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JAMES OTIS, JR.'S, ATTACK ON WRITS OF ASSISTANCE:
A TURNING POINT IN THE LIFE OF JOHN ADAMS
AND THE BIRTH OF INDEPENDENCE IN AMERICA

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[13,137 words]

What was the American Revolution?

The American Revolution was one of the great turning points in the history of mankind. It marked the beginning of the end of slavery, led to the founding of the first large and stable republic in history, and inspired the establishment of governments based on the natural rights of man all over the world.¹ In the minds of most Americans, the American War for Independence began on April 19, 1775, when shots were fired on Lexington Green.² John Adams said, however, that our War for Independence was not the real American Revolution. *That*, he said, occurred in the hearts and minds of the people during the fifteen years prior to 1775.

In 1815 John Adams wrote to Thomas Jefferson:

As to the history of the revolution, my Ideas may be peculiar, perhaps singular. What do We mean by the Revolution? The War? That was no part of the Revolution. It was only an Effect and a Consequence of it.

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The revolution was in the Minds of the People, and this was effected from 1760-1775, in the course of fifteen Years before a drop of blood was drawn at Lexington.³

In another letter to Hezekiah Niles written in 1818, John Adams said:

What do we mean by the American Revolution? Do we mean the American war? The Revolution was in the minds and hearts of the people; a change in their religious sentiments, of their duties and obligations...This radical change in the principles, opinions, sentiments, and affections of the people was the real American Revolution.⁴

For John Adams and perhaps many others, this change of mind and heart began in February 1761, the day that James Otis, Jr., a prominent Boston attorney, attacked the legality of Writs of Assistance in the Superior Court of the Royal Colony of Massachusetts. John Adams was an eyewitness to this event and took notes during the trial. Adams preserved these notes and described the trial in his *Autobiography*.

Throughout his life, John Adams was unceasing in his praise of James Otis, Jr., and his family. In 1785 he wrote the following to Thomas Jefferson in regards to the Otis family:

I declare, I don't believe there is one family upon Earth to which the United States are so much indebted for their Preservation from Thralldom. There was scarcely any Family in New England had such Prospects of Opulence and Power under the Royal Government. They have sacrificed them all.⁵

In 1823 shortly before his death, John Adams met with and wrote numerous letters to a Judge William Tudor to assist Tudor in writing a biography of James Otis, Jr. In addition to helping Tudor with Otis's biography, Adams conceived of having a painting done to commemorate Otis's contribution to the revolutionary movement during the Writs of Assistance trial. However, the painting was never undertaken.

John Adams's sons, Charles Francis Adams and John Quincy Adams, in the biography of their father, *The Life of John Adams*, spoke of the tremendous impact Otis had on their father. They observed, "It is apparent that [Otis's] arguments in February

1761 opened a new world before him [John Adams], and he entered it with unhesitating step.” Likewise, a modern biographer of John Adams, Page Smith, described how Otis’s attack on Writs of Assistance influenced Adams:

It is given a man to be once so moved, so transported as John Adams was. These are the experiences that touch and transform; these are the moments in which truth seems to have descended from heaven in the inspired word. An old man’s hindsight must have its due, for it is indeed in such moments that men are remade and revolutions conceived. Born from the authentic word, they grow in the darkness of men’s hearts and minds until they are ready to dispute with the powers of this world the issue of man’s destiny on earth.⁸

Military historian and Revolutionary War scholar John Galvin believes that James Otis, Jr., played a major role the events that led to the War of Independence. Galvin’s list of turning points in the march toward American independence differs from those of other historians. He agrees with Adams that the Writs of Assistance trial was the first of these turning points. He states:

The turning points in the march of events from loyalty to revolution are not the crises usually mentioned (Stamp Act, Townshend Acts, massacre, tea party, Port Bill). The first clear turn down the road to revolution was Otis’ attack against the writs of assistance in 1761. When he followed this with his *Vindication* in 1762, he established the first popular doctrinal basis for the defense of the province charter and the repudiation of Parliament. Otis’ early challenges set the tone of response to the Stamp Act and created the environment that brought radical Samuel Adams into the House of Representatives in 1765. The united efforts of Otis and Adams through the period of the Townshend Acts (1767-1769) resulted in the destruction of the court party on the issue of whether or not the circular letter would be rescinded. Then, with Otis gone, Adams organized the provincial committees of correspondence, which became the backbone of the resistance in Massachusetts and later in the other colonies. Adams was unable to move until the times made it possible—but to a great degree the profound shift of loyalties from the king to the provincial charter came about through the work of Otis.⁹

According to Galvin, Otis viewed himself as a loyal subject of the British crown and as a devoted student, admirer, and practitioner of the most enlightened legal system in the world. Throughout the

pre-Revolutionary period Otis fought to preserve the natural rights of man as guaranteed in that collection of laws and statutes that had come to be known as the British Constitution. In the courts, in the colonial legislature, on the streets of Boston, and on the roads of New England, Otis sought to protect his countrymen from those who threatened the rights of Englishmen. In the process of pointing out the illegality and irrationality of Britain's colonial policies during the pre-Revolutionary period, Otis unintentionally laid the legal and philosophical ground work for the revolutionary American independence movement that Samuel Adams spearheaded.¹⁰

In the introduction to a series of biographical sketches written for the National Gallery on the leaders of the pre-Revolutionary era, Lillian Miller describes the philosophical impact that Otis had on the Patriot movement:

In denouncing the writs [of assistance], James Otis, Jr., not only condemned what he believed to be their illegality as 'the worst instrument of arbitrary power, the most destructive to English Liberty, and the fundamental principles of the constitution,' but in doing so he argued that every man had a 'right to his life, his liberty...his property.' Furthermore, he defined these rights as 'written on [man's] heart, and revealed to him by his maker.' They were, Otis maintained, 'inherent, inalienable, and indefensible by any laws, pacts, contracts, covenants, or stipulations, which man could devise...' Spoken in 1761, the idea that these words express was to become so deeply ingrained in the minds and hearts of Americans in all parts of the colonies that it would animate the explosive chain of events recounted in this narrative, and [fifteen] years later find fuller and finer utterance in the Declaration of Independence.¹¹

The idea that Otis made a major contribution to the revolutionary movement stands in striking contrast to the views of a surprising number of historians who either say nothing of Otis's contributions or who, like Lawrence Leder, tell us that "Otis had *no ground in legal precedent* and so took an *emotional* position, challenging Parliament's right to authorize unreasonable searches and seizures, and *alleging* that a man's home was his castle. Otis *lost his case without winning a moral victory* as had Patrick Henry (emphasis mine)."¹² This historian suggests that Otis's Writs of Assistance

trial had little impact on the American independence movement. The writings of Tudor, Adams, and others tell quite a different story. The purpose of this paper is to show how important the Writs of Assistance trial and the contributions of James Otis, Jr. were to the American Revolution by re-examining the context and content of the trial, the immediate reaction of Otis's contemporaries to it, and the long-term effects of Otis's attack on Writs of Assistance on the American Revolution principally through the eyes of John Adams.

The Context of the Attack on Writs of Assistance

The seeds of the controversy over Writs of Assistance were planted early in the reign of George II (1727-1760), when sugar plantation owners in the British West Indies complained to Parliament that American colonial merchants were trading with planters in the French West Indies instead of with them. There were good reasons why the North American colonists did this. The French planters paid more for New England goods like rum, apple cider brandy, lumber, pork, fish, onions, cheese, livestock, wool, and flax than the British planters. The French planters also sold their molasses and sugar to American merchants for lower prices than the British planters did.¹³

Nevertheless, this pattern of trade was contrary to the popular principles of mercantilism, which dictated that colonies existed to enrich the empire of which they were a part, not someone else's. The British planters in the West Indies were extremely wealthy and, consequently, had great influence in Parliament.

The wealth of West Indian planters can be estimated by the value of the exports from the British West Indies, which dwarfed those of the mainland of North America and the mainland of Asia as well. The demand for sugar in Europe and Great Britain was very high. From 1713 to 1792, Great Britain imported a total of £162,000,000 worth of sugar from the little islands of Jamaica,

Barbados, St. Kitts, and others. Even more was purchased on the European Continent. The richest of all the “sugar islands,” however, was the French colony of San Domingo, which later became Haiti. Ironically, this is where most of the New England merchants did their trading even during the French and Indian War. The planters on these French islands acted as important allies to Great Britain and British North America during this conflict with France. French West Indian planters unhesitatingly supplied colonial New England merchants with guns, gun powder, ammunition, and medical supplies that were used to support British troops in the conquest of the French colony of Canada.¹⁴

In 1733, in response to the crocodile tears of the wealthy British West Indian sugar plantation owners, Parliament passed the Molasses Act of 1733 placing a high, nine-pence-a-gallon duty on molasses and sugar coming from non-British sources. Men acquainted with the details of New England trade like Governor Thomas Hutchinson of Massachusetts, believed that molasses could not be taxed at a rate greater than three pence a gallon without seriously endangering the business of New England distilleries and merchants.¹⁵ Molasses was used to produce rum in New England which was in high demand in many parts of the world. There were 60 rum distilleries in Massachusetts alone.¹⁶ Rum was an important source of colonial income and the specie, or gold and silver coins, needed to buy goods outside of the colonies and to pay for many colonial debts.¹⁷

Because many believed that British imperial wealth was essential to the survival of a British empire that was facing fierce competition from less benevolent empires like France and Spain, other acts promoting mercantilism were passed by Oliver Cromwell and Charles II in the late 1600s. The Navigation Acts of 1660, 1663, and 1673 forbid the importation of goods into England except in English vessels or in vessels from the country producing the goods. These acts also guaranteed markets in Great Britain for some American products like tobacco, furs, timber, and ships, but not for others like fish, flour, wheat, and meat which England produced for itself.¹⁸ Manufacturing in the colonies was restricted by

the Manufacturing Acts to protect markets for goods manufactured in England. These acts included the Woolen Act of 1699 that prohibited colonists from manufacturing woolen cloth, the Hat Act of 1732 that forbid colonists from making hats, and the Iron Act of 1750 that barred colonist from engaging in metal processing.¹⁹ The Molasses Act and other acts that placed duties on imported goods were called the Acts of Trade.

Tudor explained how New England merchants came to view the Navigation Acts, the Manufacturing Acts, and the Acts of Trade as both unfair and irrational because these acts limited the prosperity of both the colonists and Great Britain:

The northern colonies had no great staple of agriculture to employ their labor and afford them wealth. Industry and enterprise might make them amends, by enabling them to secure the comforts and gradually to accumulate the wealth that would furnish the luxuries of life, but they found their exertions impeded in every direction. Even the fisheries, which formed a very important part of their employment, were put in jeopardy by some of the regulations consequent on the 'Acts of Trade.' They seemed in fact to be made the victims of every separate interest in the empire, and in all cases of rivalry they were the party to be sacrificed; they were not allowed to manufacture, because the manufactures of the parent country would be injured; they were confined in their navigation, because the shipping interest in England would suffer; they were not allowed to sell their fish for French and Spanish molasses, because the sugar colonies would not have the monopoly of supplying them; they could not import teas from Holland, because it interfered with the East India Company; they could not trade with Spain and Portugal nor any other nation, because it infringed the navigation laws. Under this colonial system, thwarted in every movement, they received no equivalent for their deprivations, and were constantly restive and refractory: the system indeed was wholly inapplicable to them, unless they were doomed to poverty, ignorance, and insignificance.²⁰

After the Revolutionary War and the War of 1812, Tudor noted that the United States, once freed of these restrictions and allowed to develop its own industry, increased its consumption of English products a thousand fold without costing England a single dollar for government services or military protection. Tudor points out that this astonishing increase in trade between the United States

and Great Britain clearly demonstrated the foolishness of restrictive colonial policies in general and the absurdity of the Navigation Acts and Acts of Trade in particular.

Fortunately early in the 1700s some clear thinking and powerful men in Great Britain recognized the unfairness and the potentially harmful effects of the Navigation Acts and the Acts of Trade on American business and saw to it for nearly a century that many of the more obnoxious provisions in these acts were not strictly enforced. This policy of inaction was deliberately carried out primarily by the leaders and members of the Whig party in Great Britain to promote prosperity in the colonies and was called Salutory Neglect.²¹ However, In 1759 after the French and Indian War, or the Seven Years War as it was called in England, Great Britain's prime minister William Pitt, who was ironically the leader of the Whig party, and Parliament under the dying King George II became gravely concerned with their national debt that totaled £123,000,000 and was rising rapidly because of the interest on the loans taken out to finance the war.

Pitt had no intention of having Americans pay for all these costs despite the benefits British North American colonists received as a result of the conquest of Canada. However, Pitt believed that America should be required to contribute some fraction of the ongoing cost of stationing troops in America to secure Canada and the land west of the Appalachian Mountains from any further French or Indian hostilities. Pitt and his ministers made the fateful decision of not going through the usual channels of making requests for funds through the colonial legislatures. Instead Pitt decided to raise funds in America by doing away with Salutory Neglect and collecting the duties that Parliament had already approved. Pitt emphasized that he was calling for no new taxes but was calling on customs officials and royal governors to enforce provisions that had already been approved by Parliament and merely had been neglected for many years.

In August 1760, Prime Minister William Pitt sent letters to all the governors in the American colonies ordering them to "be aiding and assisting to the collectors and other officers of our

admiralty and customs.”²² Headquarters for the revitalized customs operation was to be in the port of Boston. Pitt also ordered all customs officials to go to America to occupy their posts in person. Prior to this time, most customs officials hired deputies to carry out their duties in America.²³

As part of the plan to strictly enforce the duties in the Acts of Trade, Governor Thomas Pownall of Massachusetts, who was a known opponent to the strict enforcement of the Acts of Trade, was recalled. In his place came Francis Bernard, the ex-governor of New Jersey, who was looking for a slightly better financial situation himself and lucrative government jobs for his sons. Bernard arrived in Boston in the summer of 1760. He was well aware of the town’s reputation for smuggling, and he looked forward to receiving his share—a full third—of all the money resulting from the sale of seized goods.²⁴

When Governor Bernard arrived, James Otis, Jr., was the acting Advocate General, or chief prosecuting attorney, of the Admiralty Court in Massachusetts, the special court set up to deal with violations of the Navigation Acts and Acts of Trade. As such, his principle duty was to prosecute violators of the Acts of Trade. The income for serving in this position depended to a large extent on the amounts and values of the goods confiscated by customs officials. Money from the sale of seized cargo was, according to the laws of the colony, supposed to be split three ways. One third was designated for the King’s use in the province. The royal governor received another third, and the customs officials involved in the seizure of goods got the remaining third. Income from this source could supply royal governors and other royal officials with substantial incomes that were independent of the sometimes meager salaries granted to them by colonial legislators. In time, such revenues came to be regarded as a threat to a highly valued legislative power.

All revenues that provided income to royal officials outside of the control of colonial legislatures diminished the legislatures’ *power of the purse* over the royal colonial government, especially, the royal governor—a key check in the power of the royal executive

branch. This power was similar in every respect to the *power of the purse* held by Parliament to check the power of British kings. The right to check the power of English kings to raise funds for war and other expenses was established early in English history when King John (1199-1216) was forced to sign the Magna Carta, which said that large sums of money could not be raised by the crown without the consent of the barons in common council and that no free man could be punished by the crown without judgment by his equals and by the law of the land. The Magna Carta was important because it established the idea that the king and all royal government was bound by law. Arbitrary government, or rule by edict or royal whim, was expressly prohibited.

Arbitrary measures taken by later kings such as Charles I and James II to minimize the rights of free Englishmen and the legislative power of Parliament included the dismissing of parliament for long periods of time, the raising of funds through forced loans and import duties not approved by Parliament (tonnage and poundage),²⁵ the quartering of soldiers in homes, imprisonment without a trial, and random, unwarranted searches and seizures of the property of uncooperative subjects, unapproved expansion of ancient forms of taxation (ship tax), the selling of monopolies, and the acceptance of financial support from foreign kings.²⁶ Charles I also summoned his enemies to two special courts created to try men for failing to obey Crown edicts: the Court of Star Chamber and the Court of High Commission.²⁷ Such royal actions led directly to the beheading of Charles I, the English Civil War, passage of the Petition of Right, and its acceptance by Charles II, as well as the loss of the throne by James II, the Glorious Revolution of 1688, the passage of the English Bill of Rights, and its acceptance by William and Mary of Orange.

Educated subjects of the British Empire both in British North America and in the British Isles, especially lawyers like John Adams and James Otis, Jr., were well acquainted with these key historical events. The Petition of Right passed by Parliament in 1628 declared all taxes not voted by Parliament illegal and condemned the quartering of soldiers in private houses, arbitrary

searches and seizure of property, arbitrary imprisonment, and the establishment of martial law in times of peace.²⁸ The English Bill of Rights of 1688 reaffirmed the right of Parliament to convene regularly, the illegality of foreign subsidies, and other English civil liberties such as a trial by jury, a speedy trial, and the right of petition and redress.²⁹ These laws along with the Magna Carta and others like them were regarded as England's "unwritten" Constitution. England's Constitution was unwritten only in the sense that it was not a single document written at a single moment in history by a single body of men. British North American colonists and Englishmen alike took great pride in the fact that Britain had written laws that established general legal principles that amounted to a Constitution, and many even referred to England itself as "good old Constitution."³⁰

Despite England's Constitutional laws guaranteeing essential civil liberties to all subjects of the British crown, Pitt ordered customs officials in the colonies to apply to the Superior Courts in the "Provinces," as the colonies were called at that time, for "Writs of Assistance" to help the customs officials enforce the Acts of Trade. In John Adams's *Autobiography* published between 1802 and 1807, he described the circumstances surrounding the issuing of Writs of Assistance in Massachusetts in 1759.

The next Year after I was sworn [as a member of the bar in Massachusetts], was the memorable year 1759 when the conquest of Canada was completed by the surrender of Montreal to General Amherst.... The King [George II through his Prime Minister William Pitt] sent instructions to his Custom house officers [Mr. Lechmere and Mr. Paxton in Boston] to carry the Acts of Trade and Navigation into strict Execution. An inferior Officer of Customs in Salem whose Name was Cockle petitioned the Justices of the Superior Court [under orders of Mr. Paxton] at their Session in November [1759] for the County of Essex [headquartered in Salem, MA], to grant him Writs of Assistants, according to some provisions in one of the Acts of Trade, which had not been executed....³¹

Writs of Assistance were *general* search warrants which allowed colonial customs officials to "break open Shops, Cellars, and Houses to search for prohibited Goods, and merchandise on which Duties had not been paid" without having to consult a

judge, describe the goods being searched for or their suspected location, or provide any evidence that such goods even existed. Appointees of customs officials having such Writs could legally search the premises of any individual they chose on the basis of suspicion alone without having to provide any evidence supporting the necessity of their actions. *Specific* search warrants, on the other hand, were common, well-accepted, standardized legal tools that required a judge's signature, lasted only a month, and bore a declaration of the goods that had been allegedly smuggled, their suspected location, and the names of those making these declarations. The legality of such warrants was never questioned. Adams goes on to explain how the matter of Writs of Assistance was brought to trial.

Some Objection was made to this Motion [to issue *general* search warrants or Writs of Assistance to customs officials], and Mr. Stephen Sewall, who was then Chief Justice of that Court, and a zealous Friend of Liberty, expressed some doubts of the Legality and Constitutionality of the Writ [referring to the British Constitution] and of the Power of the [Superior] Court [of Massachusetts] to grant it. The Court ordered the question to be argued at Boston in February term 1761. In the meantime Mr. Sewall died, and Mr. Hutchinson, then Lieutenant Governor...was appointed in his Stead, Chief Justice.³³

Lieutenant Governor Thomas Hutchinson was second only in power to the Royal Governor Francis Bernard in the executive branch of the Royal colonial government of Massachusetts. Hutchinson was also the commander of Castle Williams, a fortress on a small island in Boston Harbor where troops could be stationed as needed to protect (or control) the harbor and the city. In the legislative branch Hutchinson was a member of "the Council" that controlled legislative business and took charge of communicating matters of importance from colonial assembly to the royal governor.

Hutchinson was also the leader of the court party in the legislature. At this time, the court party held the majority of the seats in the legislature and generally represented the views of the wealthiest towns and businesses in the colony. The party was led by a relatively small group of politicians who consistently supported

the Governor and the Crown and occupied all the important civil and military positions in the province. The court party's positions were comparable in some respects to those of the Tory party in England that generally favored the prerogatives or rights of the king and the aristocracy. Governor Bernard and others had suggested many times that a cure for the political ills of the colonies—meaning generally speaking the frustrating checks to the power of royal governors—would be the establishment of an American nobility. Hutchinson shared these views. A number of members of the court party, particularly Thomas Hutchinson, saw themselves to a degree as the future aristocrats of America—a rough parallel to the English House of Lords. For reasons that seem odd in retrospect, Hutchinson and his party favored Writs of Assistance and enforcement of the Acts of Trade.

James Otis, Jr.'s, appointment as Advocate General to the Admiralty Court, the court charged with bringing violators of the old smuggling laws to justice, was undoubtedly seen by some as Otis's personal invitation to this new elite group of officials. Certainly the appointment was evidence for the high regard royal officials held of Otis's legal skills. The royal government wanted and needed the best attorney in the colony for this job and was willing to see that he was well compensated, and the man they chose was Otis.³⁴

However, Otis and many others in the colony objected to Hutchinson's appointment as Chief Justice not only because the action placed Hutchinson, who had had no formal legal training, at the head of the highest court in Massachusetts but also because the appointment grossly violated the principle of separation of powers, a matter of importance in English law and government theory, and virtually assured approval of the Writs. In addition to Hutchinson's executive and legislative duties, he was already a judge in two counties over the Probate Courts, which took care of matters relating to wills and the distribution of property left behind by people who died. Furthermore, Hutchinson was not just taking his place at the end of a line of four other superior court justices waiting to fill the vacancy left by the death of the Chief

Justice Sewall. Royal Governor Bernard appointed Hutchinson as *the* Chief Justice of the Superior Court, which consisted of five superior court justices, instead of Benjamin Lynde who was technically next in the line. Someone questioning the legality of an act of the Royal government could expect little impartiality or justice from a Superior Court with a Chief Justice who was a high official in both the executive and legislative branches of that government.

Bernard's motives for appointing Hutchinson Chief Justice seemed obvious to John Adams. He said that, "every observing and thinking man knew that this appointment was made for the direct purpose of deciding this question [of the legality of Writs of Assistance] in favor of the Crown."³⁵ Hutchinson was the only man in the colony whom Bernard could count on to approve the Writs of Assistance.

It is difficult in retrospect to understand why Hutchinson supported Writs of Assistance. Ten years earlier, Hutchinson had defended his brother Foster's warehouse against a crew of customs men who were determined to break in and look for illegally imported ironware. Hutchinson, who was Lieutenant Governor at that time also, warned the inspector that the Writs of Assistance signed by Governor Shirley were illegal and of no value and suggested that the Superior Court should issue these general search warrants even though the court never did.³⁶

Apparently Hutchinson's advice to Governor Shirley was not widely known. Not until the third volume of Hutchinson's *History of Massachusetts* was published shortly after John Adams' death in the early 1800s did Adams' sons Charles Francis and John Quincy Adams learn that Hutchinson had told Governor Shirley that Writs of Assistance were illegal. The Adams brothers concluded that Hutchinson's maneuvers to get the Writs of Assistance approved in 1761 were evidence of a gross deficiency in Hutchinson's moral character. They wrote this about Writs of Assistance and Hutchinson in their book *The Life of John Adams*:

Governor Shirley had been in the habit of issuing, upon his own authority, these warrants [writs of assistance], until informed indirectly by Hutchinson himself that they were illegal, and that he then

directed that application should be made for them to the superior court. No such process, however, had before issued from that court. It was sanctioned or recognized by no act of the provincial legislature, and rested upon two acts of parliament, the first passed only two years after the restoration of the Stuarts, in the spirit of the navigation acts, and the second in the reign of William the Third, sixty-five years before the time when it was to receive this new application. There can be no doubt that it was one of Hutchinson's expedients, adopted for the promotion of his own ambitions, by paying sedulous court [diligent or groveling attention] to the government in England.³⁷

In 1761 while these matters were being considered, Colonel James Otis, James Otis, Jr.'s father, was by appointment of the previous governor the Speaker of the House of Representatives, or the General Court as the legislative assembly of the colony was sometimes called. He was also the leader of the popular party, which generally supported rural views. At this time the popular party sided with the merchants in opposing Writs of Assistance and enforcement of the Acts of Trade. The party's positions were in some ways similar to those of the Whigs or the country party in England, which generally favored limitations of the royal prerogatives or the rights of the British Crown.

Colonel Otis had been promised by two previous governors that *he* would be appointed as a justice to the Superior Court when Judge Sewall died. James Otis, Jr. met with Hutchinson after Judge Sewall's death and came away believing that Hutchinson intended to support Colonel Otis's appointment. Hutchinson's appointment as Chief Justice came as a complete shock to the Otises. Though James Otis, Jr. and his father Colonel Otis never forgot this betrayal, Otis's undying opposition to the policies and politics of Thomas Hutchinson and his court party were not motivated by personal revenge. Hutchinson and his court party supported the new parliamentary policies, procedures, and restrictions on trade as necessary measures to meet the financial crisis facing the British Empire. The popular party led by the Otises was opposed to these measures because they thought that Parliament, the Ministry, the Royal Governor, and his appointees were acting illegally, irrationally, and with undue selfishness.³⁸

Thomas Hutchinson accepted the post of Chief Justice of the Superior Court of the Royal Colony of Massachusetts on November 13, 1760. Immediately after hearing this news, James Otis, Jr. resigned his lucrative post as the king's Advocate General of the Admiralty Court. Otis offered the Boston merchants both his legal expertise and his insider's knowledge of the legal irregularities and corruption going on in the Bernard administration. Two cases taken up by Otis at this time served as prologues to the Writs of Assistance trial and set the stage for that trial's tremendous impact.

The first matter Otis took on dealt with John Erving, a Boston merchant and politician, whose ship the *Sarah* had been seized and sold at auction along with its entire cargo for running customs. This seizure was the first of its kind in 16 years. Otis knew that one third of the money from the sale of the seized cargo and the ship—the king's share—was supposed to be placed in the colonial treasury to be used for building up the colony. However, Otis knew that the king's portion was not going into the provincial treasury but was being used to pay off informers. In Hutchinson's *History of Massachusetts*, he notes that "Mr. Otis, bred to the law, and at that time a practitioner in the courts, took the advantage of this irregularity."³⁹

On December 17, 1760, Otis petitioned the House of Representatives to authorize the colonial Treasurer, Harrison Gray, to sue the Royal Customs officials for recovery of the nearly £500 that had been paid to informers. The matter was taken up twice in the Inferior Court, which decided in favor of Otis and the colonial legislature both times. However, the Superior Court, with Judge Thomas Hutchinson presiding, reversed both decisions on technical grounds. Otis lost these cases, but emerged as a champion of the Boston merchants. Otis succeeded in publicly exposing and denouncing the royal government of Massachusetts in a case of corruption which Hutchinson was forced to dismiss on less than substantial grounds.⁴⁰

Otis's next move was to sue royal customs officials for trespassing on the *Sarah* in Massachusetts' Inferior Court. Once

again, the Inferior Court ruled in favor of Otis, but Otis's case was again overturned by Hutchinson in the Superior Court. Despite the loss, which was expected, Otis gained new friends in Boston and demonstrated the extent to which the Superior Court under Hutchinson was at odds with the Inferior Court.

On December 27, 1760, news reached Boston that King George II had died.⁴¹ The King's death meant that within six months all commissions and all official papers bearing his personal seal would have to be renewed under George III. The leaders of Boston's Merchant Society seized this opportunity to take the customs men back to court to protest the constitutionality of the Writs of Assistance.

At first, the merchants approached Benjamin Pratt to represent them, but he declined having just been appointed as Chief Justice of the Superior Court of New York. The merchants then approached James Otis, Jr. and Oxenbridge Thatcher who gladly took the case without charging a fee. They filed a petition with the Superior Court insisting that the Writs as issued in the past were unconstitutional. Thomas Lechmere, the surveyor general of customs in North America who resided in Boston, was caught off guard, but quickly responded with a counter-request to the Superior Court that the Writs of Assistance be granted "as usual."

The royal government then employed Jeremiah Gridley, the man who had taught law to Otis, Thatcher, Samuel Quincy and many other prominent attorneys in the Boston area, to defend their position and plea for the approval of Mr. Cockle's request for Writs of Assistance.⁴² Thus the battle lines were drawn. This was to be the showdown between James Otis, Jr., the brilliant, Harvard-educated, Gridley-trained, former Royal Advocate, and Thomas Hutchinson, the outwardly pious, proper, intelligent, and competent Lieutenant Governor, but legally untrained Chief Justice of the Superior Court, who now seemed to be an inwardly office-and power-hungry, obsequious Crown appointee and puppet of the corrupt, money-hungry Royal Governor Bernard. During this trial, the leaders of the popular party and the court party would meet face to face to decide whether colonial interests could or

should prevail over the dictates of the British Parliament and Crown.

The Trial

The trial took place in the Council chamber of the Old Town House on King Street. The room was large and elegantly decorated. Hanging in the room were two full-length portraits of Charles II and James II, men whose actions, ironically, would be scrutinized that day. There were five judges present, including Hutchinson who presided as Chief Justice. The judges sat around a great fire burning in the large fireplace used to heat the spacious stateroom on that cold February day. The judges wore voluminous wigs, broad bands, and robes of scarlet English cloth. Barristers, or attorneys who could present cases in the Superior Court, common attorneys, and important citizens and government officials from the Boston area and the surrounding counties filled the room. Adams had been practicing law for only two years. He was the youngest of the barristers present and took notes.⁴³

Gridley opened for the Crown. Gridley said that the legal foundations for the Writs in question were found in the 12th and 14th statutes of Charles II and that the authority of the Supreme Court in the Province to grant it was derived from the 7th and 8th statute of William III which gave revenue officers in this country the same powers as officers in England and that in the execution of their duty they should receive the "*like assistance*"⁴⁴ Tudor, a judge himself, commented, "It seems a most stained and preposterous inference, to make the general term, *like assistance*, mean a special and odious process called a *Writ of Assistance*, invented in the worst time of the Stuart tyranny."⁴⁵ Tudor said that Gridley's arguments all rested on the consideration: "if the Parliament of Great Britain is the sovereign legislator of the British Empire."⁴⁶

Gridley argued that certain restrictions of individual liberties were necessary in any society. Taxes and tariffs had to be honored and collected or the province would fall apart. The Writs

of Assistance, which had worked successfully in the past, should continue, even though he admitted that public opinion was overwhelmingly against them. A finding by the Court against the Writs would, he said, disrupt the whole economic structure of government.⁴⁷

Oxenbridge Thatcher was the first to speak for the merchants. Thatcher began by asking exactly what this writ should look like, thus forcing the Crown to acknowledge that there were no standard forms for such Writs or general search warrants in any of the standard legal references available anywhere in the colony as there were for the usual special search warrants that everyone recognized as legal. Adams commented on this point:

The form of this writ, was no where to be found; in no statute, no law book, no volume of entries; neither in Rastall, Coke, or Fitzherbert, nor even in the Instructor Clericalis, or Burns Justice. Where then was it to be found? No where, but in the imagination or invention of Boston Custom House Officers, Royal Governors, West India Planters, or Naval Commanders.⁴⁸

Then Thatcher insisted that the power to issue Writs of Assistance had not been officially delegated to any court in the colony. He also brought up the issue that there was a serious question whether the Superior Court of Massachusetts could in any way consider its powers equal to those of the British Court of the Exchequer where Writs of Assistance had been issued in the past in England.

The relationship of the colonial courts to the British courts was a critical issue that was taken up again by Otis. To have admitted that the Superior Court of Massachusetts was in any way *equivalent* to the Court of the Exchequer would have been a death blow to the idea that the colonies were *under* the rule of the English Courts and Parliament. The royal government was trying to promote the idea that the British Parliament and the British courts had jurisdiction or legislative and judicial power *over* the colonies. To have admitted that the Massachusetts Superior Court was *equivalent or superior* to the Court of the Exchequer in England for the people of Massachusetts would have refuted the very position that the Crown and Hutchinson had been trying to establish.

According to Tudor, Gridley's arguments were presented in a learned, dignified, and ingenious manner. Thatcher's arguments were given in a tone of great mildness and moderation. Both Gridley and Thatcher spoke only briefly. In contrast, when Otis began, the tone of the proceedings changed dramatically. According to John Adams:

Otis was a flame of fire!—with a promptitude of classical Allusions, a depth of Research, rapid summary of historical events and dates, a profusion of legal Authorities, a prophetic glare of his Eye into Futurity, and a Torrent of impetuous Eloquence. He hurried away everything before him.⁴⁹

Otis opened his four-hour attack with these memorable words:

May it please your Honors...I will to my dying day oppose with all the power and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is. It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of the constitution, that ever was found in an English law book.⁵⁰

Otis argued that Writs of Assistance were illegal by first discussing the legal precedents supporting the illegality of general search warrants and the legality of special or limited search warrants.

Your Honors will find in the old books concerning the office of a Justice of the Peace, precedents of general warrants to search suspected houses. But in more modern books, you will find only special warrants to search such and such houses, specially named in which the complainant has before sworn that he suspects his goods are concealed; and will find it adjudged that special warrants only are legal. In the same manner I rely on it that the writ prayed for in this petition, being general, is illegal....⁵¹

Everyone with this writ may be a tyrant in a legal manner, also may control, imprison, or murder anyone within the realm..... Every man may reign secure in his petty tyranny, and spread terror and desolation around him, until the trump of the arch-angel shall excite different emotions in his soul.⁵²

Otis elaborated on the sanctity of home and property as an established principle of English common law.

Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well-guarded as a prince in his castle. This writ, if it

should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way: and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient....⁵³

After showing how dangerous the Writs of Assistance were to the fundamental freedom of one's house, Otis showed how little control the court had over customs officials armed with these Writs. He then gave an example of how a Writ of Assistance had recently been used for personal revenge:

This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware: so that, these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated.

Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, 'Yes.'

'Well then,' said Mr. Ware, 'I will show you a little of my power. I command you to permit me to search your house for unaccustomed goods;' and went on to search the house from the garret to the cellar; and then served the constable in the same manner!⁵⁴

General writs, Otis argued, were a direct violation of the natural rights of man, which were incorporated into the English constitution as fundamental laws in the old Saxon laws, the Magna Carta, and in 50 confirmations of it in Parliament. Charles I lost his head, and James II lost his throne due to their violations of these basic rights. Otis asserted that the security of these rights to life, liberty, and property, had been the object of all the struggles against arbitrary power in every age.⁵⁵ Otis declared:

All precedents are under control of the principles of the law....No Acts of Parliament can establish such a writ. Though it should be made in the very words of the petition, it would be void. AN ACT AGAINST THE CONSTITUTION IS VOID. It is the business of this court to demolish this monster of oppression and to tear into rags this remnant of Star Chamber tyranny.⁵⁶

Otis argued that natural rights could never be denied to British subjects in either England or America because they were thoroughly incorporated into British constitutional law and the provincial or colonial charters. Otis also soundly condemned the idea of “virtual representation.”

Our ancestors as British subjects, and we, their descendants, as British subjects, were entitled to all those rights by the British constitution, as well as by the law of nature, and our provincial charter, as much as any inhabitant of London . . . or any part of England; and were not to be cheated out of them by any phantom of ‘virtual representation’ or any other fiction of law or politics....These rights were inherent and inalienable. That they could never be surrendered or alienated, but by idiots or madmen, and all acts of idiots and lunatics were void, and not obligatory by all the laws of God and man.⁵⁷

Otis then examined the Acts of Trade one by one and demonstrated how they also destroyed all security of property, liberty, and life, every right of nature, the English constitution, and the charter of the province. He asserted that no distinction between external and internal taxes existed in theory or upon any principle but “necessity.” Because of these considerations, the British government never dared until this time to enforce them, but instead had allowed many of those unjust laws to lay dormant for almost a century. Otis allowed the Navigation Acts to be binding on Massachusetts because the Massachusetts legislature eventually consented to them even though their implementation was delayed for 15 years by Governor Leverett of Massachusetts. In 1675 Governor Leverett very candidly informed his majesty Charles II that the Navigation Act had not been executed earlier because it was thought to be unconstitutional “Parliament not having authority over us.”⁵⁸

Otis attacked the references cited by Gridley, which he used to establish the authority of the Writs of Assistance. Tudor says that Otis denied the 13th and 14th statutes of Charles II cited by Gridley to be either authority or precedent, or to have the least color of either in America. Both acts specifically state that Writs of Assistance were to be issued under the seal of the Court of Exchequer and were returnable to it. After citing both these acts, Otis asked with triumphant confidence, “Where is your seal of his

Majesty's Court of Exchequer, and what has the Court of Exchequer to do here?"⁵⁹ Neither Hutchinson nor the other judges dared say that the Superior Court of Massachusetts was equivalent to the Court of the Exchequer in England because the idea would have been fatal to the idea of the supremacy of the English Parliament and the English Courts over the colonies. Even if the Court of Exchequer had issued the Writ of Assistance in question, Otis denied the jurisdiction of that court in America and argued substantively to support that notion.⁶⁰

Otis suggested that Writs of Assistance seemed more fitting to the tyrannous era of Charles II than to their own time and mocked the tyrannous tendencies of the English Parliament of their day and the servile nature of the people of England who would consider submitting to such a Writ. Tudor states:

Such a Writ of Assistance, [Otis] said, might become the reign of Charles II, and he would not dispute the taste of the Parliament of England in passing such an act, nor the people of England in submitting to it, but it was not calculated for the meridian of this country. He insisted further, that these warrants and writs were even in England inconsistent with the fundamental laws, the natural and constitutional rights of the subjects. If, however, it would please the people of England, he might admit that they were legal there, but not here.⁶¹

Otis spoke vehemently against the *tyranny of taxation without representation*. Tudor says, "From the energy with which [Otis] urged this position, that 'Taxation without representation was tyranny,' it came to be a common maxim in the mouth of everyone. And with him it formed the basis of all his speeches and political writings."⁶² Otis also believed that "expenditures of public money without appropriations by the representatives of the people, were arbitrary, unconstitutional and therefore tyrannical."⁶³ Otis took special note of The Molasses Act of 1733 and said that it was especially calculated to bring in enormous amounts of revenue at a devastating cost to the income and trade of Massachusetts.

[Otis] asserted this act to be a revenue law, a taxation law, made by a foreign legislature, without our consent, and by a legislature who had no feeling for us, and whose interest prompted them to tax us to the quick.⁶⁴

Otis knew that if the colonists lost their rights to representation in the political bodies that had the power to tax them, if they lost their rights to protection from unrestrained searches of their homes and seizures of their property, and if they lost their power of the purse over the royal governors and his appointees, they would become mere slaves.

It was this line of reasoning that led Otis to a discussion of slavery in general and the contradictory rights of slaves and masters which he knew could justify massive slave uprisings. Otis, as a scholar of both Latin and Greek and of Greek and Roman history, was undoubtedly familiar with the story of the Servile Wars—i.e. of Spartacus and the slave uprisings seen in Sicily and the Italian peninsula during the late Roman Republic—and may have alluded to these events during the trial. If American colonists were enslaved by England, similar uprisings became a distinct possibility. Relatively small Negro slave uprisings had already occurred on several occasions in the southern colonies. With the rising slave population in America, larger and more devastating uprisings became a distinct possibility, especially if the slaves ever came to understand the principles that Otis presented so clearly and vigorously during this trial. Thoughts of slave uprisings caused Adams and others to shudder enough to vigorously support the abolition of slavery in Massachusetts and other northern states shortly after the Revolution. Adams recalled:

Nor were the poor Negroes forgotten. Not a Quaker in Philadelphia, nor Mr. Jefferson of Virginia ever asserted the rights of Negroes in stronger terms. Young...and ignorant as I was, I shuddered at the doctrine he taught...and at the consequences that may be drawn from such premises. Shall we say, that the rights of masters and servants clash, and can be decided only by force?⁶⁵

The Reaction to Otis's Attack

Throughout the trial, Adams noted the great respect that Otis showed toward his old mentor Mr. Gridley who defended Writs of Assistance for the royal government. Adams told Tudor:

Otis was the pupil of Gridley...[and treated] his master with all the deference, respect, esteem, and affection of a son to a father...while he baffled and confounded his authorities, confuted all his arguments, and reduced him to silence!.... He dashed [his arguments] to pieces and scattered the pulverized atoms to the four winds.⁶⁶

At the close of Otis's argument, the Court adjourned. The judges issued no statements. Adams said that Otis's attack succeeded in raising such a storm of indignation against Writs of Assistance that even Hutchinson, who had been appointed on purpose to approve this writ, dared not utter a word in their favor.⁶⁷ For four days Hutchinson and the other judges considered every argument Otis raised. It was not until the close of the term of the court that Hutchinson finally issued this statement:

The court has considered the subject of writs of assistance and can see no foundation for such a writ; but as the practice in England is not known, it has been thought best to continue the question to next term, that in the meantime opportunity may be given to know the result.⁶⁸

In November of 1761 during the next term of the Superior Court, a Writ of Assistance from England was produced and approved by the Court. However, Adams said it was "a mere form to save the pride of the administration as nothing after the first trial was afterwards heard of this odious instrument...It was generally reported and understood that the Court clandestinely granted [Writs of Assistance] and the custom house officers had them in their pockets, though I never knew that they dared to produce and execute them in any one instance."⁶⁹ Only special or limited search warrants or writs, which everyone agreed were legal, were ever used after that time in Massachusetts.

Writs of Assistance were issued briefly in England at this time. One such Writ provided the foundation for Gridley's arguments in the second trial on Writs of Assistance and were used in 1763 to apprehend the papers and person of John Wilkes, a member of Parliament who published insulting remarks about King George III. These remarks were published in the *North Briton*, No. 45, on April 23, 1763. General warrants were issued for the apprehension of the author, the printers, the publisher, and their

personal and business papers. Wilkes was arrested and expelled from the House of Commons on January 19, 1764. Later that year in 1764, the general warrants used to gather evidence against him were declared illegal by the Chief Justice of England.⁷⁰

In 1766, only five years after the Writs of Assistance trial in Boston, the Superior Court of Connecticut asked for legal advice from London as to whether or not its Superior Court had the same power as the Court of the Exchequer for issuing Writs of Assistance. The attorney general of England, William de Grey, in an official, written opinion, said that he could find no legal basis for the colonies to issue these writs. In other words, he declared that Writs of Assistance were illegal in the colonies!⁷¹

Otis was an instant hero after the trial. John Adams' sons said this about the general effect of Otis's argument against Writs of Assistance:

The effect of the argument was electrical, although the interest upon which it could immediately operate was necessarily limited to the colony where the question arose. It was not like the Stamp Act, which bore at once upon the property and passions of the people of all the colonies. The introduction of the writs of assistance would in the first instance have affected only the rights of a few merchants of Boston and Salem. But the principle of tyranny was in it, and it was the natural precursor of the Stamp Act.⁷²

As a direct result of his attack on Writs of Assistance, Otis was elected as a representative of Boston to the General Court in May 1761 and took over the leadership of the popular party from his father.

From the evidence provided by John Adams, his sons Charles Francis and John Quincy Adams, Judge William Tudor, and others, it is difficult to call Otis's attack on Writs of Assistance a failure or a loss except in a very limited and technical sense. From Adams' perspective, Otis won a *major legal* and *moral* victory, a belief which Adams believed was shared by every official, merchant, attorney, and barrister who was present at the trial and probably by Mr. Gridley and Mr. Hutchinson, too, along with a large portion of the population of Boston who made Otis their representative in the legislature in the very next election!

Otis's efforts in the legislature, in the press, in the caucuses of Boston, and in towns all over Massachusetts and the rest of New England over the next 10 years led directly to the downfall of Hutchinson and his court party and to the Revolutionary War. By eloquently and forcefully establishing the principle that "taxation without representation was tyranny" and that public expenditures not approved by representatives of the people were tyrannical, Otis created a broad sense of watchfulness and a widely held disposition to resist vehemently every encroachment of the civil liberties guaranteed to British subjects. Tudor says, "The public was taught to look at principles, and to resist every insidious precedent inflexibly."⁷³ Tudor believed that it was Otis's influence which led Edmund Burke, an influential English Whig politician who supported the American Revolution but was critical of the French Revolution and wrote the widely-read book *Reflections on the Revolution in France*, to make these comments regarding the unusual watchfulness of the people of the British North American colonies that became the United States:

In other countries the people, more simple, of a less mercurial cast [a less rapid and unpredictable changeableness of mood], judge of an ill principle in government, only by an actual grievance; here [in America] they anticipate the evil, and judge of the pressure of the grievance, by the badness of the principle. They augur [predict or discern] misgovernment at a distance; and sniff the approach of tyranny in every tainted breeze.⁷⁴

Otis led the attacks against the Stamp Act and the Townshend Acts, created the public feeling or the political "atmosphere," and laid the legal and ideological foundation for the American Revolution.⁷⁵

According to John Adams, Otis's attack on Writs of Assistance was a major turning point not only in his life but for everyone present at the trial and for the nation as well and marked the birth of the movement for independence in America:

I do say in the most solemn manner, that Mr. Otis' oration against Writs of Assistance breathed into this nation the breath of life.⁷⁶

Every man of an immense, crowded audience appeared to me to go away as I did, ready to take arms against Writs of Assistance. Then and

there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the child Independence was born. In fifteen years, i.e. in 1776, he grew up to manhood and declared himself free.⁷⁷

This trial was, to Adams, the beginning of the *real* American Revolution—a pivotal event in the history of our nation and the world.



Endnotes

¹ Richard L. Bushman, "Revolution, III. Social and Cultural Change, and IV. World Impact," The Reader's Companion to American History Ed. Eric Foner and John A. Garraty (Boston: Houghton Mifflin Company, 1991) pp. 942-946

² Ralph Waldo Emerson wrote a famous poem about the commencement of the American Revolution:

Hymn Sung at the Completion of the Concord Monument,
April 19, 1836:

"By the rude bridge that arched the flood,
Their flag to April's breeze unfurled,
Here once the embattled farmers stood,
And fired the shot heard round the world."

The setting of this poem is Concord, not Lexington. Nevertheless, the opening shots of the Revolutionary War were thought to have been fired at Lexington, not Concord.

Ralph Waldo Emerson, "Hymn Sung at the Completion of the Concord Monument, April 19, 1836," The Norton Anthology of American Literature Third Edition Shorter, Ed. Nina Baym, et al. (New York: W. W. Norton & Co., 1989) p. 484

³ John Adams, "Letter to Thomas Jefferson, Quincy, August 24, 1815," The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams Vol. 2, 1812-1826, Ed. Lester J. Cappon (Chapel Hill, North Carolina: The University of North Carolina Press, 1959) p. 455

⁴ John Adams to Hezekiah Niles, 1818, as quoted in Lillian Miller's In the Minds and Hearts of the People, Prologue to the American Revolution: 1760-1774 (Greenwich, Connecticut: New York Graphic Society, 1974) p. 7

⁵ The Adams-Jefferson Letters Vol. 1, p. 107

⁶ See John Adams, "Notes taken during the Writs of Assistance Trial, February 1761," and Autobiography, 1802-1807, The Founding Fathers, John Adams Ed. James Bishop Peabody (New York: Newsweek, 1973), pp. 55-56; William Tudor, The Life of James Otis of Massachusetts [First published 1823] (New York, Da Capo Press, 1970)

⁷ See John Quincy Adams and Charles Francis Adams, The Life of John Adams [First Published 1871] (New York: Haskell House Publishers, Ltd., 1968) p. 83

⁸ Page Smith, John Adams, Vol. 1, 1735-1784 (Garden City, New York: Doubleday & Company, Inc., 1962) p. 56

⁹ John Galvin, Three Men of Boston (New York: Thomas Y. Crowell Company, 1976) p. 296

¹⁰ Galvin, pp. 3-4

¹¹ Lillian Miller, In the Minds and Hearts of the People, Prologue to the American Revolution 1760-1774 (Greenwich, Connecticut: New York Graphic Society, 1974) p. 10

¹² Lawrence Leder, America:1603-1789, Prelude to a Nation Second Edition (Minneapolis, Minnesota: Burgess Publishing Company, 1978) pp. 150-151

It seems that Leder's views are widely accepted as historical truth today. Many encyclopedias and standard historical texts give little importance to the Writs of Assistance trial and give the impression that Otis knew that Writs of Assistance were legal both in England and in Massachusetts long before he began his attack which he must have known would not succeed. In a college text on American history written by Alan Brinkley, a professor of history at Columbia University, Otis's attack on Writs of Assistance is not even mentioned. Only Otis's role as the organizer of the Stamp Act Congress is briefly discussed. The 1991 edition of the *World Book Encyclopedia* has a short descriptive article on Otis but mentions nothing about his impact on the life of John Adams, politics in Massachusetts, Thomas Hutchinson, and little about the impact of his work on the Revolutionary movement in general.

¹³ Joan Nafie, To the Beat of the Drum: A History of Norwich, Connecticut During the American Revolution (Norwich, Connecticut: Old Town Press, 1975)

¹⁴ R. R. Palmer and Joel Colton, A History of the Modern World (New York: McGraw-Hill Publishing Company, 1984) p.251. Also see Nafie.

¹⁵ Galvin, p. 25. A pence was worth 1/240 of a pound. One shilling was worth 1/20 of a pound, and a pence was worth 1/12 of a shilling. If a pound was worth about \$100 in today's currency during the colonial era, a pence would have been worth about \$0.42. Thus, the duty on molasses would have been about \$3.78 per gallon. This was a high rate on this major ingredient for rum, the principle export product of New England, and would have cut profit margins significantly. William L. Langer, An Encyclopedia of World History, Ancient, Medieval, and Modern, Chronologically Arranged (Boston:

Houghton Mifflin Company, The Riverside Press Cambridge, 1948) p. 517. See also Pauline Maier, "Molasses Act," World Book Encyclopedia Vol. 13 (Chicago: World Book, Inc., 1991) p. 690. See Galvin, p. 25, and Willard Sterne Randall, Thomas Jefferson, A Life (New York: HarperPerennial, 1993) p. 179, on the value of the English pound during the Revolutionary War era in terms of today's dollars.

¹⁶ Galvin, p. 11

¹⁷ Arthur Meier Schlesinger, The Colonial Merchants and The American Revolution, 1763-1776 (New York: Columbia University, Longmans, Green & Co., Agents, 1918) pp. 41-62

¹⁸ Alan Brinkley, American History, A Survey (New York: McGraw-Hill, Inc., 1995) p. 78

¹⁹ *Ibid.*, p. 76

²⁰ Tudor, pp. 50-51

²¹ Brinkley, p. 96

²² Galvin, p. 12

²³ *Ibid.*, p. 13

²⁴ *Ibid.*, p. 13

²⁵ "Tonnage and poundage" were duties that had been approved in 1625 by the First Parliament of Charles I, but for only one year. Charles I continued to charge and collect these "tonnage and poundage" duties for several years after the allowed year was over. Sir John Eliot, the leader of Parliament at this time objected to this practice as well as to the king's choice of the Duke of Buckingham as the leader of the English forces in a war against France. He also objected to the king's forcing wealthy men who did not support the king to house soldiers and to give the king loans to fight the war. Eliot was imprisoned without charges or a trial until Parliament refused to even discuss giving the king any more money for the French war until Eliot was released from prison. In 1628, the Petition of Right was drawn up by the Third Parliament of Charles I. It forbid all forms of taxation without consent of Parliament, the housing of soldiers in private homes, the institution of martial law in time of peace, and imprisonment without specified charges. That same year Parliament passed a Remonstrance against Charles I, the Prorogation of Parliament, for seizing goods from merchants who had refused to pay the tonnage and poundage charges that Parliament had not approved. In 1629 goods of a merchant and a member of Parliament named Rolle were seized by the king. In response to these actions by Charles I, Eliot read the "Resolutions of Eliot" in Parliament. These

resolutions said that whoever advised the levy of tonnage and poundage without a grant from Parliament or whoever voluntarily paid such duties was an enemy of England. The following year Charles I dissolved Parliament for 11 years and arrested Eliot, who died in the Tower. Charles I then imposed an ancient tax on the whole country that in the past had been levied only on seaboard towns to raise money for the building of ships for the navy. A Puritan landowner named John Hampden refused to pay this tax that Parliament had not approved, was tried in court, and lost his case but won great sympathy from the public for his stand against the tyranny of Charles I. Langer, p. 375

²⁶ Robert E. Lerner, Standish Meacham, and Edward McNall Burns, Western Civilizations, Their History and Their Culture 12th Edition (New York: W. W. Norton & Company, 1993) p. 505

²⁷ In 1641 Parliament abolished these courts. Langer, p. 376

²⁸ Lerner, p. 505

²⁹ *Ibid.*, pp. 584-586

³⁰ Richard Crawford, "The Music of the American Revolution: The Birth of Liberty" [notes for the CD of the same title] (New York, New World Records, 1996) pp. 20-21. A song entitled "The American Vicar of Bray" was printed by James Rivington, a Loyalist who owned the New York Gazette, on June 30, 1779. It is a mocking tribute to a legendary American Anglican vicar, an "amiable paragon of adaptability" who flip-flops between Tory and Whig or Patriot positions throughout the war. In the fourth stanza, England is referred to as "good old Constitution."

When Howe with drums and great parade
 Marched thro this famous town [of Boston], Sir
 I cried, 'May fame his temples shade,
 With laurels for a crown, Sir.'
 With zeal I swore to make amends
 To good old Constitution [i.e., to Great Britain];
 And drank confusion to the friends
 Of our late Revolution.

Equating England with its Constitution is an important concept that helps one understand the reluctance of Americans especially those in the legal profession, to sever their ties with England. The legal protections as defined in written British law were guaranteed to colonists in all the colonial charters and had served as the foundation of life and

civilization in America for over a hundred years. Britain's written laws were a known entity—well-established, well understood, and the most liberal and progressive of their time. Our Constitution had not yet come into existence. It was an unknown entity, a dream—undefined, unwritten, and of unknown value to humanity.

³¹ Adams, Autobiography, p. 52

Tudor also states that customs officials in Massachusetts received “an order in Council” in November 1760 directing them to carry into effect the Acts of trade and to apply to the Superior Court of Massachusetts for writs of assistance for the customs officers. Mr. Paxton, who was the head of the customs office in Boston, undoubtedly consulted with the royal officials in the colonial government before directing his deputy in Salem, Massachusetts, Mr. Cockle, to petition the Superior Court then sitting in that town for writs of assistance. Tudor, pp. 52-53

³² Adams, Autobiography, p. 52

³³ *Ibid.*, pp. 52-53

³⁴ Galvin, p. 17

³⁵ *Ibid.*, p. 23

³⁶ *Ibid.*, p. 29

³⁷ Adams and Adams, pp. 80-81

³⁸ *Ibid.*, pp. 80-81

³⁹ *Ibid.*, p. 25

⁴⁰ Galvin, pp. 25-26

⁴¹ King George II died on October 25, 1760. The news took two months to reach New England. *Ibid.*, p. 27

⁴² Galvin, pp. 27-28

⁴³ Adams, Autobiography, p. 54. A judge named Minot was also a witness to the trial and used Adams's notes to supplement his own recollections of the trial that he later published.

⁴⁴ Tudor, p. 60

⁴⁵ *Ibid.*, p. 60

⁴⁶ *Ibid.*, p. 60

⁴⁷ Galvin, p. 30

⁴⁸ Tudor, p. 65

⁴⁹ John Adams, “Letter to William Tudor, Quincy, 29 March 1817,” The Founding Fathers, John Adams, pp. 54-55

⁵⁰ John Adams, “Notes taken during the Writs of Assistance Trial, February 1761,” The Founding Fathers, John Adams, pp. 55-56

⁵¹ Tudor, pp. 65-66. It is peculiar that today students of history get the impression from reading a number of modern references that general writs of assistance were long regarded as legal in England when Otis clearly refuted this notion in 1761. Adams noted that Gridley and Otis could find only two obscure references to their ever having been used in England until 1761. It is true that the English crown issued a writ of assistance briefly during this period and used such writ to obtain evidence to prosecute John Wilkes, a member of Parliament in 1763. Writs of Assistance were soon afterward declared illegal in England and in Connecticut. Otis pointed out that the overwhelming bulk of the precedents in English law condemned general warrants and writs of assistance as illegal. Charles I lost his head and James II lost his crown because of their illegal use of warrants and their willingness to raise funds without the consent of Parliament, i.e. taxation without representation.

⁵² *Ibid.*, pp. 65-66

⁵³ *Ibid.*, pp. 66-67

⁵⁴ *Ibid.*, p. 67

⁵⁵ John Adams, "Notes," p. 56

⁵⁶ *Ibid.*, pp. 56-57

⁵⁷ Tudor, p. 71

⁵⁸ *Ibid.*, p. 71

⁵⁹ *Ibid.*, pp. 79-80

⁶⁰ *Ibid.*, p. 80

⁶¹ *Ibid.*, pp. 81-82

⁶² *Ibid.*, pp. 76-77

⁶³ *Ibid.*, p. 118

⁶⁴ *Ibid.*, pp. 83-84

⁶⁵ *Ibid.*, p. 69

⁶⁶ *Ibid.*, pp. 88-89

⁶⁷ *Ibid.*, p. 89

⁶⁸ *Ibid.*, p. 86

⁶⁹ *Ibid.*, see footnotes, pp. 86-87

⁷⁰ Langer, pp. 436-437

⁷¹ Galvin, p. 40

⁷² Adams and Adams, p. 82

⁷³ Tudor, p. 118

⁷⁴ *Ibid.*, p. 118

⁷⁵ Galvin, p. 296

That so little is known today about Otis's contributions to the revolutionary movement may be evidence for the cleverness and effectiveness of Hutchinson's attacks on his opponent. In

his study of the life of Thomas Hutchinson, Bernard Bailyn is very critical of men like James Otis, Jr., and Samuel Adams who attacked Hutchinson incessantly in the legislature and in the press from 1761 until Hutchinson left for England on June 1, 1774. Bailyn describes Hutchinson in glowing terms, almost like a misunderstood saint, whose contributions to America have been grossly underestimated. He states, "The distrust and animosity Thomas Hutchinson inspired surpass any ordinary bounds. The reactions he stirred are morbid, pathological, and paranoiac in their intensity." (See Bernard Bailyn, Faces of Revolution, Personalities and Themes in the Struggle for American Independence [New York: Alfred A. Knopf, 1990] p. 42) This suggests that Bailyn believes that the reactions of Hutchinson-critics like John Adams, Samuel Adams, James Otis, Jr., his sister Mercy Otis Warren, and her husband Joseph Warren, and virtually every colonial assembly and hundreds of town councils throughout New England who all condemned Hutchinson for his actions, were "morbid, pathological, and paranoiac." Galvin responds to these views in his book Three Men of Boston. His study suggests that Bailyn over-reacts to the attacks on Hutchinson and goes too far in his defense.

Modern students of history and many historians also seem to struggle in their attempts to explain why the reaction to the Stamp Act was so extreme in America. The tax seems so small and the need for funds so apparent and justified. This reaction suggests that many modern students and historians are not sufficiently familiar with English history, particularly the history of the English Civil War, the Glorious Revolution of 1688, and even the Magna Carta, and thus do not appreciate the legal arguments that Otis used so effectively in his attack on Writs of Assistance. They seem to fail to understand the essential importance of preserving the power of the purse in the legislative and representative branch of government to control the executive power of kings and royal governors. Any income which places a government executive outside the control of the representatives of the people he governs is a threat to the basic rights of the governed. Furthermore, any executive, or any man, who takes upon himself the power to search or seize property that is not checked by an independent judicial branch is a threat to man's essential rights of property and to his inalienable rights to life, liberty, and the pursuit of happiness.

⁷⁶ Tudor, pp. 87-88

⁷⁷ Ibid., p. 61

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4 January 2001

Dear Mr. Fitzhugh,

I am excited to inform you that I have been accepted to Yale University under the Early Decision Agreement. I received notice of this a couple of weeks ago.

I wanted to let you know because I feel the reprints of my essays in *The Concord Review*, which I sent in, greatly contributed to my application. I also know that the National Writing Board report which you shared with three schools on my application list as well as the Gilder Lehrman American History Essay prize which I received through *The Concord Review* enhanced my application even more.

I am very grateful to have had such opportunities through *The Concord Review* and the National Writing Board. The organizations you have founded and led to success have played a remarkable role in my high school career. I sincerely thank you for all of your help and for your recognition of students everywhere.

Sincerely,
Sarah Weiss
A Bintel Brief (Summer 1999)
Oscar Micheaux (Fall 2000)
Ralph Waldo Emerson Prize 2002
Yale University 2005