

## **The NSA's "General Warrants": How the Founding Fathers Fought an 18th Century Version of the President's Illegal Domestic Spying**

By David Snyder

The technology powering the National Security Agency's illegal domestic spying program would have amazed James Madison and the other framers of the Bill of Rights. In a time when the steamboat was a technological marvel, it would have been unimaginable for the government to collect millions of innocent Americans' private communications and use computers to look for "suspicious patterns."

But aside from the technology, the government's ongoing violation of fundamental civil liberties would have been very familiar to the men who gathered in 1791 to adopt the Bill of Rights. The Founding Fathers battled an 18<sup>th</sup> century version of the wholesale surveillance that the government is accused of doing today – an expansive abuse of power by King George II and III that invaded the colonists' communications privacy.

Using "writs of assistance," the King authorized his agents to carry out wide-ranging searches of anyone, anywhere, and anytime regardless of whether they were suspected of a crime. These "hated writs"<sup>1</sup> spurred colonists toward revolution<sup>2</sup> and directly motivated James Madison's crafting of the Fourth Amendment.

We've now come full circle. The president has essentially updated this page from King George's playbook, engaging in dragnet surveillance of millions of Americans,

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<sup>1</sup> *Stanford v. Texas*, 379 U.S. 476, 484 n.13.

<sup>2</sup> *Stanford*, 379 U.S. at 481 ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.") See also *Marcus v. Search Warrant of Property*, 367 U.S. 717, 729 ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.").

regardless of whether they are suspected of a crime. The founders of this country took steps to limit precisely this sort of unfettered executive power. Will we?

### WRITS OF ASSISTANCE

Writs of assistance gave the King's men – customs officials generally, but not exclusively – *carte blanche* to search the homes, papers and belongings of anyone. They permitted officials to “enter and go into any House, Warehouse, Shop, Cellar or other Place” to seize contraband goods.<sup>3</sup> Though similar in a very broad sense to search warrants, they bore little resemblance to the modern document. They required no judicial oversight or probable cause – the evidence investigators must show before a judge will issue a warrant.<sup>4</sup>

The writs delegated “practically absolute and unlimited” discretion to the officials who carried them out,<sup>5</sup> The writs were valid for the entire duration of the life of the King who issued them.<sup>6</sup> This meant that a single writ, sometimes (but not always) approved by a court at its inception (and never with any evidence of suspicion or specifics about what would be searched), could last decades with no further judicial input. Aside from that, the only limitations were that the writs did not authorize the arrest of anyone and permitted the search of land structures only during the day.<sup>7</sup>

Two events in 1760 led to the writs playing a starring role in the prologue to the American Revolution. The first was an order by British Secretary of State William Pitt

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<sup>3</sup> M.H. Smith, *The Writs of Assistance Case 1* (quoting a 1767 measure by Parliament establishing a new writ of assistance “in the British Colonies or Plantations in America.”)

<sup>4</sup> The U.S. Supreme Court in *Steagald v. United States*, 451 U.S. 204, 220 (1981), noted that writs of assistance “left customs officials completely free to search any place where they believed [contraband] might be.”

<sup>5</sup> Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 54.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

that a tax on molasses entering the colonies be strictly enforced. Customs officials were issued writs of assistance to step up enforcement against smuggled goods. The second was the death of King George II in 1760. All writs of assistance that had been issued during George II's life would expire six months after his death. The Crown's efforts to renew writs fostered intense resistance, particularly in Massachusetts.

### THE PAXTON CASE

After the king's death on October 25, 1760, Charles Paxton, the chief customs official in Boston, petitioned for new writs in Massachusetts Superior Court. A group of Boston merchants opposed the writs. James Otis, a prominent local attorney, represented the merchants in court, arguing that the writs were "the worst instance of arbitrary power, the most destructive of English liberty, that was every found in an English law book."<sup>8</sup> Otis asserted that new writs of assistance would "totally annihilate" the "freedom of one's house."<sup>9</sup> The writs, Otis said, placed "the liberty of every man in the hands of every petty officer."<sup>10</sup>

John Adams, then 26 and recently admitted to the Massachusetts bar, was among those in the courtroom watching Otis' performance. Adams later wrote that Otis' argument against the writs "breathed into this nation the breath of life."<sup>11</sup>

Adams further credited Otis' oratory with lighting the spark that led to the fire of revolution: "Then and there was the first scene of opposition to the arbitrary claims of Great Britain," Adams wrote.<sup>12</sup> "Then and there the child Independence was born. In 15

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<sup>8</sup> Lasson at 59.

<sup>9</sup> William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (unpublished dissertation) 758.

<sup>10</sup> William Tudor, *The Life of James Otis of Massachusetts* 66.

<sup>11</sup> Lasson at 59 (quoting *Works of John Adams*, X, 276).

<sup>12</sup> *Id.*

years, namely in 1776, he grew to manhood, and declared himself free.”<sup>13</sup> The U.S. Supreme Court in 1886 said the Paxton Case was “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”<sup>14</sup>

Otis and the merchants lost. The court granted the new writs. But the larger cause of resistance to the Crown’s power had only grown.<sup>15</sup> The Crown continued issuing writs up to the eve of the Revolutionary War, and the writs continued to stoke the colonists’ anger.<sup>16</sup>

### THE WILKES CASE

Two years after Otis’s impassioned argument came the case of John Wilkes, an English newspaper publisher whose fight against a general warrant issued by the King made him a hero in both England and the American colonies. Though the entire Wilkes affair played out in England, the colonial press extensively covered it, and for most colonists, John Wilkes became a household name.<sup>17</sup>

Wilkes had criticized the King and other high officials in his newspaper, *The North Briton*. Officials issued a general warrant commanding authorities “to make strict and diligent search” for the authors, printers and publishers of the offending publication.<sup>18</sup> In the process of their search, officials, broke down at least 20 doors and scores of trunks, and broke hundreds of locks.<sup>19</sup> They dumped thousands of books, charts

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<sup>13</sup> *Id.*

<sup>14</sup> *Boyd v. United States*, 116 U.S. 616, 625 (1886).

<sup>15</sup> Cuddihy at 799.

<sup>16</sup> For example, the 1768 seizure, under authority of a writ, of John Hancock’s sloop sparked a riot. Lasson at 72.

<sup>17</sup> Cuddihy at 1104-6 (noting the “saturation coverage” that the Wilkes trial received in the colonies).

<sup>18</sup> *Id.* at 887.

<sup>19</sup> *Id.* at 892.

and manuscripts on the floor.<sup>20</sup> In the end, a single warrant had allowed, in thirty hours' time, the search of at least five houses and the arrest of 49 people, nearly all of whom were innocent.<sup>21</sup>

The press in England and the American colonies made the case a *cause celebre*, and the British courts ultimately condemned the general warrant, declaring it “totally subversive of the liberty of the [warrant’s] subject.”<sup>22</sup>

The early state constitutions of the colonies reflected the growing fervor against general warrants and writs of assistance. Most outlawed general warrants, requiring instead specific warrants which demanded probable cause and specificity as to whom the authorities accused of a crime and where and when they would search. The drafters of the Fourth Amendment would draw on these provisions when they sought to limit executive power.

#### THE FOURTH AMENDMENT

It is “familiar history,” the U.S. Supreme Court noted in *Payton v. New York*, that “indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”<sup>23</sup>

When James Madison drafted the Fourth Amendment, he relied heavily on the Massachusetts Constitution, which forbade warrants that did not specify the “persons or objects of search, arrest, or seizure.”<sup>24</sup>

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<sup>20</sup> *Id.* at 893.

<sup>21</sup> *Id.*

<sup>22</sup> *Wilkes v. Wood*, 18 E.R. 489, 498.

<sup>23</sup> 445 U.S. 573, 583 (1980).

<sup>24</sup> Mass. Const. of 1780 art. 14, sec. 15.

There was some disagreement among the members of Congress over how broad the Fourth Amendment's protections should be, but when they eventually adopted it, they expressed what the Supreme Court later described as a "determination . . . that the people of this new Nation should forever 'be secure in their persons, houses, papers and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant."<sup>25</sup>

In 1967, the U.S. Supreme Court in *Katz v. United States* affirmed that the Fourth Amendment's protection against searches and seizures extends to telephone conversations captured on wiretaps.<sup>26</sup> In recognizing that the principle that the Fourth Amendment prohibits indiscriminate searches regardless of the technology involved, the Court made it plain that advanced technology doesn't clear the government of the duty to establish probable cause, and to receive a warrant, before rummaging through the private lives of Americans.

Over the past few years our government has argued that the modern exigencies of national security have changed the rules of the game and that the niceties of judicial process simply no longer apply. Madison likely would have rejected this argument, but he wouldn't have been surprised by it. "Perhaps it is a universal truth," Madison wrote in a 1798 letter to Thomas Jefferson, "that loss of liberty at home is to be charged against provisions against danger, real or pretended, from abroad."

King George's specific writs of assistance are long gone, but in authorizing the NSA spying program, the president has violated not only the privacy of millions of

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<sup>25</sup> *Stanford*, 379 U.S. at 481-82.

<sup>26</sup> 389 U.S. 347 ("The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.")

Americans and legal safeguards set up by Congress, but also the most basic motivations behind the Fourth Amendment. Over 200 years ago, the founders of our country took strong steps to permanently and finally end the authority of the government to conduct wholesale surveillance the private communications and thoughts of ordinary Americans. The question for us today is whether we're going to give up on that American ideal, or whether we're going to take the steps necessary to return to it.