

# MOLASSES

## and the Sticky ORIGINS of the 4<sup>th</sup> AMEND



Molasses.<sup>1</sup> Molasses gave us the Fourth Amendment.

Yes, that sticky, dark brown stuff, practically a food group in Southern cooking, is why we have the Fourth Amendment with all the case law, statutes and arguments related to search and seizure. Take away this uniquely American ingredient and we would have a different Constitution.<sup>2</sup> Take molasses out of the mix and we would have a different nation.

Sure, America inherited legal notions of protecting a person's house and papers from England, embodied in the saying "A man's home is his castle." This English source is especially reflected in the Fourth Amendment's first clause: the reasonableness clause. But it is the American ingredient (*i.e.*, molasses) that was the crucial American foundation of the Fourth Amendment's second clause: the warrants clause.

So what was the big deal about molasses? Surely Colonial Americans could not have consumed or sold sufficient quantities of Boston Baked Beans or sugar cookies to make an economic difference. The answer is that molasses was New England's commercial lifeblood in the 18th and 19th centuries. As the more "spirited" of you know, molasses is rum!<sup>3</sup> And rum fueled the commerce of the Atlantic basin because it was the currency of the slave trade.<sup>4</sup>

BY ROBERT J. McWHIRTER

**Robert J. McWhirter** is a senior lawyer at the Maricopa Legal Defender's Office handling serious felony and death penalty defense. His publications include *THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW*, 2d ed. (American Bar Association 2006). This article is part of the author's book in progress on the "History Behind the History of the Bill of Rights."

The author thanks several friends who contributed good editorial comment to earlier drafts of this article, including Rebecca Berch, Randy Howe, James Tatum and his dad, Dr. J. Jeffries McWhirter.

# SEES

# MENT



*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.*

1. **Molasses** Mo\*las'ses\—A thick syrup produced by boiling down juice from sugar cane, especially during sugar refining, ranging from light to dark brown in color. Portuguese melaços, pl. of melaço, Spanish melaza, from Late Latin mell ceum, -, *honey*. [See *mellit-* in Indo-European Roots.] Spanish *miel* = honey.



2. See e.g., William J. Stuntz, *The Substantive Origins of Criminal Procedure*, YALE L.J. 393 (1995) (noting that many of the curiosities and inconstancies of modern criminal procedure are a product of history).



3. **Rum**—An alcoholic liquor distilled from fermented molasses or sugar cane. From the Latin *Saccharum* (sugar).



4. Molasses to Rum to Slaves.



UNITED STATES CONSTITUTION Amendment IV.

## “A Man’s Home Is His Castle”: The English Source of Our Fourth Amendment

### Early Sources

The idea of a person’s home being sacrosanct did not originate in England. The Code of Hammurabi from the 18th Century B.C. (in what is now Iraq) speaks to this issue.<sup>1</sup> The phrase “a man’s home is his castle” comes from Justinian’s Code and was a well-established cliché by the time of the American Revolution.<sup>2</sup>

### The Rights of Englishmen

Skipping ahead about two millennia from Hammurabi takes us to England in the 1760s. In a House of Commons speech in 1766, William Pitt the Elder, proclaimed the sanctity of the home:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruin tenement.<sup>3</sup>

Even though lawyers still quote Pitt today, this terrific statement of the right to privacy in one’s home may have been honored more in the breach than the practice, and some believe Pitt asserted a myth.<sup>4</sup> Pitt, though, was responding to the case of John Wilkes, a milestone in the assertion of the right to be free from unreasonable searches.<sup>5</sup> The case, as well as the slogan “*Wilkes and Liberty*,” became famous on both sides of the Atlantic. So who was this John Wilkes whom scarcely anyone today remembers?

### John Wilkes and *The North Briton No. 45*

John Wilkes was a Member of Parliament and publisher of *The North Briton*, a political magazine mocking the government’s public relations pamphlet called *The Briton*.<sup>6</sup> After honorably fighting a duel he took a break from whoring in the London slums to whore in the Paris slums. While in France, Madame de Pompadour asked Wilkes how far freedom of the press went in England, to which he responded, “I don’t know. I am trying to find out.”<sup>7</sup>

One particular edition, *The North Briton No. 45*, harshly criticized King George III’s speech to Parliament lauding the Treaty of Paris, which ended the Seven Years’ War, as “honorable to my crown and beneficial to my people.”<sup>8</sup> Mockingly, *No. 45*’s “anonymous author” (everyone guessed it was Wilkes) wrote that “It must be a peace from God for it passes all human understanding.” *No. 45* went on to state with dripping sarcasm:

Every friend of his country must lament that a prince of so many great and amiable qualities, whom England truly reveres, can be brought to give the sanction of his sacred name to the most odious measure and to the most unjustifiable public declarations, from a throne ever renowned for truth, honor, and unsullied virtue.<sup>9</sup>

The King’s speech also defended the unpopular cider tax and responded to the riots in the cider districts of England by calling



Hammurabi

1. “If a man makes a breach into a house, one shall kill him in front of the breach and bury him in it.” Article 21, Code of Hammurabi, 1750-1700 B.C. *quoted in* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 14-15, n. 5 (1937) (also outlining biblical, Roman and other ancient sources). (This quotation begs the question of why anyone would want a dead body in his wall during a Mesopotamian summer.)

From the Old Testament comes the following: “When you make a loan to another man, do not enter his house to take a pledge from him. Wait outside, and the man whose creditor you are shall bring the pledge out to you.” Deuteronomy 24:10-11,

*quoted in* SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT 153 n.8 (2004).


2. Justinian, Roman Emperor, Sixth Century, AD. *Code of Justinian Latin Codex Justinianus, formally Corpus Juris Civilis (“Body of Civil Law”)*, the collections of laws and legal interpretation developed under Byzantine emperor Justinian I from AD 529 to 565. Encyclopedia Britannica online at [britannica.com/eb/article?tocId=9044217](http://britannica.com/eb/article?tocId=9044217)

Even earlier, Cicero exclaimed, “What is more inviolate, what better defended by religion than the house of a citizen. . . . This place of refuge is so sacred to all men, that to be dragged from thence is unlawful.” *Quoted in* DASH at 9.

Anglo-Saxon and Norman law recognized the right to protect one’s home, LASSON at 14-15, and at least as early as 1505 A.D. the English common law recognized this right. *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195 (K.B.), *cited in* Benjamin D. Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).



Pitt

3. William Pitt, the Elder. *Quoted in* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 151 (1999). The City of Pittsburgh is named for him. 

4. DASH at 3.

Myth or not, the concept has resonance. During the Watergate Hearings, Senator Herman Talmadge responded to John Ehrlichman’s assertions that the Executive has the authority to order unwarranted searches by quoting Pitt. Ehrlichman’s response, “I am afraid that has been considerably eroded over the years, has it not?” availed him nothing after Talmadge drew applause upon retorting, “Down in my country we still think it is a pretty legitimate principle of law.”

Records of the Select Committee on Presidential Campaign Activities 1973, 1974, *Senate Watergate Hearings*, National Archives, *reported in* DASH at 2.

5. DASH at 31.

6. Quite the libertine, he rejected his boring Calvinist upbringing and boring Calvinist wife in favor of sex, food and drink. He did, however, keep his Calvinist anti-monarchism and truly enjoyed being King George III’s nemesis. DASH at 26-27.



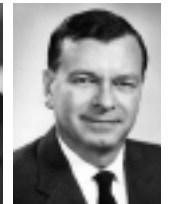
Wilkes

8. DASH at 27.

George III was actually accurate: The Treaty of Paris was very favorable, giving Britain all Canada and monopolistic control over the North Atlantic.

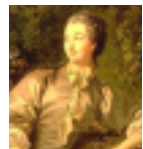


Ehrlichman



Talmadge

9. DASH at 27, *quoting from* JOHN WILKES, A COMPLETE COLLECTION OF THE GENUINE PAPERS, LETTERS, ETC. IN THE CASE OF JOHN WILKES, ESQ., at 2 (London: Berlin, 1769). *No. 45* started by stating, “The King’s speech has always been considered by the legislature and by the public at large as the speech of the minister.” This protected the author from a charge of insulting the King. Wilkes was to later abandon this precaution, to his undoing. *See infra* p. 20 n. 7.



Pompadour

7. LASSON at 43 n.108 (*citing* RAYMOND POSTGATE, THAT DEVIL WILKES 53 (1930). Wilkes’ statement shows that his case is not just a precursor to the Fourth Amendment but also to the First Amendment.

As for Madame de Pompadour, she tangentially enters this story in another way. As Louis XV’s mistress, indeed as one of the women known to history as “*Les Grande Horizontales*” for the influence they had on Louis from the horizontal position, she encouraged him to ally with Austria, which led to The Seven Years’ War. As outlined in the next section, The Seven Years’ War, aka The French and Indian War, prompted the Boston Writs of Assistance case.

France did not do well in that war, and Madame Pompadour was blamed. But, to her credit, she popularized Champagne in France, stating, “Champagne is the only wine that leaves a woman beautiful after drinking it.” *Quoted in* IAN LENDLER, ALCOHOLICA ESOTERICA: A COLLECTION OF USEFUL AND USELESS INFORMATION AS IT RELATES TO THE HISTORY AND CONSUMPTION OF ALL MANNER OF BOOZE 63 (2003) (the statement is ambiguous as to whether it is the man or woman doing the drinking). And, the Pompadour haircut is named after her—what would Elvis have done without it?



for “a spirit of concord” and “obedience to law” essential for “good order.” To this, *No. 45* rhetorically asked:

Is the *spirit of concord* to go hand in hand with the Peace and Excise, through this nation? Is it to be expected between an insolent Exciseman, and a peer, gentleman, free holder, or farmer, whose private houses are now made liable to be entered and searched at pleasure?<sup>1</sup>

## The Dunk Warrant

Predictably, Wilkes raised the ire of George III, who sent his minions to do something about it. On April 30, 1763, Secretary of State George Montague-Dunk, the Earl of Halifax, wrote what is known to history as the *Dunk Warrant*.<sup>2</sup> This general warrant sent Crown officials to search and seize all papers and presses and arrest anyone they could get their hands on—49 people in all.<sup>3</sup> It did not take them long to find Wilkes, who refused to obey the warrant, declaring it “a ridiculous warrant against the whole English nation.”<sup>4</sup> Wilkes and his gang sued the Crown officials for trespass.<sup>5</sup>

## The Wilkes Cases

As the cases, *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), 19 Howell’s State Trials 1153, and *Entick v. Carrington*, 19 Howell’s State Trials 1029 (C.P. 1765), went through the court system, they eventually ended up before Chief Justice Pratt, who later becomes Lord Camden.<sup>6</sup> His opinion contained several notable comments, including the following condemnation of

general warrants:

To enter a man’s house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour.<sup>7</sup>

An important point is that the *Wilkes* searches were under a general warrant from the Secretary of State that until then was legal. Lord Camden’s opinion set an important legal principle: *A search can be illegal even with a warrant*.<sup>8</sup>

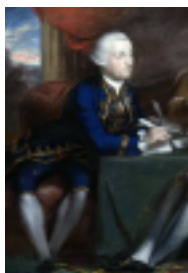
In the *Wilkes* cases (actually *Entick*), privacy in one’s papers was central. Camden was upholding a jury verdict that by definition had found the *Dunk Warrant* “unreasonable” (*i.e.*, the jury comprises the “reasonable man” at common law). As Camden stated:

Papers are the owner’s goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.<sup>9</sup>

This again underscores the point that although a warrant can fulfill all the forms of legality, it must still be reasonable to be legal. As we shall see, the Fourth Amendment specifically has two clauses incorporating aspects of this dichotomy.

In his ruling, Camden broke from long precedent. From 1700 to 1763, in a collection of the 108 known warrants, all but two

1. LASSON at 43 n.108, quoting the *North Briton No. 45*. Thus, the issue was in part searches and seizures to regulate commerce and taxation of alcohol in an interesting parallel to the rum and molasses dispute in the American Colonies.



Lord Halifax (Dunk)

2. The *Dunk Warrant* is known as “the most important warrant in history.” (See full text to the right.) Actually, George Dunk was not so bad. He was born George Mantague but took his wife’s last name of Dunk—though given that his wife was vastly richer than he, it may not have been an indication he was ahead of his time in gender relationships. History remembers him as the “Father of the Colonies” who helped found Nova Scotia, and the following are named after him: Halifax, Mass.; Halifax, N.C.; Halifax, Penn.; Halifax, Vt.; Halifax, Va.; Halifax County, N.C.; Halifax County, Va.; and Halifax, Nova Scotia.

3. See Stuntz at 399.

4. LASSON at 44. They had to carry Wilkes out of his house sitting in his chair for his appearance before Dunk. For not answering questions, Dunk put him in the Tower but had to release him a few days later upon a writ of habeas corpus because of Wilkes’ parliamentary privilege. When executing the warrant, they took all Wilkes’ personal papers, including his Will. See DASH at 29-30 for the interesting Dunk/Wilkes correspondence regarding his property.

5. At one point, Wilkes went before Secretary of State John Montagu, fourth Earl of Sandwich, an old drinking and whoring buddy.

Montagu, from the vantage of his position of respectability, said to Wilkes,

“Wilkes, you will die of the pox [syphilis] or on the gallows?”

To which Wilkes responded, “That depends, my lord, on whether I embrace your principles or your mistress.”

POSTGATE at 39.

Montagu does have another historical achievement. A gambling addict, he at one time did not want to leave his game and told his servant to “bring my meat to me between two slices of bread.” Thus, John Montagu, fourth Earl of Sandwich, gave us the “Sandwich.”



6. Lord Camden (Chief Justice Pratt). As you can see, he was a “Bigwig.” Several Web sites have the complete *Entick* opinion, including [www.constitution.org/trials/entick/entick\\_v\\_carrington.txt](http://www.constitution.org/trials/entick/entick_v_carrington.txt)

7. LASSON at 45. Even in 1765 “No one expects the Spanish Inquisition.”

8. See Stuntz at 398.

9. *Entick*, 19 Howell’s State Trials at 1066 (quoted in Stuntz at 398). Perhaps Camden had in mind the disgraceful treatment of another judge more than a century earlier at the hand of a King and his ministers with a general warrant. In 1634 King Charles I had a warrant issued to search the house of The Lord Chief Justice, Sir Edward Coke, for “seditious and dangerous papers.” Coke was the authority on the Common Law and the most influential of James I and Charles I’s opponents. He was prominent in the drafting the Petition of Right (1628),

limiting the monarchy’s power. The King’s lackeys searched Coke’s home while Coke was on his deathbed and stole everything they could get their hands on—nearly all his writings, including the manuscripts of his legal works, jewelry, money and valuables. They even took his will. It took his heirs seven years to get any of it back, and they never got the will. All of this was under a “legal” warrant. See LASSON at 31-32; DASH at 21-22.



King Charles I



Monty Python



Edward Coke



Earl of Sandwich

### The Dunk Warrant:

“George Montague Dunk, earl of Halifax, viscount Sudbury and baron Halifax, one of the lords of his majesty’s most honourable privy council, lieutenant general of his majesty’s forces, and principal secretary of state: these are in his majesty’s name to authorize and require you (taking a constable to your assistance) to **make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intitled, The North Briton, No. 45, Saturday April 23, 1763, printed for G. Kearsley in Ludgate-street, London, and them, or any of them, having found to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premisses, and further dealt with according to law: and in due execution thereof, all mayors, sheriffs, justices of the peace, constables, and all other his majesty’s officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting you, as there shall be occasion; and for so doing this shall be your warrant. Given at St. James’s the 26th day of April, in the third year of his majesty’s reign. DUNK HALIFAX.**” See [www.montaguemillennium.com/familyresearch/dunk.htm](http://www.montaguemillennium.com/familyresearch/dunk.htm), quoting *English Historical Documents*, vol. 10, p. 256 (D.B. Horn & Mary Ransome eds., 1957).

were general warrants. This use of general warrants only increased over time.<sup>1</sup> Indeed, Camden held that just because the Secretary of State always issued general warrants did not make the practice legal, and “It is high time to put an end to them.”<sup>2</sup>

### So What Happened to Wilkes and Co.?

Wilkes and his associates won big. After various jury trials and appeals, the case probably cost the Crown more than £100,000.<sup>3</sup> This would be roughly equivalent to \$24,692,320 in today’s U.S. dollars—a staggering sum by any measure.<sup>4</sup>

In Britain and the United States, Wilkes became a folk hero, with the slogan “Wilkes and Liberty” reverberating.<sup>5</sup> When the British imprisoned the leader of the New York chapter of the Sons of Liberty, Alexander McDougall and his partisans used the number 45, after the *North Briton* 45, as the symbol of their cause.<sup>6</sup> Wilkes-Barre, Pennsylvania, as well as Wilkes Counties in North Carolina and Georgia, are named after him.<sup>7</sup>

Wilkes republished *No. 45* under his own name. The King’s Attorney General wasted no time charging him criminally with seditious libel and for obscenity for an indecent poem, *Essay on Women*.<sup>8</sup> He eventually served 22 months in prison.<sup>9</sup>

Lord Camden scored even better: Camden, in New Jersey,

South Carolina and Maine, are all named for him. Plus, Camden Yards, home of the Baltimore Orioles, is part of his legacy.<sup>10</sup> He became one of the most popular men in Britain. The City of London had his portrait painted to be hung in the Guildhall, with the inscription from Dr. Samuel Johnson reading, “Zealous supporter of English liberty by law.”<sup>11</sup> Reprints of his portrait ended up on pubs and alehouses all over the realm.<sup>12</sup> That is a lot better acclaim than King George III ever got.<sup>13</sup>

## Molasses, the American Ingredient of the Fourth Amendment

*“I know not why we should blush to confess that molasses was an essential ingredient in American Independence.”*

—John Adams<sup>14</sup>

In modern cooking with refined sugar, fructose, Saccharine and Aspartame, molasses is something of a curiosity. Few people today are even aware that it comes in different forms for different purposes.<sup>15</sup> An 18th-century American, however, would have known

1. LEVY at 153. This was especially true in the colonies, where Justices of the Peace and Magistrates had no power to deny them. *Id.* at 154-56. This included general warrants allowing press gangs to invade homes as well as taverns to kidnap men for service in the Royal Navy. *Id.* at 156.

2. DASH at 31-32. Dash argues that Camden’s opinion was purely a jurisdictional ruling that the Secretary of State lacked the power to issue the warrant. Camden did not challenge that the King could still issue a general warrant. Indeed, Camden was generally pro-government, as the last line of his opinion shows: “When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy, and the worst of governments is more tolerable than no government at all.” Wilkes would certainly not have agreed given that he dedicated a good portion of his adult life to licentiousness.

Though Dash may be right, the opinion’s broad language and the fact that on appeal The Court of Kings Bench powerfully upheld Camden could signal a broader right. See LASSON at 46-47 (reporting the Justices opinions on appeal). And, as with many legal opinions, what it said is less important than what it meant. As Pitt argued, “The King of England may not enter.” Both sides of the Atlantic hailed the victory against arbitrary power (read here King George’s power)—not just freedom from the jurisdiction of the English Secretary of State.

3. LASSON at 45.

4. According to the Web site, How Much is That? (<http://eh.net/hmit/ppowerbp/>), 1760 pounds (£) would be worth £127.28 pounds in 2004. The exchange rate for 2004 was \$1.94

5. LASSON at 45-46.

6. LEVY at 160. On the 45th day of the year, 45 Sons of Liberty ate 45 pounds of beef from a 45-month-old bull, drank 45 toasts to liberty, and after dinner went to the jail to cheer McDougall 45 times. On another day they had 45 virgins who were 45 years old sing 45 songs to McDougall. *Id.* (The claim of 45 virgins 45 years old must have involved some literary license.)

7. See generally 12 THE NEW ENCYCLOPEDIA BRITANNICA, *John Wilkes*, 661-62 (15th ed. 2002).

Also, John Wilkes Booth, who shot President Lincoln at the Ford Theatre in 1865. Booth may have been trying to emulate his namesake when he yelled, “*Sic Semper Tyrannis*” (“Death to Tyrants”), from the Virginia State Seal, as he jumped off the balcony and broke his leg. On the other hand, he was probably just going for the drama. See JAMES L. SWANSON, *MANHUNT: THE 12-DAY CHASE FOR LINCOLN’S KILLER* (2007).



Booth as Mark Antony



Pope

8. DASH at 32-35. The *Essay on Woman* was a parody of Alexander Pope’s *Essay on Man*. Using the obscenity charge, the King succeeded in getting Parliament to revoke Wilkes’ privilege and thus he had to face prosecution. Because Wilkes then got into a duel, the House of Commons expelled him. While recuperating from his duel injury in France, he was tried *in absentia* and convicted. Undaunted by being an outlaw, he ran for Parliament again and won another seat. Wilkes eventually beat the rap for the outlawry charge but not for the sedition and obscenity convictions. With no rule to exclude the illegal evidence in the criminal case, the Crown used the evidence from the illegal warrant to convict him. For the complete story, see R. W. POSTGATE, *THAT DEVIL WILKES* (1929), or ARTHUR CASH, *JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY* (2006). Thus, although Wilkes won big in the civil case, he did not win and in fact probably never would have thought of asking for an enforceable right in his criminal case. See Stuntz at 400.



John Wilkes (Fetter Lane, London)

10. Camden Yards

11. LASSON at 46.

12. DASH at 32. All this popularity for Camden is interesting given that he may not have received it had any of his new fans actually read his opinion. To be sure, he handed Wilkes and crew a big win. But he was a pro government guy—a “Big Wig”—stating in the opinion, “Before I conclude, I desire not to be understood as an advocate for liberals.”

13. Actually, George III had a sad end. He had Porphyria, a maddening disease depicted in the movie *THE MADNESS OF KING GEORGE* (The Samuel Goldwyn Company, 1994). He died blind, deaf and mad at Windsor Castle in 1820.

14. Adams in a letter to George Washington, quoted in LENDLER at 107.

15. The quality of molasses depends on the maturity of the sugar cane, the amount of sugar extracted, and the method of extraction. There are three major types: un-sulfured, sulfured and blackstrap.

9. It was not hard time—indeed, more of a vacation. Wilkes went on to become the Lord Mayor of London and a great court reformer.

Wilkes’ great nephew, Lieutenant Charles Wilkes, United States Navy, led the 1838–42 United States Exploring Expedition to Antarctica, which, among other things, proved Antarctica was a continent. For this a big chunk is named “Wilkes Land.”

See NATHANIEL PHILBRICK, *SEA OF GLORY: AMERICA’S VOYAGE OF DISCOVERY, THE U.S. EXPLORING EXPEDITION, 1838-1842* (2003).



Lt. Charles Wilkes



**Un-sulfured** molasses is the finest quality made from the juice of sun-ripened cane, clarified and concentrated.

**Sulfured** molasses is from immature green sugar cane treated with sulfur fumes during the sugar extracting process. Molasses from the first boiling is the best grade because only a small amount of sugar has been removed. The second boil molasses takes on a darker color, is less sweet and has a heavier flavor.

**Blackstrap** molasses is from the third boil and has value as cattle feed and industrial uses.



# 4<sup>th</sup> Amendment

this as a matter of course as well as the fact that from molasses you get rum.

## The Molasses Act of 1733

With the Molasses Act of 1733 Parliament provided that the American colonies could only get molasses from the British West Indies, namely Jamaica, Barbados and a few other islands. But the British West Indies could not come anywhere close to meeting the demand. For example, just the tiny colony of Rhode Island during the mid-1700s needed 14,000 hogsheads of molasses annually for its distilleries. The British West Indies could only produce 2,500 hogsheads.<sup>1</sup> In the mid-1760s, Rhode Island had 22 rum distilleries, and Massachusetts had more than 63, mostly in Salem and Boston.<sup>2</sup> By 1770 around 140 rum distilleries operated in the colonies, most in northern port towns, importing 6.5 million gallons of molasses and producing almost 5 million gallons of rum.<sup>3</sup>

The colonies, of course, met the deficit of supply by buying from the French and Spanish West Indies.<sup>4</sup> The French and Spanish also were an excellent market for American fish and lumber, providing capital for American ventures and making up the trade imbalance with Britain. This was directly contrary to the interest of the British Crown.

## Mercantilism vs. Capitalism

What Britain was trying to do was to maintain its mercantilist economy in the face of emerging capitalism. Under mercantilism, colonies were part of the economic structure of the mother country.<sup>5</sup> Thus, Britain expected her American colonies to be a source

Any British Naval Officer would have agreed that His Majesty's 18th-century Navy could not have functioned without the mild inebriation from the daily grog ration.

of raw materials for British (mostly English) industry and to be the market for the manufactured goods. Colonies were not supposed to have large factories or manufacturing plants, or, in the case of molasses, large distillation facilities to compete with those in Britain. According to this policy, colonial distilleries should not have even existed or at the most should have only had the capacity to process the molasses from the British West Indies.

The quality of New England rum may have been a contributing factor in the fact that most Americans and British viewed The Molasses Act as unfair. Adam Smith criticized British mercantilist policy toward America in his *Wealth of Nations*.<sup>6</sup> Americans evaded the Molasses Act, relying on lax enforcement, petty bribery and smuggling. Sea captains like John Paul Jones made their living smuggling contraband molasses into New England boldly stating, "Sir, I have not yet begun to smuggle illegal contraband into America."<sup>7</sup>

So, where did all the rum go?



1. LASSON at 51-52.  
So what is a hogshead? It is a large keg or barrel containing from 63 to 140 gallons. The legal standard was set in 1423 at 63 gallons (52½ imperial gallons). So how big is that? Well, a beer keg is 15½ gallons and a pony keg is 7½ gallons (6½ cases or 165 cans). Thus, a hogshead equals 4 kegs or 8 pony kegs or 1,320 cans. Now nearly any major British or American city can boast having a "Hogshead" bar, tavern, alehouse or pub.



2. Though perhaps not the most high-brow source, the play and movie *1776* (Columbia Pictures 1972) got the history right. "*Molasses to Rum to Slaves*" sings Edward Rutledge of South Carolina to underscore that if slavery was a southern sin, the north was its procurator:  
*Who sails the ships out of Boston laden with bibles and rum? Who drinks the toast to the ivory coast? Hail Africa the slavers have*



Rutledge

*come! New England with bibles and rum!... 'Tisn't morals, 'tis money that saves... 'Tis Boston can boast to the West Indies coast, 'Jamaica we bring what ye crave.'*  
For another popular history source see IAN WILLIAMS, *RUM: A SOCIAL AND SOCIABLE HISTORY OF THE REAL SPIRIT OF 1776* (2005).

The real Edward Rutledge, the youngest signer of the Declaration of Independence, succeeded in getting Jefferson's condemnation of slavery taken out. After the Convention, though, he went home and freed his slaves.

3. JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF A BRITISH AMERICA, 1607-1789*, 290 (1985). See also JOHN J. MCCUSKER, *RUM AND THE AMERICAN REVOLUTION: THE RUM TRADE AND THE BALANCE OF PAYMENTS OF THE THIRTEEN CONTINENTAL COLONIES*, VOL. 1 (1989).

4. LASSON at 52.

5. Blake's print illustrates mercantilism and is a subtle social commentary. Although the three sisters appear harmoniously bound, only white Europe has a necklace, with black Africa and red America wearing slave bands. Europe holds America across the shoulders and grips Africa.



"Europe Supported by Africa & America"  
William Blake, ca. 1796



Smith

6. Adam Smith. Sources state that the quality of this rum was quite high. CLIFFORD LINDSAY ALDERMAN, *RUM, SLAVES AND MOLASSES: THE STORY OF NEW ENGLAND'S TRIANGULAR TRADE* 74-75 (1972).

7. OK, as far as we know he never said this. But then he probably did not utter the famous "Sir, I have not yet begun to fight." In his official report Jones wrote that he answered British Captain Pearson "in the most determined negative." Jones later reported to Louis XVI that he said, "I haven't as yet thought of surrendering, but I am determined to make you ask for quarter." This seems a lot to say as poor *Bonhomme Richard* was sinking under him. A contemporary account is that Jones said, "I may sink, but I'll be damned if I strike." Though this one is pretty good, it still does not hit the nail like "Sir, I have not yet begun to fight," which came from one of Jones's lieutenants, Richard Dale, speaking 45 years later. See EVAN THOMAS, *JOHN PAUL JONES: SAILOR, HERO, FATHER OF THE AMERICAN NAVY* 192, 344 n.192 (2003).



John Paul Jones was actually born John Paul in Scotland. Before the Revolutionary War, during a dispute aboard ship, Jones ran a sailor through with a sword. To beat the rap in Tobago, he skipped out of port and changed his name to John Paul Jones. THOMAS at 33-34; SAMUEL ELIOT MORISON, *JOHN PAUL JONES: A SAILOR'S BIOGRAPHY* 24-25 (1959).

## "Britannia Rules the Waves!"<sup>1</sup>

A certain portion of all that rum was sold back to the British Navy for the daily ration. On August 21, 1740, Admiral Sir Edward Vernon issued his "Order to Captains #349," setting the daily ration "of a quart of water to a half pint of rum."<sup>2</sup> This drink was called "Grog"<sup>3</sup> and, as the Admiral's order indicates, the grog was to be "mixed in a scuttlebutt kept for that purpose."<sup>4</sup> Sugar and lime juice are added "that it be made more palatable to them." The lime juice had the added benefit of preventing scurvy, which is why British sailors are still called "Limeys." Needless to say, Admiral Vernon was a favorite among the sailors.<sup>5</sup>

So important was grog to the British Navy that it was known as "Nelson's blood." This refers to Vice-Admiral Sir Horatio Nelson, the man to whom British officers still toast at dinner. Grog being the "life blood" of the British Navy can explain the term.<sup>6</sup> Any British Naval Officer would have agreed that His Majesty's 18th-century Navy, with its press gangs, floggings, and hanging by yardarms, could not have functioned without the mild inebriation from the daily grog ration. Indeed, the ship's

purser was charged with making sure the rum was the correct proof and would be punished for watering the rum.<sup>7</sup>

With this history in mind, the reader should be familiar with the recipe for Traditional Grog, Modern Grog and the modern variation of *Cuba Libre*.<sup>8</sup>

## The Triangle Trade: Rum for Slaves, Slaves for Molasses, Molasses for Rum

The British Navy's consumption, important as it was, accounted for only a small portion of New England rum's final destination. The story now takes an ugly turn—the "triangle trade": rum for slaves, slaves for molasses, molasses for rum.

Not only was the trade triangular among the three commodities, the Atlantic trade route formed a triangle.<sup>9</sup> Given the prevailing winds and currents, it was relatively easy for colonial merchant ships to bypass England altogether and head straight for the coast of Africa, most notably, the "Slave Coast" or the Guinea coast. The bottom part of the trip—the middle leg of the triangle—formed the infamous "Middle Passage."

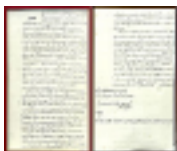
1. Nelson at Trafalgar just before getting shot. He may well have shared with his sailors a "double tot" of rum ration afforded each one before battle. If he had survived the battle he would have enjoyed another "double tot" as well.



2. "[B]e every day mixed with the proportion of a quart of water to a half pint of rum, to be mixed in a scuttled butt kept for that purpose, and to be done upon the deck, and in the presence of the Lieutenant of the Watch who is to take particular care to see that the men are not defrauded in



Admiral Vernon



Order to Captains #349, August 21, 1740

having their full allowance of rum ... and let those that are good husband men receive extra lime juice and sugar that it be made more palatable to them."

3. Grog actually gets its name from Admiral Vernon's nickname. In bad weather he wore a grogan cloak (made of thick silk, mohair and wool, often stiffened with gum). Hence, he became "Old Grog" and his much appreciated ration, "Grog." It's where we get the words *groggy*, *grog-blossom*, and *grog-shop*. See DEAN KING, ET AL, A SEA OF WORDS: A LEXICON AND COMPANION TO THE COMPLETE SEAFARING TALES OF PATRICK O'BRIAN 3 ed. at 221-22 (2000); See also THOMAS at 18-19.



4. For more than two centuries British sailors went to the scuttlebutt at mixing time to await their daily ration. While there they would gossip, giving us the synonym "scuttlebutt." Grog remained a ration in the United States Navy until 1862 and the Royal Navy until July 31, 1970, still known as "Black Tot Day," commemorated by a wreath around a casket at the Royal Navy's Submarine Base at Gosport, Hants, England. See www.pussers.com.

(The author must recommend, *purely for its academic value*, this Pusser Rum Web page for the history of rum and the Royal Navy.)



5. Admiral Edward Vernon had a junior officer named Washington—no, not George but his older half-brother, Lawrence. When Lawrence finished his service in the British Navy, he returned home to Virginia and built the family home, which he named after his former commander. When Lawrence died, the plantation passed to his younger brother, George, and that is why, as every school kid knows, George Washington lived and died at Mount Vernon.



"Kiss me Hardy"—Nelson's dying words

6. Another story is that when Nelson died at Trafalgar, October 21, 1805, his remains were preserved in a vat of rum for state burial. Two sailors drank from the vat, thus giving Navy rum the name "Nelson's blood." In reality, however, it was a cask of brandy, not rum—he was, after all, an officer! See ROGER KNIGHT, THE PURSUIT OF VICTORY, THE LIFE AND ACHIEVEMENT OF HORATIO NELSON (2006), and ADAM NICOLSON, SEIZE THE FIRE: HEROISM, DUTY AND THE BATTLE OF TRAFALGAR (2005).



Admiral Nelson



The Battle of Trafalgar, Oct. 21, 1805



A "Scuttlebutt"



Sailors at the Scuttlebutt



"Black Tot Day" Wreath

7. Before hydrometers to establish "proof," pursers put rum in a glass, add black power grains and set it in the sun (or just light it). Ignition meant 95.5 proof or nearly 50 percent alcohol. This was needed to store the rum with the gunpowder in the safest part of the ship: to protect the gunpowder from enemy fire and the booze from the crew. Thus, if this "proofed" booze leaked into the gunpowder it would still ignite. See LENDLER at 208.



The purser was the ship's paymaster/clerk who kept the accounts, freight, and tickets. The *Love Boat's* Gopher was a purser.



Fred Grandy (Gopher) – Actor and Republican Congressman from Iowa 1987–1995

Pusser's Rum gets its name from the Purser (pronounced "pusser") www.pussers.com/rum/history (last visited Mar. 5, 2007).

8. **Traditional Grog:** 2 parts water, 1 part rum, lime juice to taste, dark cane sugar to taste.

**Modern Grog:** 1 shot rum, 1 teaspoon sugar (preferably superfine), squeeze of lime, cinnamon stick, boiling water.

**Cuba Libre (Really Modern Grog):** A tall glass of ice, 1 1/2 ounces dark rum, juice from 1/2 lime, cola to fill. Garnish with lime.



9. The Triangle Trade: Rum for Slaves, Slaves for Molasses, Molasses for Rum. This was also known as the "Three-Cornered Trade." The movie *AMISTAD* (Dreamworks, 1997) depicts only a portion of the genocide that was the Middle Passage.



The ships were loaded with rum produced in New England distilleries, other trade goods and beans to feed the slaves.<sup>10</sup> The rum was unloaded and slaves were packed for the journey back across the Atlantic to the West Indies, notably Jamaica and Barbados.<sup>11</sup> There, most of the slaves were unloaded to work on plantations throughout the West Indies and South America—growing cane and extracting molasses. Some, a small percentage, went on for sale in Colonial America. And, of course, after the slaves were unloaded in Jamaica and Barbados, the ships were loaded with barrels of molasses, coming from all parts of the West Indies for the trip to New England ports, where it was unloaded to begin again the production of rum.

The trade was both efficient and profitable, as well as striking in its lack of regard for humanity.<sup>12</sup> It formed the cornerstone of New England's prosperity during the 18th and early 19th centuries.<sup>13</sup> It was a perfect example of the new raw capitalism unfettered by any policy considerations, and it flew directly in the face of Britain's mercantile system. With this background, it is not surprising that Britain later led the world in suppressing the African slave trade.<sup>14</sup>

## The Seven Years' War: 1754-1763

Despite the 1733 Molasses Act and other measures, Colonial shipping merchants and Crown officials got along well for decades through lax enforcement, bribery and smuggling. In 1754, however, things changed with the Seven Years' War, which we know as the French and Indian War.<sup>15</sup> In 1760, orders came from London to enforce the Molasses Act of 1733.<sup>16</sup> The reason for this was obvious: The British Crown could not have her colonies buying such an expensive and valuable commodity as French and Spanish molasses when Britain was at war with France and Spain.

To enforce the Molasses Act, the Crown issued *Writs of Assistance*—general search warrants good for the life of the King with no other expiration.<sup>17</sup> Thus, a customs official could use the search warrant again and again to search for contraband anywhere and anywhere. An official with a *Writ* needed no probable cause to search, or, for that matter, even a hint of suspicion.<sup>18</sup> His whim was enough. What is more, the *Writ* commanded all officers and subjects to *assist* in their execution, allowing the official to get the

manpower to carry it out.<sup>19</sup> Hence, they are also known as *Writs of Assistants*, a less common term but more descriptive of the actual effect of the warrant.<sup>20</sup>

### America Reacts to the Writs

Everything the colonies hated about being colonial seems to have crystallized around the *Writs of Assistance*—at least in New England.<sup>21</sup> When the order came to enforce the 1733 Molasses Act, it set Massachusetts abuzz. The Royal Governor, Sir Frances Bernard, wrote that news of the Molasses Act's enforcement "caused greater alarm in this country than the tak-

— continued

10. This is why Boston is still known as "Bean Town." The beans not only fed the crew, but also given a bean's nutritional value and easy portability, it became a very useful store in the slave trade. Thus, it should come as no surprise that among the ingredients of Boston Baked Beans is molasses.

#### Roger Williams' Boston Baked Beans

- 4 C small white beans
- 1 C molasses, the darker the better
- 2 tsp. salt
- 1/2 tsp. pepper
- 2 tsp. dry mustard
- 1/2 lb. salt pork or fatty bacon
- 2 onions

Soak the beans in cold water for 12-24 hours.

Quarter the onions and throw them into the bottom of the pot.

Add the drained beans. Add the salt pork. Mix all of the other ingredients with 2-4 C of hot water and dump it in the main pot. Cover the beans with water and put the pot in the coals at the back of the kitchen hearth (or, if you don't have a hearth, an oven at 250°F). Cook for 6-8 hours, adding water as necessary and occasionally stirring. For the last hour leave the pot uncovered to rid excess water.



11. Slave ships were known as "Slavers," "Blackbirds," and "Guinea Men." Slaving was sometimes called the trade in "Black Ivory." ALDERMAN at 21. No other ship would want to be downwind of a Blackbirder. "You can smell a slaver five miles downwind." ALDERMAN at 7. This despite the fact that the crew would scrub the "tween decks" with vinegar in the mistaken belief that it would disinfect the ship. *Id.*

12. The Price of a Soul? In 1764, £12 or 110 Gallons of rum would buy a slave on the African coast. This is roughly \$2,963.08 in 2004 dollars.



13. Stuntz at 405; ALDERMAN at 12. The DeWolf brothers of Rhode Island were an example. They owned a wharf in Bristol, the carts and oxen to load the rum, the distillery on Thames Street, several ships and plantations in the West Indies (the "Sugar Islands") that supplied the molasses. *Id.* at 1-2. All was dedicated to obtaining the last commodity—slaves, which made them very wealthy men.

Nearly anyone who made his life on the sea in Colonial America would have been connected in some way to "Black Ivory." John Paul Jones served at least three years on two slavers, the *King George* and *Two Friends*. THOMAS at 22; MORISON at 13. Esek Hopkins, the American Navy's Commander-in-Chief during the Revolutionary War, also traded in "Black Ivory" as captain of the brig *Sally*. ALDERMAN at 58-59.

14. "A Negro Hung Alive by the Ribs to a Gallows" by William Blake. Blake's work helped the British Abolition movement.



#### 15. The Seven Years' War—French and Indian War



16. For the general importance of this war as a foundation for the later American Revolution, see FRED ANDERSON, *THE WAR THAT MADE AMERICA: A SHORT HISTORY OF THE FRENCH AND INDIAN WAR* (2005).

17. LEVY at 156-57. The legal foundation of the Writs was that in 1662 Parliament empowered the Court of Exchequer to issue Writs of Assistance for a customs official with a constable to enter and search "any House, Shop, Cellar, Warehouse or Room or other Place, and in Case of Resistance to break open Doors, Chests, Trunks and other packages" for contraband.

18. LASSON at 53-54; DASH at 36; LEVY at 156-57.

19. DASH at 36.

20. A successor to *Writs of Assistance* exists today at 18 U.S.C. § 3105, providing that an officer may get assistance in executing a warrant.

21. DASH at 36. We have sources on the Boston Writs case, most notably John Adams, bringing this history to light. The work of other scholars *e.g.*, Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 16 (1994) suggest, "There was widespread revolt against writs of assistance throughout the colonies."



ing of Fort William Henry did in 1757.”<sup>1</sup> This shocking statement shows the seriousness of this issue in New England, especially given the contemporary accounts of the “massacre” at Fort William Henry:

[T]hen the savages fell upon the rear killing and scalping. A “hell whoop” was heard. The Indians pursued tearing the Children from their Mothers’ Bosoms and their mothers from their Husbands, then Singling out the men and Carrying them in the woods and killing a great many whom we say (sic) lying on the road side.<sup>2</sup>

With this contemporary account of the “massacre,” it is striking that the *Writs of Assistance* caused “greater alarm.”<sup>3</sup>

## 1760

As we will see, John Adams was to say that with James Otis’ argument against the *Writs* in 1761, “The child Independence was born.” If that is the case, then the child was conceived sometime in 1760:

- Sir Frances Bernard became the Royal Governor of Massachusetts. He is a much vilified figure in American colonial history. He probably deserved it. In 1760 he left the governorship of New Jersey, where he was somewhat popular, to take the governorship of Massachusetts, where he became quite unpopular. He was a dependable crown official who would enforce the Molasses Act.<sup>4</sup>
- King George II died on October 25. Because *Writs of Assistance* were only good for the life of the sovereign, they were set to

expire six months after his death, February of 1761.<sup>5</sup> Without the *Writs*, the colonials hoped they could go on smuggling French and Spanish molasses with impunity.

- Chief Justice Sewell of the Massachusetts Supreme Court died soon after Governor Bernard’s arrival. Sewall had granted *Writs of Assistance* in the absence of opposition, but was thought to have doubted their legality.<sup>6</sup> He expressed these doubts when the Chief of Customs, Charles Paxton,<sup>7</sup> petitioned the Superior Court to renew his authority to issue a *Writ*. Sewall set a hearing to give the parties the chance to argue their legality but died, leaving it to his successor. The former Royal Governor, William Shirley, had promised Sewall’s seat to James Otis, Sr. Governor Bernard, however, wanted to make sure that any judge would support the crown. Thus, he chose Thomas Hutchinson, the Lieutenant Governor, for the job.<sup>8</sup>

## “Show Me the Money!”

To encourage the enforcement of customs laws in general and the Molasses Act in particular, the Crown developed a useful little formula for divvying up the spoils: a third of the forfeited property went to the colony, a third to the governor, and a third to the seizing officer.<sup>9</sup> Generally, however, the colony never got its share because fees for snitches, lawyers, and case costs all came out of its third. This is where Governor Bernard earned his infamy. By actively enforcing the trade laws he not only ingratiated himself to his superiors in London, he made a lot of money. John Adams was highly critical of this and even Thomas Hutchinson raised an eyebrow.<sup>10</sup>

1. LASSON at 52 n. 7 (citing JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND 293 (1923)).



Ft. William Henry barracks

Fort William Henry is the fort depicted in the movie THE LAST OF THE MOHICANS (Morgan Creek Productions 1992).



The massacre scenes in the movie conformed to contemporary accounts, though reality was different.



Royal Gov. Sir Francis Bernard



2. A contemporary image of “massacre.” As with most Indian “massacres,” the numbers of dead were inflated. Plus, Colonel Monro did not get his heart cut out as in the movie but survived and arrived at Fort Edward under French guard. Also, his daughters, Cora and Alice, were not there (if they even existed), but without them there goes the movie’s romantic plot.



3. Governor Bernard’s statement demonstrates that what was happening in New England and the Writs case was central to why we have the Fourth Amendment.



Harvard Hall

4. LASSON at 56. To his credit, in New Jersey, he made good Indian treaties and established the first Indian reservation at Brotherton (later called Indian Mills). As an amateur architect he designed Harvard Hall at Harvard. Bernardston, Mass., is named for him.

5. LASSON at 57. George II had a less than regal death. Poor George was constipated for years. On Oct. 25, 1760, he was exerting to relieve the problem, which caused a heart attack—he died on the spot, or rather the pot. ANTONIA FRASER, THE LIVES OF THE KINGS AND QUEENS OF ENGLAND 221 (1975).



King George II



Justice Sewell

6. LASSON at 57. Sewell was respected for integrity and legal ability. DASH at 37. “His donations to the poor were very frequent and liberal . . . more than he could well afford; for the salaries of the judges were then quite small.” [www.sjchs-history.org/chiefjus.html#gray](http://www.sjchs-history.org/chiefjus.html#gray)

9. LASSON at 63 n. 48. Lasson reports at least two cases, *Massachusetts Bay v. Paxton* and *Ewing v. Cradock*, where the issue of the colony not getting its share of the forfeiture raised popular resentment. In *Paxton*, James Otis, Jr., prosecuted the case after a legislative investigation and resolution over Governor Bernard’s opposition. In *Ewing* two different juries found for the plaintiff despite judges instructing them that they had to find for the crown. In both cases, different appeal courts found in the defendant’s favor because they essentially lacked jurisdiction over the Admiralty Court. Again, all this shows the incredible unpopularity of the *Writs of Assistance* and the restrictive trade laws behind them.

10. John Adams was to write that Bernard was “avaricious to a most infamous degree; needy at the same time, having a numerous family to provide for.” (Bernard had nine children.)



John Adams

Hutchinson, Bernard’s successor, noted, “The governor [Bernard] was very active in promoting seizures for illicit trade, which he made profitable by his share of forfeitures.” LASSON at 57 n. 24.



Thomas Hutchinson

7. Known as “the most unpopular man in Boston.” LASSON at 63. John Adams wrote that he was “the essence of customs, taxation, and revenue.” He was burned in effigy at least twice, once with a sign saying “Every man’s servant, but no man’s friend.” [www.famousamericans.net/charlespaxton/](http://www.famousamericans.net/charlespaxton/) Despite this, Paxton, Mass., is named after him. [www.orgsites.com/ma/paxton/](http://www.orgsites.com/ma/paxton/)

8. DASH at 37-38; LASSON at 56-57. Thomas Hutchinson was a descendant of Anne Hutchinson. Though considered honest, Hutchinson was not even a lawyer, a point that must have added insult to Senior and Junior Otis. Moreover, Hutchinson stayed on as Lieutenant Governor, a member of the legislative council, and judge of probate in addition to the Chief Justiceship. DASH at 38. There may have been separate branches of government in colonial Massachusetts, but it did not stop Hutchinson from having his finger in each pie (or even the whole pie). Hutchinson was to go on to succeed Bernard and become the first American-born Royal Governor of Massachusetts as well as the last civilian Royal Governor of Massachusetts (London replaced him with General Thomas Gage). James Otis’ son, James Otis, Jr., had even gone to Hutchinson to ask his help to have his father appointed. Hutchinson instead accepted the post for himself. James Otis, Jr., never forgot this betrayal. DASH at 37-38. It is an easy supposition that the Otises did not send the Hutchinsons a Christmas card from then on.

As with the illicit trade in modern contraband, such as drugs, it seems that all parties involved end up having an economic interest. Molasses smugglers bringing in the contraband and government agents making seizures and forfeitures made a good living. This economic reality provided the backdrop for the legal questions.

## “Sixty-Three Boston Merchants”

All the *Writs of Assistance* expired in February 1761. A group known to history as the “Sixty-Three Boston Merchants” petitioned for a hearing on whether to grant new *Writs*. They retained James Otis, Jr. to plead their cause, who maintained he did it for free.<sup>1</sup> James Otis, Jr., was actually Advocate General for the Admiralty at this point—a lucrative post. He declined the Crown’s invitation to plead the case on its behalf and resigned to argue against the *Writs of Assistance*.<sup>2</sup> What motivated Otis—patriotism, radicalism, the chance to fight after his father was snubbed—is an open question. The “Sixty-Three Boston Merchants,” however, must have made it worth his while.

With James Otis was Oxenbridge Thatcher, who handled most of the heavy legal arguments that supported Otis’ rhetoric. Indeed, it was actually jurisdictional arguments like Thatcher’s that were later to win in cases involving *Writs of Assistance* in England.<sup>3</sup>

## Otis Argues Against the Writs

So what was it then that James Otis had to say about the *Writs of Assistance*? Before the specifics a sampling of his tone may help:

If the King of Great Britain in person were encamped on

Boston Common at the head of twenty thousand men, with all his navy on our coast, he would not be able to execute these laws. They would be resisted or eluded.<sup>4</sup>

For Otis this was just a warmup. The *Writs* were against English law and the *Magna Carta*, he argued.<sup>5</sup> He continued, expounding that the *Writs* were “slavery,” “villainy” and “arbitrary power, the most destruction of English liberty and the fundamental principles of the constitution.”<sup>6</sup> The *Writs* were “the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book.”<sup>7</sup>

Otis went on to argue the important legal principles that through John Adams became the Fourth Amendment. General warrants with indefinite terms are illegal making the only legal warrant a “special warrant”:

[A] special warrant directed to specific officers, and to certain houses, &c. especially set forth in the writ may be granted ... upon oath made ... by the person, who asked [for the warrant], that he suspects such goods to be concealed in those very places he desires to search.<sup>8</sup>

Thus, Otis was arguing that only warrants encompassing the requirements of particularity and specificity are legal.

Otis seemed to have his finger on the pulse of fermenting rebellion. John Adams, a young law student allowed in the court room only by special leave, was to recount decades later Otis’ electrifying effect:

I do say in the most solemn manner, that Mr. Otis’s oration against the *Writs of Assistance* breathed into this nation the



James Otis

1. LASSON at 57. DASH at 37. Jeremiah Gridley represented the Crown, which is interesting in that Gridley had trained Otis and Oxenbridge Thatcher as lawyers. DASH at 38. Also, Gridley administered an oral bar exam to John Adams lasting several hours.

2. DASH at 37.

3. LASSON at 64-65. Of course, nobody knew this in Boston at the time. Thatcher’s argument was essentially jurisdictional. According to the statute of 1662, Parliament had only authorized the Court of Exchequer to issue *Writs of Assistance*. Thus, despite the fact that Parliament had given the colonial Superior Court the jurisdiction of the Court of Exchequer, regarding the subject of issuing general warrants like the *Writs of Assistance* only an explicit parliamentary authorization would suffice. Because no court or mechanism existed in the colonies for *Writs of Assistance* to issue, they were illegal. LASSON at 61.

Parliament later passed the Townsend Acts of 1767, which among other things provided that the highest court in each colony could issue *Writs of Assistance*. LEVY at 164. This Act would have negated Thatcher’s jurisdictional arguments against them in 1761. LASSON at 72. Oxenbridge Thatcher is not remembered despite the fact that he has a very interesting name.

4. Quoted in DASH at 36.

James Otis, arguing against the *Writs* in the Council Chamber of the Old Town House, Boston, February 1761.



5. *Magna Carta* (the “Great Charter”) actually says nothing of the sort. The closest thing supporting Otis in *Magna Carta* would be Article 39:

**No free man shall be taken, imprisoned, disseised, outlawed, banished, or in anyway destroyed, nor will we proceed or prosecute against him except by the lawful judgment of his peers and by the law of the land.**

By Otis’ time *Magna Carta* had become a great myth of the source of liberty both in America and Britain. DASH at Ch. 1. What *Magna Carta* really says and the details of what happened at Runnymede in 1215



King John signing the Magna Carta

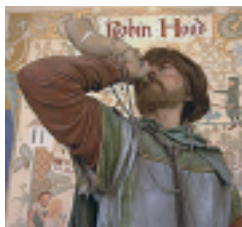
had done in the prior century. DASH at 22-23. As commentators have noted, Otis did

not have to be too concerned with the technicalities of history because he was “making history.” See LEVY at 157.



A.D. pale in comparison to the myth, liberally amplified over the years and mixed with Robin Hood.

Otis’ citations to “precedent” would make a modern-day lawyer blush. His representations about *Magna Carta* and other sources were, to say the least, a stretch. But what he was doing was asserting new rights by arguing they had always existed much the same as Edward Coke



6. LEVY at 158. The arguments about “slavery” and “villainy” are interesting given that the “Sixty-Three Boston Merchants” hired James Otis to get rid of the *Writs* to facilitate the molasses for African slave trade.

7. LASSON at 59.

8. LEVY at 158.

9. LASSON at 59. LEVY at 157.

10. Much of what we know of this dispute and the legal arguments come from John Adams writing 56 years later. Some argue that he wrote when he had an interest in emphasizing New England’s role at the expense of the Southern states where the Revolution was actually won. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994) (the *Writs* case was “almost unnoticed in debates over the federal Constitution and Bill of Rights”). But cf. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 97, 223-28 (1993) (the *Writs* case was key to understanding the Fourth Amendment). LASSON, however, did a masterful job of laying out the sources showing the importance of the *Writs* case. LASSON at Ch II.

11. LEVY at 158 (“Adams reaction to Otis’ speech is so important because a straight line of progression runs from Otis’ argument in 1761 to Adams’ framing of Article XIV of the Massachusetts Declaration of Rights of 1780 to Madison’s introduction of the proposal that became the Fourth Amendment.”).

12. OK, no source records him saying this, but would such a statement necessarily have been inaccurate? Also, given that he had 15 children (9 sons and 6 daughters), it is possible that he said it to one of them!



Hutchinson

13. In 1765 Hutchinson was to write of Otis, “What will posterity say of him when they reflect upon or feel the ruin he has brought upon his country.” LASSON at 66 n. 52. Hutchinson was, obviously, a poor prophetic voice but the statement shows that he too loved his country and wanted the best for it. History proved him wrong and Otis right. One wonders if he understood this as he left America for the last time.



John Adams



George III

breath of life.” He “was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against the Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence [sic] was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.”<sup>9</sup>

Much debate ensues about the importance of this argument to the eventual development of the American Revolution and the Fourth Amendment.<sup>10</sup> Adams identified “the Argument concerning Writs of Assistance ... as the Commencement of the Controversy, between Great Britain and America.” Given that John Adams wrote the Massachusetts Declaration of Rights, from which James Madison liberally stole when he wrote the Bill of Rights, James Otis had to have influenced events a great deal.<sup>11</sup> As for that “child independence [sic],” we all know that it grew up to do great things, though King George III could have stated, “The child was a bastard conceived of the vices of liquor, bootlegging, and smuggling.”<sup>12</sup>

### So Otis Won the Writs Case, Right?

No, he lost. Chief Justice Hutchinson (remember, the guy who got the job over Otis’s dad) was the judge. In fairness to Hutchinson, however, it appears that he did have concerns about the legality of the *Writs* and his basic honesty was not questioned. Governor Bernard selected him for what Hutchinson believed about the role of British government in the colonies and Bernard

got what he expected.<sup>13</sup>

Largely because of the *Writs* case, however, the people overwhelmingly elected Otis to the General Assembly.<sup>14</sup> On Mar. 6, 1762, the Assembly passed a bill abolishing *Writs of Assistance*. Governor Bernard negated the bill after giving it in his words “a more solemn condemnation than it deserved.”<sup>15</sup> The Assembly then reduced the salaries of Superior Court judges and specifically withheld Hutchinson’s extra allowance for being Chief Justice.<sup>16</sup>

### The Writs in Practice

With Judges like Hutchinson in power, the Crown could depend on winning any legal battle regarding the *Writs*.<sup>17</sup> Actually enforcing the *Writs*, though, turned out to be no easy matter.

Notable is the case of Captain Daniel Malcolm, one of the “Sixty-Three Boston Merchants” of 1761 who retained James Otis.<sup>18</sup> On Sept. 24, 1766, two customs officials and a deputy sheriff executed a writ at his house. When they tried to enter a part of his cellar, Malcolm met them with “two swords and a pistol.” In a clear indication that this confrontation had been staged to produce the 18th-century version of a photo-op or sound bite, Captain Malcolm’s lawyer arrived—none other than our friend, James Otis, Jr.

What were the customs officials to do? Being smart enough not to mess with Captain Malcolm (and his swords and pistol), they went to the governor and the Colonial Council for assistance. (After all, they did have a *Writ of Assistance*). The council advised the governor his “assistance” was unnecessary because the sheriff could raise a *posse comitatus*.<sup>19</sup> By the time the sheriff arrived to raise a *posse*, there was a crowd in front of Malcolm’s house to offer “assistance”—to Captain Malcolm.<sup>20</sup> The officers left, whereupon Captain Malcolm rewarded the crowd with “several buckets of wine” (probably from his cellar).

### The Road to Revolution

In an attempt to reconcile differences with the colonies, Parliament passed the Sugar Act of 1764, providing better duties for molasses importation. Alas for British interests, it was too late. The Crown and Parliament then became more restrictive with the Stamp Act and the Townshend Acts of 1767.<sup>21</sup> There was the Boston Tea Party and on it went.<sup>22</sup> But, as John Adams stated, the “child independence” was born. Thus, the protections incorporated in the Fourth Amendment began the process to make us America.

— continued

14. John Adams reported that Chief Justice Ruggles of the Court of Common Pleas lamented “Out of this election will arise a damned faction, which will shake this province to its foundation.” Adams noted that “Ruggles foresight reached not beyond his nose. That election has shaken two continents, and will shake all four.” Quoted in LASSON at 66 n. 52.

15. LASSON at 66; LEVY at 159.

16. Otis probably engineered this Assembly action and it must have given him considerable satisfaction. The lives of Hutchinson and Otis remained entangled for years, often sadly.



James Otis, Jr.

DASH at 39. In 1765, during the Stamp Act riot, the “Chief Justice’s House [was] destroyed with the savageness unknown in the civilized country. . . . [T]he Chief Justice took the lead in the judgment for granting writs, and now he has paid for it.” LASSON at 68 (Governor Bernard writing to the Lords of Trade). Hutchinson blamed Otis for the mob’s action. DASH at 39. As the years passed, Otis became alcoholic and Hutchinson presided over the examining board that pronounced him “a distracted or lunatic person.” Otis spent the rest of his days on an isolated farm in Nantasket, Mass., dying in 1783 at age 58 by lightning. In a final irony, Otis’s sister, Mercy Otis Warren, took over Hutchinson’s former mansion when he escaped the Revolution to England. DASH at 39.

17. Much of the popular sentiment against the writs of assistance had to do with the fact that they were enforced in the vice-admiralty courts without a jury. The Crown had set these courts up in the mid-1750s to more effectively enforce British trade law by avoiding juries. Stuntz at 405, 409-11. Thus, this history is part of the foundation of the Sixth and Seventh Amendments as well as the Fourth.

18. LASSON at 68-69.

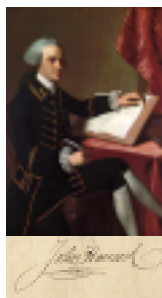
19. *Posse Comitatus*—(Latin for “the power of the county”) at common law referred to the county sheriff’s authority to conscript any able-bodied man over 15 to help him keep the peace or pursue a felon. In the earlier medieval period the term was *pro toto posse suo* invoking the power of every able-bodied man to apprehend the accused. This is the “Posse” in Westerns. See DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 176 (2003).



20. Captain Malcolm died in 1769 at 44 years old. His gravestone reads “true son of Liberty, a Friend to the Publick, an Enemy to oppression.” He asked to be buried “in a stone grave 10 ft. deep” to be safe from British bullets. As this photo demonstrates, British soldiers singled out his grave marker at Copp’s Hill for target practice. www.celebrateboston.com/sites/malcom.htm



21. Despite the fact that the Townshend Acts of 1767 gave the *Writs* a firmer legal footing, they were just as hard to enforce. For example, in 1768 the crown seized a sloop called “*Liberty*” that John Hancock owned (the guy who put his name in the middle and largest on the Declaration of Independence). It seems that *Liberty* had landed without paying any duties on its load of Madeira wines. (Hancock could afford the loss, being one of the wealthiest men in America). *Liberty* was forfeited and became a coast guard sloop searching for other smugglers. The next year, in 1769, a Newport mob, enraged by *Liberty*’s new activities of seizing vessels, ran her aground and burned her. LASSON at 72 and n.71. After this and other incidences, Hutchinson wrote that he doubted whether any customs officer would be bold enough to make a seizure. LASSON at 72.



22. The Boston Tea Party—What they do not teach in grade school is that tea was not the only thing the Sons of Liberty grabbed. There were three ships raided, *Dartmouth*, *Eleanor*, *Beaver* with cargos of tea and hard cider worth about \$4,444,617.60 in 2004 dollars. The hard cider did not end up in Boston Harbor. LENDLER at 221.



## Of Wilkes and Writs: The Fourth Amendment's Two Clauses

The Fourth Amendment's two clauses, the reasonableness clause and the warrants clause, can be traced back to the English and American sources respectively.<sup>1</sup>

**Of Wilkes:** We can see the roots of the Fourth Amendment's first clause, the reasonableness clause, in the *Wilkes* cases. Remember the legal principle in Camden's opinion: **A search can be illegal even with a warrant allowing the search.** Our Fourth Amendment incorporates this principle by stating that any search must be "reasonable" to be legal.<sup>2</sup>

### The Reasonableness Clause:

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.*<sup>3</sup>

Thus, even a search pursuant to law may still be "unreasonable" under the Fourth Amendment and therefore illegal (i.e., unconstitutional).

**Of Writs:** From Otis' argument against the *Writs of Assistance* one can plainly see that the Fourth Amendment was a reaction to general warrants. This is why the Fourth requires probable cause upon an oath and specificity and particularity in search warrants:

### The Warrants Clause:

*... 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.*<sup>4</sup>

Thus, any warrant is only supposed to issue after the police have met exacting requirements.

Indeed, the very grammar of the Fourth Amendment, with two clauses separated by a comma and the conjunction "and,"<sup>5</sup> underscores that the drafters considered the two clauses as independent protections with primacy given to the reasonableness clause.

Going directly from James Otis's argument of 1761, John Adams wrote the Massachusetts Declaration of Rights of 1780, with Article XIV reading as follows:

Every subject has the right to be secure from all unreasonable searches and seizures, and seizures of his person, his houses, 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.<sup>6</sup>

Under this Article, all searches must be objectively reasonable and the redress to a warrant is only a secondary consideration with unique requirements. James Madison liberally relied on Adams in writing the Fourth Amendment.<sup>7</sup>

### What Does the History Teach About the Fourth Amendment?

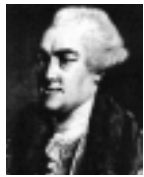
First, get *reasonable* about the Fourth Amendment: Because warrants were the problem not the answer, we should look to the reasonableness clause for ideas about the Fourth Amendment's direction. As Lord Camden established, a warrant can meet all the legal formalities and still be unreasonable. The modern court has

collapsed the two clauses, and focusing on the warrants clause alone is limiting because of the many exceptions to the rule.<sup>8</sup> Today's Supreme Court may be resurrecting the reasonableness clause.<sup>9</sup>

Second, men like Adams and Madison broadly wanted to protect the "right to be secure" from government intrusion. These men could never have known all the ways the police can search into one's private life today.<sup>10</sup> But, they did create a constitutional structure where the burden of justifying any expansion of police/government power falls on the supporters of that expansion.<sup>11</sup>

Third, the Fourth Amendment is not limited to criminal court: The Fourth's wording does not use criminal terminology, distinguishing it from the Fifth, Sixth, and Eighth Amendments.<sup>12</sup> Indeed, both the

1. **Of Wilkes and Writs.** Presenting a history of anything is about organizing the material and interpreting it in a relevant way.



Wilkes

Without this, facts are just a timeline. Would Adams or Madison have told us that the Fourth's first clause comes from the *Wilkes* case and the second clause comes from the *Writs* case? Probably not, because the two cases were contemporaneous.



Otis

2. Stuntz at 400.

3. UNITED STATES CONSTITUTION Amendment IV, clause 1.

4. UNITED STATES CONSTITUTION Amendment IV, clause 2.

5. "Place a comma before a conjunction introducing an independent clause." STRUNK AND WHITE, *THE ELEMENTS OF STYLE*. See also W. H. FOWLERS, *DICTIONARY OF MODERN ENGLISH USAGE*.



John Adams

6. For a good account of Adams writing the Massachusetts Constitution, see DAVID MCCULLOUGH, *JOHN ADAMS* 220-25 (2001). Adams was to state that "I take vast satisfaction in the general approbation of the Massachusetts Constitution. If the people are as wise and honest in the choice of their rulers, as they have been in framing a government, they will be happy, and I shall die content with the prospect for my children." MCCULLOUGH at 224. Adams' constitution is the oldest functioning written constitution in the world. *Id.* at 225.

7. Interestingly, Madison's original even more explicitly demonstrates that the drafters of the Fourth Amendment considered warrants the problem:

*The right of the people to be secure in their persons, houses, papers, and 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 place to be searched, and the persons or things to be seized.* Annals of Congress, 1st Cong., 1st sess., P. 452; reproduced in LEVY at 282.

No records suggest why Congress modified the language to the current Fourth Amendment.



James Madison

8. See, e.g., *Johnson v. United States*, 333 U.S. 10, 14-15 (1948) (all warrantless searches are per se "unreasonable"). *United States v. Leon*, 468 U.S. 897 (1984) (officer's "good faith" exception).



9. See, e.g., *United States v. Thornton*, 124 S. Ct. 2132 (2004) (Scalia concurring) (Though a search incident to arrest is as an old exception to the warrants clause, the arrest still must be "reasonable" under the Fourth Amendment). Regarding Justice Scalia's jurisprudence on criminal procedure issues in general, see Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005). For an analysis in relation to modern issues of the reasonableness clause, see Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977.

For the author's attempt to implement Justice Scalia's position, see *United States v. Dale Juan Osife*, 398 F.3d 1143 (9th Cir. 2005).

10. See, 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).

11. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (providing a thorough analysis of the context and legislative discussions of the Fourth Amendment's creation).

12. For instance, the Fifth Amendment speaks of "infamous crimes" and "in any criminal case." The Sixth Amendment speaks about "the accused, in all criminal prosecutions." The Eighth Amendment prescribes "cruel and unusual punishment." All these amendments clearly were intended to apply at least primarily in criminal court. Not so the Fourth Amendment.

*Wilkes* and *Writs* cases were civil, not criminal. The reasonableness language contemplates a jury in an action for trespass.<sup>1</sup> Scholars argue that civil cases in trespass against police and other government officials would do more to deter illegal (*i.e.*, “unreasonable”) police searches than the current rule excluding illegally obtained but probative evidence in criminal cases.<sup>2</sup> Others argue that this remedy for illegal conduct misses the reality of the need to directly deter illegal police practice.<sup>3</sup>

Fourth, the Fourth Amendment came out of state constitutions and thus state constitutions may still hold power to protect liberty.<sup>4</sup>

Fifth, there are no “War” exceptions to the Fourth Amendment, and this is no mere oversight: Otis argued in 1761, during the French and Indian War, which did not end until 1763.<sup>5</sup> Also, both Adams and Madison had just finished fighting the British. The Fourth then does not allow exceptions for any

The Writs were “the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book.”

“war,” such as the “War on Drugs.”<sup>6</sup> The current so-called War on Terror is no exception, and the Fourth should inform the limits of legislation such as the Patriot Act. **AZ AT**

1. Historically, there was no exclusionary rule to disqualify illegally obtained evidence from a later criminal trial. Recall that *Wilkes* lost in a subsequent criminal trial on the very evidence that Crown officials trespassed to get. The reason for this is that a trespass action is a suit in equity and “he who seeks equity must do equity.” Thus this history is not a justification for the modern exclusionary rule. The Supreme Court dealt with this reality directly in *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961), and established definitively the modern justifications for the exclusionary rule.

Although there is not a long history of exclusionary rule application in the search and seizure context, there is an ancient, even biblical, basis under the law of confessions. Moreover, the context of search and seizure of personal papers blurs the line between mere seizure of items and seizure of a person’s private written statements. Thus, the history of the Fourth and Fifth Amendments are intertwined. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 390 (1968); Timothy P. O’Neill, *Rethinking Miranda: Custodial Interrogation as a Fourth Amendment Search and Seizure*, 37 U.C. DAVIS L. REV. 1109 (2004).

2. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* Ch. 1 (1997).

The Fourth Amendment’s wording seems to invite civil litigation against government forces that act unreasonably. For general discussions of various legal actions see among many other sources Karen M. Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as it Applies to Fourth Amendment Excessive Force Cases*, 21 *TOURO L. REV.* 571 (2005); Karen M. Blum, *Support Your Local Sheriff: Suing Sheriffs Under § 1983*, 34 *STETSON L. REV.* 623 (2005); John Williams, *False Arrest, Malicious Prosecution, and Abuse of Process in §1983 Litigation*, 20 *TOURO L. REV.* 705 (2004); Jeffrey Sturgeon, *A Constitutional Right to Reasonable Treatment: Excessive Force and the Plight of Warrantless Arrestees*, 77 *TEMP. L. REV.* 125 (2004).

4. See Arizona Constitution, Art. II § 8, Right to Privacy. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” See also *State v. Bolt*, 689 P.2d 519 (Ariz. 1984).

5. **Death of General Wolfe at the Battle of Quebec, 1759.** French general Montcalm (he was the French general



in the movie *THE LAST OF THE MOHICANS* also died in the battle.

6. See *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997) (Fourth Amendment does not permit a blanket “Drug War” exception to the knock and announce requirement for a felony drug investigation).

3. Carol S. Steiker, *Second Thoughts About First Principles*, 107 *HARV. L. REV.* 820 (1994) (challenging Amar arguing from the realities of modern criminal practice), and Tracey Maclin, *When the Cure for the Forth Amendment is Worst than the Disease*, 68 *S. CAL. L. REV.* 1, 16 (1994) (challenging the limitation of Amar’s selective read of history).

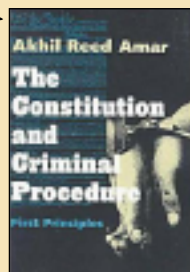
See also David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 *SAN DIEGO L. REV.* 227 (2005), specifically arguing that the Framers of the Fourth Amendment only intended to protect the home and consequently many of its application in modern criminal procedure has no foundation in originalism. For this same theme see David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 *FLA. L. REV.* 1051 (2005), and David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 *HASTINGS CONST. L.Q.* 47 (2005).



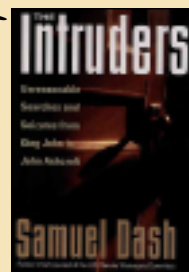
## Major Resources

• NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937). (This is the source to which all others turn.)

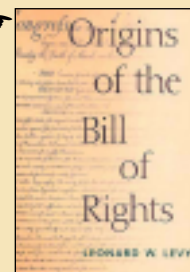
• William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393 (1995).



AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997). But see also Carol S. Steiker, *Second Thoughts About First Principles*, 107 *HARV. L. REV.* 820 (1994).



SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* (2004).



LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* (1999).