The Early Days of the Right to Privacy

Even before the United States was an independent country, courts were protecting against government intrusions.

BY THOMAS J. SHAW

"Life must be lived forward but can only be understood backwards."

So said the philosopher Kierkegaard, in a phrase that aptly describes the "why" of my love of studying history. Love of history and love of the law led me to author a trilogy of books on the history of law during wartime. These books describe the legal issues that arose preceding, during, and after the three major global wars America has been involved in.

They also describe the lawyers and judges involved with these issues and the statutes and trials that shaped the law during wartime, which went on to shape the law in peacetime. Many of these issues and how they were dealt with continue to inform the thinking of today's lawyers and judges.

In this new column launching in this issue, I'll describe what happened in each war by highlighting one out of hundreds of legal issues. Here, I describe what happened just before the American Revolutionary War with the legal issue of privacy.

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Trials held during this period in both America and Great Britain helped to clarify the early rights to privacy. These judicial decisions, and many other events leading up to and during this war, contributed to the framing of the U.S. Constitution and the Bill of Rights, which still act as the foundation of American privacy law. Two cases from the years leading up to the war stand out as early influences on the right to privacy against governmental intrusions.

The first was *Lechmere*, which took place before the superior court in Massachusetts in 1761. A British statute from the time of Charles II a century earlier allowed customs officials, in the search for imported goods for which customs duties hadn't been paid, to:

> "enter, and go into any house, shop, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other package, there to seize, and from thence to bring, any kind of goods or merchandize whatsoever."

This authority required the customs officer to operate under a writ of assistance. Such a writ was a general power to enter any location to search for goods, without specification of the location, the goods to be searched, or a limit on the duration. The writs were held for life and could be used against anyone. Because the writs had to be renewed upon the death of the monarch (George II had recently died), several merchants in Boston tried to oppose the re-granting of these writs to local customs officials, including Thomas Lechmere.

Their counsel argued that the writs were unconstitutional under English law, but ultimately the court ruled the writs were valid. The reaction to the *Lechmere* decision led the Massachusetts assembly to pass a statute against general writs of assistance. The British-appointed colonial governor, however, vetoed this law.

The British solicitor general and attorney general were then asked to find a legal basis for using these general writs in America, but they could not. Instead, the British decided to provide legal certainty by enacting a clause within the Townshend Act of 1766. This provision stated:

> "it is doubted whether such officers can legally enter houses and other places on land, to search for and seize goods.... To obviate which doubts for the future.... be it enacted... such writs of assistance, to authorize and impower the officers of his Majesty's customs to enter and go into any house, warehouse, shop, cellar, or other place, in the British colonies or plantations in America, to search for

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