of structures required a warrant; and 4) the Framers embraced some common law principles to regulate searches and seizures).
25 Amar, *First Principles*, supra note __, at 757 n.*.
requirement.  He maintains:  “We need to read the Amendment’s words and take them seriously:  they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.”  For Amar, Fourth Amendment reasonableness has no fixed meaning.

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

Davies is in broad agreement with Taylor’s conclusion that the purpose of the Amendment was solely to prohibit general warrants.  Davies, however, refuses to take the next step that Taylor took.  Instead, he maintains that his goal in the *Michigan* article is merely to show that the “original meaning” of the Fourth Amendment “does not fully endorse either the warrant-preference or generalized-reasonableness construction; in fact, it shows that neither is

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26 See id. at 774.
27 Id. at 758-59.
28 Id. at 759.
29 See id. at 804-11.
31 Davies, *Original Fourth Amendment*, supra note __, at 551 (“[T]he evidence indicates that the Framers understood ‘unreasonable searches and seizures’ simply as a pejorative label for the inherent illegality of any searches and seizures that might be made under general warrants.  In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment.”).  But see id. at 570 n.43 (asserting that the Framers believed that individualized suspicion was an inherent aspect of reasonableness).
really equivalent to the Framers’ understanding.” Davies leaves the reader in a void: he does not purport to know the original meaning of reasonableness beyond negating the warrant preference view and the competing view of Taylor. Taylor’s view, in contrast, has more dramatic implications regarding the regulation of governmental intrusions. According to Taylor, the two clauses are distinct. The first clause substantively requires only that searches and seizures be “reasonable.” The second clause addresses only those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or about what factors are to be examined to determine reasonableness.

The Supreme Court's collective opinion has for decades vacillated between the two competing views of the relationship of the clauses. The Court’s initial cases were notable for their premise that a warrant complying with the specifications of the Warrant Clause was required for all searches. The Court’s only acknowledged exception in those early cases was for searches incident to arrest, which had a strong historical pedigree. 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. At other times, the Court has rejected a “categorical warrant requirement” and has looked to the totality of the circumstances to measure the validity

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33 Davies, Original Fourth Amendment, supra note __, at 736.
34 See In re Jackson, 96 U.S. 727 (1878) (asserting that warrant based on probable cause necessary to search letter in mail); Weeks v. United States, 232 U.S. 383, 393 (1914) (“The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution.”); Amos v. United States, 255 U.S. 313 (1921) (cannot search house without warrant); Agnello v. United States, 269 U.S. 20, 29 (1925) (“While the question has never been directly decided by this court, it has always been assumed that one’s house cannot lawfully be searched without a search warrant[.]”); Taylor v. United States, 286 U.S. 1, 6 (1932) (failure to obtain warrant before searching garage, when there was “abundant opportunity” to do so, necessitated suppression of evidence).
of the government’s activities.\textsuperscript{37}

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.\textsuperscript{38} Some cases engage in a contemporary balancing of individual and governmental interests,\textsuperscript{39} adopt the common law as of 1791 as dispositive,\textsuperscript{40} or mandate some level of individualized suspicion.\textsuperscript{41} 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.\textsuperscript{42}

Looking specifically at the role of history in Supreme Court opinions over the course of time, it takes no great insight to say that its treatment has varied. Occasionally, historical


\textsuperscript{38} See generally CLANCY, THE FOURTH AMENDMENT, supra note __, 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).


\textsuperscript{40} E.g., Wyoming v. Houghton, 526 U.S. 295 (1999).

\textsuperscript{41} E.g., Indianapolis v. Edmond, 531 U.S. 32 (2000).

\textsuperscript{42} CLANCY, THE FOURTH AMENDMENT, supra note __, at 468.
analysis has been outright rejected as a basis to interpret the Amendment.\(^43\) The Court has sometimes asserted that law enforcement practices are not “frozen” by those in place at the time the Fourth Amendment was adopted.\(^44\) Hence, the Court has occasionally asserted that interpretation of the Amendment evolves to permit modern developments\(^45\) and that the Amendment must be interpreted in light of contemporary norms and conditions.\(^46\) Indeed, the Warren Court era was known for a nonhistorical treatment of Fourth Amendment issues.\(^47\)

On the other hand, the Supreme Court has often relied on the common law at the time of the framing in 1791 as an important guide. Exactly how that tool has been used, as with other interpretative techniques, varies with who wrote the opinion.\(^48\) Using the common law as the measure of what the Fourth Amendment requires is distinct from using the common law as the

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


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

\(^{46}\) E.g., Payton v. New York, 445 U.S. 573, 600 (1980) (stating that “contemporary customs and norms necessarily play” a “large role” in assessing reasonableness); Steagald v. United States, 451 U.S. 204, 217 (1981) (“Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we as a society, now regard as proper.”); Tennessee v. Garner, 471 U.S. 1, 12-15 (1985) (changing the common law rule that had permitted the police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry). \(\text{Cf.}\) Wyoming v. Houghton, 526 U.S. 295 (1999) (utilizing contemporary considerations in the balancing test to measure the reasonableness of a search or seizure as an alternative if historical analysis does not produce a dispositive answer). \(\text{But cf.}\) Richards v. Wisconsin, 520 U.S. 385, 392 n.4 (1997) (cautioning that “[i]t is always dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment,” given the Fourth Amendment’s purpose of preserving that degree of privacy that was afforded at the time it was adopted).

\(^{47}\) E.g., Terry v. Ohio, 392 U.S. 1 (1968).

measure of the Framers’ intent. As to the former, the common law rule as of 1791 defines Fourth Amendment terms, such as reasonableness, search, or seizure. As to the latter, the common law is consulted to ascertain the Framers’ intent, which is in turn used to justify reliance on some conception of what the Amendment requires. Hence, sometimes there is a broader recognition that the Amendment was designed by the Framers to protect individuals from unreasonable governmental intrusion. 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. In other words, according to that 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.

III.

John Adams and the Historical Context: 1761-1780

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. United States Dist. Court, 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). See also Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 353 (1974) (“The Bill of Rights in general and the Fourth Amendment in particular are profoundly anti-government documents.”); Morgan Cloud, The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory, 48 STAN. L. REV. 555, 626-27 (1996) (arguing that the values underlying the Amendment, to protect individual rights, must be reflected in its application to modern conditions, where scientific invention has made it possible for government agents to violate privacy rights without employing physical power).

See, e.g., JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-2 (1980) (“The Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context . . . . That the complete inference will not be 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
A. Historical Context

This section examines the historical events between 1761 and 1780 and John Adams’ role during that period. 1761 marked the beginning of the challenges to British search and seizure practices and 1780 is the year that Massachusetts ratified its Constitution, written by John Adams. That 20 year span is remarkable for the broad examination of and challenges to then existing practices, the articulation of alternative principles, and the adoption of state constitutional protections against unjustified intrusions. It is also the period of history most relied on by the Supreme Court when construing the Fourth Amendment.

The longer historical record is complex, involving hundreds of years of evolution in the regulation of searches and seizures, with many contradictory developments. Nonetheless, during the 1761-80 time frame, life was fairly simple, as were most search and seizure principles. There were no organized police forces, forms of criminal activity were straightforward, and investigations rudimentary at best. Only one type of warrantless seizure may have been common, that is, the arrest of a suspected felon. Such seizures were rarely made except in hot pursuit of the felon. “Those were simple times, and felons were ordinarily those who had done

forbidden actions.” The Framers intended that the “underlying values” be honored.

51 See generally CUDDIHY, supra note __ (comprehensive treatment of the complex history of search and seizure in England and its American colonies to adoption of the Fourth Amendment). Thus, for example, as Professor Sklansky has demonstrated, the common law—which was one important source of search and seizure rules—was not a “unified, systematic body of rules, constant across space and time.” David A. Sklansky, The Fourth Amendment and the Common Law, 100 COLUM. L. REV. 1739, 1795 (2000). Search and seizure rules “varied from colony to colony and from decade to decade.” Id. at 1795-96. Sklansky also observed that “in both England and America, theory and practice often diverged.” Id. That latter observation remains true to this day.

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


54 TAYLOR, supra note __, at 28 (citing 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 582-83 (2d ed.
violence or stolen property.” Due to the lack of warrantless searches and seizures and the fact that the only persons searched or seized without a warrant usually were suspected felons, those actions were not the cause of public outcry. This is not to say that there were no rules governing searches and seizures in that era. On the contrary, there was a vibrant common law tradition and influential treatise writers who were articulating rules to address the needs of the times.

The law relating to warrants was more complex. As Telford Taylor observed, scholars seeking the origin of search and seizure warrants have traveled into a “foggy land.” One form of practice included the common law search warrant, which “crept into the law by imperceptible practice,” and was a “hybrid criminal-civil process.” Such warrants were well established by the middle of the 16th century. 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. As will be discussed, a central claim of James Otis in the Writs case in

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55 TAYLOR, supra note __, at 28.


57 See ___ infra.

58 TAYLOR, supra note __, at 24.

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

60 TAYLOR, supra note __, at 24-25.

61 LASION, supra note __, at 17.

62 See M. H. SMITH, THE WRITS OF ASSISTANCE CASE 336-39 (1978) [Hereinafter SMITH]. 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).
1761 was that such warrants were “special,” which came to mean in that era that the victim of a theft had to state under oath before a justice of the peace the basis for his belief that his goods would be found in a specified place; if probable cause was established, “the justice would issue a warrant authorizing the victim to go with a constable to the specified place and, if the goods were found, to return [with] the goods and the suspected felon before the justice, for . . . disposition of the matter.” The validity of Otis’ claim as a matter of established English common law at that time is debatable but appears closer to the truth as to the then existing Massachusetts practice.

There also existed a common law arrest warrant for felons. An arrest warrant was a command to the sheriff of the county or the marshal of the court to apprehend a felon and bring the felon to court. This warrant was issued upon a showing similar to that necessary for a search warrant. Another form of practice evolved from the crown’s issuance of warrants and writs of assistance. The authority to do so was found neither in the common law nor in any statute; instead, it was a manifestation of “residual police power untrammeled by doctrine or

63 See __ infra.

65 CUDDIHY, supra note __, at 392. Compare 2 HALE, supra note __, 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”).
66 See CUDDIHY, supra note __, 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).
67 2 HALE, supra note __, at 105-09.
68 Id. at 105.
69 Id. at 111.
methodology and exercised at the royal discretion in the interest of good public order.”\(^{70}\) That form of practice was condemned in the 1760s in the English general warrant cases, which were influential with the leaders of the founding era and in subsequent Supreme Court case law.\(^{71}\)

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

\(^{70}\) SMITH, supra note __, at 21. See generally LASSON, supra note __, at 18-22 (tracing early history of search and seizure in England).

\(^{71}\) See __ infra.

\(^{72}\) LASSON, supra note __, at 23.

\(^{73}\) TAYLOR, supra note __, at 26. 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 . . . .

Quoted in SMITH, supra note __, at 43, 535-36.

\(^{74}\) LASSON, supra note __, at 54.
and were valid for the duration of the life of the sovereign.” 76 The man who did the seizing, known as the informer, would initiate the proceedings to condemn the goods. 77 The successful informer would receive a portion of the goods condemned, making the informer the “beneficiary of a mode of law enforcement that was commonly resorted to” at a time when no regular police organizations existed. 78 It was that form of practice that Otis opposed in the Writs case.

B. John Adams and the Writs of Assistance Case 79

Perhaps the single most significant influence on Adams’ views occurred when Adams was a young man, just beginning his legal career in Boston in 1761. Smuggling was a widespread practice in the American colonies and writs of assistance were a principal means of combating the practice, at least in Massachusetts. 80 In 1760, new writs of assistance were requested following the expiration of the previously-issued writs due to the death of the king.

75 SMITH, supra note __, at 29.

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

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

78 SMITH, supra note __, at 13.

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

80 LANDYNISKI, supra note __, at 30. See generally LASSON, supra note __, at 51-78. Authorities in Massachusetts were more successful in obtaining writs of assistance than in other colonies. See, e.g., SMITH, supra note __, at 96,
group of Boston merchants opposed the proposed writs, retaining James Otis to represent their cause. The key issue at the first hearing on the proposed writs, and the question upon which the case ultimately turned, was whether the Superior Court should continue to grant the writs in general and open-ended form or whether it should limit the writs to a single occasion based on particularized information given under oath.\textsuperscript{81} Otis’ argument has often been cited by the Supreme Court and many others as reflecting the Framers’ intent and as an exposition of proper search and seizure practices.\textsuperscript{82} Indeed, no authority preceding Otis had articulated so completely the framework for proper search and seizure practices that was ultimately embodied in the Fourth Amendment’s warrant clause.\textsuperscript{83}

Three men have given accounts of what occurred in that courtroom: Thomas Hutchinson (the chief justice of the court that heard the arguments); James Otis; and John Adams.\textsuperscript{84} Adams, in fact, gave several summaries at different times. The first was his contemporaneous notes; the second was an “abstract” written a short time after the argument; and the third significant summary was in a series of letters to William Tudor more than 50 years after the event. Except for Adams’ recollections in the Tudor letters, all of the accounts are broadly consistent with each other. In contrast, Adams’ account in the Tudor letters is generally discounted as an accurate

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recall of the details of the arguments.\textsuperscript{85}

Hutchinson’s summary of the \textit{Writs of Assistance Case} was succinct:

It was objected to the writs, that they were of the nature of general warrants; that, although formerly\textsuperscript{86} it was the practice to issue general warrants to search for stolen goods, yet, for many years, this practice had been altered, and special warrants only were issued by justices of the peace, to search in places set forth in the warrants; that it was equally reasonable to alter these writs, to which there would “be no objection, if the place where the search was to be made should be specifically mentioned, and information given upon oath. The form of a writ of assistance was, it is true, to be found in some registers, which was general, but it was affirmed, without proof\textsuperscript{87}, that the late practice in England was otherwise, and that such writs issued upon special information only.\textsuperscript{88}

Hutchinson recalled that he, as chief justice, sought information about the proper practice and that judgment was suspended pending receipt of that information. Upon learning that general writs were used in England, “it was judged sufficient to warrant the like practice in the province.”\textsuperscript{89}

Otis’ 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.\textsuperscript{90} In that article, Otis alluded to legalistic arguments, such as the lack of statutory authority for issuing the writs, but his 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. He wrote:

[\textit{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, \textit{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’ed, unless he will comply with his unreasonable and imprudent demands: Will anyone under such circumstance, ever again boast of british honor or british privilege?91

Otis also cited Walley v. Ware, a case where a magistrate had questioned Ware about the charge of breach of the Sabbath day acts or for profane swearing. In response, Ware, who was a customs official, demanded to search the magistrate’s home for uncustomed goods.92 Otis observed that Ware did not pretend to have any “suspicion of contraband goods as a reason for his conduct.”93

The article acknowledged that a person’s security in his home is sometimes “forfeited” but those instances were “in cases of the most urgent necessity and importance; and this necessity and importance is, and always ought to be determin’d by adequate and proper judges.”94 The writs procedure, Otis maintained, stood in sharp contrast, with each person subject to “petty tyrants.”95 After arguing that there was no necessity for the writs, Otis concluded by emphasizing the uncontrolled discretion of the customs officials: “can a community be safe 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?”96

Adams’ accounts of the Writs case were more detailed. Highlighted here are pertinent portions of the arguments of Jeremiah Gridley and Oxenbridge Thatcher followed by an

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91 Id. at 489 (formatting in original).
92 Id. at 476 n.29, 490.
93 Id. at 490.
94 Id.
95 Id.
extended examination of James Otis’ argument.\footnote{97} Jeremiah Gridley, the attorney general of the Massachusetts Bay Colony, defended the general writs of assistance, \textit{inter alia},\footnote{98} as necessary to enforce the customs laws.\footnote{99} As reported in Adams’ abstract, Gridley argued that the writs were justified, \textit{inter alia}, by

the necessity of the Case and the benefit of the Revenue . . . . [T]he Revenue [was] the sole support of Fleets & Armies, abroad, & Ministers at home[,] without which the Nation could neither be preserved from the Invasions of her foes, nor the Tumults of her own Subjects. Is not this I say infinitely more important, than the imprisonment of Thieves, or even Murderers? yet in these Cases ‘tis agreed Houses may be broke open. . . . So it is established, and the necessity of having public taxes effectually [sic] and speedily collected is of infinitely greater moment to the whole, than the Liberty of any Individual.\footnote{100}

Gridley conceded that the “common privileges of Englishmen” were taken away but asserted that

\footnote{96} Id. at 494-95.  
\footnote{97} Gridley, Thatcher, and Otis became close friends of Adams, who later remarked that he remained friends with the three men “till their deaths.” 3 \textsc{Diary and Autobiography of John Adams} 273 (L.H. Butterfield, ed. 1961) [Hereinafter \textsc{Diary and Autobiography of Adams}]. Indeed, their names appear frequently in Adams’ extensive writings; in particular, Adams, Gridley, and Otis were often together in court rooms, clubs, meetings, and other gatherings. Gridley, during an interview with Adams concerning Adams’ qualifications to be sworn to practice in Boston as an lawyer had, in 1758, given Adams some advice: “pursue 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 is high esteem; he described Otis as “by far the most able, manly and commanding Character of his Age at the Bar.” Id. at 275. Adams also recounted in his diary the increasing mental problems of Otis in the years leading up to the Revolution. \textit{E.g.}, 1 id. at 270 (diary entry for December 23, 1765, recounting Otis’ emotional instability and “inexplicable Passage in his conduct”); 2 id. at 50, entry for August 22 and 23, 1771 (observing that“Otis’s Gestures and Motions are very whimsical, his Imagination is disturbed--his Passions all roiled.”); id. at 64-65 (diary entry for October 27, 1772) (describing Otis as “looking and acting as wildly as ever he did”). Otis was an important political figure for several years after the \textsc{Writs} case but ultimately was marginalized due to mental illness. \textit{See generally} \textsc{William Tudor, Life of James Otis} (1823).  
\footnote{98} He also discussed whether the court had jurisdiction to issue such writs. \textit{E.g.}, 2 \textsc{Legal Papers of John Adams}, \textit{supra} note__, at 136-38.  
\footnote{99} \textit{See generally} \textsc{Quincy}, \textit{supra} note__, at 476-82. This necessity argument has often been invoked in justifying searches. \textit{See}, \textit{e.g.}, Entick v. Carrington, 19 Howell’s St. Tr. 1029, 1063-64 (K.B. 1765) (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.). \textit{See generally} \textsc{Clancy, The Fourth Amendment}, \textit{supra} note __, at §§ 11.3.4.4.2.--11.3.4.4.3. (discussing role of necessity in measuring reasonableness in Supreme Court opinions).  
\footnote{100} \textsc{Smith, supra} note__, at 281.
those benefits were also taken away in criminal cases.\textsuperscript{101}

Gridley was opposed by two advocates: Oxenbridge Thatcher and James Otis. Thatcher’s argument made little impression on Adams and it has not served to influence subsequent development of search and seizure principles.\textsuperscript{102} “The bulk of [Thatcher’s] argument as recorded by Adams was addressed to the power of the Superior Court to act as the Court of Exchequer.”\textsuperscript{103} Nonetheless, Thatcher addressed some search and seizure standards, raising concerns about the scope of the writs:

[...]ny other private person may, as well as a custom-house officer, take an officer, a sheriff or constable, &c., and go into any shop, store, &c., and seize; any person authorized by such a writ, under the seal of the Court of Exchequer, may; not custom-house officers only. Strange.\textsuperscript{104}

He also noted the permanent nature of the writs and the fact that they were “not returnable.”\textsuperscript{105} Thatcher added: “If such seizure were brought before your honors, you would often find a wanton exercise of their power. At home, the officers seize at their peril, even with probable cause.”\textsuperscript{106}

\textsuperscript{101} Id.
\textsuperscript{102} This is not to say that Adams discounted Thatcher as a person or as an advocate. Adams referred to Thatcher as “an eminent barrister at law, in as large [a] practice as any one in Boston. There was not a citizen of that town more universally beloved for his learning, ingenuity, every domestic and social virtue, and conscientious conduct in every relations of life.” 10 WORKS OF JOHN ADAMS, supra note __, at 285 (letter to H. Niles, February 13, 1818). Adams described himself as frequent visitor to Thatcher’s home, until Thatcher’s death in 1765, where they discussed many intellectual subjects. Id. at 285-86. See also 9 PAPERS OF JOHN ADAMS, supra note __, at 589 (1780 letter of Adams referring to Otis and Thatcher and remarking that he did not “know where to find greater or better Men”). For a brief summary of Thatcher’s life, see CLIFFORD K. SHIPTON, NEW ENGLAND LIFE IN THE EIGHTEENTH CENTURY: REPRESENTATIVE BIOGRAPHIES FROM SIBLEY’S HARVARD GRADUATES 443-49 (1995).
\textsuperscript{103} 2 LEGAL PAPERS OF JOHN ADAMS, supra note__, at 114.
\textsuperscript{104} Id. at 124.
\textsuperscript{105} Id. at 125.
\textsuperscript{106} Id. at 124. See also id. at 138-39 (quoting Adams’ Abstract). In 1765, Thatcher wrote The Sentiments of a British American, in which he observed that, if an admiralty court certified that there was “probable cause of seizure,” an action against a customs official would not lie. Quoted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 495 (Bernard Bailyn, ed. 1965). See also Stephen Hopkins, the Rights of the Colonies Examined, quoted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION at 516 (observing that probable cause certification by a
 Adams' contemporaneous notes of Otis' Argument

Adams took notes of Otis’ argument as he sat in the court room on February 24, 1761.107

In relevant part, Adams recorded that Otis asserted:

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

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

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

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

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

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

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

Continuance of Writts and Proscesses, proves no more nor so much as I grant a special Writ of aff. on special oath, for specl Purpose[.]

The Abstract of Otis’ Argument

Within a few weeks of the hearing, Adams created an “abstract” of the arguments,109

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107 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 114.
108 For the full text of Adams’ notes, see, e.g., QUINCY, supra note __, at 469-77. The material quoted here omits the footnotes inserted by Quincy and substitutes the modern spelling of such words as “Houfe.” The notes are also reproduced in a variety of other works. E.g., 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 123-32, which extensively modernizes spelling, punctuation, extends abbreviations, and adds explanatory footnotes. For discussion of the sources cited by Otis, see QUINCY, supra note __ at 471-76, 483; C UDDIHY, supra note __, at 389-91.
109 Adams noted in his diary some time shortly after April 3, 1761, that he had shown the Abstract to “J.Q.,” who was apparently Joshua Quincy, and that Quincy remarked that Gridley “did not use that Language. He never was Master of such a style.” 2 WORKS OF JOHN ADAMS, supra note __, at 124-25.
which has been reproduced numerous times.\textsuperscript{110} Others have questioned whether Adams “exercised artistic license” and mixed his own views with those of Otis, perhaps to create “a minor work of political propaganda.”\textsuperscript{111} If one views the abstract as a reflection of Adams’ views on search and seizure—or at least his knowledge of search and seizure practices and preferred options as to principles—rather than for its historical accuracy, such arguments lose much of their force. Yet, as to historical accuracy, regarding the core concerns as to the standards by which the government should be able to exercise authority to search and seize, the notes, the abstract, the article attributed to Otis, and Hutchinson’s account are very similar.\textsuperscript{112}

According to the abstract, James Otis made a variety of arguments as to the invalidity of

\textsuperscript{110} See 2 LEGAL PAPERS OF JOHN ADAMS, supra note\textsuperscript{__,} at 121-23, 134-35 n.103 (noting multiple sources of the Abstract and reproducing it with notes on its variations). Numerous sources quote the Abstract. E.g., Payton v. New York, 445 U.S. 573, 608-09 (1980) (White, J., dissenting); TAYLOR, supra note \textsuperscript{__}, at 36-37; SMITH, supra note \textsuperscript{__}, at 331-79 (extensive analysis of Otis’ argument).

\textsuperscript{111} 2 LEGAL PAPERS OF JOHN ADAMS, supra note\textsuperscript{__,} at 123.

\textsuperscript{112} In his Autobiography, Adams discounted the accuracy of his contemporaneous notes: “I took a few minutes, in a very careless manner, which by some means fell into the hands of Mr. Minot, who has inserted them in his history. I was much more attentive to the Information and the Eloquence of the Speakers, than to my minutes, and too much allarmed [sic] at the prospect that was opened before me, to care much about writing a report of the Controversy.” 3 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note \textsuperscript{__}, at 276. Despite this disclaimer made late in life, the notes are remarkably consistent with the abstract, made shortly after the arguments. Adams’ comments are also somewhat confusing. Minot reproduced Adams’ abstract of the argument—not his notes. Minot dedicated the book to Adams and gave Adams a copy. See www.johnadamslibrary.org/book/?book=2347625Adams%20252.10%20v.2.

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

“Until the trump of the arch-angel shall excite different emotions of his foul.”

* * *

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

See GEORGE RICHARDS MINOT, CONTINUATION OF THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY: FROM THE YEAR 1748 [TO 1765] at 95-96 (1798) (copy in Boston Public Library). Adams’ copy, which is dated 1803, has two other minor comments: he crossed out the word “charge” and inserted “chance” in the margin, id. at 90; and struck out the word “decerned” and wrote that “the conclusions better descen’d,” id. at 92. Given the lack of comments regarding the rest of Minot’s version, it is a fair conclusion that Adams viewed the summary as accurate. See also 10 WORKS OF JOHN ADAMS, supra note \textsuperscript{__}, at 246 (letter to John Tudor, March 29, 1817, noting that Minot’s account contained “some interpolations”).
the writs, including the ability of courts to question acts of Parliament.113 Putting those arguments aside and focusing on the pertinent question regarding the proper criteria to regulate searches and seizures, Otis maintained:

I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search. . . . And in this light the writ appears like a warrant from a Justice of the Peace to search for stolen goods. Your Honors will find in the old books concerning the office of a Justice of the Peace, precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and

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

Coke’s “against reason” dictum was the fulcrum for James Otis's 1761 argument during the Writs of Assistance Case. Of course, Otis denounced the general writ of assistance as a violation of American liberties. But the crucial point is that he leveled a constitutional attack against the legislation authorizing the writ. Otis opened by developing and emphasizing the high level of protection the common law afforded the house under the “castle” doctrine. He then established that the common-law authorities had already condemned general warrants as illegal. From those premises, he concluded that any statute that authorized use of a general writ would be so contrary to the principles of common law as to be “void.”

Davies, Original Fourth Amendment, supra note __, at 689-90 (citations omitted). He later continues:

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

Id. at 693.

Davies misses the larger point. Otis was working within a legal regime where the notion that a court could void a statute as “against reason” was at best novel and had little support beyond what Coke had asserted in Bonham’s Case, 8 Coke Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610). That question today would be framed to ask whether the statute was constitutional. Otis, in that part of the argument that Davies relies on, was addressing whether the court had the power to strike down a defective writ. The Fourth Amendment and the concept of judicial review now gives courts such authority. The separate question concerns what criteria should be employed to assess the reasonableness of the search or seizure. Davies conflates the two questions to support his view that the Framers had no criteria in mind when they inserted the word “unreasonable” in the Fourth Amendment. Ignored or at least dismissed by Davies is the part of Otis’ argument where he offered explicit criteria to measure the legality (now “reasonableness”) of a search. In that portion of his argument, Otis was not arguing for some undefined concept of “reasonableness” but, instead, articulated specific criteria to measure the propriety of the writs, that is, the requirements that regulated the issuance of a common law search warrant for stolen goods. That second question, the criteria that should be utilized to determine if an intrusion is justified, is the important one today.
such houses specially named, in which the complainant has before sworn that he suspects his goods are concealed; and you will find it adjudged that special warrants only are legal. In the same manner I rely on it, that the writ prayed for in this petition, being general, is illegal. It is a power, that places the liberty of every man in the hands of every petty officer. I say I admit that special writs of assistance, to search special places, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself. . . . In the first place, the writ is universal, being directed ‘to all and singular Justices, Sheriffs, Constables, and all other officers and subjects;’ so, that, in short, it is directed to every subject in the King’s dominions. Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner also may control, imprison, or murder any one within the realm. In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him. In the third place, a person with this writ, in the daytime, may enter all houses, shops, &c. at will, and command all to assist him. Fourthly, by this writ not only deputies, &c., but even their menial servants, are allowed to lord it over us. Now one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses, when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient. This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of Sabbath-day acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, Yes. Well then, said Mr. Ware, I will show you a little of my power. I command you to permit me to search your house for uncustomed goods. And went on to search his house from the garret to the cellar; and then served the constable in the same manner. But to show another absurdity in this writ; if it should be established, I insist upon it, every person by the 14 Charles II. has this power as well as custom-house officers. The words are, ‘It shall be lawful for any person or persons authorized,’ &c. What a scene does this open! Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor’s house, may get a writ of assistance. Others will ask it from self-defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.

Again, these writs are not returned. Writs in their nature are temporary things. When the purposes for which they are issued are answered, they exist no more; but these live forever; no one can be called to account. Thus reason and the constitution are both against this writ.
Otis thereafter examined the legal authority for the writs, arguing that there was none. . . . But these prove no more than what I before observed, that special writs may be granted on oath and probable suspicion. The act of 7 & 8 William III. that the officers of the plantations shall have the same powers, &c. is confined to this sense; that an officer should show probable ground; should take his oath of it; should do this before a magistrate; and that such magistrate, if he think proper, should issue a special warrant to a constable to search the places. . . .

iii. The William Tudor Letters

Toward the end of his life and more than 50 years after the Writs case, Adams wrote a series of lengthy letters to William Tudor, purporting to describe the scene and the arguments. The letters are claimed recounts of the details of the argument, intermingled with Adams’ comments on a variety of matters. Much of the length of the letters are reproductions of various English statutes and Otis’ comments on them. Adams wrote those detailed accounts despite his repeated claims, in the letters and elsewhere during that same time period, that he could not accurately recollect Otis’ arguments. Numerous authorities have examined the “inaccuracies and exaggerations of these letters.” The Tudor letters are remarkable for what they omit: there is no recounting of Otis’ 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.

Nonetheless, approaching the letters as evidence of Adams’ knowledge and views about search and seizure practices, there are a few comments that shed light. First, Adams uses the

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114 2 WORKS OF JOHN ADAMS, supra note __, appendix A.
115 10 WORKS OF JOHN ADAMS, supra note __, at 289-92, 314-62.
116 In one aside, Adams observed that molasses was one of the principal commodities imported, the main use of which was to make rum. Adams noted that “[w]its may laugh at our fondness for molasses” but, for his part, Adams maintained: “I know not why we should blush to confess that molasses was an essential ingredient in American independence.” Id. at 345.
117 E.g., id. at 314, 321, 355.
118 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, 107 (collecting authorities).

-29-
word “security” repeatedly to describe the quality of the right protected as to each person’s life, liberty, and property.120 Thus, for example, Adams said that Otis examined the acts of trade and demonstrated that, if they were considered revenue laws, “they destroyed all our security of property, liberty, and life.”121 That same concept—security—was utilized by Adams in Article 14 of the Massachusetts Declaration of Rights and is replicated in the Fourth Amendment. In addition, Adams had Otis noting the scope of the searches: “Houses were to be broken open, and if a piece of Dutch linen could be found, from cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty.”122 Otis, according to one Tudor letter, insisted that the writs were “inconsistent with the fundamental law, the natural and constitutional rights of the subjects.”123 He later observed that they were “the most tyrannical instruments that ever were invented.”124

iv. The Aftermath of the Writs Case

Hutchinson wrote that Otis’ efforts encouraged those in opposition to the government and “taught” the people that the practices were “incompatible with English liberties.”125 Indeed, the use of the writs of assistance for customs searches and seizures “caused profound resentment” in the colonies126 and their use is considered to be “the first in the chain of events which led directly

119 Id.
120 E.g., id. at 315-16.
121 Id. at 316.
122 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 319.
123 Id. at 323.
124 Id. at 347.
125 THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY (FROM 1749 TO 1774) at 94-95 (London 1828). The people perceived Otis’ actions as springing from a “sincere concern for the liberties of the people” and elected him as their representative in the next election to the general assembly. Id. at 95.

126 LANDYNSKI, supra note __, at 31.
and irresistibly to revolution and independence.”

After the Superior Court ruled in favor of the proponents of the writs, a series of steps were taken by opponents. The Massachusetts Assembly passed a bill requiring that writs of assistance be issued only when the customs officer possessed credible information, from a specified informant, that one of the acts of trade had been violated by a specified person at a specific place. The bill was vetoed by the governor, despite his recognition that the bill was very popular and that the veto would cause a clamor. Public reaction in Massachusetts and in other colonies against the writs was widespread and included rescuing seized ships, issuing town meeting promulgations, pamphleteering, publishing

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

128 SMITH, supra note __, at 567-68. See also QUINCY, supra note __, at 495-96 (providing text of the bill).

129 SMITH, supra note __, at 425-28.

130 See, e.g., QUINCY, supra note __, at 436-38, 445-45, 463; 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 179-80.

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

Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ even as Menial Servants; whenever they are pleased to say they suspect there are in the House, Wares, [etc.] for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns . . . . These Officers may under the color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ransack Mens [sic] Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.

accounts of Otis’ arguments in the writs of assistance case,\textsuperscript{132} and creating other writings and propaganda decrying the oppressive nature of the writs.\textsuperscript{133}

In 1767, Parliament passed the Townshend Act to clarify existing statutory authority to issue the writs in the colonies.\textsuperscript{134} That Act, which authorized general writs of assistance, was ineffective, with most courts in the American colonies continuing to refuse to issue the writs.\textsuperscript{135} Some colonial courts instead issued special writs.\textsuperscript{136} 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.\textsuperscript{137} Notably, Massachusetts continued to issue general writs of assistance,\textsuperscript{138} which played roles of John Adams’ cases. This is to say that Massachusetts remained the main battleground in the colonies regarding British search and seizure practices,\textsuperscript{139} although the Townsend Act kept the issue alive in other colonies for most of the period leading up to the Revolution.

\begin{itemize}
\item\textsuperscript{132} See, e.g., CUDDIHY, supra note __, at 396, 544-45.
\item\textsuperscript{133} See generally SMITH, supra note __, at 466-501, 562-66; QUINCY, supra note __, at 436-38, 444-49, 458-59, 463, 488-94. As an example of the contemporary reaction, Chief Justice Thomas Hutchinson’s home was burned by arsonists during the Stamp Act riots of 1765. The then-governor of Massachusetts Bay Colony attributed the attack to Hutchinson’s role in granting writs of assistance to customs officials. QUINCY, supra note __, at 416 n.2, 434 n.20; LASSON, supra note __, at 68; TAYLOR, supra note __, at 38.
\item\textsuperscript{134} SMITH, supra note __, 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 __, at 449-50.
\item\textsuperscript{135} See generally QUINCY, supra note __, at 500-11; O.M. Dickerson, Writs of Assistance as a Cause of the Revolution (summarizing colonial courts’ reaction to petitions for writs of assistance between 1761 and 1776) in THE ERA OF THE AMERICAN REVOLUTION 40-75 (Richard B. Morris, ed., 1939).
\item\textsuperscript{136} QUINCY, supra note __, at 510-11, 534-35; SMITH, supra note __, at 2, 460, 469-70.
\item\textsuperscript{137} SMITH, supra note __, at 2-3, 461-62, 520-23. Only South Carolina gave in. Id. at 3-4.
\item\textsuperscript{138} See generally QUINCY, supra note __, at 401-35.
\item\textsuperscript{139} Cf. CUDDIHY, supra note __, at 327 (“Colonial Massachusetts, not Great Britain, formulated most of the ideas
v. *Importance of the Writs of Assistance Case to Adams*

Adams left a long record regarding the importance of the *Writs of Assistance Case* to him. In his Autobiography, Adams wrote: “A Contest appeared to me to be opened, to which I could foresee no End, and which would render my Life a Burden and Property, Industry and every Thing insecure. There was no Alternative left, but to take the Side, which appeared to be just, to march intrepidly forward in the right path, to trust in providence for the Protection of Truth and right, and to die with a good Conscience and a decent grace, if that Tryal should become indispensible.”

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

> Yesterday the greatest Question was decided, which ever was debated in America, and a greater perhaps, never was or will be decided among Men. A Resolution was passed without one dissenting Colony “that these united Colonies, are, and of right ought to be free and independent States, and as such, they have, and of Right ought to have full Power to make War, conclude Peace, establish Commerce, and to do all the other Acts and Things, which other States may rightfully do.” You will see in a few days a Declaration setting forth the Causes, which have impell'd Us to this mighty Revolution, and the Reasons which will justify it, in the Sight of God and Man. A Plan of Confederation will be taken up in a few days.

> When I look back to the Year 1761, and recollect the Argument concerning Writs of Assistance, in the Superiour Court, which I have hitherto considered as the Commencement of the Controversy, between Great Britain and America, and run through the whole Period from that Time to this, and recollect the series of political Events, the Chain of Causes and Effects, I am surprized at the Suddeness, as well as Greatness of this Revolution.

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140 3 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note __, at 276.
141 Letter from John Adams to Abigail Adams, 3 July 1776, 9 WORKS OF JOHN ADAMS, supra note __, at 418.
Can there be any clearer statement of the importance of the *Writs* case to Adams? Yet we have much more; throughout his life, Adams repeatedly made similar statements. For example, in 1780, Adams marked 1760 as the beginning of the dispute with Great Britain, when

orders were sent from the board of trade in England to the custom-house 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.\(^{142}\)

Similarly, in a famous letter to William Tudor, in 1817, Adams wrote about the impact of Otis’ argument: “Every man of an immense crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”\(^{143}\) If we take Adams at his word, throughout his long life Adams held the belief that the *Writs* case was so important that it marked the beginning of the American Revolution. Notably, Adams distinguished between the war and the Revolution.\(^{144}\) 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.”\(^{145}\)

\(^{142}\) *9 WORKS OF JOHN ADAMS*, supra note __, at 266-67 (letter to Mr. Calkoen dated October 4, 1780).


\(^{144}\) *10 WORKS OF JOHN ADAMS*, supra note __, at 282 (letter to H. Niles, February 13, 1818).

\(^{145}\) *Id.* at 282-83 (letter to H. Niles, February 13, 1818). *See also id.* at 172 (letter to Thomas Jefferson on August
Several themes that found later resonance in John Adams’ views and in Fourth Amendment jurisprudence can be seen in Thatcher’s arguments, including the acknowledgement of probable cause as a standard to measure the propriety of an intrusion, a concern with standardless discretion, and the temporary nature of warrants. Still, it was Otis who inspired Adams and many of the principles that Otis advocated found a place in Adams’ writings and subsequent search and seizure constitutional provisions. Specifically, 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’ concerns about the need for certain procedures, the scope of intrusions, and the arbitrary use of authority, have had continued importance in search and seizure jurisprudence to this day. Underlying all of those arguments and principles was a quest for objective criteria to measure the legitimacy of a search or seizure.

C. The English General Warrant Cases

Shortly after the Writs of Assistance Case, a series of general warrant cases were litigated in England. The principal case, Wilkes v. Wood,146 has been considered by the Supreme Court as

a fundamental driving force behind the adoption of the Fourth Amendment. The case arose as a result of the publication of a series of pamphlets, called the *North Briton*, which were published anonymously. The author, John Wilkes, used the pamphlets to deride government ministers and criticize governmental policies. After an especially bitter attack in the *North Briton No. 45*, the government decided to apprehend and prosecute the responsible party for seditious libel. A warrant was issued by Lord Halifax, the secretary of state, to four messengers, ordering them “to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.” This warrant was general as to the persons to be arrested, the places to be searched, and the papers to be seized. It resulted in the arrest of forty-nine persons in three days. Eventually, the messengers located the printers and learned Wilkes’ identity. Wilkes and all of his private papers were then seized.

The printers and Wilkes brought separate suits against the messengers for false imprisonment. In *Wilkes*, Chief Justice Pratt (soon to be elevated and called Lord Camden) criticized the warrants for failing to specify the offenders’ names in the warrant and for giving

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149 *LASSON, supra* note __, at 43-44.

150 *See* Money v. Leach, 3 Burrow Rep. 1742 (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); Huckle
the messengers the discretionary power to search wherever their suspicions chanced to fall.\textsuperscript{151} Pratt maintained that if the power to issue such warrants existed, “it certainly [might] affect the person and property of every man in this kingdom, and [was] totally subversive of the liberty of the subject.”\textsuperscript{152}

Adams purchased the 1771 edition of James Burrow’s \textit{Reports of the Cases Adjudged in the Court of King’s Bench},\textsuperscript{153} which contains the report of the \textit{Money v. Leach},\textsuperscript{154} including background information about the origins of the litigation involving the use of general warrants to locate the persons involved in publishing the \textit{North Briton No. 45}. Burrow’s report begins by summarizing the background facts. Money and two other King’s messengers entered Leach’s house to look for the printer or publisher of \textit{North Briton No. 45}, based on the general warrant issued by Halifax.\textsuperscript{155} Although the information had not been used to support the issuance of the


\textsuperscript{152} \textit{Id}.

\textsuperscript{153} One cannot know for sure when Adams acquired the \textit{Burrow} volume containing the \textit{Wilkesite} litigation but it is the original edition, published in 1771. Moreover, on April 20, 1771, Adams wrote about reading Burrow in his diary:

This mettlesome Barrister gives us the best Account of the Unanimity of the Kings Bench that I have ever heard or read. According to him, it is not uncommon abilities, [illegible] Integrity and Temper as Mr. Burrows would perswade [sic] us, but sheer fear of Lord M-d [Mansfield], the Scottish Chief which produces this Miracle in the moral and intellectual World -- i.e. of 4 Judges, agreeing perfectly in every Rule, order and judgment for 74 Years together. 4 Men never agreed so perfectly in Sentiment, for so long a Time, before. 4 Clocks never struck together, a thousandth Part of the Time, 4 Minds never thought, reasoned, and judged alike, before for a ten thousandth Part.

\textsuperscript{2} \textit{WORKS OF JOHN ADAMS, supra} note \textsuperscript{2}, at 257. Adams’ copy of Burrow is at \texttt{www.archive.org/details/reportsofcasesad03burr}. The Boston Public Library on line folio reference is \texttt{www.johnadamslibrary.org/book/?book=2215967Adams%2082.1%20v.3%20Folio}. Adams also makes reference to a case from Volume 2 of “Burrow’s Reports,” which was another opinion by Lord Mansfield, in a paper written by him in 1774. See \textit{4 WORKS OF JOHN ADAMS, supra} note \textsuperscript{2}, at 165.

\textsuperscript{154} 3 Burrow Rep. 1742 (K.B. 1765).

\textsuperscript{155} The warrant directed the messengers and their assistants to make strict and diligent search for the said Authors Printers and Publishers of the aforesaid seditious Libel intitled [sic] “The North Briton No. 45. April the 23rd. 1763:’” And them or any of them having found, to apprehend and seize, together with their Papers, and to bring in safe Custody before said Earl, to be examined concerning the Premisses [sic], and to be further dealt with according to Law[.]
warrant, the authorities became aware of information that the *North Briton* had been written by Wilkes and that he had been seen frequenting Leach’s home.\textsuperscript{156} The messengers alleged as justification for their actions that Leach had printed the 26th edition and that, before executing the warrant, they received information that Leach was the printer of No. 45.\textsuperscript{157} According to the messengers, when they entered Leach’s home, which is where he conducted his printing business, they observed a newly printed copy of the North Briton and an unfinished part of a new edition that Leach was then reprinting.\textsuperscript{158} Leach was seized and kept in custody for four days until Halifax could interrogate him. At the conclusion of that time period, it was concluded that Leach was not the printer of Number 45 and he was released.\textsuperscript{159}

The case, tried before Judge Pratt, resulted in a jury verdict awarding Leach substantial monetary compensation. The messengers appealed.\textsuperscript{160} On appeal before Chief Justice Mansfield and a panel of other judges, counsel for the messengers argued, *inter alia*, that the warrant complied with “long Practice and Usage.”\textsuperscript{161} Responding to the assertion that it was a general warrant, counsel asserted that “it is legal to issue and execute a Warrant against a Person unknown, but *only described.*”\textsuperscript{162} Reciting the facts known to the messengers before executing the warrant, counsel also argued that the messengers had “probable Cause” to seize Leach.\textsuperscript{163} He emphasized: “This Warrant was executed honestly, and upon probable Cause.”\textsuperscript{164}

\begin{footnotes}
\begin{itemize}
    \item Id. at 1743.
    \item Id. at 1748.
    \item Id. at 1743.
    \item Id. at 1743-44.
    \item Id. at 1744, 1749.
    \item Id. at 1745.
    \item Id. at 1755.
    \item Id. at 1756 (italics in original).
    \item Id. at 1756-57 (italics in original).
    \item Id. at 1757.
\end{itemize}
\end{footnotes}
In response, Leach’s counsel addressed the claim that there was probable cause to seize Leach:

Here is no probable Cause, nor any Reason for justifying the Officer under a probable Cause. . . . Here is only information from One of their own Body, “That the Author of the Paper had been seen going into Leach’s House; and that Leach was the Printer of the Composition in general;” not of this particular Paper.

But though neither this Hearsay-Information was itself true; nor would the Consequence follow, if it had been true; yet they thereupon arrest and imprison an innocent Man.165

Counsel for Leach also attacked the legality of the warrant:

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

If “Author, Printer, and Publisher,” without naming any particular Person, be sufficient in such a Warrant as this is; it would be equally so, to issue a warrant generally, “to take up the Robber or murderer of such a One.” This is no Description of the Person; but only of the Offence: It is making the Officer to be Judge of the Matter, in the Place of the Person who issues the Warrant. Such a Power would be extremely mischievous, and might be productive of great Oppression.166

Leach’s counsel added points about the warrant’s lack of an oath and about its broad scope, that is, its authorizing the seizure of all papers.167 He cited in support Hale’s History of the Pleas of the Crown and Hawkins’ Pleas of the Crown.168

In rebuttal, counsel for the messengers again asserted that they had probable cause to detain Leach:

They were reasonably satisfied, “that Leach was the Printer.” And on Search, this probable Cause was encreased [sic] to a higher Degree: For, they found another fresh Sheet of the same Work, just printed off, and wet.169

165 Id. at 1761.
166 Id. at 1762.
167 Id. at 1762-63.
168 Id. at 1763. He also noted that Chief Justice Scruggs had been impeached for issuing warrants similar to the one in Leach. Id.
169 Id. at 1764.
Frankly, the arguments of the lawyers in *Money v. Leach* are quite familiar to us today—and that is my essential point. Adams was exposed to litigation that raised core themes debating the proper criteria to search and seize: the legality of general warrants; whether the person to be arrested must be identified in the warrant; whether the place to be searched must be specified; whether a warrant must be supported by an oath; what information sufficed to support the issuance of a warrant; and was probable cause required to search or seize. The concern with a “general warrant” was just a part of the broader mosaic. Of particular note are the competing claims about probable cause as a measure of justification and that certain information did or did not meet that standard. Except for the peculiarities of punctuation and speech, the arguments on both sides of the *Leach* case could be easily made in 21st Century America but are now grounded on Fourth Amendment principles.

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

> It is not fit, that receiving or judging of Information should be left to the Discretion of the officer. The Magistrate ought to judge; and should give certain Directions to the Officer. This is so, upon Reason and Convenience. Then as to Authorities–Hale and All Others hold such an uncertain Warrant void: And there is no Case or Book to the contrary.

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170 *Id.* at 1765.
171 *Id.* at 1766.
172 *Id.* at 1766-67.
The three other judges also viewed the warrant as illegal and void.\footnote{173}

The \textit{Wilkesite} cases are traditionally viewed as having had a significant influence on American thought about search and seizure practices in the era leading up to the adoption of the Fourth Amendment.\footnote{174} Amar, for example, views those cases as primarily responsible for most of the list of objects explicitly protected by the Amendment.\footnote{175} William Cuddihy has

\footnote{173 \textit{Id.} at 1767. The case was set for reargument and, after hearing reargument, Mansfield stated that his opinion had not changed. The other judges were said to be “assenting” in affirming the judgment. \textit{Id.} at 1767-68. \textit{See} note ______ for Adams’ comments on Burrow’s characterization regarding the unanimity of opinions of judges sitting with Lord Mansfield.

174 \textit{See} note ______. Another contemporary English case, \textit{Entick v. Carrington}, 2 Wilks K.B. 275, 19 Howell’s St. Tr. 1029 (1765), also has been repeatedly cited by the United States Supreme Court as a “‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law.’” Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (quoting Boyd v. United States, 116 U.S. 616, 626 (1886)). \textit{Accord} Berger v. New York, 388 U.S. 41, 49 (1967). Notwithstanding this confidence by the Supreme Court, I have found no reference to \textit{Entick} at all by Adams or by anyone involved in the discussions between 1787 and 1791 regarding the need for a bill of rights, despite the voluminous commentary of the era regarding the adoption of the Constitution and proposed amendments. However, \textit{Entick} had been the subject of numerous London publications at the time of the decision and the case found its way into numerous reports of cases. \textit{Cuddihy, supra} note __ at 459, 481. Nonetheless, there were various versions of the case report and the one most often cited, with the “most elaborate versions of Camden’s statements, was not published until 1781. \textit{Davies, Original Fourth Amendment, supra} note __, at 566 n.25.

The \textit{Entick} case stemmed from a warrant issued by the secretary of state to arrest Entick and to seize his books and papers, based on the charge that he was “the author, or the one concerned in writing of several weekly very seditious papers[.]” 19 Howell’s St. Tr. at 1031. Entick was arrested, and all of his papers were seized from his home. After his release, he sued the messengers in trespass. The jury returned a verdict for Entick and the case was heard by Judge Pratt, who by then was called Lord Camden. Camden condemned the scope of the warrant, which had authorized seizure of all of Entick’s papers, comparing it unfavorably to the criteria for warrants for stolen goods. \textit{Id.} at 1063. He also discussed the fundamental role that property rights played in society and outlined a hierarchy of property rights. Camden said that there was no right to seize or inspect papers, which were considered the owner’s “dearest property.” \textit{Id.} at 1066. He distinguished the right to search for and seize stolen goods based on the property rights involved: in the case of stolen goods, the owner is permitted to recapture his own goods; the seizure of private papers, however, involved taking the owner’s property by the government. Camden also rejected the government’s right to search papers as a means of discovering evidence in either criminal or civil cases. \textit{Id.} at 1073. Camden’s hierarchy had a strong influence on early decisions of the Supreme Court, particularly \textit{Boyd v. United States}, 116 U.S. 616 (1886). \textit{See also} Thomas K. Clancy, \textit{What Does The Fourth Amendment Protect: Property; Privacy; or Security?}, 33 \textit{Wake Forest L. Rev.} 307, 310-26 (1998) (discussing \textit{Entick’s} influence on the Supreme Court’s interpretation of the Fourth Amendment).

175 Why did both Massachusetts' Article XIV and the federal Fourth bother to specify “persons,” “houses,” and “papers”? Precisely to remind us, I suggest, of the heightened sensitivity government should show towards searches and seizures of these three specially-named items. Houses are often more private than other buildings; diaries and other private papers are often our dearest possessions (and raise large issues of free expression, as do all political papers); and searches and seizures of our bodies—our persons—obviously call for special sensitivity. Note how, in \textit{Wilkes} and \textit{Entick}, intrusions occurred against persons, houses,
documented that the cases were extensively reported in the popular press in the colonies, including in Boston, and that they were exploited to increase bad feelings against British rule and molded colonial sentiment to view general warrants as oppressive.176

Yet, remarkably absent from Adams’ writing is any extended discussion of these English developments. He was clearly aware of them. Wilkes, after being charged with seditious libel in 1763 for his part in publishing The North Briton, No. 45, fled to the continent; he returned in the spring of 1768 and was elected to Parliament.177 On June 6, 1768, as a member of the “Committee of the Boston Sons of Liberty,” Adams sent a letter to Wilkes. Its opened with this greeting: “The friends of Liberty, Wilkes, Peace and good order to the number of Forty five, assembled at the Whig Tavern Boston New England, take this first opportunity to congratulate your Country, the British Colonies and yourself, on your happy return to the land alone worthy of such an Inhabitant[.].”178 The Sons of Library in Boston viewed Wilkes as a hero and “Wilkes and Liberty” and “45” were popular symbols.179 More generally,180 Wilkes was perceived


176 See Cuddihy, supra note _ at 538-40, 847-50. As Cuddihy stated: “Massive coverage of the Wilkes affair by the colonial press sensitized readers not only to but against general warrants.” Id. at 538. See also Davies, Original Fourth Amendment, supra note __, at 562-65 (summarizing newspaper accounts and other sources of information about the general warrant cases).

177 1 PAPERS OF JOHN ADAMS at 215-16 n.1.


179 See, e.g. ESTHER FORBES, PAUL REVERE AND THE WORLD HE LIVED IN 120, 128 (1942). In one famous example, Paul Revere in 1768 was commissioned by 15 Sons of Liberty to create a silver punch bowl in honor of the members of the Massachusetts legislature who refused to give in to the King’s request to rescind a letter that had been sent to other colonies, which had sought to generate opposition to the Townsend Acts. Engraving on the bowl included “No. 45,” “Wilkes and Liberty,” and a “torn document for general warrants.” Id. at 128-29. The Bowl is now in the Boston Museum of Fine Arts and has been described as ranking with the Declaration of Independence and the
throughout the American colonies as a champion of liberty.\footnote{181}

\textit{D. John Adams’ Library}

\textit{“I have spent an Estate on Books.”}\footnote{182}

\textit{“[B]y degrees I procured the best library of Law in the State.”}\footnote{183}

Adams was not merely boasting; he read widely and collected an extensive collection of books.\footnote{184} The importance of his library to him and to our understanding of his knowledge and views cannot be overstated.\footnote{185} Adams began collecting books on law, history, and political

\begin{itemize}
  \item Constitution as the nation’s “three most cherished historic treasures.”
  \item http://www.mfa.org/collections/search_art.asp?recview=true&id=39072&coll_keywords=paul+revere&coll_accession=&coll_name=&coll_artist=&coll_place=&coll_medium=&coll_culture=&coll_classification=&coll_credit=&coll_provenance=&coll_location=&coll_has_images=&coll_on_view=&coll_sort=0&coll_sort_order=0&coll_view=0 &coll_package=0&coll_start=151.
  \item In his diary on August 14, 1769, Adams recounted dining with 350 Sons of Liberty under the Liberty Tree, followed by a variety of toasts. He noted that Otis and Samuel Adams promoted such occasions because they “impregnate [the people] with the sentiments of Liberty.” Although Adams did “not see one Person intoxicated,” the editor of his diary viewed that observation as “remarkable, considering that fourteen toasts were drunk at the Liberty Tree in Boston, followed by forty-five (in honor of John Wilkes’ \textit{North Briton}, No. 45) at the dinner.” \footnote{1 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note __, at 341-42.}
  \item Adams was a member of the Bill of Rights Society. \footnote{180} \textit{1 PAPERS OF JOHN ADAMS, supra note __, at xiv.} That Society, begun in England in 1769, was largely designed to promote Wilkes’ views and pay his debts. \footnote{181} \textit{PETER D. G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY} 111-15 (Oxford Press 1996). Adams’ correspondence occasionally referenced Wilkes. In one letter, Adams observed that, during the period leading up to the Revolutionary War, “parties in England were as angry as in America. Wilkes and Junius agitated the king, ministry, parliament, and nation.” \footnote{182} \textit{10 WORKS OF JOHN ADAMS, supra note __, at 202.} In a letter to John Taylor in 1814, Adams mentioned Wilkes’ being interrupted when writing an edition of the North Briton and attributed to Wilkes this comment: “I have been studying these four hours to see how near I could come to treason without committing it.” \footnote{183} \textit{6 WORKS OF JOHN ADAMS, supra note __, at 490.}
  \item Wilkes was viewed by Americans as a friend of liberty and his name was known. Indeed, numerous towns and places were named after him (and Lord Camden). \footnote{184} \textit{See, e.g.,} Akhil Reed Amar, \textit{the Fourth Amendment, Boston, and the Writs of Assistance}, 30 \textit{SUFFOLK L. REV.} 53, 65-66 (1996) (recounting locations).
  \item Letter to Abigail Adams, June 6, 1774, \textit{reproduced in FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS DURING THE REVOLUTION} 4 (Charles F. Adams, ed. 1876).
  \item \textit{2 WORKS OF JOHN ADAMS, supra note __, at 50 n.*.}
  \item For an overview of his early readings and influences, \textit{see 1 LEGAL PAPERS OF JOHN ADAMS, supra note __, at liv-lvi, lxxiv-lxxvii.} He was an avid reader and commented often about the course of his legal and other studies. For example, as a young lawyer, Adams borrowed Hale’s treatise from Otis and reported that he had read it three times. \footnote{185} \textit{1 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note __, at 169, 173.} He wrote that he had “read a Multitude of Law Books,” including Coke, Hawkins’ \textit{Pleas of the Crown}, and others. \textit{Id.} at 173.
  \item \textit{E.g.,} \textit{id.} at 220 (diary entry for August 1, 1761) (maintaining that, the “English Constitution is founded, tis bottomed And grounded on the Knowledge and good sense of the people” and that the “very Ground of our Liberties, is freedom of Elections” but to decide who to elect, a person’s mind has to be “opened and enlarged by Reading”); \textit{id.} at 337 (diary entry for January 30, 176) (observing that he had spent a great deal of money collecting
\end{itemize}
systems by the early 1760s and amassed one of the largest libraries in New England, which is now housed at the Boston Public Library. Adams was first and last a lawyer, with a deep love for learning and understanding the law. He had access to a broad set of materials on search and seizure, including during the period of 1761 to 1779, which were the years that influenced Adams’ views on search and seizure, culminating in his drafting of Article 14 of the Massachusetts Declaration of Rights.


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186 The Boston Public Library has digitized many of his books and catalogues all of them at
187 His deep knowledge of the law and utilization of extensive citations to authority to support his views are illustrated in papers he wrote in 1773 on the independence of judges and on the rights of the province of Massachusetts. *See 1 PAPERS OF JOHN ADAMS, supra* note __, at 252-345. As a young attorney at their first meeting, Gridley grilled Adams on what law books Adams had read. *See 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra* note __, at 54-55. Later, Adams joined a club that Gridley formed to read and discuss books on law and other subjects. *Id.* at 251-55.
188 For an examination of colonial knowledge of treatises discussing search and seizure principles, *see generally CUDDHY, supra* note __ at 188-90, 552-54. For a summary of the treatment of the general warrant in the major treatises of the era, *see id.* at 268-73, 28-83.
189 Adams had all four volumes of Blackstone’s *Commentaries.* He had the third edition of Volume 1, published in 1767. There is little doubt when Adams obtained his copy of volume 4 of Blackstone, given that Adams is listed as one of the subscribers to the American printing, dated 1771-72. That volume is particularly notable for citing *Money v. Leach* as support for Blackstone’s assertion that general warrants were illegal. *4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND* at 288 ni. (1771-72). In his diary on June 7, 1771, Adams recounts a conversation where he suggested to a person that he purchase a copy of Blackstone to further his legal knowledge. *2 WORKS OF JOHN ADAMS, supra* note __, at 271.
191 *See www.johnadamslibrary.org/search/books/?author=Coke.* Adams repeatedly referenced reading Coke. *E.g., 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra* note __, at 133, 158, 174, 253, 273; *2 WORKS OF JOHN ADAMS, supra* note __, at 103 (diary entry for November 26, 1760); *4 WORKS OF JOHN ADAMS, supra* note __, at 141-46, 160-64 (papers written in 1774); *1 PAPERS OF JOHN ADAMS, supra* note __, at 258, 262 (on the independence of judges, written in 1773). In a letter to Jonathan Mason, Jr., on August 21, 1776, he requested Mason to “pursue my Lord Coke” and urged Mason, who had already read volume one, to “study the second, third, and fourth Institutes
Hale’s *Pleas of the Crown*, and William Hawkins’ *A Treatise of the Pleas of the Crown*. Those treatises were the major sources of understanding search and seizure principles; other parts of this article demonstrate that Adams and his contemporaries routinely cited them as authority for positions they advocated. This is not to say that search and seizure principles were either fully formed or that there was a consensus as to proper practices. If there had been, modern analysis would have a firmer grounding and clearer basis. Nonetheless, claims that the concept of reasonableness had no meaning or that no objective criteria existed to guide the Framers is belied by the treatment of search and seizure principles in the treatises of the era.

To illustrate the depth and scope of the era’s treatment of search and seizure principles, and referencing only the books in Adams’ library, the following highlights are offered. Blackstone discussed four ways in which an arrest could legally occur, including the need for probable cause and a particularized warrant. He also detailed the rights of Englishmen.

with equal Diligence. My lord Coke is justly styled the oracle of the Law and whoever is master of his Writings is Master of the Law of England.” 9 WORKS OF JOHN ADAMS, supra note __, at 432-33.

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


Adams had the fourth edition, dated 1762, and he signed his name inside the book. See www.johnadamslibrary.org/book/?book=2223764Adams%20111%20Folio. In his diary, however, Adams referred to reading Hawkins in 1760. See 2 WORKS OF JOHN ADAMS, supra note __, at 103 (diary entry for November 26, 1760). Adams, for example, cited Hawkins in 1773. See 1 PAPERS OF JOHN ADAMS, supra note __, at 297, 303 n3.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 287-91 (1771-72). Blackstone’s four methods were:

1. With a warrant. Blackstone cited Coke for the proposition that a justice of the peace could not issue one to “apprehend a felon upon bare suspicion” and Hale for the need to offer the justice of the peace “probability offered to him of such suspicion.” Id. at 287. He added: “it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party, against whom the warrant is prayed.” Id. Blackstone rejected general warrants: “A general warrant to apprehend all persons suspected, without
Burn provided a list of “causes of suspicion” to justify an arrest.\textsuperscript{197} He detailed when an arrest could be made with or without a warrant,\textsuperscript{198} discussed the manner of arrest, such as nighttime arrests,\textsuperscript{199} circumstances that justified breaking doors,\textsuperscript{200} and the power to search pursuant to writs of assistance in excise and customs situations and, in the case of resistance, the permissibility of breaking open “doors, chests, and other package.”\textsuperscript{201}

Dalton, among other principles, addressed when an arrest is valid for affrays and breaches of peace\textsuperscript{202} and when officials could break and enter a house.\textsuperscript{203} He observed that a

\begin{quote}
\textit{Id.} at 289.
\end{quote}

1. Burns’s list included:

\begin{enumerate}
\item “The common fame of the country; but it seems that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground.”
\item When the person is found in circumstances that “induce a strong presumption of guilt; as coming out of a house wherein the murder hath been committed, with a bloody knife in one’s hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them.”
\item Flight or actions indicating a “consciousness of guilt.”
\item Accompanying a known offender at the time of the offense.
\item “The living of an idle, vagrant, and disorderly life, without having any visible means to support it.”
\end{enumerate}

\textit{Id.} at 85-86.

\begin{quote}
\textit{Id.} at 86.
\end{quote}

\begin{quote}
\textit{Id.} at 87.
\end{quote}

\begin{quote}
\textit{Id.} at 88-89.
\end{quote}

\begin{quote}
\textit{Id.} at 446.
\end{quote}

\begin{quote}
\textit{Id.} at 29, 299-300, 404.
\end{quote}

\textit{See} note \textsuperscript{__}.

\textit{1 Richard Burn, The Justice of the Peace and Parish Officer} 85 (1762).
man’s home is his castle except against the King, that warrants for customs searches permitted entry into any house during the day time “where the Goods are suspected to be concealed,” and the distinguished between day and nighttime excise searches. Dalton set forth standards for hue and cry and detailed causes of suspicion that a person is the felon. He addressed standards for warrants to issue, including that it was “not safe” for a justice of the peace to issue a blank warrant, and that one could not be issued “upon bare Surmise to break any Man’s house to search for a felon.” He asserted that the liberty of a man “is a Thing specially favoured by the Common Law.” To arrest, Dalton stated, there “must be some just Cause, or some lawful and just Suspicion at the least.” He discussed causes of suspicion to arrest for felonies, including permitting an arrest if in the “Company of the Offenders,” if living “idly and vagrant,” or if in possession of the stolen goods.

Hale wrote about a broad variety of search and seizure topics, often citing Dalton and Coke to support his statements. He discussed the circumstances when an arrest warrant could be issued by the court: the requesting party usually should be examined under oath, that examination must be reduced to a writing concerning whether a felony had been committed and

204 Id. at 300.
205 Id. at 69.
206 Id. at 79.
207 Id. at 128-29.
208 Id. at 381-82.
209 Id. at 401-05.
210 Id. at 402.
211 Id. at 403.
212 Id. at 406.
213 Id. at 407.
214 Id.
215 Id.
216 Id. at 408.
the party’s grounds for suspicion,\textsuperscript{217} and the person suspected of the crime had to be named.\textsuperscript{218} A general warrant was condemned by Hale as “not sufficient justification in false imprisonment.”\textsuperscript{219} He discussed the circumstances when doors of a house could be broken to search or arrest.\textsuperscript{220} A notable aspect of his writing was Hale’s repeated recognition of probable cause as the standard to arrest or search.\textsuperscript{221} Another theme was the difference between \textit{ex officio} powers and those granted under a warrant.\textsuperscript{222} He also outlined what could be done by hue and cry\textsuperscript{223} and the standards for issuing and executing arrest and search warrants.\textsuperscript{224}

\textit{Reports of Cases.} Adams had numerous reports of cases. As discussed earlier, of particular significance regarding Adams’ knowledge of search and seizure principles is his 1771 edition of James Burrow’s \textit{Reports of the Cases Adjudged in the Court of King’s Bench}, which included the case report of \textit{Money v. Leach}.\textsuperscript{225}

\textit{History Books.} For the purpose of the present inquiry, the most important history book

\textsuperscript{217} 2 Hale, \textit{supra} note \textsuperscript{\(\_\)}, at 91, -92, 111.

\textsuperscript{218}  Id. at 112, 114.

\textsuperscript{219}  Id. at 112, 114; \textit{see also} 1 Hale, at 580, 584. Hale stated that the general warrant to apprehend all persons suspected of committing a crime was void and was no defense to a suit for false imprisonment. 1 \textit{HALE}, \textit{supra} note \textsuperscript{\(\_\)}, at 580; 2 \textit{id.} Vol. I at 580; Vol. II at 112. Lasson has summarized Hale’s views:

\begin{quote}

The party asking for the warrant should be examined under oath touching the whole matter, whether a crime had actually been committed and the reasons for his suspicion. The warrant should specify by name or description the particular person or persons to be arrested and must not be left in general terms or in blanks to be filled in afterwards. Upon the reasoning of the first rule, Hale held that warrants to search any suspected place for stolen goods were invalid (although he admitted that there were precedents of such general warrants) and should be restricted to search in a particular place suspected, after a showing, upon oath, of the suspicion and the “probable cause” thereof, to the satisfaction of the magistrate.

\end{quote}

\textsuperscript{220} 1 \textit{id.} at 579-80; 2 \textit{id.} at 82, 92, 102-03, 116-17.

\textsuperscript{221} 1 Hale, at 579-80; 2 Hale, at 81-82, 85, 91-92, 103, 105, 110, 150, 152. Hale recognized that the grounds to establish probable cause were “very many” and listed “common fame,” hue and cry, possession of stolen goods, and association with the known robber. \textit{Id.} at 81.

\textsuperscript{222} \textit{E.g.,} 2 Hale, \textit{supra} note \textsuperscript{\(\_\)}, at 85, 90.

\textsuperscript{223} \textit{Id.} at 98-103.

\textsuperscript{224} \textit{Id.} at 105-20, 149-52.

\textsuperscript{225} 3 Burrow 1742 (K.B. 1765).
that Adams had was George Richard Minot’s *Continuation of the History of the Province of Massachusetts Bay*. Minot had obtained a copy of Adams’ abstract of the 1761 *Writs of Assistance Case*, where James Otis famously offered a detailed alternative view to the abusive search and seizure practices engaged in by British colonial authorities. As noted previously, Adams inserted notes in the margins of the book, commenting on the accuracy of Minot’s account.

*Theories of Government.* Of less direct relevance to search and seizure provisions, but undoubtedly a strong influence on Adams’ views on the relationship of individuals to government, was Adams’ extensive collection of books on the history and structure of government. The collection was utilized by Adams in writing his own thoughts on the structure of government, including his lengthy *Defence of the Constitutions of Government of the United States of America*, published shortly before the convening of the federal Constitutional Convention in 1787.

**E. Adams as Litigator and Observer**

**i. Customs Searches and Seizures**

Adams litigated numerous cases in the Court of Vice Admiralty, most of which involved breaches of British acts of trade. The acts “regulated the flow of colonial trade, laid duties on

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226 The learning that Adams received from his collection is reflected throughout his writings. For example, in 1774-75, he wrote a series of papers signed *Novanglus* in the Boston Gazette, which are referred to collectively as *A History of the Dispute with America, from its origin, in 1754, to the present time*. See 4 WORKS OF JOHN ADAMS, *supra* note __, at 3-177. The papers are laced with copious references to historical and legal authorities.

227 Reproduced in 4-6 WORKS OF JOHN ADAMS, *supra*.

228 Adams’ *Defence* drew both praise and criticism during the time that the new Constitution was being debated. *See*, e.g., 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 474-75 (Merrill Jensen ed. 1978) (*quoting* Compo: To the Head of the Wrongheads of New Haven County Connecticut Courant, November 26, 1787). Jefferson, for example, praised it, see 4 WORKS OF JOHN ADAMS, *supra* note __, at 579, but Madison saw little value in it. *See* 2 WILLIAM C. RIVES, HISTORY AND LIFE AND TIMES OF JAMES MADISON 503-04 (1870).

229 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note __, at 98, 102-05.
some aspects of it, and established a system of enforcement."²³⁰ It was within that web of acts and enforcement that the Writs case arose in 1761. A few years later, Adams litigated two significant Admiralty cases. The cases illustrate Adams’ awareness of the British search and seizure practices, his opposition to them,²³¹ and illuminate some of his views on proper search and seizure criteria.

The first, Folger v. Sloop Cornelia, is an interesting footnote to the Writs litigation. Adams was co-counsel with James Otis and they represented Timothy Folger, who was a “Searcher and Preventive Officer at Nantucket.”²³² Folger was sympathetic to the merchant interests; opposing him were the customs officials of the port of Boston.²³³ Folger was, at best, lax in his enforcement of the acts and had been actively engaged in importation, had a store in which imported goods were sold, and had extensive dealings with merchants, including John Hancock.²³⁴ Folger’s presence in Nantucket thus created “a sizable loophole for evaders of the Acts of Trade” and “represented a threat to the security of the revenue.”²³⁵ The actual litigation, however, had little to do with the background. In January, 1768, Folger seized the sloop Cornelia. Thereafter, customs officials in Boston informed Folger that his commission was invalid and litigation ensued over who could validly seize the ship and receive the proceeds from the seizure.²³⁶ The formal outcome of the case had nothing to do with the peculiarities of British

²³⁰ Id. at 98.
²³¹ Adams also represented Crown officers in two cases in 1769; Adams later related that he had been asked to take the position of advocate general of the Admiralty but he declined “since he wished to be under no obligation to those whose political principles he opposed.” Id. at 102-03.
²³² Id. at 147. Cf. Quincy, supra note __, at 450-51 (stating that Folger was removed from office in 1768 because he had voted in the Massachusetts House of Representatives for resolves favoring American manufacturers).
²³³ See 2 Legal Papers of John Adams, supra note __, at 147.
²³⁴ Id. at 149.
²³⁵ Id. at 149-50.
²³⁶ Id. at 151-52.
search and seizure practices, although Folger’s relationship with the anti-government faction colored Folger’s subsequent efforts to affirm the validity of his commission.\textsuperscript{237}

The second, more significant, case resulted from the seizure of John Hancock’s sloop \textit{Liberty} in June 1768. John Hancock was an outspoken critic of British rule and a wealthy, influential merchant, who latter became a signer of the Declaration of Independence and Governor of Massachusetts. “The uproar over the \textit{Liberty} led the Crown to send troops to Boston.”\textsuperscript{238} This in turn led to the Boston Massacre in March 1770,\textsuperscript{239} with Adams representing British soldiers involved in that shooting. Adams represented Hancock in the \textit{Liberty} litigation and was “draftsman of political manifestos for the Town of Boston” commenting on the event.\textsuperscript{240} That case, described as Adams’ politically most important case until the Boston Massacre trials, “played a leading part in the development of colonial opposition to the British customs system and Vice Admiralty courts.”\textsuperscript{241}

The \textit{Liberty} was searched and seized for violation of the statutory prohibition against unloading goods before entry.\textsuperscript{242} The events that followed were as much political as judicial. The sloop was ultimately put up for sale and purchased by customs authorities, who fitted her out as a revenue cutter. She was later seized by a mob in Rhode Island and burned.\textsuperscript{243}

Adams, representing Hancock in the trial concerning his involvement in the unloading, drafted an “unusual”\textsuperscript{244} argument in Hancock’s defense; he challenged the statute as invalid.

\textsuperscript{237} Id. at 156.
\textsuperscript{238} Id. at 103.
\textsuperscript{239} Id.
\textsuperscript{240} Id. at 102, 184-92.
\textsuperscript{241} Id. at 173.
\textsuperscript{242} Id. at 175.
\textsuperscript{243} Id. at 179-80.
\textsuperscript{244} Id. at 190.
because neither Hancock nor his representative had ever consented to it, in violation of his fundamental rights under Magna Carta, and that it denied Hancock his right to a jury trial.\textsuperscript{245} The popular aspect of the seizure is more telling. After the ship was seized, a “crowded” town meeting was held in Boston. Representatives of the town were appointed and Adams was charged with drafting instructions for those representatives.\textsuperscript{246} In his draft, which was approved by the town meeting, Adams asserted that the seizure of the Liberty had been unjustified because it was “without any probable cause of seizure that we know of, or indeed any cause that has yet been made known.”\textsuperscript{247} “The statements on probable cause . . . by the Boston town meeting on the Liberty[] saturated newspapers from Rhode Island to South Carolina.”\textsuperscript{248} The Liberty incident thus represented another significant reference to probable cause as the proper measure of a search or seizure; both Thatcher and Otis had referenced that standard in the Writs case. With the Liberty, Adams became an advocate for that standard.

\textit{ii. familiarity with search warrants for stolen goods}

In addition to Otis’ argument in the Writs case and the various treatises in his library, there is other evidence of Adams’ knowledge of search and seizure practices related to the recovery of stolen goods. Otis, it should be recalled, argued that warrants for stolen goods were “special,” that is, a magistrate issued them based on an oath, a showing of “good Grounds of suspicion,” “probable suspicion,” or “probable ground” and requiring a particular description of

\begin{flushright}
\textsuperscript{245} \textit{Id.} at 190, 198-207. \textit{See also} QUINCY, \textit{supra} note __, at 457-63 (reproducing Adams’ notes).
\textsuperscript{246} Instructions of the Town of Boston to Their Representatives, 1768, \textit{reprinted in} 3 WORKS OF JOHN ADAMS, \textit{supra} note __, at 501.
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} CUDDIHY, \textit{supra} note __, at 590 (citing sources). Cuddihy cites additional authority of the period using the lack of probable cause to explain why certain notorious maritime seizures between 1761 and 1776 were unreasonable. \textit{Id.} at 586-91. He observes that probable cause did not have an exact content but the controversies “had inserted ‘probable cause’ of seizure into the American legal vocabulary as a nebulous understanding that property could not
the place to be searched. Contemporaneous with the *Writs* case, Adams served as an attorney in the case of *Hunt v. White*, which involved a “very slanderous, and malicious Lye, made and published to [Hunt’s] Damage.”249 Although all the details are unclear, Adams prepared for his argument by writing in his diary:

Mr. Hunt, it seems sometime after last Thanksgiving Day, made his application to Mr. Justice Dyer, for a Warrant to search for stolen [] goods. [] The justice administered an oath to him and he swore that on . . . the Night after last Thanksgiving Day, his House was broken and 17 of Money stolen from his Chest. A Warrant of search was granted and dilligent search was made, but the Money not found.250

According to Adams’ notes, White thereafter told a variety of false stories related to those events251 and the litigation did not turn on the form the warrant took. Nonetheless, the warrant that Hunt obtained had many of the features of a “special” warrant and was based on criteria later embedded in the Article 14 and the Fourth Amendment: issuance by a magistrate; an oath; and a statement of facts to justify the issuance.

**iii. The home as a castle**

Otis’ argument in the *Writs* case in 1761, as reported by Adams, emphatically emphasized that a man’s home is his castle. Otis was, of course, not the first to make such observations and the principle seems to have had general acceptance in the colonies.252 In addition to the treatises he read, there is also ample other evidence indicating Adams’ familiarity with this principle.

The years between the *Writs* case and the onset of the Revolutionary War were

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249 1 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note __, at 179.
250 Id. at 180.
251 Id.
252 E.g., CUDDHY, supra note __, at 185-88 (recounting numerous iterations of that principle); Davies, Original Fourth Amendment, supra note __, at 601-03 (same).
tumultuous ones in Boston and one notorious event occurred on February 22, 1770, when Ebenezer Richardson shot and killed an eleven year boy. Richardson had been widely rumored to be a member of the customs establishment and, hence, the target of much criticism. On that date, a Boston mob targeted the shop of Theophilus Lillie, who had refused to honor an agreement not to import British goods. “[T]he technique used against men like Lillie had been the ‘exhibition,’ a sign or placard planted before the offending shop, carrying language whose general import was ‘Don’t Buy from the Traitor.’” A gang of boys paraded in front of Lillie’s shop and placed a sign before his door. Richardson, observing the boys and the sign, at first attempted to persuade other bystanders to run their wagons over the sign; failing that, he took a cart and a horse and attempted to do so himself. This led to a general tumult, with the crowd hurling missiles at Richardson, who retreated to his home, accompanied by a man named George Wilmot. Witnesses at trial testified that stones shattered the windows of the house and, eventually, the crowd began to push at the doors. As the “pelting continued, Richardson thrust a gun through the window, ‘snapping’ it at the mob. Finally, he fired a charge of bird shot,” resulting in the boy’s death.

The crowd seized Richardson and Wilmot, much abused them, and dragged them through the town. At Faneuil Hall, in the presence of a thousand people, justices of the peace examined Richardson and Wilmot, and then committed them to jail. The Sons of Liberty exploited the incident to their “utmost advantage,” including inflammatory newspaper reports and the use of

253 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 396-97.
254 Id. at 397-98.
255 Id.
the boy’s funeral to advance their cause. Two thousand people attended the funeral.\textsuperscript{256} The Boston Massacre occurred two weeks later. In this atmosphere, as the editors of Adams’ Legal Papers have observed, the chance of Richardson receiving “a fair trial was minimal and of acquittal zero.”\textsuperscript{257}

The significance of the case, \textit{Rex v. Richardson}, for present purposes, is not what happened to Richardson and Wilmot;\textsuperscript{258} instead, it stands out due to the arguments of counsel for Richardson. Josiah Quincy eventually became Richardson’s attorney. His principal defense was that Richardson, being attacked in his own home and his life endangered, could use all possible means to defend himself.\textsuperscript{259} Contained in Adams’ papers are notes from defense counsel, probably written by Quincy.\textsuperscript{260} Those notes summarize the right of self defense, including the following references to the importance of the home:

\begin{quote}
A Man’s house is his Castle and he may defend it by himself alone or with such as he calls to assist him. 1 H.H.P.C. 445. 487. 5 Coke Repts. 91b. Semane’s Case. 11 Coke Repts. 82b. Lewis Bowles Case.\textsuperscript{261}
\end{quote}

Quincy’s references have been interpreted by Worth and Zobel, the editors of Adams’ legal papers. The first reference, “1 H.H.P.C. 445. 487,” refers to 1 Hale’s \textit{Pleas of the Crown}:

\begin{quote}
“445: But if \textit{A.} come to enter with force, and in order thereunto shoots at his house, and \textit{B.} the possessor, having other company in his house, shoots and kills \textit{A.} this is manslaughter in \textit{B.}” I id. at 487: “[H]is house is his castle of defense, and therefore he may justify assembling of persons for the safeguard of his house.”\textsuperscript{262}
\end{quote}

\textsuperscript{256} \textit{Id.} at 399-400. Adams, in his diary, recounted that he attended the funeral. He remarked: “My Eyes never beheld such a funeral. The Procession extended further than can be imagined. This [shows] there are many more Lives to spend if wanted in the Service of their Country.” \textit{1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, supra} note __, at 349-50 (Diary entry for 02/26/1770 or “thereabouts.”).
\textsuperscript{257} 2 \textit{LEGAL PAPERS OF JOHN ADAMS, supra} note __, at 400-01.
\textsuperscript{258} \textit{Id.} at 402, 404.
\textsuperscript{259} \textit{Id.} at 410.
\textsuperscript{260} \textit{Id.} at 411.
\textsuperscript{261} \textit{Id.} at 413. The prosecutor’s notes of the arguments are similar. \textit{See id.} at 422-234.
\textsuperscript{262} \textit{Id.} 412. n.91.
The second refers to “5 Coke Repts. 91b. Semane’s Case,” which is *Semayne v. Gresham*, or more often called *Semayne’s Case*. That case has endured through time as important in the construction of search and seizure principles. It has been cited and debated in numerous Supreme Court opinions, with much of the discussion examining the circumstances when the government may enter a person’s home. Written by Lord Coke, the most famous aspect of the case, however, is Coke’s assertion that “the house of every man is to him as his castle.” Relevant to the Richardson litigation was *Semayne’s* observations on the right of a person to use self-defense in one’s home:

“[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and altho’ the life of man is a thing...”

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264 CUDDIHY, supra note __, at 63.
265 See Michigan v. Hudson, 547 U.S. 586, 594 (2006) (referring to unannounced entries); Georgia v. Randolph, 547 U.S. 103, 123 (2006) (Stevens, J., concurring) (“At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a “house” or “castle” unless authorized to do so by a valid warrant.”); United States v. Banks, 540 U.S. 31, 41 (2003) (referring to unannounced entries); Wilson v. Layne, 526 U.S. 603, 609 (1999) (“In 1604, an English court made the now-famous observation that ‘the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.’”)
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precious and favoured in law . . . if thieves come to a man’s house and rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall loose nothing . . . . [E]very one may assemble his friends and neighbours to defense his house against violence.”

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

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

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

In his own case preparation as a lawyer, Adams in 1774 addressed the protections afforded a person in his home. The case, King v. Stewart, was an instance of mob “violence which disturbed Adams deeply.” On March 19, 1766, a mob broke into the home and store of Richard King, terrorized the family, caused significant damage, and burned some of his papers. Protracted litigation followed and Adams became counsel for King in 1773. In

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267 Id.
269 2 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 412. n.93.
270 1 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 106.
271 Id.
272 Id.
Adams’ handwriting is “what appears to be a complete text of his address to the jury.” In the course of that argument, Adams described “that strong Protection, that sweet Security, that delightful Tranquillity which the Laws have thus secured to [an Englishman] in his own House . . .” He added:

An Englishmans dwelling House is his Castle. The Law has erected a Fortification round it—and as every Man is Party to the Law, i.e. the Law is a Covenant of every Member of society with every other Member, therefore every Member of Society has entered into a solemn Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery. . . . Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightfull Tranquillity which the Laws have thus secured to him in his own House, especially in the Night. Now to deprive a Man of this Protection, this quiet and Security in the dead of Night, when himself and Family confiding in it are asleep, is treat[ing] him not like an Englishman not like a Freeman but like a Slave.

iv. Litigation on Arrest Warrants

Beginning in 1761, a series of events resulted in “complex litigation,” described as a “landmark in the history of Martha’s Vineyard, [which] arose out of an unhappy family situation.” A series of warrants were issued to arrest various members of the family, including Wadsworth Mayhew. When Deputy Sheriff Cornelius Bassett sought to execute a warrant for the arrest of Mayhew, he enlisted the aid of a number of men. Apparently, they set out at 9:30 P.M. for the house where Mayhew was supposed to be and surrounded it. Bassett went to the front door and demanded entrance. In response, he received a charge of buckshot in the legs. He

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273 Id. at 107.
274 Id. at 137.
275 Id.
276 Id. at 87. See also CUDDHY, supra note __, at 563-69 (providing additional details about the litigation and asserting that the litigation “defined Massachusetts as the first jurisdiction to complete the transition from general to specific warrants”).
277 1 LEGAL PAPERS OF JOHN ADAMS, supra note __, at 87-91.
and his men then broke down the door and, after a struggle, seized Wadsworth.\textsuperscript{278} Numerous law suits resulted and Otis\textsuperscript{279} and later Adams represented Bassett and another man.\textsuperscript{280} Robert Treat Paine was the opposing attorney. Adams and Paine both took notes. Adams scribbled that the “Turning Point” of the case was the “legality of the Warrant.” He referred to the warrant as “General,” and added: “Void in itself. Broke open in dead of Night.”\textsuperscript{281} He also cited several authorities on the law of arrests that stand for the propositions that one coming to another’s door to make an arrest must announce his purpose and give those inside the opportunity to admit the person before the breaking of the door was justified.\textsuperscript{282} He thereafter wrote: “No Necessity. Late at Night.”\textsuperscript{283} Paine’s minutes also referenced the law pertaining to arrests and warrants\textsuperscript{284} and at the end listed the following “Objections to Warrant”:

To search all suspected houses.
Not for sufficient Cause to break house.
If Warrant good, officer could not break in the night.\textsuperscript{285}

Cuddihy notes the “foremost irony” of the litigation: “Adams and Otis, who had acquired reputations as opponents of general writs of assistance, had championed clients acting under close relatives of those writs.”\textsuperscript{286} Irony aside, the detailed criteria for the issuance and execution of warrants that Adams and Paine recognized as controlling demonstrate detailed knowledge of search and seizure principles, including a distinction between general and specific warrants, limitations on nighttime searches, knock and announce principles, and the law of

\textsuperscript{278} Id. at 89-90.
\textsuperscript{279} Cuddihy, supra note __, at 565.
\textsuperscript{280} Cuddihy, supra note __, at 567; 1 Legal Papers of John Adams, supra note __, at 90.
\textsuperscript{281} 1 Legal Papers of John Adams, supra note __, at 91.
\textsuperscript{282} Id. at 99.
\textsuperscript{283} Id.
\textsuperscript{284} Id. at 101-05.
\textsuperscript{285} Id. at 105.
arrests.

F. Adams as Delegate to the Continental Congress

In 1774, the American colonies created the First Continental Congress. John Adams was a delegate from Massachusetts, serving from September 5 to October 26.\textsuperscript{287} In an address to the American people on October 21, 1774, and again in an address to the King on October 26, 1774, Congress “protested the power of Commissions of Customs ‘to break open and enter houses without authority of any civil magistrate founded on legal information.’”\textsuperscript{288} Simultaneously, “Congress warned the inhabitants of Quebec that British legislation had exposed them to excises,” and that they should “expect entrance by ‘insolent excise-men into ‘houses, the scenes of domestic peace and comfort and called castles of English subjects in the books of their law.’”\textsuperscript{289}

IV.

1776 to 1791: The Evolution of Search and Seizure Provisions.

A. Article 14 and Other Early Search and Seizure Provisions

Many of the state governments at the time of the American Revolution adopted legal protections against unreasonable searches and seizures.\textsuperscript{290} Those protections, embodied in the constitutions of the various states after declaring their independence, typically addressed only

\textsuperscript{286} CUDDHY, supra note __, 569.
\textsuperscript{287} Among Adams’ notes from that Congress is this reference to a speech by Lee: “Life, and liberty which is necessary for the security of _____, cannot be give _____ up when we enter into society.” Notes of John Adams, Sept. 8, 1774, quoted in THE SPIRIT OF ’SEVENTY-SIX 52 (Henry S. Commager, et al., eds. 1958).
\textsuperscript{288} CUDDHY, supra note __, at 543-44 (citing sources).
\textsuperscript{289} Id. at 544 (citing sources). See also id. at 779-80 (arguing that Professor Davies’ characterization of these addresses as referring to writs of assistance is inaccurate and asserting that Congress was referring to actions that did not require writs); 2 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note __, at 147 (Adams writing in his diary on October 4, 1774, that Lee showed him the address to the People of Canada).
abuses associated with general warrants.\textsuperscript{291} The Massachusetts Constitution, drafted by John Adams in 1779 and adopted by the Commonwealth in 1780,\textsuperscript{292} offered a much different model. The constitution Adams created was preceded by a “Declaration of Rights,” including a search and seizure provision\textsuperscript{293} that ultimately became Article 14, which provided:

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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
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\textsuperscript{290} See generally id. at 603-13.

\textsuperscript{291} The Virginia, Maryland, and North Carolina constitutions only addressed and abolished general warrants. See Sources of Our Liberties 312, 348, 355 (R. Perry & J. Cooper eds., 1960) (quoting each constitution); see also note __ (reproducing the Virginia provision). Pennsylvania offered a somewhat broader provision. Its statement of rights, Section 10, provided:

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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.
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Quoted in id. at 330. The first clause of this provision, although declaring the broader principle of freedom from searches and seizures, arguably served only as a premise for condemning general warrants, which were the only abuses prevented. Vermont adopted a constitution in 1777 with a search and seizure provision identical to Pennsylvania’s but Vermont was not admitted into the Union until 1791. See Sources of Our Liberties 358, 366 (R. Perry & J. Cooper eds., 1960). With the exceptions of New Hampshire and Massachusetts, discussed infra, the remaining states did not address searches and seizures at all in constitutions they adopted. See, e.g., id. at 309-10.

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


\textsuperscript{293} The sole change made to Adams’ draft was to substitute the word “subject” for “man.” 8 Papers of John Adams, supra note __, at 1263 n.24.
prescribed by the laws.\textsuperscript{294}

Although Adams consulted other state constitutions,\textsuperscript{295} Article 14 had significant innovations: the words “secure” and “unreasonable” to define the quality and scope of the right protected were new to search and seizure provisions; and the first sentence declared a broad right against unreasonable searches and seizures, not just a prohibition against general warrants. Other aspects of Article 14 were similar to provisions in other states. The first sentence contains a list of four objects protected, similar to the list in Pennsylvania’s Constitution, adopted four years before the Massachusetts provision.\textsuperscript{296} The second sentence of Article 14 abolished general warrants, as had several previous state constitutions. Adams, consistent with the Pennsylvania constitution, required the foundation of the warrant to be specified and under an oath or affirmation. Adams added some innovative language: (1) the warrant had to be “accompanied with a special designation of the person or objects of search, arrest or seizure;” and (2) issued “with the formalities prescribed by law.”

Somewhat remarkable and certainly disappointing, Adams never seems to have commented on the Massachusetts search and seizure provision.\textsuperscript{297} Nor is there any discussion—other than an ambiguous comment by a Congressman who’s identity is disputed—by any of the men who debated the structure of the Fourth Amendment as to why they were choosing Adams’
model as the better of the two models. Nonetheless, as discussed in the next sections, Adams’
model became the preferred format during the crucial period that began with the drafting of the
Constitution in 1787 and ended with the drafting of the Fourth Amendment in 1789.

B. The Constitutional Convention of 1787

The United States Constitution resulted from a convention in Philadelphia in 1787. Almost none of the debate at the convention involved discussion of a bill of rights and there is no
record of any discussion of a search and seizure provision. The Framers were concerned with
the larger issues of the structure and powers of the Federal government and its relationship to the
states. In the final days of the convention, George Mason, a delegate from Virginia, proposed
including a bill of rights. He argued: “It would give great quiet to the people, and, with the aid
of the state declarations, a bill might be prepared in a few hours.” 298 Elbridge Gerry of
Massachusetts moved that a bill of rights be prepared, which was seconded by Mason. The very
brief recorded debate that accompanied the motion only mentioned the necessity for juries and
was not otherwise specific as to the elements of a bill of rights. The motion was defeated by an
even vote among the states, with Massachusetts being absent. 299 Both Mason and Gerry
ultimately declined to sign the Constitution at the conclusion of the convention but their
influence on the process continued, with each playing a role in the subsequent evolution of the
language of the Fourth Amendment.

Adams was in England at the time of the Constitutional Convention, which had adopted a

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See, e.g., 9 WORKS OF JOHN ADAMS, supra note __, at 505-09 (three letters written between 1779-80).
298 Quoted in JONATHAN ELLIOT, 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 538 (1876).
299 Id.
code of silence.  

Upon reviewing a copy of the proposed Constitution shortly after it had been made public, Adams wrote a letter to Thomas Jefferson stating that he hoped it would be adopted “and Amendments be made at a more convenient opportunity.” He then posed these questions to Jefferson: “What think you of a Declaration of Rights? Should not such a thing have preceded the Model?” As will be discussed, subsequent arguments, on either side of the debate over the inclusion of a bill of rights in the Constitution, were often not much more detailed that the sentiments expressed in Adams’ letter.

C. The Confederation Congress

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

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

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300 See, e.g., DAVID O. STEWART, THE SUMMER OF 1787 at 51 (2007) (discussing the “strict” adherence to the code of silence by the delegates).
301 THE ADAMS JEFFERSON LETTERS 210 (Lester J. Cappon, ed. 1959).
302 Id. Although Jefferson did not reply directly on this point to Adams, he did write to Madison on December 20, 1787, that “no just government should refuse” a bill of rights. Quoted in DAVID O. STEWART, THE SUMMER OF 1787 at 227, 327 (2007). See also 5 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 788 (John P. Kaminski & Gaspare J. Saladino, ed. 2000) (letter from Adams to Cotton Tufts on January 23, 1788) (affirming support for the Constitution but indicating a need for future amendments); id. Vol. 4 at 212 n.4 (letter from Adams to Cotton Tufts on February 12, 1788) (affirming support for the Constitution but stating: “a Declaration of Rights I wish to see with all my Heart”).
Cuddihy’s point is an important one: Lee utilized the first sentence of Article 14 of the Massachusetts Declaration of Rights as the basis of his proposal. Moreover, Lee shared that model with many others, including George Mason, an important figure during the ratification debates in Virginia, and urged Mason to develop a plan for several states to ratify the Constitution with amendments.  

304 In a letter to Mason from Richard Henry Lee, dated October 1, 1787, Lee commented on the proceedings in the confederation Congress and how it had sent the proposed Constitution without change to the States despite his attempts to amend it. He sent Mason a copy of his proposed amendments. Lee suggested to Mason that Virginia and other states join in creating amendments and approving the Constitution with the amendments. 2 THE LETTERS OF RICHARD HENRY LEE 438-40 (James C. Ballagh, ed. 1914). A similar letter was sent to Samuel Adams, Elbridge Gerry, and numerous other influential men. See id. at 444-47. Lee’s proposal was widely disseminated and “responses to Lee’s letter and amendments were voluminous.” 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 463 (John P. Kaminski & Gaspare J. Saladino, ed. 2003).  

Lee’s proposed amendment is linguistically broader than the initial views of the writer of a pamphlet that gained widespread circulation, “Letters of a Federal Farmer.” In letter number 4, dated October 12, 1787, the writer complained that several essential rights were omitted, including “‘freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property and persons.’” NEIL H. COGAN, CONTENTS OF THE CONSTITUTION 706, 710 (1999). However, in letter number 6, dated December 25, 1787, the writer listed among the “unalienable or fundamental rights in the United States” that “he is subject to no unreasonable searches or seizures of his person, papers or effects.” 17 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 274 (John P. Kaminski & Gaspare J. Saladino, ed. 1995). Giving more detail, in letter number 16, dated January 20, 1788, the writer stated:

[T]hat all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure; and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land. NEIL H. COGAN, CONTENTS OF THE CONSTITUTION 717, 722 (1999). Some have attributed the Letters to Lee but others have doubted that attribution. E.g., 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 15-16 (John P. Kaminski & Gaspare J. Saladino, ed. 1983). Lee was elected to the Senate after ratification of the Constitution and was a champion of amendments in the Senate. RICHARD H. LEE, 1 MEMOIR OF THE LIFE OF RICHARD HENRY LEE 240-41 (1825).

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

Adams and Lee were frequent correspondents. In a letter dated November 15, 1775, Adams shared with him his outline of his plan for government. 4 WORKS OF JOHN ADAMS, supra note __, at 185-87. In an interesting letter to John Adams on October 8, 1779, Lee stated that he was “much interested in the establishment of a wise and
D. The Ratification of the Constitution by the States

After the Constitutional Convention, and during the period of time when the individual states were considering the proposed Constitution, thousands of letters, pamphlets, speeches, and other comments were generated, both for and against adoption.\textsuperscript{305} There were extensive communications among the various factions throughout the states.\textsuperscript{306} The omission of a bill of rights was a significant criticism of the proposed Constitution but the surviving records indicate that the debate rarely involved delving into the details of an enumeration of a bill of rights. Instead, it was usually at a much higher level of generally, that is, whether to amend the Constitution or not to include a bill of rights.\textsuperscript{307}

Notwithstanding this, there were numerous isolated references to a need for protection free republic in Massachusetts Bay” and expressed his desire to “finish the remainder of my days” in Massachusetts. 2 THE LETTERS OF RICHARD HENRY LEE 155 (James C. Ballagh, ed. 1914). On September 10, 1780, Lee wrote to Adams regarding his reading the draft of the Massachusetts constitution. 10 PAPERS OF JOHN ADAMS, supra note __, at 142.

\textsuperscript{305} See generally DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION.

\textsuperscript{306} See generally LASSON, supra note __, at 83-100.

\textsuperscript{307} The argument against a Bill of Rights was straight forward: it was not needed. One delegate to the Pennsylvania ratifying convention stated the position succinctly: “What occasion for a bill of rights when only delegated powers are given? One possessed of 1000 acres, conveys 250. Is it necessary to reserve the 750?” Delegate McKean, quoted in James Wilson’s notes of the Pennsylvania Ratification Convention (December 10, 1787), 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 546-47 (Merrill Jensen, ed. 1976). Similar comments, although perhaps more artfully stated, were repeatedly made. See, e.g., 5 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 488 (John P. Kaminski & Gaspare J. Saladino, ed. 2000) (discussing such views); id. at 550 (views of “Remarker” in the Independent Chronicle); LASSON, supra note __ at 88-91.

For representative rejoinders by the Anti-Federalists, see 4 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 251-52 (John P. Kaminski & Gaspare J. Saladino, ed. 1997) (essay by Vox Populi in the Massachusetts Gazette, November 16, 1787); id. at 216-18 (essay by Portius, American Herald, November 12, 1787). The sentiments of those concerned with the absence of a bill of rights were well summed up by “One of the Common People,” writing in the Boston Gazette, on December 3, 1787. After rebutting the claim of another essayist that a bill was not needed because the Constitution was a limited grant of authority to the Federal government, id. at 376-69, the writer concluded:

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

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against searches and seizures. Some have claimed that the commentary addressed solely a concern with general warrants.\textendash{}308 The historical record, however, does not support that view. Instead, a variety of concerns were expressed. Most of the comments are themselves vague assertions, consisting of little more than a phrase or a sentence or two.\textendash{}309 Some did involve complaints about general warrants\textendash{}310 but others addressed more broadly stated concerns about unjustified searches and seizures,\textendash{}311 the unlimited power of new officers\textendash{}312\textendash{}particularly excise

\textit{Id.} at 369.  
308 \textit{E.g.,} Davies, \textit{Original Fourth Amendment, supra} note \textit{___}, at 610-11.  
309 \textit{See} \textit{Cuddihy, supra} note \textit{___}, at 673-80, 686-91 (summarizing the pamphlets and essays). A notable exception was a \textquote{revised} constitution drafted by \textquote{The Society of Western Gentlemen.} In early 1788, those Anti-Federalists circulated a draft constitution that included the following provision:

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


\begin{quote}
There is no provision by a bill of rights to guard against encroachments of power in too many instances to be named; but I cannot pass over in silence the insecurity we are left with regard to warrants unsupported by evidence--by the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power; to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure.
\end{quote}

\textit{Observations on the New Constitution and the Federal and State Conventions, reproduced in} 2 BIRTH OF THE BILL OF RIGHTS\textit{--ENCYCLOPEDIA OF THE ANTIFEDERALISTS} 143 (Jon L. Wakelyn, ed. 2004). Warren published the pamphlet under the name \textquote{A Columbian Patriot,} and it was for a long time thought to have been written by Eldridge Gerry. \textit{Id.} Vol. 1 at 73. Warren\textquotethe only reference to Otis and the writs of assistance made during the period when the Constitution and proposed amendments were being debated. Akhil Reed Amar, \textit{the Fourth Amendment, Boston, and the Writs of Assistance}, 30 \textit{SUFFOLK L. REV.} 53, 76 (1996).  
311 \textit{See, e.g.,} note \textit{___}; An Old Whig V, Philadelphia Independent Gazetteer, November 1, 1787, \textit{quoted in} 13 \textit{DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION} 541 (John P. Kaminski & Gaspare J. Saladino, ed. 1981) (expressing view that, without a Bill of Rights, no persons\textquotethe houses and papers [would be] free from seizure and search upon general suspicion or general warrants\textquotethe); Brutus II, New York Journal, November 1,
There are no tracts or detailed discussions about a search and seizure provision. I repeat two points for emphasis: the commentary urging the adoption of a search and seizure provision was fragmentary and isolated within a vast ocean of discussion about the proposed Constitution; and the concerns expressed often extended beyond general warrants.

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

1787, quoted in 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 135 (John P. Kaminski & Gaspare J. Saladino, ed. 2003) (arguing that a bill of rights was necessary because of the power of the central government of “granting search warrants, and seizing persons, papers, or property”).

“New officers may be created, the duties of which you would shudder to hear named.–Your houses may cease to be your castles—the most unreasonable searches may be made on you, your papers, &c. &c.” American Herald (January 14, 1788), quoted in 5 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 711 (John P. Kaminski & Gaspare J. Saladino, ed. 1998).

Compare Virginia Independent Chronicle, November 28, 1787, quoted in 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 178 (John P. Kaminski & Gaspare J. Saladino, ed. 1988) (arguing that there should be no concern about the federal government collecting excise taxes, given that Pennsylvania had long used such taxes and, in executing such taxes, “[n]o man’s house was broke open. The rights and properties of the people were not outraged.”) with The Impartial Examiner I, Virginia Independent Chronicle, February 27, 1788, quoted in 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 422 (John P. Kaminski & Gaspare J. Saladino, ed. 1988) (arguing that the “new species of authority . . . may warrant the most flagrant violations of the sacred rights of habitation” in pursuit of excise taxes). See also Luther Martin: Genuine Information VI, Baltimore Maryland Gazette, January 15, 1788, quoted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 377 (John P. Kaminski & Gaspare J. Saladino, ed. 1984) (“By the power to lay excises, a power very odious in its nature, since it authorises [sic] officers to go into your houses, your kitchens, your cellars, and examine into your private concerns, the Congress may impose duties on every article of use or consumption[,]”); A Son of Liberty, New York Journal, November 8, 1787 quoted in 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 135 (John P. Kaminski & Gaspare J. Saladino, ed. 2003) (arguing that, under the new Constitution, “[e]xcise laws established, by which our bed chambers will be searched by brutal tools of power, under pretence, that they contain contraband or smuggled merchandize, and the most delicate part of our families, liable to every species of rude or indecent treatment, without the least prospect, or shadow of redress, from those by whom [sic] they are commissioned.”).

Concern about the scope of searches to enforce excise taxes was longstanding. See, e.g., CUDDIHY, supra note __, at 300-02. The concerns expressed were particularly acute when the states were debating the proposed Constitution in 1787-88. See, e.g., id. at 678-79, 742 n.272; 22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1710-11 (John P. Kaminski & Gaspare J. Saladino, ed. 2008).

313 Robert Whitehill’s numerous comments and speeches at the Pennsylvania convention were some of the broader observations. They included: “Houses may be broke open by officers of the general government.” 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 514 (Merrill Jensen, ed. 1976). See also note
Accord to the spirit of obedience which you manifest; to the ease with which you part
with your money, so will the mode of assessing and collecting it be varied from time to
time by your new masters. If one [collector] shall not be competent, he shall be attended
with a host.—Whether that host shall be the posse of your county or a file of armed
soldiers, shall depend upon circumstances. They are to determine, and you are to make
no law inconsistent with such determination, whether such Collectors shall carry with
them any paper, purporting their commission, or not—whether it shall be a general warrant
or a special one—whether written or printed—whether any of your goods, or your persons
shall be exempt from distress, and in what manner either you or your property is to be
treated when taken in consequence of such warrants. They will have the liberty of
entering your houses by night as well as by day for such purposes.—All these points are
given in letter and spirit in the New Constitution, and the subject has not a shadow of
security that they will not be executed.—Nay, if they ever should mean to exercise the
right of taxation at all, I affirm it can be done with success by them in no other way, but
in an arbitrary manner, and by previously subduing the spirit and strength of this
Commonwealth.315

The essayist then referred to Article 14 to show that Massachusetts had “deemed it of
consequence, to preface such powers, with the mode in which they should be exercised.”316

After setting forth the provisions of Article 14, the essayist added:

These checks are omitted, in the present proceedings, and the sole reason why appears to
be this, that the makers of them know the power itself to be improper, that the people
would always be convinced of that impropriety, and would never submit, so long as they
could resist.—That of course it must be collected without these checks, or not collected at
all.317

Eventually, all of the original thirteen states ratified the Constitution.318 It was, however,
a close vote in several crucial states. To secure ratification, a strategy was developed of
accompanying ratification with proposed amendments.319 Virginia, North Carolina, Rhode

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315 John De Witt IV, American Herald, November 19, 1787, reproduced in 4 DOCUMENTARY HISTORY OF THE
316 Id. at 270.
317 Id.
318 The list is in JONATHAN ELLIOT, 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 319-37 (2d ed.
1891).
319 E.g., 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 294-95 (John P. Kaminski &
Island, and New York each proposed amendments to the Constitution that included a search and seizure provision. But the actual process within each of those states demonstrates that only Virginia and New York had any real influence. North Carolina initially refused to ratify the Constitution unless its amendments were adopted but later reversed itself and approved of the Constitution unconditionally. Rhode Island’s ratification did not come until after the Constitution was in effect and the other states were in the process of ratifying the Fourth Amendment. 320 A search and seizure amendment was debated in Pennsylvania, 321 Maryland, 322 Rhode Island, which ratified the Constitution on May 29, 1790, requested the following amendment:

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

JONATHAN ELLIOT, 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 335 (2d ed. 1891). The design of the Rhode Island proposal was virtually the same as New York’s, with the main difference being the substitution of “person” for New York’s “freeman.”

The absence of a Bill of Rights was a significant topic of debate at the Pennsylvania ratifying convention. See, e.g., JONATHAN ELLIOT, 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436-38, 454, 489-90 (2d ed. 1891). As to searches and seizures, Robert Whitehill on December 8, 1787, argued that the proposed Constitution offered “no security . . . for people’s houses or papers” and that “[t]he case of Mr. Wilkes, and the doctrine of general warrants show that judges may be corrupted.” He added: “A wicked use may be made of search warrants.” Notes of James Wilson’s notes of the Pennsylvania Ratification Convention (December 8, 1787), quoted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 526 (Merrill Jensen, ed. 1976). A few days later, Whitehill proposed the following as part of a bill of rights:

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


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

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

JONATHAN ELLIOT, 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (2d ed. 1891). That proposal tracks closely the Maryland Constitution, Declaration of Rights provision of the time period, which remains unchanged to this day as Article 26. See, e.g., Thomas K. Clancy, A Vision of Search and Seizure Protection, 34
and Massachusetts but the proposals were rejected by those states’ ratifying conventions.

Virginia’s search and seizure proposal became the basis for the other states that did propose a search and seizure provision. The Virginia convention began on June 2, 1788, and it ratified the Constitution with recommended amendments on June 27, 1787. In early June, the Anti-Federalist members of the convention agreed to a “Declaration or Bill of Rights.”

This amendment was considered indispensable by many of the committee; for, Congress having the power of laying excises, (the horror of a free people,) by which our dwelling houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens. General warrants, too, the great engine by which power may destroy those individuals who resist usurpation, are also hereby forbidden to those magistrates who are to administer the general government. JONATHAN ELLIOT, 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551-52 (2d ed. 1891). Despite these sentiments, the committee chose not to submit any proposed amendments to the Maryland convention. Id. at 555. Existing records indicate that there was also some concern expressed about the “power of excise officers to search and seize.” 2 BIRTH OF THE BILL OF RIGHTS—ENCYCLOPEDIA OF THE ANTIFEDERALISTS 197 (Jon L. Wakelyn, ed. 2004) (notes of Samuel Chase); see also id. at 191(ESSAYS BY A FARMER, I, by John Francis Mercer, who added that, in England, it had become a maxim that juries would return “ruinous verdicts” for customs searches, although acknowledging that the damages were frequently paid by the government “upon certificate of the judge that there was probable cause of suspicion”).

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

The proposal for a “Declaration or Bill of Rights” was rejected by the ratifying conventions of Massachusetts and Virginia. The proposal became the basis for the other states that proposed a search and seizure provision.

In early June, the Anti-Federalist members of the Virginia convention agreed to a “Declaration or Bill of Rights.” The convention began on June 2, 1788, and it ratified the Constitution with recommended amendments on June 27, 1787. The Virginia convention, as he had at the Federal convention, was a strong proponent of amendments to Constitution. See, e.g., 3 PAPERS OF GEORGE MASON 1062-68 (Robert A. Rutland, ed. 1970). Mason composed a list of objections to the Constitution, listing inter alia, the absence of a “Declaration of Rights.”
Among those provisions was the following:

That every free Man has a Right to be secure from all unreasonable Searches and Seizures of his Person, his papers, and his property. All Warrants therefore to search suspected places, or to seize any freeman, his papers, or Property, without Information upon Oath (or Affirmation of a Person religiously scrupulous of taking an oath) of legal and sufficient Cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected Person, without specifically naming or describing the place or Person, are dangerous, and ought not to be granted.\[^{326}\]

The records of the Virginia convention’s debate have the most detailed comments concerning the need for a search and seizure provision of any of the ratifying conventions but the specific language of the Anti-Federalists’ proposal was never examined. The speakers sometimes expressed a concern about general warrants but they also spoke more broadly about unjustified intrusions. Patrick Henry spoke frequently. On June 5, 1788, around

\[^{99}\] Mason’s views became well known, with Mason sending his list to many influential men. See generally 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 40-42 (John P. Kaminski & Gaspare J. Saladino, ed. 1988). That list included Elbridge Gerry, 3 PAPERS OF GEORGE MASON, supra note __, at 1005-06 (letter dated October 20, 1787), Thomas Jefferson, id. at 1045 (letter dated May 26, 1788), and George Washington, id. at 1001 (letter dated October 7, 1787), who in turn sent the list to James Madison. Id. at 1002. Washington also had a copy of Lee’s objections to the Constitution and observed that Lee’s and Mason’s “political tenants” were “always in unison.” Id. Notably absent from Mason’s list was any reference to searches and seizures.

It is unknown who drafted the recommended amendment sent to Congress by the Virginia ratifying convention. Some maintain that Mason probably drafted it. E.g., CUDIHY, supra note __, at 684-85 (arguing that Mason probably drafted the provision); KATE M. ROWLAND, 2 THE LIFE OF GEORGE MASON 444 (1892) (same and noting that the original manuscript is in the handwriting of Mason); 19 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 43, 63 (John P. Kaminski & Gaspare J. Saladino, ed. 1995) (reproducing the draft and noting editorial changes in Mason’s hand). There is, however, reason to doubt that Mason was the drafter. Mason’s proposed amendments to the Constitution, circulated by him prior to the Virginia ratifying convention, did not include a search and seizure provision. Also, although Mason was the primary drafter of the Virginia Declaration of Rights in 1776, the general warrant provision was added by the convention; Mason disclaimed being the author and dismissed it as “‘not of fundamental nature.’” SOURCES OF OUR LIBERTIES 302 n.8 (R. Perry & J. Cooper eds., 1960); 1 PAPERS OF GEORGE MASON, supra note __, at 290.

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

\[^{326}\] 3 PAPERS OF GEORGE MASON, supra note __, at 1070. It is also quoted in JONATHAN ELLIOT, 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 658 (2d ed. 1891).
the same date that the Anti-Federalists were drafting their search and seizure proposal,\(^{327}\) Henry argued in the convention broadly about the concern that “excise men . . . may search at any time your houses and most secret recesses.”\(^{328}\) On June 16, 1788, he made extended remarks about the proposed Constitution and returned to a concern about searches and seizures at least twice. At one point, he observed:

Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress? They will tell you, that he is executing the laws under the authority of the continent at large, which must be obeyed; for that the Government cannot be carried on without exercising severity. If, without a reservation of rights, or control, you are contented to give up your rights, I am not.\(^{329}\)

Later that same day, Henry argued:

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

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\(^{327}\) See Letter from Patrick Henry on June 9, 1788, reprinted in 18 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1301 (John P. Kaminski & Gaspare J. Saladino, ed. 1995) (discussing how George Mason had agreed to act as chair of the Anti-Federalist group and that they had drafted amendments and a bill of rights that the group intended to introduce).

\(^{328}\) 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 963 (John P. Kaminski & Gaspare J. Saladino, ed. 1990). George Mason, on June 11, struck a similar theme: “And as to excises—This will carry the exciseman to every farmer’s house who distills a little brandy, where he may search and ransack as he pleases.” Id. at 1157.

within proper bounds.\textsuperscript{330}

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

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

That general warrants are grievous and oppressive, and ought not to be granted, I fully admit. I heartily concur in expressing my detestation of them. But we have sufficient security here also. We do not rely on the integrity of any one person or body; but on the number and different orders of the Members of Government: Some of them necessarily the same feelings as ourselves. Can it be believed, that the Federal Judiciary would not be independent enough to prevent such oppressive practices? If they will not do justice to persons injured, may they not go to our own State Judiciaries and obtain it?\textsuperscript{331}

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

I feel myself distressed, because the necessity of securing our personal rights, seems not to have pervaded the minds of men: For many valuable things are omitted. For instance:–General warrants, by which an officer may search suspected places, without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized: any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred, may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here, than they have in England; because there, if a person be confined, liberty may be quickly obtained by writ of \textit{habeas corpus}. But here a man living many hundred miles from the Judges, may rot in prison before he can get that writ.\textsuperscript{332}

Randolph again replied, denying the power of the Federal Government to issue general

\textsuperscript{330} \textit{Id.} at 1331-32.
\textsuperscript{331} \textit{Id.} at 1351-52.
\textsuperscript{332} \textit{Id.} at 1474-75.
warrants.\textsuperscript{333}

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

The Anti-Federalist proposal was adopted by the Virginia convention on June 27, 1788 as a recommendation to the first Congress.\textsuperscript{334} That recommendation differed notably from the search and seizure provision of the Virginia constitution of 1776, which provided:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.\textsuperscript{335}

Instead, the Virginia proposal was demonstrably influenced by Article 14, largely adopting its structure and much of its language. The language of the first sentence was virtually a replication of Article 14, including Adams’ first sentence declaring a right to be secure from unreasonable searches and seizures. That language had been used by Richard Henry Lee in his list of Amendments, which he provided to Mason shortly after the conclusion of the Federal convention.\textsuperscript{336} The second sentence of the Virginia proposal prohibited general warrants, continuing the evolution of the language of such prohibitions; it added some new verbiage but maintained the essential historical lesson of seeking objective criteria for warrants to issue.

\textsuperscript{333} Id. at 1484.
\textsuperscript{334} 3 PAPERS OF GEORGE MASON, supra note __, at 1119; 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1515, 1550-52 (John P. Kaminski & Gaspare J. Saladino, ed. 1993).
\textsuperscript{335} Quoted in SOURCES OF OUR LIBERTIES 312 (R. Perry & J. Cooper eds., 1960).
\textsuperscript{336} See note _______.

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However, a notable change from Article 14 was the exclusion of slaves from its protection. In sum, the Virginia convention had before it two types of search and seizure provisions, including its own narrow one banning only general warrants; the convention chose the Adams model.\footnote{337 During the course of the Virginia convention, there were general references to the Massachusetts Constitution but I have found no specific reference to Article 14. \textit{E.g.}, 10 \textit{Documentary History of the Ratification of the Constitution} 1268-69, 1380 (John P. Kaminski & Gaspare J. Saladino, ed. 1993).}

Virginia’s proposed search and seizure provision was dispatched to the New York convention,\footnote{338 3 \textit{Papers of George Mason}, \textit{supra} note __, at 1071. \textit{See also Cuddihy}, \textit{supra} note __, at 703 n.121 (citing sources for the transmission of the Virginia proposal to New York). There were extensive contacts between the Anti-Federalists in New York, Virginia, and other states during the period that the Constitution was before the states for ratification and there were allegations that they were working in concert. \textit{E.g.}, 9 \textit{Documentary History of the Ratification of the Constitution} 788-90, 811-13 (John P. Kaminski & Gaspare J. Saladino, ed. 1990). The Virginia Anti-Federalists sent their amendments to New York on June 9, 1788. \textit{Id.} at 813, 817-20.} where it went through a peculiar evolution but ultimately emerged substantively unaltered. At the New York convention, the Federalists feared defeat and initially engaged in protracted discussions of the provisions of the proposed Constitution; the proceedings dragged on and no discussion of search and seizure principles occurred during that time.\footnote{339 \textit{See generally} 22 \textit{Documentary History of the Ratification of the Constitution} 1670-72 (John P. Kaminski & Gaspare J. Saladino, ed. 2008).} Upon arrival of the news that Virginia had ratified the Constitution, the Federalists stopped “‘disput[ing] every inch of ground” and “‘quietly suffered [proposals made by the Anti-Federalists] without a word in opposition to them.’”\footnote{340 \textit{Id.} at 1672 (quoting letter from Nathaniel Lawrence to John Lamb on July 3, 1788). \textit{See also} \textit{id.} at 2084-87 (summarizing impact of receipt of the news from Virginia of that state’s ratification).}

On July 7, 1788, John Lansing, Jr., proposed a declaration of rights, which included a provision substantively identical to Virginia’s search and seizure recommendation.\footnote{341 Lansing’s July 7, 1788 proposal was:}{\footnotesize

That every Freeman has a Right to be secure from all unreasonable Searches & Seizures of his person, his papers & his property and that therefore all Warrants to search suspected places or to seize any Freeman his papers or property without Information upon Oath (or Affirmation of a Person religiously scrupulous of taking an Oath) of sufficient Cause are grievous and oppressive and all general Warrants to search suspected places or to apprehend any suspected person without specifically naming or describing the place or person are dangerous & oppressive & ought not to be granted.\footnote{342 \textit{Id.} at 813 (quoting letter from Nathaniel Lawrence to John Lamb on July 3, 1788). \textit{See also} \textit{id.} at 247-50 (summarizing impact of receipt of the news from Virginia of that state’s ratification).}}
Three days later, Lansing submitted a “new arrangement, and with material alterations,” of his previous plan.\footnote{Id. at 2111-12.} Lansing’s new plan produced an almost incoherent search and seizure provision,\footnote{Id. at 2119.} which was repeated by a proposal of Melancton Smith on July 17.\footnote{Id. at 2119.} Two days later, Lansing introduced another version,\footnote{Lansing’s July 10, 1788 proposal was: \begin{quote} That every Freeman has a Right to be secure from all \textit{unreasonable} Searches \& Seizures of his person his papers \& his property without Information upon Oath or Affirmation of sufficient Cause \& that all general warrants to search suspected places or to apprehend any suspected person without specifically describing or naming the place or person are dangerous \& oppressive \& ought not to be granted. \end{quote} \textit{Id.} at 2120. Lansing’s marginal notes indicated “See Virginia Plan.” \textit{Id.} at 2127 n.4.} which restored the language to closely resemble Virginia’s proposal and that version, with some stylistic changes,\footnote{Smith’s proposal had only stylistic changes. \textit{Id.} at 2201.} was agreed to on July 26 by the convention.\footnote{\textit{Id.} at 2236.} There was no recorded debate of the search or seizure provision at the convention.\footnote{See \textit{id.} at 2306.} As an indication of how little thought was given to the process in New York, the convention did not even change Virginia’s limiting the coverage of the provision to a free man.\footnote{The final version on July 26 provided: \begin{quote} That every Freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; and therefore that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted. \end{quote} \textit{Id.} at 2308.} The North Carolina debate adds very little more detail. On July 28, 1788, the North
Carolina convention debated possible amendments. Delegate Spencer at one point argued that there “ought to be a bill of rights.” He asserted: “Our rights are not guarded. There is no declaration of rights, to secure every member of society those unalienable rights which ought not to be given up to any government.” Another member replied that a bill of rights could not possibly list all of the rights and, if one was not listed, it would not be protected. Thus, he asserted, “a bill of rights might operate as a snare, rather than a protection.” And so it went.

Members of the convention mentioned a few enumerated rights, such as trial by jury, but almost all of the discussion was on the level of generally as the comments just quoted.350 On July 31, 1788, the convention resolved to consider proposed amendments collectively and not individually.351 It examined a long list of possible amendments, including a search and seizure provision similar to that proposed by the Virginia convention.352 The convention thereafter dissolved, after agreeing not to ratify the Constitution until a declaration of rights and certain other amendments had been presented to Congress or until a subsequent national convention was.

debates at the South Carolina ratifying convention, there were only brief references to the absence of a bill of rights and no amendments were proposed. Id. at 318.

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

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

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

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

called to consider amendments. However, North Carolina reversed this action on November 21, 1788, and ratified the Constitution unconditionally, that is, without any proposed amendments.\(^{353}\)

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

\textit{E. The Drafting of the Fourth Amendment}

In response to the concerns regarding the absence of a bill of rights in the Constitution, the First Congress drafted a series of amendments, one of which ultimately became the Fourth Amendment.
Amendment. The initial draft was prepared by James Madison, who was a committed Federalist. He had been a delegate to the Constitutional Convention and was the primary author of *The Federalist*, which rejected the need for a bill of rights.\textsuperscript{354} However, Madison’s position evolved over time.\textsuperscript{355} After the Constitution was adopted and when seeking a seat in the new Congress, Madison promised that, if elected, he would introduce amendments to the Constitution that included an enumeration of rights.\textsuperscript{356} In Congress, Madison offered the following draft:

\begin{quote}
The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.\textsuperscript{357}
\end{quote}

Madison left a record of what he believed was the evil to be combated: general warrants.

Shortly before introducing his proposed amendment in Congress, Madison wrote that he

\textsuperscript{354} The primary *Federalist* Paper addressing whether a bill of rights should be included in the Constitution, and opposing such a bill, was Number 84, written by Alexander Hamilton. He asserted: “The truth is . . . that the constitution is itself in every rational sense, and to every useful purpose, a Bill of Rights.” Hamilton also maintained that a bill of rights was not only unnecessary “but would be dangerous. They would contain various exceptions to powers not granted[,]” *The Federalist* No. 84 (Alexander Hamilton). Madison wrote Number 38, in which he asserted that a bill of rights was not essential to liberty.

\textsuperscript{355} In a letter to Thomas Jefferson, dated October 17, 1788, Madison asserted that his “own opinion has always been in favor of a bill of rights” but that he believed that an omission of a bill was not a “material defect, nor [had he] been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others.” *5 Writings of James Madison* 271 (Gaillard Hunt, ed. 1904). During the period of time when the House was debating amendments, Madison wrote that “many States” had ratified the Constitution “under tacit compact” that amendments would be adopted and that the Constitution would not have been ratified in Virginia “had no assurances been given by its advocates that such provisions would be pursued. As an honest man I feel bound by this consideration.” Letter to Richard Peters, quoted in *Creating the Bill of Rights* 282 (Helen E. Veit & Kenneth R. Bowling, ed. 1991). Others have seen a different motivation for Madison’s proposals for a Bill of Rights: to undercut the challenge posed by the Anti-Federalists. \textit{E.g.,} *Cuddihy*, supra note __, at 724-27. \textit{See also 23 Documentary History of the Ratification of the Constitution* 2505 (John P. Kaminski & Gaspare J. Saladino, ed. 1995) (quoting letter from James Madison to George Washington on August 11, 1788, stating concern about proposals regarding a second constitutional convention would have to “be parried”). \textit{See also id.} at 2516 (summarizing Madison’s maneuvering in the House of Representatives and asserting that his introduction of his proposed amendments ended “any real chance that a second general convention would be summoned.”).

\textsuperscript{356} *Lasson*, supra note __, at 97-98.

\textsuperscript{357} Annals of Cong., 1st Cong., 1st Sess., at 452, quoted in *Lasson*, supra note __, at 100 n.77.
perceived the need to be “security against general warrants.”\footnote{5 Writings of James Madison 320 (Gaillard Hunt, ed. 1904) (letter to George Eve dated January 2, 1789). See also and Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), reprinted in 11 The Papers of James Madison, supra note __ at 415, 416 (listing as one of the “essential rights . . . ”exemption from general warrants, &c.”); Letter from James Madison to a Resident of Spotsylvania County (Jan. 27, 1789), reprinted in 11 The Papers of James Madison, supra note __, at 428 (listing “Exemption from General Warrants, & c.” as needed provision).} Similarly, Madison detailed in a speech to the House of Representatives his reasons for proposing the amendments.\footnote{5 Writings of James Madison 370-89 (Gaillard Hunt, ed. 1904).} At one point he highlighted the need for a search and seizure provision:

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to those means, which may admit of abuse to a certain extent . . . ; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, . . . which laws in themselves are neither necessary nor proper . . . ? I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.\footnote{Id. at 383-84. See also id. at 390 (Madison’s notes of his speech referenced general warrants).}

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

Madison’s draft is a compilation of sources. Without doubt, he was acquainted with the Virginia Declaration of Rights and with the recommended amendment that resulted from the Virginia ratifying convention.\footnote{Madison had been a delegate to the Virginia ratifying convention. 9 Documentary History of the} What appears obvious is that, like the Virginia Declaration of Rights, Madison perceived the evil to be avoided as general warrants. However, instead of
adopting that earlier formulation from Virginia, Madison adopted Adams’ structure embodied in Article 14 of the Massachusetts Declaration of Rights, which had strongly influenced the Virginia ratifying convention’s formulation of its recommended amendment. Madison copied almost verbatim Adams’ declaratory statement containing four essential elements: (1) a right against searches and seizures; (2) limiting that right to be against only “unreasonable” intrusions; (3) defining a list of objects specifically protected, including persons, houses, papers, and “other property;”362 and (4) defining the quality of the right protected as the right to be “secure.”363

Madison, as had Adams and the previous state constitutional provisions, condemned general warrants. The Madison draft differed from Article 14 in two significant ways: (1) linguistically, the draft only prevented general warrants;364 and (2) Madison used substantially different language to articulate the criteria for a proper warrant to issue. As to the second point, the Adams formula for prohibiting general warrants was awkward, vague, and wordy; instead,

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362 The list of objects protected is identical to the Article 14 list, which was in turn derived from the Pennsylvania constitution, see note __ supra, except for Madison’s substitution of the phrase “other property” instead of “possessions.” Madison’s phrase was changed in the House consideration of the Amendment to the word “effects,” which remained in the Amendment as adopted. “Effects” are limited to personal property and do not include real property. Oliver v. United States, 466 U.S. 170, 177 n.7 (1984); Hester v. United States, 265 U.S. 57 (1924).

363 Madison, in his address to the House of Representatives, repeatedly used variations on the concept of “security” as the underlying concern. Hence, he asserted, Amendments were needed to “expressly declare the great rights of mankind secured under this Constitution.” 5 WRITINGS OF JAMES MADISON at 374. As other example, he stated, that the Bill of Rights would “provide those securities for liberty which are required by a part of the community” and that it would “incorporate those provisions for the security of rights.” Id. at 374-75.

364 E.g., Payton v. New York, 445 U.S. 573, 583-84 (1980). Lasson, for example, maintained that this draft of the Amendment was

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

LASSON, supra note __, at 103. See also United States v. Rabinowitz, 339 U.S. 56, 81 (1950) (Frankfurter, J., dissenting) (Fourth Amendment framed with general warrants especially in mind); Harris v. United States, 331 U.S. 145, 191 (1947) (Murphy, J., dissenting) (Fourth Amendment “designed in part, indeed perhaps primarily, to outlaw such general warrants”); TAYLOR, supra note __, at 42 (Madison’s draft only prohibited general warrants). But see
Madison substituted new phraseology, drawing on warrant issuance criteria in other provisions, including the requirement of an oath or affirmation, a particular description, and a requirement of some level of individualized suspicion. The Madison draft’s sole substantive innovation was to identify that level of suspicion as probable cause.

The congressional history concerning the evolution of the final form of the language of the Amendment is sparse and somewhat disputed. The provision generated very little recorded debate. The Madison draft was referred to a Committee of Eleven, which was made up of one member from each state represented in Congress. That committee reported a draft to the full House in the following form:

The rights of the people to be secured in their persons, houses, papers, and effects, shall...
not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized. 369

After this version was reported, “the phrase ‘unreasonable searches and seizures,’ inadvertently omitted in the committee’s draft, was inserted” and the word “secured” was changed to “secure.” 370 Those changes restored the Amendment to the Madison draft proposal, with the sole substantive change being a narrowing of the objects protected from “other property” to “effects.” 371

There was another–fundamentally important–change. After the Committee of Eleven reported its draft to the House, the phrase “by warrants issuing” was objected to by a member of Congress, who believed that “[t]his declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore [sought] to alter it [to] read ‘and no warrant shall issue.’” 372 The historical records do not further specify the basis of the objection. What is known is that the member appeared to recognize the Amendment as declaratory of a right and that he sought to clarify that right by making the first clause linguistically independent of the second clause. The identify of the member is contested. The Annuals of Congress lists the objector as Egert Benson of New York. 373 Relying on newspaper accounts, 374 scholars have

369 LASSON, supra note __, at 100-01.


371 See note __


challenged the accuracy of the Congressional record and have argued that Elbridge Gerry of Massachusetts made the motion.\textsuperscript{375}

Gerry had been a member of the Constitutional Convention, where he had proposed a bill of rights and thereafter declined to endorse the Constitution. Prior to the Massachusetts ratifying convention, he explained in a letter to the Massachusetts legislature that he refused to sign the Constitution, \textit{inter alia}, because the “system is without the security of a bill of rights.”\textsuperscript{376} Gerry believed, however, that the proposed Constitution had “great merit, and by proper amendments may be adapted to the ‘exigencies of government and the preservation of liberty.’”\textsuperscript{377} In a letter on June 22, 1788, Gerry observed that New York was going to adopt the Constitution conditionally by annexing a bill of rights; he believed that “removed all our objections.”\textsuperscript{378}

After the Constitution had been ratified, Gerry stood for election for the House of Representatives. In an open letter to the citizens of his district, Gerry stated that he would “be desirous of such amendments as will remove the just apprehensions of the people, and secure their confidence and affection.”\textsuperscript{379} In Congress, he helped Madison’s efforts to introduce a bill of rights.\textsuperscript{380} Gerry was a long time intimate of Adams and, being from Massachusetts, was undoubtedly familiar with Article 14.\textsuperscript{381} If Gerry made the motion, it is reasonable to conclude that he did so to restore the structure set forth in Article 14 or at least to reflect the proposed

\textsuperscript{375} See Davies, \textit{Original Fourth Amendment}, \textit{supra} note __, at 716-19; Cuddihy, \textit{supra} note __, at 694-95, 730-31. See also Amar, \textit{First Principles}, \textit{supra} note __, at 775 n.66 (criticizing accuracy of the House reporter).

\textsuperscript{376} \textit{LETTER TO SENATE AND HOUSE OF REPRESENTATIVES OF MASSACHUSETTS} (Oct. 18, 1787), \textit{reprinted in} JAMES T. AUSTIN, 2 \textit{THE LIFE OF ELBRIDGE GERRY} 42-43 (1829).

\textsuperscript{377} \textit{Id.} at 43.

\textsuperscript{378} \textit{Id.} at 84-85 (letter to General Warren).

\textsuperscript{379} \textit{Id.} at 93.

\textsuperscript{380} Cuddihy, \textit{supra} note __, at 693.

\textsuperscript{381} In a letter to Gerry shortly as he drafted the Massachusetts Constitution, Adams discussed its structure and his hope for its adoption. 9 WORKS OF JOHN ADAMS, \textit{supra} note __, at 505-06 (letter to Gerry dated November 4, 1779). In a letter dated December 2, 1814, upon hearing of the death of Gerry, Adams remarked that they had been
provisions by Virginia and New York, which were in turn influenced by Article 14.  

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

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

The proposed revision appears to have been defeated by a “considerable majority.”

friends for over 40 years. 10 WORKS OF JOHN ADAMS, supra note __, at 106.

382 During a debate in Congress, Gerry stated that the members of the Massachusetts delegation “were particularly instructed to press the Amendments recommended by the convention of that state at all times.” Congressional Register for 07/21/1789. However, a search and seizure provision was not among the amendments recommended by Massachusetts. See ___ supra. In a letter dated August 18, 1789, Congressman Frederick A. Muhlenburg wrote that the House had spent the day as a Committee of the Whole debating amendments. He observed: “Mr. Gerry & Mr. Tucker had each of them a long string of Amendts. which were not comprised in the Report of the special Committee [sic], & which they stile [sic] Amendments proposed by the several States.” CREATING THE BILL OF RIGHTS 281 (Helen E. Veit & Kenneth R. Bowling, ed. 1991). Cuddihy asserts that Gerry “had an established record of opposition to general searches and seizures.” CUDDIHY, supra note __, at 695 n.90. In support of that claim, Cuddihy cites only the fact that Gerry had been a member of a committee in 1773 that had sent a copy of Otis’ arguments in the Writs case to the Connecticut Committee of Correspondence. Id.

383 CUDDIHY, supra note __, at 724.

384 LASSON, supra note __, at 101, 102 n.84 (citing Annals of Cong., 1st Cong., 1st Sess., at 783). But see Davies,
Several days later, Benson, acting as chairman of the committee appointed to arrange and report amendments, reported the clause as either he or Gerry had proposed it, notwithstanding its apparent rejection by the House.\textsuperscript{385} At this point, the historical record is barren of substantive

\begin{quote}
Original Fourth Amendment, supra note __, at 719-20 (arguing that the motion passed, although acknowledging that the historical evidence “is inconsistent” and maintaining that a subsequent minor grammatical change in the language of the Amendment made after the “no warrant shall issue” motion was made and supports his view).
\end{quote}

\textsuperscript{385} LASSON, supra note __, at 101-02; LANDYNISKI, supra note __, at 41-42. It is unknown whether the change was due to Benson’s oversight, his unilateral action, or an unreported acceptance of Benson’s phrasing by the House. LASSON, supra note __, at 102 n.84.

The committee consisted of three members: John Sherman of Connecticut; Theodore Sedgwick of Massachusetts; and Benson. There is no evidence that Sherman or Sedgwick had any influence on the drafting of the Amendment. At best they were disinterested. Sherman had performed distinguished service on behalf of the colonies and the newly independent United States, including being the only person to have signed the Declaration of Independence, the Declaration of the Rights of the Colonies, the Articles of Confederation, and the Constitution. See ROGER S. BOARDMAN, ROGER SHERMAN 122 (1938). Yet, Sherman had little history of interest in search and seizure issues. As a delegate to the Constitutional Convention and during the subsequent attempts to ratify the Constitution, he was opposed to the inclusion of a Bill of Rights. \textit{Id.} at 261-62, 267-73. See also CHRISTOPHER COLLIER, ROGER SHERMAN’S CONNECTICUT 242 (1971) (quoting Sherman as stating on September 12, 1787: “The State Declaration of Rights are not repealed by this Constitution; and being in force are sufficient.”). Sherman had been an associate justice in Connecticut in 1768-69 and had some involvement in the debate as to whether writs of assistance should be issued as general or specific writs. The Connecticut court apparently declined to issue general writs. QUINCY, supra note __ at 501-06. As a member of Congress, Sherman eventually came to see the amendments as harmless. See, e.g., CREATING THE BILL OF RIGHTS 271 (HELEN E. VEIT & KENNETH R. BOWLING, ed. 1991) (Sherman, in a letter on August 4, 1789, wrote that the amendments “will probably be harmless & Satisfactory to those who are fond of Bills of rights”); Sherman’s comments at note __ supra. His main contribution to the Bill of Rights was as an advocate for not interweaving them into the text of the original document. ROGER S. BOARDMAN, ROGER SHERMAN, supra at 293-94. Sherman did, however, maintain a long term friendship with John Adams. \textit{Id.} at 123, 175; 10 WORKS OF JOHN ADAMS, supra note __, at 429 (Adams describing on July 17, 1789, his “unalterable friendship” with Sherman). But I have found no indication that they specifically discussed search and seizure principles. Cf. Adams’ diary 21, entry for 08/17/1774, 2 WORKS OF JOHN ADAMS, supra note __, at 343 (Adams’ wrote that, while a delegate to the Continental Congress in 1774, Adams had a conversation with Sherman in which Sherman asserted that Otis’s tract on the rights of the colonists had conceded too much authority to parliament); 6 WORKS OF JOHN ADAMS, supra note __, at 427-42 (correspondence between Adams and Sherman on the structure of governments). In a debate at the Continental Congress regarding the composition of a statement of grievances against Great Britain , according to Adams’ notes, Sherman observed: “The Colonies adopt the common Law, not as the common Law, but as the highest Reason.” 2 DIARY AND AUTOBIOGRAPHY OF ADAMS, supra note __, at 129.

Sedgwick was a strong Federalist and unlikely candidate for limiting the powers of the Federal government. See generally M.E. Bradford, \textit{High Federalist Teaching: Theodore Sedgwick of Massachusetts}, \textit{The INTERCOLLEGIATE REVIEW} 31 (Spring 1990). Sedgwick had been a delegate to the Massachusetts ratifying convention and served on the committee that was asked to prepare recommended amendments. \textit{Id.} at 34. As discussed in note __, a search and seizure amendment was not proposed by that committee; a subsequent attempt to add one was defeated. In a letter dated July 19, 1789, Sedgwick showed little respect for Madison or his “system of amendments.” He did not want them to “shackle the operations of government” and he viewed the debate regarding the amendments as a “water gruel process.” CREATING THE BILL OF RIGHTS 264 (Helen E. Veit & Kenneth R. Bowling, ed. 1991) (letter to Benjamin Lincoln). Sedgwick wrote another letter on August 20, 1789, in which he

\begin{verbatim}
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\end{verbatim}
comments about the meaning of the Fourth Amendment: the House version was accepted by the Senate, later formally enacted by both Houses of Congress, and ratified by the states. There are no records of any debate in the Senate on the Fourth Amendment and virtually no information appears to exist about ratification debates regarding the Amendment in the individual states.

V. Adams’ Views and Influence

Although the road is long and winding, Adams’ imprint on the final product is clear. No other actor, drafter, or “framer” had any comparable influence on the language and structure of the Fourth Amendment. Adams and his contemporaries were exposed to many sources of information about search and seizure practices and the criteria—or lack thereof—to regulate them. Adams had varied and unique experiences that informed his views. Without doubt, Otis’ arguments in the Writs of Assistance case had a profound and lifelong influence on Adams. He lived in Massachusetts, which bore the brunt of the arbitrary customs search and seizure practices and generated a significant amount of other litigation on search and seizure principles. Adams, as a litigator, had numerous cases involving searches and seizures, including customs

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386 LASSON, supra note __, at 103.
387 See CUDDHY, supra note __, at 712-23. Based on his examination of the state records regarding the ratification of the Amendment, Cuddihy observed: “None of [the state legislative] journals preserves a single utterance by a state legislator on the right respecting search and seizure. . . . To the extent that the direct evidence indicates, the amendment’s ratifiers took their thoughts about its original meaning to the grave.” Id. at 713.
388 Cf. Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (Because the Fourth Amendment was based on the Massachusetts model, “[t]his is clear proof that Congress meant to give wide, and not limited, scope to [the] protection against police intrusion.”).
389 Adams was certainly not without faults. For example, it was during his administration that the Alien and
enforcement and general warrants, night time searches, and entries into the home. Regarding the *Liberty* seizure, Adams contributed to the popular conception of the proper criteria for a search or seizure by arguing in the press for the probable cause standard. He served in the Continental Congress, which warned Canada about British practices. Adams corresponded with virtually all of the leading figures of the day, exchanging ideas on the theories and structures of government.\(^{390}\) Adams read extensively, including the major treatises of the era that addressed search and seizure principles. In addition to writing the Massachusetts Constitution, Adams wrote extensively on the structure of government. Finally, he examined other state constitutions when drafting the Massachusetts Constitution. Reflecting all of those influences, he created something unique, Article 14 of the Massachusetts Declaration of Rights.

Taylor, Amar, and those others who argue for a reasonableness standard without any objective criteria—general reasonableness—simply ignore or miss the rich search and seizure jurisprudence of the period leading up to the Fourth Amendment.\(^{391}\) On the other hand, those

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\(^{390}\) Adams’ correspondence is massive. Here are some illustrations: Correspondence with Patrick Henry of Virginia in 1776 on their thoughts on government, 4 *WORKS OF JOHN ADAMS*, supra note __, at 201-02; correspondence with John Penn of North Carolina detailing a “sketch [of] the outlines of a constitution” for North Carolina at the request of delegates from that state, *id.* at 203-09.

\(^{391}\) Professor Davies asserts that the Framers “would have understood ‘unreasonable searches and seizures’ as the pejorative label for searches or arrests made under that most illegal pretense of authority—general warrants.” *Davies, Original Fourth Amendment, supra* note __, at 693. *See also id.* at 723 (Framers were merely banning general warrants and not creating a broad reasonableness standard). There are multiple problems with Davies’ position. First, as discussed in note __, supra, it ignores that portion of Otis’ argument that set out detailed objective criteria for a warrant to issue. Second, if the Framers were concerned only with general warrants, the initial draft of the Fourth Amendment was clearly sufficient to address those concerns, as were its numerous state predecessors regulating only warrants. Third, if “reasonableness” is to be equated with the common law standards of the day, as Davies asserts, *see* note __ *supra*, he fails to acknowledge that there was a series of common law rules that regulated (and limited) warrantless and warranted searches and seizures. This is to say, as Cuddihy has observed:

To Davies, “unreasonable searches and seizures” embrace little more than the declarations of the 81 members of the First Congress who framed the amendment and its immediate antecedents employing identical phraseology. Davies excludes, sidetracks, and otherwise minimizes unarticulated but palpable assumptions, documentation incompatible with his thesis, and most of the legacy of search and seizure before 1780. The reader is left with historical meaning without 99 percent of the history that vests
advocating a warrant preference rule cannot reconcile that view with the rich variety of search and seizure practices of the era. Many of the principles that remain today as core search and seizure concerns were being litigated at that time. Treatise writers, judges, and others were attempting to formulate objective criteria to measure the propriety of such intrusions. Those criteria extended well beyond the comparative worth of general or specific warrants.

For example, James Wilson delivered a series of lectures on the law between 1790 and 1972. Wilson was a strong Federalist and, among other accomplishments, was an important figure in the ratification of the Constitution debates in Pennsylvania. In his lectures, Wilson covered a host of topics but several illustrate the then contemporary legal thought on search and seizure. He at one point discussed the importance of law books, asserting that “the law, particularly the common law, abounds in rich materials.” He cited as examples Coke and

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392 To be fair, there is some support in the Framing era for the view that recourse to a magistrate was a favored procedure to pre-authorize a search. Otis, according to Adams’ abstract, stated that an officer should state his grounds to search “before a magistrate; and that such magistrate, if he think proper, should issue a special warrant to a constable.” 2 WORKS OF JOHN ADAMS, supra note __, appendix A. In the article attributed to Otis, he maintained that the needed justification to invade a person’s home “ought to be determin’d by adequate and proper judges.” QUINCY, supra note __, at 490. Similar other isolated comments were made by others, including Leach’s counsel, see __ supra, and Blackstone, see note __ supra.


James Burrow. In organizing the materials and providing assistance to those studying law, Wilson pointed to Hale’s works as “a most valuable part” and to Blackstone. Regarding the apprehension of criminals, Wilson noted that obtaining a warrant “is the first step usually taken” and that, “[b]y the constitution of Pennsylvania,[397] no warrant to seize persons shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.” He detailed some of the standards for arrests: when a felony was committed in one’s presence, all persons of age were “bound to apprehend the person who has done the mischief” but if the crime was “out of their view, they are, upon hue and cry, obliged to pursue with the utmost diligence, and endeavor to apprehend him who has committed it.” Wilson added: “In all these cases, the doors of houses may, if necessary, be broken open for the apprehension of the offenders, if admittance is refused on signifying the cause of demanding it.” Other contemporary and near contemporary commentators also saw the Amendment

395 Id. at 254.
396 Id. at 255.
397 Pennsylvania amended its Constitution in 1790, Article IX § 8, to closely resemble the Fourth Amendment. It provided:

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

Reprinted in Davies, Original Fourth Amendment, supra note __, at 615-16 n.181. If the Fourth Amendment was viewed at the time as have no application beyond banning general warrants, then there was no reason to amend the Pennsylvania Constitution, given that the previous version had done so. See note __ supra.
399 Id. at 446.
400 Id.
401 A recent article, David T. Hardy, The Lecture Notes of St. George Tucker: a Framing Era View of the Bill of Rights, 103 NW. U.L. REV. 1527 (2009), sheds some additional light. St. George Tucker was a professor of law at William and Mary from 1790 until his appointment to the bench in 1804. Id.

While at William and Mary, he produced an edition of Blackstone’s Commentaries, annotated in light of American law. The text became “the standard work on American law for a generation” and Tucker remained the most frequently cited American legal scholar for over two decades. Tucker’s role in American legal scholarship was likewise striking. He has been termed “the first modern American law professor” and creator of the American law degree.

Id. at 1528. Tucker’s annotated Blackstone was cited by the Supreme Court in District of Columbia v. Heller, 128 S. Ct. 2783 (2008) to help interpret the Second Amendment. Hardy reproduced Tucker’s notes on the Fourth
Amendment and argued that the notes “treat[] probable cause and warrant issuance as components of reasonableness.” These are Tucker’s notes:

The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated---- What shall be deemed unreasonable searches and seizures. The same article informs us, by declaring, “that no warrant shall issue, but first, upon probable cause – . . .which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly describe the place to be searched; and fourthly--the persons, or things to be seized. All other searches or seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional. And herewith agrees our State bill of rights--Art. 10.

[Tucker note: "vi: Act concerning aliens--contra 5: Cong: c:’"]

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

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

Nor can it be construed to restrain the authority, which not only peace officers, but every private person possesses, by the common law, to arrest any felon if they shall be present when the felony is committed, 103 NW. U.L. REV. at 1535-36 (footnote omitted).

In addition to the lecture notes, Tucker’s commentary on Blackstone has a specific section on the Fourth Amendment. In that section, Tucker sets forth the language of the Amendment, notes that general warrants were found to violate the common law in a series of English cases, and discussed at some length why the Alien Act, ch. 58, 1 Stat. 570, (1798) (expired 1800), passed by the Fifth Congress, violated the Fourth Amendment. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 301-04 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803). See also 103 NW. U. L. REV. at 1536 n.34. Tucker’s commentary was cited by Justice Story in his treatise. See next note.

Justice Story wrote a famous commentary about the Constitution some 50 years after the Fourth Amendment was ratified. His commentaries are often cited for the pity statement that the Fourth Amendment “is little more than the affirmance of the great constitutional doctrine of the common law.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (1833). Story states that “its introduction into the amendments was doubtless occasioned by the strong sensitivities excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution.” Id. Relying on these brief references, some draw support for the view that the Amendment was merely designed to address the general warrant controversies or was not designed to address warrantless situations. E.g., Davies, Original Fourth Amendment, supra note __, at 618 n.190.

Story’s commentaries, read in full, simply do not support that view; in fact, they are inconsistent with it. First, in the quotation just reproduced, Story was merely observing that the Amendment was “occasioned by” the general warrant controversies; he did not say that it was defined or limited by them. Second, Story provided a broad view of the Amendment’s purpose: “This provision seems indispensible to the full enjoyment of the rights of personal security, personal liberty, and private property.” STORY, COMMENTARIES, supra at 748. Third, Story cited two instances involving warrantless situations which were viewed as being within the preview of the Amendment. The first, during Adams’ administration, involved the Alien Act of 1798, which was viewed as a violation of the Amendment because it authorized the president to order the removal of “such aliens, as he should judge dangerous to the peace and safety of the United States, or have reasonable grounds to suspect of any treasonable, or secret machinations against the government.” Id. at 749. The second event involved the seizure of two Americans by military force during Jefferson’s administration “without any warrant, or order of any civil authority,” from New-Orleans to Washington for trial. Id. at 749. Citing Ex parte Bollman, 4 Cranch 75, Story observed that the Supreme Court found that the seizures “wholly disregarded” the Constitution. Id. at 749-50. He added: “Without any
as extending protections beyond general warrants and did not see Fourth Amendment analysis as either some undefined reasonableness quest or cabined by a warrant requirement.

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

**Probable Cause.** One of the many disputes among contemporary legal scholars revolves around the meaning and significance of “probable cause” to the Framers. Yet, the concept of probable cause as a justification for a search or seizure was well known in the framing era: Thatcher, Otis, and Adams advocated such a standard. Otis, for example, 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,” “probable suspicion,” or “probable ground.” Variations of that wording abound in treatises and

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404 The early Congresses passed several customs statutes that have been cited to support various points of view as to the need for warrants or individualized suspicion to justify searches. See generally Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1739-43 (1996); CUDDEHY, supra note __, at 735-39. See also Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 671 (1995) (O'Connor, J., dissenting) (referring to the Collection Act of 1789 to illustrate the First Congress’ desire to maintain individualized suspicion as a requirement even where the warrant requirement would be inapplicable). As Professor Cloud notes, the statutes had a mix of requirements, depending upon the location and purpose of the search.
commentaries. Recall also the arguments in *Money v. Leach* that the search was justified because the authorities had probable cause at the time of the search, despite the fact that the authorities were acting under a general warrant. Madison’s sole innovation in drafting the Fourth Amendment was to explicitly adopt probable cause as a required basis for a warrant to issue. He did not write those words in a vacuum. In sum, and as noted throughout this article, that standard was repeatedly referenced as a needed criterion. Merely because the meaning of probable cause was not fixed does not undermine its importance. Indeed, its meaning remains unfixed to this day.

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

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405 E.g., 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 85 (1762) (asserting that an arrest must be based on “some probable ground”); 2 HALE, supra note __, 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).

406 See, e.g., United States v. Watson, 423 U.S. 411, 418-19 (1976) (discussing “ancient” common law rule permitting arrests without warrant for misdemeanors and felonies committed in an officer’s presence and for felonies not in an officer’s presence for which there were reasonable grounds to arrest). See also Payton 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); Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780) (recognizing as defense to false imprisonment claim, stemming from constable’s arrest of plaintiff, fact that arrest was based on allegations that plaintiff had stolen goods). Nonetheless, there were numerous examples of suspicionless searches and seizures throughout England and its American colonies. See, e.g., CUDDHY, supra note __, at 486-97.

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

408 See CLANCY, THE FOURTH AMENDMENT, supra note __, at § 11.3.2.1.1. (discussing Supreme Court’s treatment of the meaning of probable cause). Others claim that, although probable cause was a requirement of legal doctrine, “judges in the Framers’ era did not widely engage in aggressive sentryship of probable cause.” 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.

409 See CUDDHY, supra note __, at 747-48 (overview of legality of nocturnal searches); QUINCY, supra note __ at 450 (writs of assistance for customs searches were modified in 1768 to authorize day time only execution); id. at 448 (in 1766, custom searchers withdrew from Daniel Malcomb’s residence to avoid entering at night, recognizing
requirement to knock and announce for execution of a warrant at a home;\textsuperscript{410} and a distinction between arrests in a house and in public.\textsuperscript{411} In contrast, the writs of assistance were seen as deficient because, \textit{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 need to justify the request. The era was characterized by repeatedly expressed concerns about the scope of searches and seizures and the need to limit an officer’s discretion. Illustrative are the views expressed about the seizure of all of Entick’s, Wilkes’, and Leach’s papers and Adams’ recollection of Otis noting the scope of searches under Writs of Assistance as “[h]ouses were to be broken open, and if a piece of Dutch linen could be found, from cellar to the cock-loft, it was to be seized and become the prey of governors, informers, and majesty.”\textsuperscript{412}

\textit{Certain objects valued.} Houses were universally acknowledged as a man’s castle.\textsuperscript{413} Indeed, the physical entry into the home has been described as the “chief evil against which the

\textsuperscript{410} See \textit{Cuddihy}, supra note __, at 749-50 (historical analysis of unannounced searches of the home); CLANCY, THE FOURTH AMENDMENT, supra note __, at § 12.5.4. (analyzing legal status of knock and announce requirement under Fourth Amendment).


\textsuperscript{412} 2 LEGAL PAPERS OF JOHN ADAMS, supra note__, at 319.

\textsuperscript{413} The Supreme Court has been quite insistent in affording special protection for the home. \textit{See}, e.g., \textit{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. \textit{E.g.}, \textit{Weeks v. United States}, 232 U.S. 383, 390 (1914) (“Resistance to these practices had established the principle which was enacted into the fundamental law in the 4th Amendment, that a man’s house was his castle, and not to be invaded by any general authority to search and seize his goods and papers.”); Fraenkel, \textit{Concerning Searches and Seizures}, 34 HARV. L. REV. 361, 364-65 (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’”).
wording of the Fourth Amendment is directed.\textsuperscript{414} Camden in \textit{Entick} emphasized the importance of a person’s private papers. 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. Variations of this list appeared to be common that era, stemming from Blackstone’s \textit{Commentaries}, where he stated that the rights of Englishmen are primarily “the free enjoyment of personal security, of personal liberty, and of private property.”\textsuperscript{415} It is notable that the Supreme Court has similarly construed the Fourth Amendment as protecting three interests: “two kinds of expectations” in property, one involving searches and the other involving seizures; a search occurs when a reasonable expectation of privacy is infringed; 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.\textsuperscript{416} 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.”\textsuperscript{417}

\begin{quotation}
  Certain qualities in those objects valued: the right to be secure. Adams and his contemporaries repeatedly used the concept of “security” to describe the quality of the right protected as to each person’s life, liberty, and property.\textsuperscript{418} Otis, in the article attributed to him,
\end{quotation}

\textsuperscript{414} \textit{E.g.}, United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).
\textsuperscript{415} 1 \textsc{Blackstone’s Commentaries}, \textit{supra} note ___ at 144. \textit{See also id.} at 129 (stating that the three rights are: “the right of personal security, the right of personal liberty, and the right of private property”). For representative references to Blackstone’s list, see James Otis, \textit{A Vindication of the British Colonies} (1765) (“The absolute liberties of Englishmen, as frequently declared in Parliament, are principally three: the right of personal security, personal \textit{liberty}, and private property.”), \textit{reprinted in} \textsc{Pamphlets of the American Revolution} 558 (Bernard Bailyn, ed. 1965); New York Journal article, January 23, 1788, \textit{reprinted in} \textsc{20 Documentary History of the Ratification of the Constitution} 643 (John P. Kaminski & Gaspare J. Saladino, ed. 2004).
\textsuperscript{416} Soldal v Cook County, 506 U.S. 56, 63 (1992).
\textsuperscript{417} 3 \textsc{Joseph Story, Commentaries on the Constitution of the United States} § 1895, at 748 (1833).
\textsuperscript{418} \textsc{2 Legal Papers of John Adams, supra note ___}, at 315-16.
argued that the writs of assistance made “every householder . . . less secure.” Recalling Otis’ argument many years later, Adams said in a letter to William Tudor that Otis examined the acts of trade and demonstrated that “they destroyed all our security of property, liberty, and life.”

After complaining of the seizure of all his papers under a general warrant and receiving the reply from the authorities that such papers 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.”

That same concept—security—was utilized by Adams in Article 14 of the Massachusetts Declaration of Rights and is replicated in the Fourth Amendment. More broadly, the concept of security, in contradistinction to the modern notion of privacy, was repeatedly referenced in the framing era as defining the nature of the right that was to be protected in each of the objects ultimately listed in the Amendment.

CONCLUSION

Knowledge of the past is always incomplete. Nonetheless, lawyers are taught about the need to make inferences and to draw conclusions from incomplete sets of facts. Thus, for example, it is disappointing that Adams never commented specifically on the structure and meaning of Article 14. It is also disappointing and puzzling that no one ever stated that the Fourth Amendment’s first clause was designed to broadly regulate all types of governmental searches and seizures or rejected that view and said that the Amendment was designed to address

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419 Id. at 316.
421 For a discussion of the origin and meaning of the word “secure,” see CLANCY, THE FOURTH AMENDMENT, supra.
only general warrants. Instead, one must draw the conclusions that appear the most sound, based on what is known. In this regard, John Adams offered some advice:

In unforeseen Cases, i.e. when the State of things is found such as the Author of the Disposition has not foreseen, and could not have thought of, we should rather follow his Intention than his Words, and interpret the Act as he himself would have interpreted it, had he been present, or conformably to what he would have done if he had foreseen the Things that happened. This Rule is of great Use to judges.422

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

The men more directly involved in the drafting of the Fourth Amendment were strongly influenced by the Massachusetts model. During the crucial period of 1787-89, when the various state conventions debated the need for a search and seizure provision, there were two models: the model prohibiting general warrants and Article 14. Virginia, taking the lead, chose the

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422 2 WORKS OF JOHN ADAMS, supra note __, at 165 (diary entry for December 27, 1765; citations omitted).
Massachusetts model, as did New York, North Carolina, and Rhode Island. None chose the general warrant model, even though it had been the prevalent one in state constitutions. Madison, in his draft, conflated the two models. The House of Representatives, however, recognized that Madison’s draft was inadequate and changed the Fourth Amendment to closely resemble the structure of Article 14.

Even if one rejects my view as to the strong historical links between Adams, Article 14, and the Fourth Amendment, thus discounting the importance of Adams’ views and role, there remains abundant evidence that the Framers were concerned with more than general warrants. It is neither historically accurate to say that the Reasonableness Clause had no meaning to the Framers nor that the Amendment was designed solely to ban general warrants. During the 1761-1791 time period, there was a vibrant jurisprudence seeking to establish the primacy of objective criteria to measure the legitimacy—that is, the reasonableness—of governmental searches and seizures. Admittedly, discussion about the details of a desirable search and seizure provisions was sparse. Yet, the comments that are extant show a wide range of search and seizure issues on the minds of the people. For sure, there were concerns about general warrants but there were many other comments about broader concerns: concerns about unreasonable searches and seizures; about the unlimited power of new officers (particularly excise officers); about nighttime entries; and about protection of the home. Looking even more widely, the treatise writers of the era offered detailed criteria for measuring the propriety of searches and seizures. Adams and others utilized those treatises and common law cases to argue for the primacy of measurable criteria: no night time searches; a need to knock and announce before entering; probable cause to justify a seizure; etc. While Adams and our other forefathers struggled to establish exactly
what the proper criteria were, objective criteria to measure the propriety of a search and seizure that persisted from case to case was the goal.

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