

TWO HISTORY LESSONS IN THE FOURTH AMENDMENT

I've known the story of James Otis' fight against Writs of Assistance and its role in the establishment of our Fourth Amendment. But I really liked this telling of the story in the BoGlo.

[T]he Fourth Amendment can be traced to a neighborhood that has long regarded outsiders with skepticism. It was in the North End that simmering public resentment against searches found a test case in 1766, when an imperious British official squared off against a proud homeowner who insisted that his modest dwelling was, indeed, his castle.

[snip]

Those with long memories remembered that the original Puritans had fled England at a time when royal officers searched their dwellings for Puritan Bibles and other signs of independent thinking. They knew the phrase "a man's home is his castle," linked to an English lawyer, Sir Edward Coke, who had inspired the first generation of New Englanders—and whose own home had been ransacked by English authorities near the end of his life.

The English, tightening the clamps on their vast empire, were stepping up their systems of enforcement in the 1750s and 1760s. The British were certain that they had the right to enter houses to enforce the law—how else could they run an empire? All known governments asserted this power, and much precedent supported it.

In a celebrated court case in 1761, an

up-and-coming lawyer, James Otis, attacked the Writs of Assistance in a speech that soon became famous. In a small chamber inside the Old State House, he held his audience spellbound, speaking for hours as he drew on ancient English law to skewer the English. In insisting on “the freedom of one’s house,” he was inventing an argument as much as he was citing precedent—the Magna Carta, designed by 13th-century barons, was a long way from the problems of a Boston homeowner in 1761, and the law was vaguer on these points that Otis cared to admit. But as he hammered away at British arrogance, he expressed an idea about the importance of privacy with deep roots in New England’s rocky soil.

The story’s useful not just for the way the arguments attributed to the British at the time – all governments assert the power to enter homes at will, and how could you run an empire without that authority? – resonate with the arguments made about surveillance now.

But because of the stark contrast it offers with a different story of our founding, one told by John Yoo in an October 2001 OLC memo authorizing the government to use military force in times of emergency within the US. The whole memo is worth reading, but Yoo situated an undefinable authority to respond to exigencies in the Executive, pointing to things like the Shay’s Rebellion and this language from an Alexander Hamilton Federalist paper.

As they understood it, the Constitution amply provided the federal Government with the authority to respond to such exigencies. “There are certain emergencies of nations in which expedients that in the ordinary state of things ought to be forborne become essential to the public weal. And the government, from the possibility of such

emergencies, ought ever to have the option of making use of them." The Federalist No. 36, at 191 (Alexander Hamilton). Because "the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy." Id. No. 23, at 122 (Alexander Hamilton). As the nature and frequency of these emergencies could not be predicted, so too the Framers did not try to enumerate all of the powers necessary in response. Rather, they assumed that the national government would possess a broad authority to take action to meet any emergency. The federal Government is to possess "an indefinite power of providing for emergencies as they might arise." Id. No. 34, at 175 (Alexander Hamilton). Events leading up to the Federal Convention, such as Shay's Rebellion, clearly demonstrated the need for a central government that could use military force domestically.

I'm most interested in what Yoo did with this argument. Having decided the President had the authority to use the military within the US, Yoo argued that military operations included searches.

Our forces must be free to "seize" enemy personnel or "search" enemy quarters, papers and messages without having to show "probable cause" before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally "reasonable." They must be free to use any means necessary to defeat the enemy's forces, even if their

efforts might cause collateral damage to United States persons.

[snip]

The view that the Fourth Amendment does not apply to domestic military operations against terrorists makes eminent sense. Consider, for example, a case in which a military commander, authorized to use force domestically, received information that, although credible, did not amount to probable cause, that a terrorist group had concealed a weapon of mass destruction in an apartment building. In order to prevent a disaster in which hundreds or thousands of lives would be lost, the commander should be able to immediately seize and secure the entire building, evacuate and search the premises, and detain, search, and interrogate everyone found inside. If done by the police for ordinary law enforcement purposes, such actions most likely would be held to violate the Fourth Amendment. See *Ybarra v. Illinois*, 444 U.S. 85 (1979) (Fourth Amendment violated by evidence search of all persons who are found on compact premises subject to search warrant, even when police have a reasonable belief that such persons are connected with drug trafficking and may be concealing contraband). To subject the military to the warrant and probable cause requirement that the courts impose on the police would make essential military operations such as this utterly impossible.

Cheney's people did try, unsuccessfully, to use this memo to justify using force in Lackawanna, NY to search for suspected terrorists.

But it was actually used: as foundation for the illegal wiretap program (which, given that it amounted to the NSA invading the stored

communications of Americans without a warrant, fundamentally amounted to the deployment of the military domestically). The memo was not withdrawn until after the FISA Amendments Act established a different basis for the dragnet.

The BoGlo tribute to James Otis only underscored how much we've colonized our own country, insisting on the authority to conduct such searches because how else can you run an empire!