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### The Child Independence is Born: James Otis and Writs of Assistance

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**THE CHILD INDEPENDENCE IS BORN:  
JAMES OTIS AND WRITS OF ASSISTANCE**

**James M. Farrell  
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**Expired without a groan**

On May 26, 1783, the *Boston Gazette* reported "that last Friday Evening, the House of Mr. Isaac Osgood was set on Fire and much shattered by Lightning, by which the Hon. JAMES OTIS, Esq., of this Town, leaning upon his Cane at the front Door, was instantly killed. Several Persons were in the House at the Time, some of whom were violently affected by the Shock, but immediately recovering ran to Mr. Otis's Support, but he had expired without a Groan."<sup>1</sup> On June 7, 1783, *The New-Hampshire Gazette* published a commemorative ode "On the DEATH of the Honourable James Otis, Esq."<sup>2</sup> that remarked on Otis's eloquent contribution to the American patriot cause:

*Then OTIS rose, and first in patriot fame,*

*To listening crowds resistance dared proclaim.*

*From soul to soul the great idea ran,*

*The fire of freedom flew from man to man.*

*His pen, like Sydney's made the doctrines known;*

*His tongue like Tully's shook a tyrant's throne.*

*From men like OTIS Independence grew*

*From such beginnings empire rose to view.*

Yet it was only implicitly that the Ode, written by Thomas Dawes, recalled the speech by which we most remember Otis and by virtue of which he could claim precedence as an

American revolutionary. Assuming a more direct reference to Otis's oratorical masterwork was not necessary for readers in 1783, Dawes praised the speech that earned Otis fame:

*Blessed with a native strength and fire of thought  
 With Greek and Roman learning richly taught  
 Up to the fountain's head he pushed his view  
 And from first principles his maxims drew  
 Spite of the times, this truth he blazed abroad  
 The people's safety is the law of God.*

Two and a half centuries after Otis delivered the Writs of Assistance speech in Boston in 1761, its glory is scarcely diminished. In 1826 Daniel Webster described Otis's oration as "a masterly performance" that displayed a "learned, penetrating, convincing, constitutional argument, expressed in a strain of high and resolute principles."<sup>3</sup> Since that time, in all fashions of metaphorical dress, Otis's speech has been given pride of place in both professional history and popular literature. George Bancroft described Otis's performance as "the opening scene of American resistance."<sup>4</sup> To John Fiske, it seemed "there appeared in the horizon the little cloud like unto a man's hand which came before the storm. This was the famous argument on the writs of assistance."<sup>5</sup> Otis's speech, said John Clark Ridpath, was "the living voice which called to resistance, first Boston, then Massachusetts, then New England and then the world!" It was, he wrote, "the greatest and most effective oration delivered in the American colonies before the Revolution."<sup>6</sup> John T. Morse described Otis's performance as "the first log of the pile which afterward made the great blaze of the Revolution."<sup>7</sup> In the view of Henry

Lawrence Gipson, Otis's argument "helped to lay the foundation for the breach between Great Britain and her continental colonies."<sup>8</sup> In the words of A. J. Langguth, at the Writs of Assistance trial, "James Otis stood up to speak, and something profound changed in America."<sup>9</sup>

This chapter is a reexamination of Otis's Writs of Assistance speech, and a reconsideration of the evidence upon which rests its historical reputation. Are the claims by historians who credit Otis with sparking the Revolutionary movement warranted or not? My reassessment begins with a detailed review of the nature and function of writs of assistance within the political, legal, and economic environment of colonial Massachusetts. I then turn to an analysis of the 1761 legal hearing, and consider the principal issues in dispute and the arguments advanced by the courtroom participants. In particular, I aim to recover and reconstruct what Otis said, and assess the authenticity of various texts purported to represent his words and arguments. How did the speech text enter the public record, and what were the various forces that contributed to its corruption over the decades? Following that discussion, I explore other evidence about what Otis said, and in particular the reliability of the recollections of John Adams, made fifty-seven years after the writs of assistance trial. The Adams testimony has often been dismissed and discredited by historians and critics as of little value in understanding Otis's speech. But, I will argue that there are compelling historical and textual proofs supporting Adams's account, and therefore sufficient reason to place more confidence in his estimation of the significance of Otis's address. Finally, I consider the implications of this reassessment. If Adams's recollections are indeed more reliable than most historians suggest, then what would it mean for our understanding of Otis's influence on the

rhetoric of the American Revolution, and his importance in the early patriot movement? With a more complete picture of Otis's oration, what must we conclude about his influence on colonial opposition to British rule, and about his impact on American legal thought about the constitutional protection against unreasonable search, and with regard to the practice of judicial review of legislative action?<sup>10</sup>

### **The Worst Instrument of Arbitrary Power**

In remembering James Otis's Writs of Assistance speech, John Adams told William Tudor that the subject, once addressed, raised "a number of very important questions." The first of those questions is the one with which we shall begin: "What were writs of assistance?"<sup>11</sup>

We William Sheaffe Depy. Collector and Benja. Hallowell Comptroller of his Majesty's Customs for the Port of Boston Received Information that a Number of Casks of Brandy Wines and other Liquors had been Clandestinely imported into this Town Concealed in a Cellar under the House of Captn. Danl Malcom directing Mr. Vincent and Mr Turner Waiters to follow us and Mr. Benja. Cudworth Deputy Shereff of the County of Suffolk to be ready at Call by Virtue of a Writt of Assistance legally granted to said Benja Hallowell to be aiding and Assisting to us in the Discharge of our Duty.<sup>12</sup>

Thus began the Declaration of William Sheaffe and Benjamin Hallowell in the matter of Daniel Malcom, a Boston merchant who had resisted the search of his house by customs officials in September 1766, five years after the Writs of Assistance case argued by James Otis. From this declaration, we get a contemporary description by the king's officers of an attempt to execute a search under the authority of a writ of assistance.

Captain Daniel Malcom was a popular Boston merchant, a passionate supporter of colonial rights, and, as it turned out, a client of James Otis. When Hallowell and Sheaffe arrived at his home to search for the uncustomed wine, Malcom refused them entry to a locked cellar within his house that he claimed had been leased to Captain William Mackay. According to his deposition, Malcom told the officers that “the first Man that would break open my House without having Legal Authority for the same, I would kill him on the Spot.” Malcom further swore in his deposition that he “had not any illegal Goods of mine in my House” and that “my full determination was if they should break open my House to pursue them in Law as far as Justice would go.”<sup>13</sup> Rather than test Malcom’s resolve, Sheaffe and Hallowell left without either searching the premises or seizing any smuggled goods.

Hallowell had gone to Malcom’s house armed with a writ of assistance. That writ, if it was like others issued to customs officers in the colonies, authorized Hallowell, in the name of the king,

to take a Constable, Headborough or other publick Officer inhabiting near unto the place and in the daytime 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 prohibited and uncustomed and to put and secure the same in our Storehouse in the port next to the place where such seizure shall be made.<sup>14</sup>

From the deposition we know that Hallowell enlisted the aid of the sheriff, as well as two tidewaiters, “by Virtue of a Writt of Assistance legally granted.” “A writ,” as Hiller

Zobel explains, was “a command to an officer in the name of the sovereign.”<sup>15</sup> By authority of the writ of assistance, the men called by Hallowell were obligated to assist in the search for smuggled goods. Yet the writ was not a search warrant. The authority to search was not invested by the writ, but rather by the commission of the customs official and ultimately by the statutes of Parliament that governed British trade.<sup>16</sup> This last point is important, for if the authority to search existed apart from the issuance of the writ, then the writ need not be specifically sworn by an officer on suspicion of illegal trade activity. In other words, writs of assistance were used as *general* warrants. They were not drawn up to address specific cases of smuggling. They did not require the oath of a customs officer before a magistrate, but were executive instruments more or less permanently entrusted to an officer of the crown. Hallowell’s writ dated from March 22, 1765<sup>17</sup> and all customs officers in Massachusetts had such writs from 1761 to the outbreak of the Revolution.<sup>18</sup>

These legal documents were called writs of assistance (and sometimes “assistants”) because they could be used to enlist the aid of any officer of the crown in conducting a search of a dwelling, shop, or warehouse for smuggled goods. The appearance of the local sheriff aiding in a search could seem intimidating to a merchant or householder, and perhaps the ability to enlist such support contributed to making the writs obnoxious to colonial Americans. However, others understood the necessity of “assistance” differently. Customs officials usually operated in the major seaports, but they had responsibility for a wide territory. Moreover, they were often royal appointees sent from England. As a consequence, most of the king’s subjects in the colonies would not know personally the Surveyor of Customs, or his deputies, the way they might

recognize their local sheriff or justice of the peace. The writ that brought such local officers into the search process, along with the requirement that the search be conducted during daylight, was meant, as much as anything, to protect the local property owner from abuse by customs officials. The presence of the local constable served as a voucher for the authority and character of the unfamiliar customs agent, and could also ensure that the search was executed according to law.<sup>19</sup>

Whatever security may have been afforded to merchants and householders by the presence of a local peace officer, however, seems to have been undone by the general character of the colonial writs of assistance. With a general writ in hand, customs agents could search for contraband goods immediately. Not requiring the agents to appear first before a magistrate, whose office or court may have been located at some distance from the suspected smuggling hold, meant an increased probability that uncustomed imports could be seized and forfeited. “The whole essence of a ‘Writ of Assistance,’” wrote a twentieth-century British customs official, “is speed in use where delay would endanger the revenue.”<sup>20</sup> This seems to have been exactly the point argued by Jeremiah Gridley in the 1761 rehearing of the Writs case. “The necessity of having public taxes effectually and speedily collected,” he stated, “is of infinitely greater moment to the whole, than the Liberty of any Individual.”<sup>21</sup>

Of particular interest to the customs officers were goods controlled by the various trade and navigation acts, the whole system of which “was designed primarily to aid the English merchant and shipbuilder by creating monopolies in the colonial trade.”<sup>22</sup> The various statutes controlling trade in and with the colonies identified particular “enumerated” goods—products that could be exported from the colonies only to Great



Britain or only to another British colony. There were also statutes that designated certain products as “staple” goods—items that could be imported into the colonies only from a British port. In addition, all such imports and exports had to be transported by British shipping. American colonials might trade with other nations, or with the colonies of other nations, but they could do so legally only through the medium and agency of Great Britain. It was the function of customs officials to enforce this system of trade and navigation, and they relied on “a complicated documentary control system to insure compliance with both regulatory and revenue provisions.” They also relied on “broad powers to search vessels, as well as premises ashore for contraband”—searches that were aided by writs of assistance.<sup>23</sup> Goods on which the proper duties had not been paid were subject to confiscation and forfeiture. As an incentive to the officials involved, one-third of the value of the condemned goods went to the customs agent executing the search. In addition, handsome rewards were paid to informers who directed customs officers to cellars or warehouses where contraband goods were concealed.

In England, this system of trade laws was enforced under the jurisdiction of the Court of Exchequer, which issued English writs of assistance. There was no Court of Exchequer in America, so violations of commercial law were tried either in a court of common law or in the vice-admiralty courts. From the point of view of customs officers, the vice-admiralty courts had the advantage of being independent of bothersome colonial influences. In such courts, judges, not juries, decided the case, and the judges’ salaries were paid directly by the crown, not by colonial legislatures. A customs agent bringing an action of condemnation against a local merchant or shipowner, then, would not face the prospect of losing his share of the forfeiture because of a sympathetic local jury.

Instead he could rely on the vice-admiralty court to enforce the trade laws, thereby securing His Majesty's revenue, along with the custom agent's share of the fruits of his enforcement labors.

The power of customs officers to search for smuggled goods, however, came from neither the vice-admiralty courts nor the Court of Exchequer in England, but rather from the various pieces of parliamentary legislation that controlled colonial trade. Of particular importance to the Writs of Assistance case were three British statutes governing colonial commerce, plus a fourth that defined the expiration of all legal commissions and writs upon the death of a sovereign. As Joseph R. Frese explains, "it was in a very practical act on the collection of the customs revenue that mention was first made of a search warrant for customs officials, which was to be the basis of the whole writs of assistance controversy."<sup>24</sup> That early legislation was the 1660 "Act to prevent Fraudes and Concealments of His Majestyes Customes and Subsidyes." The act included the provision that a magistrate could

issue out a Warrant to any person or persons thereby enableing him or them with the assistance of a Sheriffe Justice of the Peace or Constable to enter into any House in the day time where such Goods are suspected to be concealed, and in case of resistance to breake open such Houses and to seize and secure the same goods soe concealed, and all Officers and Ministers of Justice are hereby required to be aiding and assisting thereunto.<sup>25</sup>

However, as Frese has shown, the search warrant permitted under the act of 1660 was "very specific and very limited," and "was to be issued only upon oath."<sup>26</sup>

Two years later, Parliament passed the “Act for preventing Fraudes and regulating Abuses in his Majesties Customes.” This 1662 legislation allowed customs officials authorized by Writt of Assistance under the Seale of his Majestyes Court of Exchequer to take a Constable Headborough or other Publique Officer inhabiting neare unto the place and in the day time to enter and go into any House Shop Cellar Ware-house or Room or other place and in case of resistance to breake open Doores Chests Trunks and other Package there to seize and from thence to bring any kind of Goods & Merchandize whatsoever prohibited and uncustomed.<sup>27</sup>

Frese has argued that the 1662 Act was never intended to extend customs search powers beyond those defined in the act of 1660. Rather, it was meant “to plug the holes in the navigation laws of the mercantile system.” According to Freese, the writ of assistance included in the legislation, like that in the act of 1660, was special and limited, requiring an oath before a magistrate prior to the execution of a search.<sup>28</sup> In practice, however, this second piece of legislation, which did not explicitly require an oath, was taken at the time as a broad extension of the search powers afforded to customs officials with a writ of assistance.

All English customs laws, including search provisions, were explicitly applied to the American colonies in 1696 under the “Act for preventing Frauds and regulating Abuses in the Plantation Trade.” That legislation granted to colonial customs officials the

same Powers and Authorities for visiting and searching of Shippes and takeing their Entries and for seizing and secureing or bringing on Shoare any of the Goods

prohibited to be imported or exported into or out of any the said Plantations or for which any Duties are payable or ought to have been paid . . . as are provided for the Officers of the Customes in England by the said last mentioned Act. . . . And that the like Assistance shall be given to the said Officers in the Execution of their Office as by the said last mentioned Act is provided for the Officers in England.<sup>29</sup>

The “last mentioned Act” referred to in the 1696 legislation was the 1662 law that had been understood to grant broad search authority under a general writ of assistance. By the legislation of 1696, therefore, colonial customs agents could lay claim to the same general search powers as were granted in England and could petition for the same general writs of assistance to aid them in the execution of their office.

One other piece of parliamentary legislation is central to the Writs of Assistance case. In 1702 Parliament passed an act that extended the life of existing legal instruments, including writs of assistance, six months beyond the death of the reigning sovereign.<sup>30</sup> Because George II died on October 25, 1760, all writs issued during his reign would need to be renewed within six months of the ascension of the new king. Whether that statute of renewal authorized general customs writs, or merely special writs, was one of the legal issues in the 1761 case. There was no doubt, however, that the death of George II “necessitated the reissuance of all writs and warrants” and was a major factor in touching off the controversy of 1761, to which we turn next.<sup>31</sup>

### **Desired by One of the Court**

According to Thomas Hutchinson, who was both Chief Justice and Lieutenant-Governor at the time of the 1761 case, general writs had been “in use some years” before

the trial that made them famous, despite the fact that there had been “a widespread laxity of enforcement” of the commercial laws.<sup>32</sup> In 1760, however, in an effort to stem illegal trade with the French enemy, Prime Minister William Pitt ordered a stricter enforcement of the trade and navigation laws. Pitt’s directive, which came before the death of George II, instructed colonial governors, and by extension royal customs officers, to “make the strictest and most diligent Enquiry into the State of this dangerous and ignominious Trade.” More important, Pitt ordered colonial officials to “take every Step, authorized by Law, to bring all such heinous Offenders to the most exemplary and condign Punishment.”<sup>33</sup>

Either motivated by Pitt’s instructions, or directed by the governor of Massachusetts, James Cockle, the Collector of Customs at Salem, applied to the Superior Court, then sitting in that seaport town, for a writ of assistance. As John Adams remembered,

The King sent Instructions to his Custom house officers to carry the Acts of Trade and Navigation into strict Execution. An inferiour Officer of the Customs in Salem, whose Name was Cockle petitioned the Justices of the Superiour Court, at their Session in November [1760] for the County of Essex, to grant him Writs of Assistants, according to some provisions in one of the Acts of Trade, which had not been executed, to authorize him to break open Ships, Shops, Cellars, Houses &c. to search for prohibited Goods, and merchandizes on which Duties had not been paid.<sup>34</sup>

Rather than issue a writ of assistance to Cockle, the court postponed a decision on the matter until the next term in Boston. According to both Adams and Hutchinson, Stephen

Sewell, the recently deceased chief justice of the court, “had doubts of the legality of such writs,” doubts that were perhaps shared by other members of the court.<sup>35</sup> Historian M. H. Smith believes the judicial skepticism was generated, or at least strengthened, by a March 1760 *London Magazine* article then circulating in Massachusetts. “As to a writ of assistance from the exchequer,” the article said, “I believe it never was granted without an information upon oath, that the person applying for it has reason to suspect that prohibited or uncustomed goods are concealed in the house or place which he desires a power to search.”<sup>36</sup> Because of the article, and Sewell’s doubts, Cockle’s application for a writ could not have come at a worse time for the court.<sup>37</sup>

The Superior Court was next scheduled to meet in Boston during the February term of 1761. Before that meeting, a new chief justice had to be named. James Otis Sr. had been promised by a previous governor that he would fill the next vacancy on the court. But when it came time to replace Sewell, Governor Francis Bernard, himself newly appointed, named Thomas Hutchinson to the post. Following Hutchinson’s own account of these events, some later historians, unsympathetic to James Otis Jr. have argued that his opposition to writs of assistance was part of a personal vendetta against Hutchinson and Bernard for the slight to his father. Otis, said Hutchinson, “with great warmth, engaged in behalf of his father, and, not meeting with that encouragement which he expected, vowed revenge, if he should finally fail of success.”<sup>38</sup> No doubt there was some personal resentment on the part of the Otis family toward both Bernard and Hutchinson. But as John Adams asked Benjamin Waterhouse, “would Mr. Otis, because his father had been disappointed of an office, which had been promised him by two successive governors, worth one hundred and twenty pounds sterling, at most, have

resigned an office, which he held himself, worth two or three hundred pounds sterling, at least?”<sup>39</sup>

Adams’s reference is to the fact that sometime between the application of James Cockle for the writ of assistance and the February hearing that produced Otis’s famous speech, Otis resigned the office of Acting Advocate General and became, instead, counsel for the merchants opposing the writs. The precise chronology of these events remains puzzling, but some facts are reasonably clear. Sewell died on September 10, 1760. Cockle’s application at Salem was made at the November sitting of the court. Apparently at that sitting, some objections were raised as to the legality of general writs of assistance, perhaps by Salem and Boston merchants. At least some of the justices of the court also had reservations based on the questions raised in the *London Magazine* article, as well as on the doubts articulated by the late Chief Justice Sewell. The court, however, could hardly rule against Cockle’s application on the basis of opinions written in a popular magazine or doubts raised by a dead judge. As the Acting Advocate General, Otis was assigned to research the law and relevant statutes in connection with such writs.<sup>40</sup> On November 13, Bernard nominated Hutchinson as Chief Justice. By December 24, Otis had resigned as Acting Advocate General and was representing the merchants opposing writs of assistance, though, as Smith points out, “exactly when he resigned is not known.”<sup>41</sup> Neither can we know for certain whether Otis switched sides on principle, to spite Hutchinson, or some combination of the two. On this point there is not sufficient evidence to draw more than a purely speculative conclusion.

Whatever Otis’s motivation, the appointment of Hutchinson to the court was pivotal, for it would have put an end to any anxiety Governor Bernard may have felt

about the legality of writs of assistance. Had Sewell lived, or had the court without Sewell ruled against the writs, Bernard might have failed to carry out the directive from Pitt to enforce the trade laws. Moreover, without that stricter enforcement, Bernard would have forfeited any potential gain in personal income that might accrue to him through effective administration of the customs laws in Massachusetts. Because the governor, like the customs officer, received one-third of any seized and condemned property, it was in Bernard's financial interest to have the Superior Court affirm the legality of the writs and to allow customs officers to exercise full authority in searching for prohibited and uncustomed goods. Whether or not such calculations entered into Bernard's decision to appoint Hutchinson, it is indisputable that "Bernard had ascertained that Hutchinson favored the legality of the writs" and appointed Hutchinson just in time for him to hear the case.<sup>42</sup> Years later, John Adams alleged that the Hutchinson appointment "was made for the direct purpose of deciding this question in favor of the crown."<sup>43</sup>

Only three days before Hutchinson took his seat on the bench, word reached Boston that George II had died. Now the matter of writs of assistance concerned not only the legality of the writ applied for by James Cockle, but also the legitimacy of all writs of assistance, which would expire as legal instruments six months after the death of George II. Facing the expiration of all such writs, as well as the opposition to the writs being mounted by Boston merchants and their new attorney, Thomas Lechmere, Surveyor General of the Customs, applied to the court to be heard on the matter so that "Writs of Assistants may be granted to himself and his officers as usual." Thus the Cockle



application was superseded, and the case that became famous for Otis's speech entered the legal record under the title "Petition of Lechmere."<sup>44</sup>

It is John Adams who gives us the only contemporary portrait of the setting of the Writs of Assistance trial. Writing to William Tudor fifty-seven years after the event, he stated: "the scene is the Council Chamber in the old Town House in Boston. The date is in the month of February, 1761."<sup>45</sup> Adams described the chamber as containing "a great fire," around which

were seated five Judges, with Lieutenant-Governor Hutchinson at their head, as Chief Justice, all arrayed in their new, fresh, rich robes of scarlet English broadcloth; in their large cambric bands, and immense judicial wigs. In this chamber were seated at a long table all the barristers at law of Boston, and of the neighboring county of Middlesex, in gowns, bands, and tie wigs. They were not seated on ivory chairs, but their dress was more solemn and more pompous than that of the Roman Senate, when the Gauls broke in upon them.

. . . Two portraits, at more than full length, of King Charles the Second and of King James the Second, in splendid golden frames, were hung up on the most conspicuous sides of the apartment. If my young eyes or old memory have not deceived me, these were as fine pictures as I ever saw.<sup>46</sup>

When the matter of Lechmere's petition was to be heard, Jeremiah Gridley opened the case for the crown. Gridley was the most distinguished member of the bar in Boston at the time and had been the mentor of both James Otis and John Adams. The personal connection between the adversaries before the court created what Adams called "a moral spectacle, more affecting to me than any I have since seen upon any stage."<sup>47</sup>

As best we can determine from Adams's trial notes of the hearing, and the abstract he made shortly after, Gridley began by identifying two central points of issue: "The first Question, therefore for your Honors to determine is, whether this practice of the Court of Exchequer in England (which it is certain, has taken place heretofore, how long or short a time soever it continued) is legal or illegal. And the second is, whether the practice of the Exchequer (admitting it to be legal) can warrant this Court in the same practice."<sup>48</sup> To prove the legality of the writs, Gridley maintained that parliamentary statute had established writs of assistance and that customs officials were therefore entitled to use them as legal instruments. "By the 7 & 8 of Wm. C. 22 § 6th," said Gridley, "This authority, of breaking and Entering ships, Warehouses Cellars &c given to the Customs House officers in England by the statutes of the 12th And 14th Of Charl. 2d. Is extended to the Custom House officers in the Plantations: and by the statue of the 6th of Anne, Writts of assistance are continued, in Company with all other legal Processes for 6 months after the Demise of the Crown."

According to Gridley, there were ample legal precedents for the writ in question. "What this Writ of assistance is," he said, "we can know only by Books of Precedents. And We have produced, in a Book intituld the modern Practice of the Court of Exchequer, a form of such a Writ of assistance to the officers of the Customs." Having shown that "the Court of Exchequer at home has a power by Law of granting these Writs," Gridley went on to argue that it was entirely appropriate, even necessary, for the Superior Court of the Province to grant them in Massachusetts. "Writs of Assistance under the Seal of his Majesty's Court of Exchequer at home will not run here," he argued. "They must therefore be under the Seal of this Court." Moreover, Gridley maintained,

writs were circumstantially necessary. “‘Tis the necessity of the Case and the benefit of the Revenue that justifies this Writ,” he held, “and the necessity of having public taxes effectually and speedily collected is of infinitely greater moment to the whole than the Liberty of any Individual.”<sup>49</sup>

Gridley was followed by Oxenbridge Thacher, whom Adams described as displaying “a very easy and musical Eloquence.”<sup>50</sup> Thacher answered some of Gridley’s arguments and took a position against the issuance of general writs. For that reason, he is most often represented as arguing on the same side as Otis. M. H. Smith, however, believes Thacher may have functioned as an *amicus curiae*, a distinguished local lawyer of some learning able to brief the court on the relevant law and precedent. Indeed, according Adams’s Abstract, Thacher opened by saying that he appeared “In obedience to the Order of this Court.” Thacher reported that he had “searched with a good deal of attention all the antient Reports of Precedents . . . but have not found any such Writ as this Petition prays.”<sup>51</sup>

After addressing the issue of precedents, Thacher focused mainly on the question of jurisdiction that had been raised by Gridley. “The most material question,” he said, “is whether the Practice of the Exchequer, will warrant this Court in granting” writs of assistance. After researching the matter, Thacher concluded that “This Court has renounced the Chancery Jurisdiction, which the Exchequer has in Cases where either Party is the Kings Debtor.” Moreover, he argued, there was a distinct difference between the English and provincial courts in the power and manner of overseeing customs officers who might abuse writs: “In England all Informations of uncustomed or prohibited Goods are in the Exchequer, so that the Custom House Officers are the Officers of that Court

under the Eye and Direction of the Barons and so accountable for any wanton exercise of Power.” But in America, customs officers were not answerable to the Massachusetts Superior Court, and so “the Writ now prayed for is not returnable.” Such unchecked power in the hands of customs officers was dangerous, Thacher implied, since colonial customs officials were not required to “return” to court and account for their use of the writs. In England, at least, “they seize at their peril, even with probable Cause.”<sup>52</sup> After Thacher’s presentation, which apparently was considerably shorter than the others, Otis made his memorable address.<sup>53</sup>

Otis began with an introduction that accounted for his involvement in the case and identified the basis of his objections to writs of assistance. Otis told the court that he appeared “in obedience to your order, but likewise in behalf of the inhabitants of this town,” thus indicating that he had originally undertaken study of the question as directed by the court but had since resigned his position to serve as counsel to the Boston merchants. Otis also said his efforts were made “out of regard to the liberties of the subject.” As he saw it, British liberties were under assault, and he was compelled to oppose “all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is.”

As Otis continued, he told the court that the writ of assistance was “the worst instrument of arbitrary power” and that he opposed it “from principle.” He asked the court to indulge him as he presented “the whole range of argument” against the writs, an argument he would make with pleasure “as it is in favor of British liberty.” Reflecting on his resignation as Acting Advocate General, he declared that he would “cheerfully submit myself to every odious name for conscience sake” and maintained that he was following

“the only principles of public conduct that are worthy of a gentleman or a man.” He would, if necessary, “sacrifice estate, ease, health, and applause, and even life, to the sacred calls of his country.”

Following this dramatic exordium, Otis turned directly to the writs, which he opposed on constitutional grounds. Leaving aside the issues of necessity, jurisdiction, and current practice that had been raised by the other lawyers, he maintained that the “the writ prayed for in this petition, being general, is illegal,” for all the relevant acts of Parliament, as well as the principles of natural law and the constitution, established that “special warrants only are legal.”

Otis’s argument against general writs was focused on four main points. First, he held, “the writ is universal,” which is to say that it could be issued to any revenue or customs officer, or their subordinates, who could in turn enlist the aid of any public official. The power of the writ, then, was not limited to those who held royal commissions; nor was it confined to those local officials elected by the people. Instead, “every one with this writ may be a tyrant.”

Second, Otis argued that the writs were perpetual. “There is no return,” he charged. “A man is accountable to no person for his doings.” Once a writ of assistance was issued to a customs inspector, it did not expire, and the inspector was not required to return to court to account for how the writ was used or to demonstrate that the search had been conducted legally and as directed by the writ itself. This was especially a problem in the colonies, where customs agents did not act as officers of the local common law courts, but were instead agents of the British exchequer.

Otis's third argument for the illegality of the writs stressed the fact that a customs official, "with this writ, in the daytime, may enter all houses, shops, etc., at will and command all to assist him." In other words, a search would not be limited to the specific premises suspected to contain contraband, and no oath attesting to suspicion of smuggling had to be given prior to the search. Instead, a customs official could enter "all houses," and do so "at will."

"Fourthly," Otis said, "by this writ not only deputies, etc., but even their menial servants are allowed to lord it over us." There being no requirement to swear to suspicion and no accountability after execution, there was no opportunity for a magistrate to estimate the character of those who used the writ to search shops or dwellings. The writ might be used by persons unworthy of exercising such power, and could conceivably be used in the service of personal revenge or for other illicit purposes.

All of this, Otis contended, proved that general writs were dangerous to the liberties of British subjects, and thus were illegal. "One of the most essential branches of English liberty is the freedom of one's house," he said. "A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle." Should the court issue general writs of assistance, that security would be eroded and "would totally annihilate this privilege."

Otis provided an example to the court of the kind of abuse of power he envisioned, telling the story of a "Mr. Ware," who used his writ to harass "Mr. Justice Walley," a judge who had ruled against Ware in a legal dispute. According to Otis, Ware said to the judge, "I will show you a little of my power" and "went on to search the house [of Mr. Walley] from the garret to the cellar." Otis warned that this kind of behavior,

encouraged by the issuance of general writs of assistance, would lead to a society “involved in tumult and blood.”

Having shown why general writs were dangerous to liberty, Otis concluded that they were therefore unconstitutional. In doing so, he advanced a radical legal theory calling for the judicial nullification of parliamentary law. “Reason and the constitution,” he asserted, “are both against this writ.” Urging the court to ignore any past practice of issuing general writs, he stated that “all precedents are under the control of the principles of law.” In a statement that would reverberate through the history of American legal argument, he claimed that, “An act against the constitution is void.” General writs, which were both dangerous and contrary to constitutional principle, could not have been intended, or authorized, by the parliamentary statutes that governed customs inspections and revenue collections. Rather, said Otis, the Court must interpret the statutes in question in light of the constitutional principles that protected the liberties of the subject. The court was compelled, therefore, to reject applications for general writs of assistance, for the constitution allows only that “special writs may be granted on oath and probable suspicion,” and the existing statutes “can prove no more.”

Following the February hearing, the court postponed its decision on the legality of writs of assistance. Hutchinson explained that “The court was convinced that a writ, or warrant, to be issued only in cases where special information was given upon oath, would rarely, if ever, be applied for, as no informer would expose himself to the rage of the people.” In other words, requiring writs of assistance to be supported by an oath on special evidence for each customs search would effectively end meaningful enforcement of the trade laws and collection of revenue. In addition, some of Hutchinson’s fellow

judges doubted “whether such writs were still in use in England . . . and, if judgment had been then given,” Hutchinson wrote, “it is uncertain on which side it would have been.” To clarify the legality of general writs, Hutchinson took “the first opportunity in his power, to obtain information of the practice in England,” and the Massachusetts court suspended its judgment until such clarification was received.<sup>54</sup>

Hutchinson wrote to William Bollan, a former Advocate General of the Vice-Admiralty court in Massachusetts, who was at the time residing in England and serving as Massachusetts provincial agent. According to Bollan, on June 13, 1761, he sent Hutchinson “a copy of the writ of assistance taken out of the court of exchequer, with a note thereon, setting forth the manner of its issuing.” Bollan told Hutchinson that “these writs upon any application of the commiss’rs of customs to the proper officer of the court of exchequer are made out of course by him, without any affidavit or order of the court.”<sup>55</sup>

When the Massachusetts Superior Court reconvened in November, there was a second hearing on writs of assistance. Very brief minutes of the second hearing were made by Josiah Quincy, from which it appears that many of the same arguments were presented. This second hearing, however, was a formality, as Hutchinson and the Court had already decided, based on the Bollan correspondence, that general writs were both legal and consistent with English practice.<sup>56</sup> The *Boston Gazette* of the following week reported that “the Judgment of the Court [was] *immediately* given in Favour of the Petition.” Josiah Quincy noted that “The Justices were unanimously of the Opinion that this Writ might be granted, and some Time after, out of Term, it was granted.”<sup>57</sup>

According to John Adams, neither Hutchinson nor the other justices publicly defended



their decision to grant the writs; nor did they produce the documents, such as Bollan's letter, which led them to conclude in favor of the writs.<sup>58</sup> Hutchinson said only that "A form was settled, as agreeable to the form in England as the circumstances of the colony would admit, and the writs were ordered to be issued to custom-house officers, for whom application should be made to the chief justice by the surveyor-general of the customs."<sup>59</sup>

The writs that were finally granted declared, in the name of the king,

that it shall be lawfull to or for any person or persons authorized by Writ of Assistants under the seal of our Court of Exchequer to take a Constable, Headborough or other publick Officer inhabiting near unto the place and in the daytime 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 prohibited and uncustomed and to put and secure the same in our Storehouse in the port next to the place where such seizure shall be made.<sup>60</sup>

### *I took a few minutes*

One of the chief problems faced by students of Otis's rhetoric is the fact that there is no complete text of his most famous speech, and the only contemporaneous record of his address has been corrupted over time. Otis's eloquent performance, therefore, is frequently characterized as the stuff of legend, "firmly implanted in the mythology of the American Revolution." Lorenzo Sears maintained that Otis's rhetorical legacy "is mostly a tradition," while E. L. Magoon confessed that in judging Otis's oratory, "we are compelled to estimate his merits chiefly through imperfect descriptions." Barnet Baskerville agreed; Otis's "reputation for eloquence," he concluded, "is sustained by

tradition rather than by a precise record of his utterance.”<sup>61</sup> In order to acquire the best understanding possible of what Otis said at the Writs trial, it is necessary to trace the history of his speech from its origins in 1761, through its earliest public appearances, to its reincarnation in William Tudor’s biography, and finally to its subsequent inclusion in numerous anthologies of American discourse.<sup>62</sup>

On February 24, 1761, John Adams took away from the Council Chamber in the Boston Town House (now called the “Old State House”) nine small pages of “contemporaneous notes” he made at the Writs of Assistance hearing. Included in those notes is the bare outline of Otis’s argument, consisting mostly of the legal authorities cited by the orator, along with a few memorable phrases from the speech.<sup>63</sup> Sometime soon after the trial, certainly before April of the same year, Adams worked up from these notes an Abstract of Otis’s speech—a more readable, but nonetheless skeletal text of the five-hour oration.<sup>64</sup> As we shall see, this Abstract is the original source for all the later published versions of Otis’s remarks.

M. H. Smith argues that Otis may have assisted Adams, after the fact, in composing the Abstract. According to Smith, “it is not probable that so much that fitted Otis’s personal situation got into the abstract by accident, or even by the unguided artistry of John Adams.” Rather, says Smith, much of the Abstract may have been “inspired by Otis himself . . . in conversation with Adams afterward.”<sup>65</sup> Whether Otis-inspired, or creatively hatched from the memory of John Adams, the Abstract lay virtually unnoticed for twelve years. A few of Adams’s friends and colleagues saw it as it circulated among members of the Boston bar, and several versions of it have survived in the legal papers

and commonplace books of other lawyers.<sup>66</sup> But the Abstract itself was not publicly available until first printed in 1773.

In April of that year, Jonathan Williams Austin, a clerk in Adams's law office, took the Abstract from among Adams's legal papers and submitted it to a local newspaper for publication. It seems likely that this is when Adams's own handwritten version of the Abstract disappeared.<sup>67</sup> On April 29, 1773, the *Massachusetts Spy* printed a text of Otis's speech, introducing it as "being taken from the mouth of that great American oracle of law, JAMES OTIS, Esq; in the meridian of his life."<sup>68</sup> This was the only text of the speech to appear in print during Otis's lifetime. Twenty years after his death the speech reappeared, this time in the second volume of George Richards Minot's *Continuation of the History of the Province of Massachusetts Bay* (1803). According to Minot, Otis's speech presented "a striking picture of the spirit of the times, and in some measure portrays the manner of that ardent patriot and well-read lawyer." Minot informed readers that his text of the speech was drawn from "such minutes as we possess" and lamented that "we cannot recover at this day many elegant rhetorical touches and weighty arguments, which were unavoidably omitted."<sup>69</sup> The Otis speech as published by Minot matched almost exactly the version from the *Massachusetts Spy*. In his *Autobiography* Adams confirmed that Minot's text was, with minor variations, the same he had crafted in his Abstract of 1761.<sup>70</sup>

As the first major histories of the Revolution began to appear in the years following the War of 1812, many Americans—including men such as Adams who played important roles in the establishment of national independence—recognized that much of the true history of the contest would never be transmitted to posterity and that many

patriots would share the fate of being forgotten. In mid-November 1816, Adams received a letter from William Tudor, who had studied law under Adams during the early 1770s. In reply, Adams asked: “who shall do justice to the characters of James Otis, Samuel Adams, and John Hancock, who breasted a torrent of persecution from 1760 to 1775, and ever since?”<sup>71</sup> He responded to his own question by offering Tudor a portrait of these men, and in particular of James Otis, which he hoped would reach posterity and assist in securing the fame Otis deserved. “In February term, 1761,” Adams told Tudor, “Otis demonstrated the illegality, the unconstitutionality, the iniquity and inhumanity of that writ in so clear a manner, that every man appeared to me to go away ready to take up arms against it. No harangue of Demosthenes or Cicero ever had such effects upon this globe as that speech.”<sup>72</sup>

Copying from Minot’s *History* what had once been his own Abstract of Otis’s address, Adams sent Tudor the speech text, commenting upon it in language that has been recounted time and again by students of the Revolution:

Otis was a flame of fire! With a promptitude of classical allusions, a depth of research, a rapid summary of historical events and dates, a profusion of legal authorities, a prophetic glance of his eye into futurity, and a torrent of impetuous eloquence, he hurried away every thing before him. American independence was then and there born; the seeds of patriots and heroes were then and there sown, to defend the vigorous youth, the *non sine Diis animosus infans*. Every man of the crowded audience appeared to me to go away, as I did, ready to take up 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, namely in 1776, he grew up to manhood, and declared himself free.<sup>73</sup>

Early in 1818, Adams sent copies of his correspondence with Tudor to Hezekiah Niles, editor of *Niles's Weekly Register*, a national journal printed in Baltimore. Along with the text of Otis's address, Niles published several letters Adams had written to Tudor, including one that contained the important passage in which Adams claimed that with the Writs of Assistance case "the child Independence was born." This was the first reprinting of Otis's speech since it had appeared in Minot's 1803 history of Massachusetts. But, whereas Minot's book was a two-volume scholarly tome of limited geographical interest, Otis's speech now reached a wider audience through the popular medium of Niles's magazine. Publication in this form, along with Adams's testimony about the importance of the speech, began to secure a place for it in the popular culture of the early republic.<sup>74</sup>

In the summer of 1819, Boston publishers Hews and Goss released *Novanglus and Massachusettensis*, a reprint of the 1774-1775 newspaper debate between John Adams and Daniel Leonard (mistakenly identified as Jonathan Sewell) over the nature and limits of British sovereignty in the colonies. In publishing these polemical essays, Hews and Goss were responding to the public clamor for more history of the Revolution. In addition to the Adams-Leonard exchange, the work included Thomas Dawes's "Ode" to Otis, as well as "Letters from the Hon. John Adams, to the Hon. William Tudor, and others, on the Events of the American Revolution."<sup>75</sup> The twenty-eight letters included the epistle of March 29, 1817, which contained Adams's glowing testimony to Otis's early role in the history of the Revolution. By late 1819, Otis's speech had achieved

wider circulation and greater fame than at any time since its delivery fifty-eight years earlier.

All these published versions of Otis's speech contained what Adams called "interpolations"—two passages the retired president identified as "bombastic expressions" added by his former law clerk Jonathan Williams Austin. For several years Adams labored to correct the corrupted text. In his own copy of Minot's 1803 *History* he underlined the questionable passages, and in the margin wrote "interpolation." We can be confident that he had done this by 1807, when he commented to Mercy Otis Warren about the "garbled" version that appeared in Minot.<sup>76</sup> In a letter to William Tudor of March 29, 1817, in which Adams himself copied the speech from Minot, he indicated to Tudor which passages were not originally his own, telling him "I will copy them from the book, and then point out those interpolations."<sup>77</sup> Later Adams forwarded a copy of his correspondence with Tudor to Hezekiah Niles. Niles published the text of the speech in his *Weekly Register*, but printed the questionable passages in italics, and included Adams's reminder to Tudor that "the lines underscored are interpolations."<sup>78</sup>

The questionable passages occur near one another in the text and are transcribed below as they appear in *Niles's Weekly Register* in context, with the interpolations italicized:

in the next place, it is perpetual—there is no return. A man is accountable to no person for his doings: 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.*<sup>79</sup>

Fourthly, by this not only deputies, &c. but even their menial servants are allowed to lord it over us. *What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of GOD's creation?*<sup>80</sup>

Important as they are, however, these “interpolations” pale in comparison with the alterations made by Otis’s biography, William Tudor Jr. In his *Life of James Otis* (1823) Tudor followed Adams in portraying Otis in full heroic garb:

He was a man of powerful genius, and ardent temper, with wit and humor that never failed: as an orator, he was bold, argumentative, impetuous, and commanding, with an eloquence that made his own excitement irresistibly contagious; as a lawyer, his knowledge and ability placed him at the head of his profession; as a scholar, he was rich in acquisition, and governed by a classic taste; as a statesman and civilian, he was sound and just in his views; as a patriot, he resisted all allurements that might weaken the cause of that country, to which he devoted his life, and for which he sacrificed it.<sup>81</sup>

In relating the story of the Writs of Assistance case, the younger Tudor relied extensively on the correspondence between Adams and his father. Indeed, the two chapters dealing with the 1761 trial are taken almost entirely from the letters Adams wrote between 1816 and 1819.<sup>82</sup> Tudor emphasized Adams’s belief that “then and there, the child Independence was born.”<sup>83</sup> After offering his account of the Writs dispute and conveying his version of Otis’s speech, Tudor quoted Adams’s statement that “Mr. Otis’s oration against writs of assistance, breathed into this nation the breath of life.”<sup>84</sup>

When reprinting Otis’s speech, however, Tudor relied on Minot’s text and included the questionable passages, thereby ignoring the objections Adams had made to

his father and which had been printed in the public press.<sup>85</sup> At the same time, Tudor expunged two full paragraphs from Minot's version. These paragraphs had never been questioned by Adams and had appeared in every printed version of the speech before Tudor's biography.

The first excision comes immediately after the exordium of the address:

In the first place, may it please your Honours, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search. The act of 14th Charles II which Mr. Gridley mentions, proves this. And in this light the writ appears like a warrant from a Justice of the Peace to search for stolen goods.<sup>86</sup>

At the place where this passage should have appeared Tudor presented a digression on the dangers of writs of assistance. In doing so, he neither paraphrased the content of the missing lines, nor indicated that he had edited the speech. Before continuing with the text of Otis's address, Tudor told his readers that

it appears that some of these writs had been issued, though by what authority is not stated; and the officers of the revenue were afraid to make use of them, unless they could obtain the sanction of the superior court, which had led to the application. It is impossible to devise a more outrageous and unlimited instrument of tyranny, than this proposed writ: and it cannot be wondered at, that such an alarm should have been created, when it is considered to what enormous



abuses such a process might have led. The following paragraph from the report of Otis's speech before quoted, will serve to shew what kind of instrument was here prayed for, and some results that might have been expected from it.<sup>87</sup>

The second passage effaced by Tudor is the final paragraph of Adams's Abstract as published by Minot and Niles:

Again, these writs are not returned. Writs in their nature are temporary things. When the purposes for which they are issued are answered, they exist no more, but these live forever: no one can be called to account. Thus reason and the constitution are both against this writ. Let us see what authority there is for it. Not more than one instance can be found of it in all our law-books; and that was in the zenith of arbitrary power, viz. in the reign of Charles II. when star-chamber powers were pushed to extremity by some ignorant clerk of the Exchequer. But had this writ been in any book whatever, it would have been illegal. All precedents are under the control of the principles of the law. Lord Talbot says it is better to observe these than any precedents, though in the house of lords, the last resort of the subject. 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. (vid. Viner.) But these prove no more than what I before observed, that special writs may be granted *on oath and probable suspicion*. The act of 7th and 8th of William III. that the officers of the plantations shall have the same powers, &c. is confined to this sense, that an officer should shew probable ground, should take his oath of it, should do this before a magistrate, and that such magistrate, if he think proper, should issue a

special warrant to a constable to search the places. That of 6th of Anne can prove no more.<sup>88</sup>

As a peroration, the passage is admittedly not as stirring as that which, by the erasure, became the conclusion in Tudor's book. Still, Tudor's amendment is a significant truncating of the speech that leaves out numerous legal citations, several important features of Otis's rebuttal argument, and the clearest statement of the principle for which the speech is most remembered: "An act against the constitution is void." We can only speculate about Tudor's rationale for shortening the speech. Perhaps he was less concerned with offering an authentic text than with conveying the importance of the occasion and the eloquence of James Otis. Perhaps his understanding of the literary tastes of his day led him to print a speech more in keeping with the reading habits of 1823.

Whatever the reason for Tudor's editing, Charles Francis Adams offered a "correct version" in the 1856 edition of his grandfather's *Works*. That version, based on the text in Minot that John Adams had identified as his own "Abstract," included all the passages removed by Tudor but none of the interpolations identified by Adams.<sup>89</sup> This version, however, has gone largely unnoticed. Ever since the appearance of Tudor's biography in 1823, virtually every published edition of the speech has been taken from that work.<sup>90</sup> Yet, while Tudor offered a shortened version of Otis's speech, in the end he provided the most complete picture of the full range of Otis's arguments and appeals. For in addition to his text of the Writs of Assistance speech, he printed a comprehensive account of the citations and themes of Otis's address as John Adams had outlined them to his father.

As perhaps the only living witness to Otis's speech, Adams recalled for William Tudor, Sr., everything he could remember about Otis's argument in the hope that his recollections would inspire "some of my fellow-citizens of the present or some future age" to compose a truthful history of the Writs of Assistance case.<sup>91</sup> Adams hoped future historians would "see with compassion how such a genius as Otis was compelled to delve among the rubbish of such statutes, to defend the country against the gross sophistry of the crown and its officers."<sup>92</sup> Yet unlike Adams's Abstract, these additional recollections were written fifty-seven years after Otis's speech. Still, *The North American Review* found them fascinating and valuable, and noted that prior to 1823 only "a few interpolated fragments" of the argument had been published. But with the appearance of Tudor's *Life of Otis*, "a full and satisfactory sketch of it" was "now given to the public."<sup>93</sup>

### **A Generous Endeavor**

On June 1, 1818, Adams wrote to William Tudor, Sr., that "no man could have written from memory Mr. Otis's argument of four or five hours, against the acts of trade, as revenue laws, and against the writs of assistance, as a tyrannical engine to execute them, the next day after it was spoken. How awkward, then would be an attempt to do it after a lapse of fifty-seven years!" Still, Adams communicated to Tudor what he could remember as "some of the heads of his discourse," which, he said, were "indelibly imprinted on my mind."<sup>94</sup> In what Adams called a "short series of letters" that kept him writing at least once a week for the entire summer of 1818, he composed an account of Otis's speech that went well beyond the Abstract that had been printed in Minot's *History*.<sup>95</sup> These letters on the Writs of Assistance argument occupy fifty pages in the tenth volume of the *Works of John Adams* edited by Charles Francis Adams.<sup>96</sup> Most

scholars, however, have dismissed the letters as unreliable given Adams's age when he wrote them and the span of time that had passed since Otis's speech. Horace Gray said that "the elaborate narrative given more than half a century afterwards by Adams to Tudor, who printed an abstract of it as the argument of Otis in this case, is rather a recollection of the sentiments of the colonists between 1761 and 1766."<sup>97</sup> Wroth and Zobel argue that in writing to Tudor, Adams "sought to recreate a great moment of his youth." The letters to his former law clerk "put into Otis' mouth the entire body of arguments against the power of Parliament developed over the whole of the next decade."<sup>98</sup> M. H. Smith, too, discredits Adams's recollections, describing them as "imagination on the loose" and "all but valueless as additional evidence to Adams's on-the-spot notes and the Abstract."<sup>99</sup> In editing the *Works of John Adams*, even Charles Francis Adams said it was difficult to resist the belief that as a "generous endeavor" his grandfather had "insensibly infused into this work much of the learning and of the breadth of views belonging to himself."<sup>100</sup> How much credit, then, can we give Adams's fifty-seven-year-old memoirs of Otis's speech?

In what follows, I argue that Adams's later memoirs are in fact a valuable source for understanding Otis's famous speech, and that his detailed recollections merit more analysis than they have received. In the first place, we should note that Adams did not claim a perfect remembrance of Otis's words. Indeed, he was quite cautious about qualifying his recollections of the details of Otis's speech. When writing to Tudor he compared himself to an elderly client of his. "This lady died last year, at 95 or 96 years of age," and had told Adams she "was in an awkward situation; for if she related any fact of an old date, anybody might contradict her, for she could find no witness to keep her in

countenance.”<sup>101</sup> When Adams was unable to recall details, he readily confessed as much to Tudor. “I cannot pretend to remember them verbatim and with precision,” he wrote on one occasion.<sup>102</sup> On another, he explained that Otis had extended his argument “much farther than I dare to attempt to repeat.”<sup>103</sup> Two months later, he told Tudor that the participants on both sides of the case cited many sources and that “it would not only be ridiculous in me, but culpable to pretend to recollect all that were produced. Such as I distinctly remember, I will endeavour to introduce to your remembrance and reflections.”<sup>104</sup> It is unfair to Adams, then, to suggest that he meant his letters to be word-for-word account of Otis’s speech.

Second, a prominent criticism of those who have dismissed Adams’s letters to Tudor focuses on the belief that too much of what Adams attributed to Otis in 1761 was actually his own political thinking, developed over a much longer period of time, rather than what Otis actually said in February 1761. But a close reading of the letters to Tudor reveals that it is usually easy to distinguish between Adams’s general political reflections and the arguments he ascribed to Otis. Adams was quite consistent in indicating when he was relating the substance of Otis’s words. In one letter, for example, he wrote that, “This passage Mr. Otis quoted, with a very handsome eulogium of the author and his book.” He also recounted how “Mr. Otis made a calculation, and showed it to be more than sufficient to support all the crown officers.”<sup>105</sup> In another letter, he recalled that, “Otis asserted and proved, that none of these statutes extended to America, or were obligatory here,” once again unmistakably indicating his attribution of the argument to Otis.<sup>106</sup>

The absence of such attribution is usually a sign that Adams is engaged in a philosophical digression or a more general historical reflection of his own. To take but one case, only a few paragraphs later in the same letter in which he discussed Otis's arguments on the extension of statutes to the colonies, Adams left off his account of the speech to tell Tudor, "indeed, upon the principle of construction, inference, analogy, or corollary, by which they extended these acts to America, they might have extended the jurisdiction of the court of king's bench, and court of common pleas, and all the sanguinary statutes against crimes and misdemeanors, and all their church establishment of archbishops and bishops, priests, deacons, deans, and chapters; and all their acts of uniformity, and all their acts against conventicles."<sup>107</sup> This is Adams talking; when his remarks are read in context, it is perfectly evident that he is not accrediting these ideas to Otis. Yet this is precisely the kind of passage that has generated the skepticism of historians and editors. Perhaps Adams believed such digressions would help Tudor, or future writers, understand Otis's argument.<sup>108</sup> But regardless of Adams's motives, he is consistent in distinguishing between his personal reflections and his characterization of Otis's claims, principles, and reasoning. After one aside, Adams told Tudor: "This is another digression from the account of Mr. Otis's argument against writs of assistance and the acts of trade."<sup>109</sup> In short, Adams repeatedly distinguished between his digressions and personal reflections and the arguments presented by Otis in 1761. With this in mind, let us temporarily suspend our skepticism, give Adams the benefit of the doubt, and see what we can glean from his recollections about the content of Otis's address.

In reviewing what Adams said were the arguments of James Otis, we need to recognize that he recalled both broad claims advanced by Otis and specific pieces of evidence employed in support of those claims. Adams told Tudor that his memory of the specific evidence might be flawed, but that in recalling the major claims of Otis's case he had little doubt about the trustworthiness of his recollection. "We must confine ourselves to his principles and authorities in opposition to the acts of trade and writs of assistance," Adams wrote. "These principles I perfectly remember. The authorities in detail I could not be supposed to retain."<sup>110</sup>

How reliable were Adams's recollections? One way to answer that question is to use the Abstract of 1761 as a check on his memory. According to that document, which is unquestionably the most authentic and credible record of Otis's speech available, Otis told the court he had looked "into the books" regarding writs of assistance and asked the "patience and attention" of the court as he presented "the whole range of an argument, that may perhaps appear uncommon in many things, as well as points of learning, that are more remote and unusual, that the whole tendency of my design may the more easily be perceived, the conclusions better descend, and the force of them better felt."<sup>111</sup> This is an introduction that promises an unusual speech and which can help us understand the material Adams presented in 1818. The criticism of Adams centers on the claims that he "infused into this work" much of his own "learning and of the breadth of views," and that he compressed into Otis's 1761 speech "the entire body of arguments against the power of Parliament developed over the whole of the next decade."<sup>112</sup> Yet, according to Adams's Abstract, Otis stated that his argument would take him beyond the normal statute books and legal treatises commonly relied on by colonial lawyers. If the Abstract

is to be trusted, Otis prepared the court to hear a long and complex political and historical argument, one that is consistent with the type of argument Adams recalled in 1818.

Another source for determining the accuracy of Adams's recollections is the contemporaneous writing of James Otis, especially from the period 1761 to 1764, when echoes of the Writs case might have been strongest. It is possible that Adams could have confused the arguments in the Writs of Assistance case with the arguments employed by Otis in other works from the early 1760s, and in fact there are a few occasions where this plainly occurs.<sup>113</sup> However, in a June 1, 1818 letter to William Tudor, Adams spent considerable time summarizing the content of Otis's 1762 pamphlet *A Vindication of the Conduct of the House of Representatives of the Province of the Massachusetts-Bay*.<sup>114</sup> Moreover, in letters to William Wirt at roughly the same time, Adams referred to and quoted from Otis's 1764 *Rights of the British Colonies Asserted and Proved*.<sup>115</sup> Given the fact that he had very recently reviewed Otis's principal written works of the period, it seems unlikely that Adams would identify the same arguments as having occurred in the Writs speech—unless Otis actually *had* made the arguments in that speech. If we discover in Otis's early pamphlets the principles and arguments identified by John Adams, it can hardly be maintained, as several historians have insisted, that those principles and arguments actually originated with Adams and belonged to the later years of the colonial struggle. Keeping in mind these questions, let us examine what John Adams says about the Otis argument.

As Adams reviewed for Tudor the “heads of discourse” from Otis's speech, which he claimed were “indelibly imprinted” on his mind, he advanced a number of specific assertions about the “principles” of Otis's argument. According to Adams, Otis began



with an exordium that contained an apology for his resignation of the office of Advocate-General in the Court of Admiralty.<sup>116</sup> The Abstract confirms that Otis made this opening in his speech. In the second of his “heads,” Adams stated that Otis advanced a natural rights philosophy and “asserted that every man, merely natural, was an independent sovereign, subject to no law, but the law written on his heart,” and that “his right to his life, his liberty, no created being could rightfully contest. Nor was his right to his property less incontestable.”<sup>117</sup> In 1762, Otis wrote: “God made all men naturally equal. . . . No government has a right to make hobby horses, asses and slaves of the subject, nature having made sufficient of the two former, for all the lawful purposes of man, from the harmless peasant in the field to the most refined politician in the cabinet; but none of the last, which infallibly proves they are unnecessary.”<sup>118</sup> Two years later, Otis wrote that “There can be no prescription old enough to supersede the law of nature and the grant of God Almighty, who has given to all men a natural right to be *free*, and they have it ordinarily in their power to make themselves so if they please.”<sup>119</sup> That these sentiments were the convictions of James Otis in the early 1760s (and not simply those of Adams in later years) is clear. The fact that Otis wrote these words in 1762 and 1764 does not diminish the likelihood that he uttered similar sentiments in 1761.

Under this second “head,” Adams also tells us that Otis elaborated on the natural rights argument. “Nor were the poor negroes forgotten,” Adams remembered, and nobody “ever asserted the rights of negroes in stronger terms” than had Otis.<sup>120</sup> This certainly was both an “unusual” argument, as Otis had promised, and a radical political doctrine for the time. Yet in 1764 Otis wrote that “the colonists are by the law of nature freeborn, as indeed all men are, white or black. . . . Does it follow that ‘tis right to enslave

a man because he is black? Will short curled hair like wool instead of Christian hair, as 'tis called by those who hearts are as hard as the nether millstone, help the argument?"<sup>121</sup> Again, what Adams attributes to Otis in 1761 is consistent with other works by Otis from the same period.

The third "head" of the Otis argument, according to Adams, involved political association for "the mutual defence and security of every individual for his life, his liberty, and his property." When writing to Tudor, Adams recalled that Otis "asserted these rights to be derived only from nature and the author of nature," and that they were "inherent, inalienable, and indefeasible by any laws, pacts, contracts, covenants, or stipulations, which man could devise."<sup>122</sup> In short, in 1818 Adams recalled Otis making a natural law argument; neither government, nor laws, nor contracts, could usurp or diminish the natural rights of all human beings. According to Adams's trial notes, taken on the day of the hearing in 1761, Otis argued that, "all precedents" were governed by "the Principles of the Law."<sup>123</sup> As Wroth and Zobel explain, in this argument Otis was using a common 18<sup>th</sup>-century strategy "to ensure that precedent did not stifle the orderly growth of the law." The "appeal to principles" invoked "common law, natural law, reason, and common sense."<sup>124</sup> That Otis considered the reference to principles to be an appeal to natural law is made clear in Adams's trial notes. There, Adams recorded Otis arguing that, "An act against the Constitution is void: an Act against natural Equity is void."<sup>125</sup> In the Abstract, too, we find Otis arguing that, "had this writ been in any book whatever it would have been illegal. ALL PRECEDENTS ARE UNDER THE CONTROUL OF THE PRINCIPLES OF THE LAW."<sup>126</sup> Moreover, in 1764 Otis wrote that "if the reasons that can be

given against an act are such as plainly demonstrate that it is against *natural* equity, the executive courts will adjudge such act void.”<sup>127</sup>

Under the fourth “head” of Otis’s discourse, Adams told Tudor that Otis advanced a traditional Whig understanding of the contest between power and liberty. “He asserted,” Adams wrote, “that the security of these rights to life, liberty, and property, had been the object of all those struggles against arbitrary power.”<sup>128</sup> We know from the Abstract that in 1761 Otis proclaimed writs of assistance to be “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution.”<sup>129</sup> In addition, only a year later Otis would write that “Tho’ most governments are *de facto* arbitrary, and consequently the curse and scandal of human nature; yet none are *de jure* arbitrary.”<sup>130</sup> And two years after that, he asserted that “the present establishment founded on the law of God and of nature was began by the Convention with a professed and real view in all parts of the *British* empire to put the liberties of the people out of reach of arbitrary power in all times to come.”<sup>131</sup>

From these premises, Adams says, Otis further “asserted that 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 Bristol, or any part of England.”<sup>132</sup> As with other main points of Otis’s speech, we see that he also employed this argument in his written work of the early 1760s. In 1762, he wrote that “the subjects in the colonies are entitled to all the privileges of the people of Great Britain,” and are so entitled “by the common law, by their several charters, by the law of nature and nations, and by the law of God.”<sup>133</sup> Similarly, in his 1764 “Rights of the British Colonies Asserted and Proved,

he argued that “the colonists are entitled to as *ample* rights, liberties, and privileges as the subjects of the mother country are, and in some respects to *more*.”<sup>134</sup> Such statements are fully in keeping with what is attributed to Otis in Adams’s Abstract.

The fifth “head” of Otis’s speech, Adams told Tudor, “examined the acts of trade, one by one, and demonstrated, that if they were considered as revenue laws, they destroyed all our security of property, liberty, and life, every right of nature, and the English constitution, and the charter of the province.”<sup>135</sup> From Adams’s point of view, this argument was central to the understanding of Otis’s speech as among the earliest discourses of resistance. In emphasizing this element of Otis’s address, Adams was asserting that Otis objected to writs of assistance, in part, because they were used in the collection of revenue, and so were instruments employed in taxing the colonies without their consent. Was Adams inventing? Not likely. In the first place, some of the statutes Adams claims Otis discussed were cited in the Abstract. Others were clearly debated at the hearing as is evidenced by their citation in the abstracts of participating attorneys Jeremiah Gridley and Oxenbridge Thacher.<sup>136</sup> Regarding these statutes, we can be reasonably confident that Adams is correct. Many of the other specific British statutes cited by Adams are directly related to imperial commerce and the regulation of trade in the colonies. Considering that the 1761 case involved the issuance of writs of assistance designed to discourage smuggling and to regulate trade by enforcing customs laws, it is not far fetched to believe the additional statutes may have entered into Otis’s long argument.<sup>137</sup>

In discussing Otis’s fifth “head” Adams expatiated at length on legal and historical sources cited by Otis. These other sources, which Adams gave Tudor “without

pretending to remember the order in which he read them,”<sup>138</sup> included Joshua Child, Joshua Gee, John Ashley, Malachy Postlethwayt, and, in defense of colonial charters, Jeremiah Dummer. According to Adams, in citing these sources, Otis meant to show “the temper, the views, and the objects” of British colonial policy over a century, and to demonstrate that Great Britain sought to “annul all the New England charters” and to subject the people of the colonies “to the supreme domination of parliament, who were to tax us, without limitation.”<sup>139</sup>

Did Otis, in fact, cite these sources as Adams claimed? There is no way to know for sure with regard to every case, but it is telling that all the sources Adams mentions predate the Writs of Assistance trial. He did not make the mistake of attributing to Otis citations that, chronologically speaking, could not have been adduced in 1761.<sup>140</sup> It is also the case that each of the works in question deals directly with matters at issue in the Writs of Assistance case.<sup>141</sup> Moreover, at least some of the sources identified by Adams were demonstrably familiar to Otis. For instance, Adams told Tudor that “Mr. Otis also quoted Postlethwait,” referring to Malachy Postlethwayt, whose *Britain’s Commercial Interest Explained and Improved* (1757) Otis cited in his *Rights of the British Colonies Asserted and Proved*.<sup>142</sup> Adams also told Tudor that Otis relied on the work of Jeremiah Dummer to defend the sanctity of the colonial charters. Adams quoted one passage from Dummer’s *Defence of the New England Charters* (1721) and stated that Otis “also alluded to many other passages in this work, very applicable to his purpose, which any man who reads it must perceive, but which I have not time to transcribe.”<sup>143</sup> There is no prima facie reason to doubt Adams here. The passage he cited is directly relevant to the Writs case and supports Otis’s principle that statutes contrary to the charters are “illegal,

null and void.”<sup>144</sup> We also know that in 1762 Otis defended the Massachusetts House of Representatives by referring to the colony’s charter, and that in 1764 he cited Dummer in his *Rights of the British Colonies Asserted and Proved*.<sup>145</sup>

Yet even if we could identify all the specific pieces of evidence, all the statutes and law books and colonial histories used by Otis, we could only guess at how those sources were employed or how they fit together into a coherent discourse. As Adams told Tudor, “I cannot pretend to recollect those observations with precision.” He left it for his correspondent “and others to make your own remarks upon them.”<sup>146</sup> However, this closer examination of the “heads” of Otis’s discourse has shown that Adams’s recollections are more reliable than previously thought. The comparison of Adams’s later account with other historical and textual evidence shows that Adams’s compilation of the major points of Otis’s argument was probably trustworthy, and that the previous doubts about the value of those recollections are hasty and misplaced. Yet, as trustworthy as Adams’s memoirs might be, are they evidence enough to support his claim about Otis’s primacy as an American Revolutionary? Can we conclude on the basis of Adams’s testimony that Otis’s Writs of Assistance oration “breathed into this nation the breath of life”?<sup>147</sup>

### **He gave the reins to his genius**

Can we trace American Independence to the radicalism of James Otis’s Writs of Assistance speech? To answer that question, we need to have confidence about the *substance* of Otis’s argument. The historical reputation of Otis and his speech rests ultimately on the vital claim by John Adams that with Otis’s performance “the child

independence was born.” That claim, in turn, must stand on textual and historical evidence that shows Otis advancing direct opposition to British authority and policy in terms that resonate in later Revolutionary discourse. To be sure, Otis never advocated a break with Great Britain, nor did he explicitly invoke the general right to revolution upon which the argument of the Declaration of Independence would be advanced. Throughout the writs trial, and in all his political writing from the same period, it is clear that Otis is interested in defending traditional *British* liberties. But, the evidence is strong that in doing so he forcefully objected to the writs of assistance as threats to colonial American property and liberty. In opposing those threats, he was the first to give voice to constitutional arguments that would be developed and rearticulated over the next fifteen years. If we have confidence that Otis advanced such arguments, we would also have stronger grounds for revising the chronology of American opposition to British colonial policy. While many standard histories of the American Revolution never mention the Otis address, and tend to mark the commencement of the Revolutionary movement with the widespread opposition to the Stamp Act in 1765, it may be necessary, and more accurate, to trust the chronology proposed by John Adams. In the glow of a newly asserted independence, Adams wrote to his wife and identified what he considered to have been “the Commencement of the Controversy, between Great Britain and America.” The independence of America, he said, can be traced “to the Year 1761” and “the Argument concerning Writs of Assistance, in the Superior Court.”<sup>148</sup> Let us examine the evidence that lends credit to Adams’s conclusion.

First, as Adams maintained, Otis objected to general writs that would violate fundamental law as embodied in the British constitution and the colonial charters. Any

statute or court order so violating these fundamental laws would therefore be null and void. Second, according to Adams, Otis objected to writs used to enforce the British acts of trade and navigation. Since Otis interpreted these acts as revenue laws, he saw them as instruments of tyranny, tools for taxation without representation. If Otis advanced both these claims, he would certainly be entitled to the fame some have accorded him as the “leading orator in the course of resistance.”<sup>149</sup> Both these claims articulate radical doctrines, and both provide the foundation of many arguments later employed in the colonial cause. So the question is an important one: To what extent did Otis advance the claims in 1761?

In Adams’s Abstract of the speech, we see Otis arguing that a writ of assistance is “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution.”<sup>150</sup> In his later recollection, Adams told William Tudor Sr. that Otis maintained “all these acts to be null and void by the law of nature, by the English constitution, and by the American charters, because America was not represented in Parliament.”<sup>151</sup> Both of these sources leave little doubt that Otis did indeed reject writs of assistance as an illegal exertion of arbitrary power and therefore, as null and void. He would restate the principle again in his 1764 pamphlet *The Rights of the Colonies Asserted and Proved*: “Should an act of parliament be against any of *his* natural laws, which are *immutably* true, their declaration would be contrary to eternal truth, equity and justice, and consequently void”<sup>152</sup>

But what of Otis’s other argument—the assertion that the acts of trade were essentially revenue laws, enforced with writs of assistance, and consequently usurped the liberty of Americans to tax themselves? On this topic, according to Adams, Otis “gave



the reins to his genius, in declamation, invective, philippic, call it which you will, against *the tyranny of taxation without representation.*”<sup>153</sup> As Adams explained to Tudor Sr. in 1818, “Otis had reasoned like a philosopher upon the navigation acts, and all the tyrannical acts of Charles II; but when he came to the revenue laws, the orator blazed forth.”<sup>154</sup> Otis challenged the legality of “An act for the better securing and encouraging the trade of his Majesty’s sugar colonies in America,” saying the act was “a revenue law; a taxation law; an unconstitutional law; a law subversive of every end of society and government; it was null and void.” Adams explained Otis’s argument: “It was a violation of all the rights of nature, of the English Constitution, and of all the charters and compacts with the colonies; and if carried into execution by writs of assistance and courts of admiralty, would destroy all security of life, liberty, and property.”<sup>155</sup>

One powerful piece of evidence corroborating Adams’s account is the abstract of the argument made by Jeremiah Gridley. Arguing the crown’s case Gridley maintained that issuance of the writs was justified by the “necessity” to generate revenue for Britain’s administration of her American colonies. He stated:

It is true the common privileges of Englishmen are taken away in this Case, but even their privileges are not so in cases of Crime and fine. ‘Tis the necessity of the Case and the benefit of the Revenue that justifies this Writ. Is not the Revenue the sole support of Fleets and Armies abroad, and Ministers at home? without which the Nation could neither be preserved from the Invasions of her foes, nor the Tumults of her own Subjects. Is not this I say infinitely more important, than the imprisonment of Thieves, or even Murderers? Yet in these Cases ‘tis agreed Houses may be broke open.<sup>156</sup>

It is clear from Gridley's statement that the issue of revenue was raised during the trial. The attorneys arguing the case in 1761 accepted as a matter of fact that the writs would be used to enforce customs laws, and that proper enforcement of those laws was necessary not merely for regulation of trade, but also for the collection of revenue.

Yet, according to Adams, Otis argued that however necessary such trade laws might be, "every one of those statutes from the navigation act to the last act of trade, was a violation of all the charters and compacts between the two countries." Consequently, each of the acts "was a fundamental invasion of our essential rights, and was consequently null and void; that the legislatures of the colonies, and especially of Massachusetts, had the sole and exclusive authority of legislation and especially of taxation in America."<sup>157</sup>

There is other evidence as well. In 1762, Otis published his defense of the Massachusetts House of Representatives. The house, led by Otis, had objected to an expenditure from the treasury by the governor and council that had not been previously appropriated by the house, "and paying it without their privity or consent." Otis wrote that the action of the governor was "in effect taking from the house their most darling privilege, the right of originating all Taxes." When that privilege is sacrificed, Otis argued, "the Government will very soon become arbitrary."<sup>158</sup> Two years later, in articulating the rights of British colonists, Otis again said that, "Taxes are not to be laid on the people but by their consent or by deputation."<sup>159</sup> He also made the specific connection himself between the acts of trade, and the taxation of the colonies: "I cannot but observe here," Otis wrote,

that if the Parliament have an equitable right to tax our trade, 'tis indisputable that they have as good an one to tax the lands and everything else. The taxing trade furnishes one reason why the other should be taxed, or else the burdens of the province will be unequally borne, upon a supposition that a tax on trade is not a tax on the whole. But take it either way, there is no foundation for the distinction some make in England between an internal and an external tax on the colonies. By the first is meant a tax on trade, by the latter a tax on land and the things on it.<sup>160</sup>

Bernard Bailyn sees a direct connection between the Writs of Assistance argument and the “peculiar tendency of thought which would shape, and alone explains, the intended meaning of” Otis’s 1764 pamphlet. As Bailyn argues, Otis was not so much concerned with the writs of assistance as he was with “the laws of Parliament controlling the American economy that made such writs necessary.”<sup>161</sup>

We see, then, that in 1818 John Adams recalled Otis, in his speech on writs of assistance, identifying this or that act of trade as “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.”<sup>162</sup> We discover that during the Writs trial Jeremiah Gridley defended the enforcement of customs laws as, in fact, laws designed to raise revenue. We find James Otis, a year after the Writs trial, quoting John Locke and arguing about the principle of taxation only by consent. We see Otis in 1764 denying Parliament’s right to tax the colonies without their consent, and maintaining that all the laws of navigation and trade are, in effect, taxes that subject Americans to arbitrary rule and reduce them to slavery. Despite the fact that the contemporary Abstract

prepared by John Adams does not show an argument that opposes writs of assistance as an instrument of illegal taxation, can there be any doubt that Otis could have made such an argument? Although Adams did not record the word “tax” in his digest of the long Otis speech, could the imposition of British taxation have been part of what Otis saw in this “instrument of slavery?”

This cross-examination of John Adams, and of the historical and textual evidence, proves that Adams was a reliable witness in testifying to the Revolutionary character of Otis’s remarks. The evidence shows that Otis made the arguments Adams attributed to him and proves that Otis’s opposition to writs of assistance was based on a constitutional theory, and was cast in a language, that would form the substance and rhetoric of American colonial protest for the next decade and a half. Otis was the first to raise a principled objection to the violation of American colonial rights, and was first to publicly oppose British taxation of the American colonies. John Adams was right. The Writs of Assistance address was the first defense of American liberty on grounds that would become commonplace in American colonial protest rhetoric through 1776. Now, then, let us examine the lines of political and legal influence that can be traced to Otis’s 1761 performance.

### **The Child Independence**

When William Tudor published his biography of Otis in 1823, the *North American Review* expressed the hope that any question about Otis’s primacy as a Revolutionary leader would be settled. “Where the revolution began can be, we think, no longer a question, in any well informed and unbiased mind,” wrote the editors in assessing Tudor’s work. “It was in February 1761, that the fundamental rights of the

American colonies were first openly and boldly proclaimed.”<sup>163</sup> Yet controversy about Otis’s speech and challenges to his historical reputation persisted. Even today, the general reputation of Otis as a political thinker remains uneven, a point emphasized by Richard A. Samuelson, who described Otis as “the man who sparked the revolution that he tried to prevent.”<sup>164</sup> Some scholars have argued that Otis’s later writing demonstrates a “complete defection on constitutional grounds” from the advanced positions he articulated in the early 1760s.<sup>165</sup> In contrast, others have said that “the ‘wavering’ or ‘retreat’ often referred to in secondary accounts is found neither in his writings nor his recorded speeches,” and have acknowledged “the significance of Otis’s contribution to a radical conversation within Western liberal thought.”<sup>166</sup> The influence of the Writs of Assistance speech also continues to be a matter of scholarly dispute. While many historians have asserted that the speech laid “a foundation for independence” and “was one of the direct causes, though distant in point of time, which led up to the American Revolution,” others have maintained that the speech “cannot possibly be made out as arousing a popular animosity against writs of assistance” and that the historic importance of the speech “with reference to the American Revolution, has doubtless been overestimated by some writers.”<sup>167</sup>

O. M. Dickerson is one who doubts the influence of Otis’s speech, arguing that, “not one-tenth of one percent of the total population of the colony could have heard” it.<sup>168</sup> Joseph Frese, on the other hand, has argued that the arguments advanced by Otis “were used throughout the entire controversy and copies of them were shipped from colony to colony.”<sup>169</sup> Frese is among the majority of Otis scholars who have affirmed that the Writs of Assistance speech “raised the fundamental question as to the extent to which

Parliament could exercise sovereign powers within the Empire.”<sup>170</sup> In the end, however, it is impossible to reconstruct any direct line of influence from Otis’s speech to the Declaration of Independence. And, indeed, an event such as the Revolution cannot be reduced to a single cause such as a 1761 Boston legal hearing.

Yet, there is good reason to continue to hold Otis’s speech in high esteem in the chain of events that would eventually culminate in the colonies’ move for separation from Great Britain. First, there is little doubt about the influence Otis’s speech had on John Adams. As George Bancroft wrote, when Adams witnessed the Writs of Assistance oration, he “caught the inspiration which was to call forth his own heroic opposition to British authority.”<sup>171</sup> It is also certain, as Moses Coit Tyler recognized, that “Otis’s speech against writs of assistance made him at once a leader of public opinion in New England respecting the constitutional rights of the colonies.”<sup>172</sup> Even Thomas Hutchinson, hardly an Otis devotee, testified that after the writs of assistance case, “the town of Boston, at their next election, shewed the sense they had of his merit, by choosing him [Otis] one of their representatives in the general assembly.”<sup>173</sup> From his position in the Massachusetts General Court, Otis became the acknowledged leader of the opposition against the royal inclinations of Governor Bernard and Lt. Governor Hutchinson. His leadership in the House afforded him a platform from which he could articulate the political philosophy that best represented early colonial opposition to Britain, a philosophy that “laid a broad basis for American political theory on natural law.”<sup>174</sup>

Otis’s status in the House, and his opposition leanings, in turn, led to his participation as a Massachusetts delegate to the Stamp Act Congress of 1765. At that

Congress, Otis shared his political views with representatives from other colonies and was remembered as an effective orator and opinion leader. “How often have I listened to the encomiums pronounced on his eloquent speeches delivered in that illustrious body,” Caesar Rodney wrote to John Adams.<sup>175</sup> It was at that Congress in 1765 that Otis first met John Dickinson, who later entrusted to Otis drafts of his famous *Letters from a Farmer in Pennsylvania*. “I do not forget the Obligations, which all Americans are under to you in particular, for the indefatigable Zeal and undaunted Courage you have shewn in defending their Rights,” Dickinson wrote in 1768.<sup>176</sup> Dickinson addressed the Townshend writs in his ninth Farmer’s letter, a copy of which he sent to Otis prior to its publication. Dickinson’s letter demonstrates the confluence of opinion between the two men. “I am well aware, that writs of this kind may be granted at home, under the seal of the court of exchequer,” Dickinson wrote. “But I know also, that the greatest asserters of the rights of Englishmen have always strenuously contended that such a power was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man’s house as his castle, or a place of perfect security.”<sup>177</sup>

In 1773, opposition to writs of assistance arose in Connecticut, and the Committee of Correspondence from that colony sent to Massachusetts for some advice. In reply, Massachusetts sent along the “minutes of the arguments made by Mr. Thacher and Mr. Otis before the Judges of the Superior Court of this Province against such a writ being Granted here.”<sup>178</sup> In short, writs of assistance remained a source of controversy, and the objections registered against them throughout the colonies followed in principle and form the arguments advanced by Otis in 1761. In this regard, Otis made a substantial early contribution to the rhetoric of American rights. That rhetoric was expanded and repeated

in his pamphlets, in his legislative speeches, in Boston town meetings, and in the Stamp Act Congress. In light of all this, there are grounds for concluding that Otis's speech on writs of assistance was instrumental in launching opposition to "taxation without representation," and in provoking "a far-reaching discussion of parliamentary sovereignty."<sup>179</sup>

Then there is the influence of Otis's argument on the legal issues involved in the case. The Writs of Assistance speech was only incidentally a political statement. In its context, as a rhetorical response to immediate circumstances, Otis's argument was forensic. While some of the disputes addressed in the trial were of mere local significance, limited only to the outcome of the particular case, other issues were of more lasting importance. On a practical level, if writs of assistance were ruled to be legal, customs enforcement in Boston would be both vigorous and effective. But a favorable ruling by the Massachusetts court would not reach to the other colonies, and could have little influence on judicial proceedings or legal philosophy in the mother country. The constitutional issues, however, while not settled in a manner that satisfied Otis and his colonial colleagues, did not disappear from the legal landscape, and indeed had a lasting and undeniably profound influence on later American legal development. That influence can be seen in the search protections included in early state constitutions, in the Fourth Amendment to the United States Constitution, and in the principle of judicial review.

Otis's opposition to general writs of assistance emerged out of his common law understanding of the liberties of the subject. Otis relied on what Leonard Levy has called "the rhetorical tradition against general searches" that originated in English cases argued by Sir Edward Coke and Sir Matthew Hale,<sup>180</sup> and his 1761 argument "represented the



apotheosis of long-building sentiment in Massachusetts against generalized invasion of private homes by the government.”<sup>181</sup> His objection to general searches on grounds of natural rights and common law is rightly understood as one source of the Fourth Amendment protections against illegal search and seizure. To trace the influence of Otis’s argument, we must once again turn to John Adams. As a witness to the Writs of Assistance speech, and as a lawyer trained in English common law, Adams early formed his own opinion about the limits of the government’s power to enter private dwellings and search for incriminating evidence. In 1779 when Adams sat down to draft the Massachusetts Constitution, he included in that document the following provision:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.<sup>182</sup>

The influence of the Writs case on Adams’s thinking is obvious. Later, when drafting the Bill of Rights, the framers of the United States Constitution employed similar language:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

According to Davies, the framers of the Constitution “aimed the Fourth Amendment precisely at banning Congress from authorizing use of general warrants.”<sup>183</sup> As Levy states, “a straight line of progression runs from Otis’s argument in 1761 to Adams’s framing of Article XIV of the Massachusetts Declaration of Rights of 1780 to James Madison’s introduction of the proposal that became the Fourth Amendment.”<sup>184</sup> What is taken for granted today as a right cherished by Americans was early and forcefully articulated by James Otis in the Writs of Assistance trial.

No less important is the influence of Otis’s Writs of Assistance argument on the doctrine of judicial review. Otis sought to have the Superior Court of Massachusetts disallow general writs on constitutional grounds. He maintained that “An act against the constitution is void.” But it remained to be determined who would judge such an act unconstitutional. The presumption in 1761 was that Parliament would discern whether its own statutes were consistent with the liberties of the subject. What Otis proposed was that the executive courts, judges whose duty it was to implement and enforce the laws passed by Parliament, should also have the role of measuring the legality of such statutes and of nullifying those that violated natural law or were contrary to established constitutional principles. As Horace Gray wrote, “Otis, while he recognized the jurisdiction of Parliament over the Colonies, denied that it was the final arbiter of the justice and constitutionality of its own acts.” Instead, Gray explained, Otis “contended that the validity of statutes must be judged by the Courts of Justice; and thus foreshadowed the principle of American Constitutional Law, that it is the duty of the

judiciary to declare unconstitutional statutes void.”<sup>185</sup> Otis’s oration let loose upon the American legal landscape the principle “which in its final form became the American doctrine of judicial supremacy.”<sup>186</sup> Evaluated from a more distant historical vantage, then, few speeches have had a more lasting impact on jurisprudence and legal practice in the United States. Indeed, it is fair to say that few American legal speeches compare in importance to Otis’s Writs of Assistance speech. If for no other reason than its long-range legal influence, Otis’s oration has rightly been preserved and transmitted to us, and properly remains among the most essential forensic texts in American history.

### **Conclusion**

With this reexamination of James Otis’s Writs of Assistance speech we have a more profound understanding of the importance of this very early statement of opposition to British policy. This close study of the writs trial, and this rigorous historical testing of the reliability of John Adams’s recollections, encourages a greater appreciation of Otis’s contribution to the patriot cause. Tracing the textual evolution of Otis’s discourse has yielded an artifact that is more authentic and accurate than any published since the speech was delivered. Moreover, the investigation and analysis of the historical evidence has produced a more comprehensive understanding of the substance and the radical implications of the Writs of Assistance speech. Now, we understand the value of that address and its status within the rhetorical legacy of the American Revolution. With this examination, we now grasp the significance of Otis’s speech better than at anytime since John Adams recorded his notes in the Boston courtroom in 1761.

While we still cannot know for certain all the elements of Otis’s four- or five-hour argument, and have lost forever the contours and details of his eloquence, nevertheless

we have inherited text enough to serve as an iconic representation of his courageous and penetrating performance. After the Revolution, James Otis's oration resonated with those in the early Republic who understood that liberty required a regular, vigorous defense, and who rated eloquence as primary among the civic virtues. In recovering Otis's performance, and assigning it a respected station in the scripture of our civil religion, they held up for their own posterity an example of the patriot orator, the eloquent American statesman, the defender of liberty, the "Vindicator of American Rights," the man who started the Revolution.<sup>187</sup>

Whether Otis's speech qualifies as an oratorical masterpiece or not, it was quickly considered worthy of inclusion in school readers and anthologies, and holds its place today as among the most important statements, not only of Revolutionary doctrine, but also of legal principles still at work in, still essential to, our civic culture. A man's house is still his castle. As both James Otis and John Adams understood, the legal principle involved in the Writs case is central to the protection of liberties from the encroaching power of the government. As those liberties may once again be threatened, to know the value of James Otis's Writs of Assistance address is the duty of every American citizen.

ENDNOTES

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<sup>1</sup> *The Boston Gazette and the Country Journal*, 26 May 1783. The same notice, with minor variations ran in *The Providence Gazette and Country Journal* (31 May), *The New-Hampshire Gazette and General Advertiser* (31 May), *The Massachusetts Spy and Worcester Gazette* (5 June), and *The Pennsylvania Gazette* (9 June).

<sup>2</sup> [Thomas Dawes] “On the Death of the Honourable James Otis, Esq.” *The New-Hampshire Gazette and General Advertiser*, 7 June 1783. The attribution to Dawes is made by William Tudor [Jr.], *The Life of James Otis of Massachusetts: Containing Also, Notices of Some Contemporary Characters and Events From the Year 1760 to 1775* (Boston: Wells & Lilly, 1823), 486. The ode was published again in 1819, included amidst letters from John Adams to William Tudor on the subject of Otis and the Writs case. See *Novanglus and Massachusettensis; or Political Essays, published in the years 1774 and 1775, on the principal points of controversy between Great Britain and her Colonies. . . .* (Boston: Hews & Goss, 1819), 232; The “Ode” reappears in Lydia Maria Child’s fictional *The Rebels, Or Boston Before the Revolution* (Boston: Cummings, Hilliard, & Co., 1825), 45.

<sup>3</sup> Daniel Webster, “Adams and Jefferson,” *Works of Daniel Webster*, vol. I (Boston: Little & Brown, 1851), 121.

<sup>4</sup> George Bancroft, *History of the United States, from the Discovery of the American Continent*, vol. 4 (Boston: Little, Brown & Co., 1856), 414.

<sup>5</sup> John Fiske, “Thomas Hutchinson, Last Royal Governor of Massachusetts,” in *Essays Historical and Literary*, vol. 1 (New York: Macmillan, 1902), 26. Fiske is paraphrasing 1 Kings 18:44, thereby comparing Otis to the prophet Elijah.

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<sup>6</sup> John Clark Ridpath, *James Otis, the Pre-Revolutionist* (Milwaukee: H. G. Campbell, 1903), 57-58, 47. In the estimation of Thomas Wentworth Higginson, Otis's oration, along with Patrick Henry's "Liberty or Death" was "one of the two great speeches of the Revolution," (Thomas Wentworth Higginson, *American Orators and Oratory* [Cleveland: Imperial Press, 1901], 50-51.

<sup>7</sup> John T. Morse, Jr., *John Adams* (New York: Houghton, Mifflin, 1924), 23.

<sup>8</sup> Lawrence Henry Gipson, *The Coming of the Revolution, 1763-1775* (New York: Harper & Brothers, 1954), 39.

<sup>9</sup> A. J. Langguth, *Patriots: The Men Who Started the American Revolution* (New York: Simon and Schuster, 1988), 22. See also Kathryn Griffin Swegart, "The Man Who Sparked the Revolution," *Yankee Magazine* (June 1993), 58.

<sup>10</sup> This study extends the work of earlier rhetorical historians and critics who have taken up Otis's speech. See: Lorenzo Sears, *The History of Oratory* (Chicago: S. C. Griggs & Co., 1896), 309-310; George V. Bohman, "The Colonial Period," in *A History and Criticism of American Public Address*, ed. William Norwood Brigance, vol. 1 (New York: Russell & Russell, 1960), 3-54, esp. 39-43; Jerald Banninga, "James Otis on the Writs of Assistance: A Textual Investigation," *Speech Monographs* 27 (1960): 351-352; Robert Oliver, *History of Public Speaking in America* (Boston: Allyn and Bacon, 1965), 45-51; James A. Benson, "James Otis and the 'Writs of Assistance' Speech—Fact and Fiction," *Southern Speech Journal* 34 (1969): 256-263; Barnet Baskerville, *The People's Voice: The Orator in American Society* (Lexington: University of Kentucky Press, 1979), 7-31; Michael Riccards, "James Otis, Colonial Leader and Lawyer," in *American Orators*

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*Before 1900: Critical Studies and Sources*, ed. Bernard K. Duffy and Halford R. Ryan (New York: Greenwood, 1987), 299-306.

<sup>11</sup> John Adams to William Tudor, 17 June 1818, *Works of John Adams* 10:322. Essential sources for understanding the details of the Writs of Assistance case include: Horace Gray, "Writs of Assistance," Appendix I in Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, between 1761 and 1772*, ed. Samuel M. Quincy (Boston: Little, Brown, 1865), 395-511, L. Kinvin Wroth and Hiller B. Zobel, eds., *Legal Papers of John Adams* (Cambridge: Belknap Press, 1965), 2:98-147, and M. H. Smith, *The Writs of Assistance Case* (Berkeley: University of California Press, 1978). All these studies were helpful in the construction of my account of the case.

<sup>12</sup> George Gregerson Wolkins, "Daniel Malcom and Writs of Assistance," *Massachusetts Historical Society Proceedings* 58 (1925): 26.

<sup>13</sup> Wolkins, "Malcom and Writs of Assistance," 40-41.

<sup>14</sup> Smith, *Writs of Assistance Case*, 559.

<sup>15</sup> Hiller B. Zobel, *The Boston Massacre* (New York: W. W. Norton, 1970), 13.

<sup>16</sup> For an example of the commission for a customs officer, see O. M. Dickerson, "Writs of Assistance as a Cause of the Revolution," in *The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene*, ed. Richard B. Morris (New York: Columbia University Press, 1939), 45.

<sup>17</sup> Wolkins, "Malcom and Writs of Assistance," 10.

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<sup>18</sup> Dickerson, “Writs of Assistance as a Cause of the Revolution,” 40.

<sup>19</sup> This was precisely the point raised by Jeremiah Gridley in the rehearing of the Writs case in November 1761. “This is properly a Writ of Assistants, not Assistance,” Gridley said. It is meant “not to give the Officers a greater Power, but as a Check upon them. For by this they cannot enter into any House, without the Presence of the Sheriff or civil Officer, who will be always supposed to have an Eye over and be a Check upon them.” See: Quincy, *Reports*, 56-57. See also Gipson, *Coming of the American Revolution*, 35-36.

<sup>20</sup> Mr. Leftwich, Secretary to the Commissioners of H. M. Customs and Excise, to George G. Wolkins, 7 April, 1927 in Wolkins, “Writs of Assistance in England,” *Proceedings of the Massachusetts Historical Society* 66 (1942): 362.

<sup>21</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:138.

<sup>22</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:98.

<sup>23</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:98-99.

<sup>24</sup> Joseph R. Frese, “Early Parliamentary Legislation on Writs of Assistance,” *Publications of the Colonial Society of Massachusetts* 38 (1959): 319. See also Gray, “Writs of Assistance,” 397-400.

<sup>25</sup> Frese, “Early Legislation,” 324. The 1660 act is referred to in the legal documentation as 12 Car. II. c. 19.

<sup>26</sup> Frese, “Early Legislation,” 324-325.

<sup>27</sup> Frese, “Early Legislation,” 333. This act is referred to in the legal documentation as 14 Car. II. c 11.



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<sup>28</sup> Frese, “Early Legislation,” 334-335. Wroth and Zobel maintain that “The actual intent of Parliament in the Act of 1662 . . . cannot be determined,” but that “a course of practice under the statute soon developed which was a surer guide to construction in the courts than ambiguous language and incomplete history,” (Wroth and Zobel, *Legal Papers of John Adams* 2:109).

<sup>29</sup> Frese, “Early Legislation,” 353-354. This Act is referred to in the legal documentation as 7 & 8 Wm. III. c. 22

<sup>30</sup> The act is referred to in the legal documentation as 1 Anne stat. I, c. 8. During the Writs trial, both Gridley and Otis mistakenly refer to the act as 6 Anne, although the error may have been John Adams’s. See Smith, *Writs of Assistance Case*, 130, 273; Wroth and Zobel, *Legal Papers of John Adams* 2:112-113.

<sup>31</sup> Joseph R. Frese, “James Otis and Writs of Assistance,” *New England Quarterly* 30 (1957): 497; Wroth and Zobel, *Legal Papers of John Adams* 2:112.

<sup>32</sup> Thomas Hutchinson, *History of the Colony and Province of Massachusetts-Bay*, ed. Lawrence Shaw Mayo, vol. 3 (Cambridge: Harvard University Press, 1936), 67; Wroth and Zobel, *Legal Papers of John Adams* 2:100. See also Lawrence Henry Gipson, “Aspects of the Beginning of the American Revolution in Massachusetts Bay, 1760-1762,” *Proceedings of the American Antiquarian Society* 67 (1958): 11- 32.

<sup>33</sup> Gipson, *Coming of the Revolution*, 32-33. For the complete Pitt instructions see Gray, “Writs of Assistance,” 407-408.

<sup>34</sup> John Adams, *Diary and Autobiography* ed. L. H. Butterfield, 4 vols. (New York: Atheneum, 1964), 3:275. Gray, “Writs of Assistance,” 409, doubts the Cockle connection

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and the Salem origins of the case, and M. H. Smith, who is skeptical of some of Adams's other recollections, says that on the matter of James Cockle and the Salem application, "John Adams's testimony is in essentials consistent and convincing" (*Writs of Assistance Case*, 134). More important is the opening sentence of Jeremiah Gridley's speech in the trial, wherein he introduces himself as representing "Mr. Cockle & others." On the profitable relationship between Cockle and Francis Bernard, see Zobel, *Boston Massacre*, 19-23.

<sup>35</sup> Hutchinson, *History of the Colony*, 3:68. See also Adams, *Diary and Autobiography* 3:275. Adams was mistaken, however, in believing that Sewell had died just after, rather than before, the Cockle application. Sewell died on September 10, 1761.

<sup>36</sup> Smith, *Writs of Assistance Case*, 538, 142. The article from the *London Magazine* was also reprinted in the *Boston Evening Post*, 19 January 1761. Hutchinson also refers to "a London magazine" as the "authority" for doubts about the legality of general writs (*History of the Colony*, 3:68).

<sup>37</sup> Smith, *Writs of Assistance Case*, 141.

<sup>38</sup> Hutchinson, *History of the Colony*, 3:63. See also Shipton, "James Otis," 250-252; Smith, *Writs of Assistance Case*, 202-230; John R. Galvin, *Three Men of Boston* (New York: Thomas Y. Crowell, 1976), 14-28; John J. Waters, Jr., *The Otis Family in Provincial and Revolutionary Massachusetts* (Chapel Hill: University of North Carolina Press, 1968), 118-121; John C. Miller, *Sam Adams: Pioneer in Propaganda* (Stanford: Stanford University Press, 1936), 32-34.

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<sup>39</sup> John Adams to Benjamin Waterhouse, 6 February 1818, *Works of John Adams* 10:281.

On the feud between the Otis and Hutchinson clans see John J. Waters and John A. Schutz, "Patterns of Massachusetts Colonial Politics: The Writs of Assistance and the Rivalry between the Otis and Hutchinson Families," *William and Mary Quarterly*, 3rd Ser., 24 (1967): 543-567. See also Peter Shaw, "Their Kinsman, Thomas Hutchinson: Hawthorne, the Boston Patriots, and His Majesty's Royal Governor," *Early American Literature* 11 (1976): 183-190.

<sup>40</sup> *Wroth and Zobel, Legal Papers of John Adams*\_ 2:139. In the opening of his Writs of Assistance speech, Otis explained that as Advocate General, "I was desired by one of the court to look into the books, and consider the question now before the court."

<sup>41</sup> Smith, *Writs of Assistance Case*, 321.

<sup>42</sup> Waters, *Otis Family* 119. Hutchinson took office on December 30, 1760, the same day George III was proclaimed king in Boston; news of the death of George II had reached Boston on 27 December. See Hutchinson, *History of the Province*, 3:64. The Chief Justice's first official duties began January 27, 1760, less than a month before the Writs trial. (Gray, "Writs of Assistance," 411).

<sup>43</sup> Adams to Tudor, 29 March 1817, *Works of John Adams* 10:247.

<sup>44</sup> *Wroth and Zobel, Legal Papers of John Adams*\_ 2:112-114. Otis's clients' petition for a hearing to oppose the writs is filed under the title "Petition of Greene, et al." Other sources list the trial as "Paxton's Case," after Charles Paxton, another customs officer who had also applied for writs and who was first to have his writ granted after the case concluded. See Quincy, *Reports*, 51, and Gray, "Writs of Assistance," 412-414.

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<sup>45</sup> Otis spoke on the second Tuesday of the February term in 1761. Some scholars have taken that to be the second Tuesday of the month, and have incorrectly dated the speech February 10. However, the February term began on Tuesday, February 17, making the correct date for the speech February 24 (see Wroth and Zobel, *Legal Papers of John Adams* 2:112). The petitions which gave rise to the controversy also indicate that the hearing would be held “the third Tuesday of February Adom. 1761” (Gray, “Writs of Assistance,” 412-413).

<sup>46</sup> Adams to Tudor, 29 March 1817, *Works of John Adams* 10:244-45.

<sup>47</sup> Adams to Tudor, 9 July 1818, *Works of John Adams* 10:327.

<sup>48</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:123-138. All quotations from these courtroom arguments are taken from this volume. See also Gray, “Writs of Assistance,” 469-482, and the helpful notes therein. Both the Gridley and Thacher speeches were first printed in the latter work.

<sup>49</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:136-138.

<sup>50</sup> Adams, *Diary and Autobiography* 3:275.

<sup>51</sup> Smith, *Writs of Assistance Case*, 293. In his account of the trial, George Richards Minot concludes the same, writing that “Mr. Thacher, an eminent lawyer, being ordered by the Court to search for precedents, reported that eh found no such writ in the ancient books: that the most material question was, whether the practice of the Exchequer was good ground for this Court,” George Richards Minot, *Continuation of the History of the Province of Massachusetts Bay, from the Year 1748*, vol. 2 (Boston: J. White & Co., 1803), 90.

<sup>52</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:138-139.

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<sup>53</sup> Quotations from the Otis speech are taken from Wroth and Zobel, *Legal Papers of John Adams* 2:139-144.

<sup>54</sup> Hutchinson, *History of the Province* 3:68. Later, Hutchinson took explicit credit for convincing his fellow judges to grant the writs. “The court seemed inclined to refuse to grant them” he wrote in 1765, “but I prevailed with my brethren to continue the cause until the next term, and in the mean time wrote to England, and procured a copy of the writ, and sufficient evidence of the practice of the Exchequer there, and the like writs have ever since been granted here,” (Hutchinson to Secretary Conway, 1 October 1765, cited by Gray, “Writs of Assistance,” 415).

<sup>55</sup> George G. Wolkins, “Bollan on Writs of Assistance,” *Massachusetts Historical Society Proceedings* 59 (1926): 414-421.

<sup>56</sup> As Hutchinson recollected, “at the next term, it appeared that such writs issued from the exchequer, of course, when applied for; and this was judged sufficient to warrant the like practice in the province.” Hutchinson, *History of the Province* 3:68.

<sup>57</sup> Gray, “Writs of Assistance,” 486; Quincy, *Reports*, 57.

<sup>58</sup> Adams to Tudor, 29 March 1817, *Works of John Adams* 10:248.

<sup>59</sup> Hutchinson, *History of the Province* 3:68-69. The first writ was granted to Charles Paxton on December 2. James Cockle, whose Salem application started the case, received his writ on December 4. See Gray, “Writs of Assistance,” 414, 422.

<sup>60</sup> Smith, *The Writs of Assistance Case*, 559. See also Gray, “Writs of Assistance,” 419.

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<sup>61</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:106; Lorenzo Sears, *History of Oratory* (Chicago: S. C. Griggs & Co., 1896), 310; E. L. Magoon, *Orators of the American Revolution*, 3rd edition (New York: Baker & Scribner, 1849), 80-81; Barnet Baskerville, *The People's Voice: The Orator in American Society* (Lexington: University of Kentucky Press, 1979), 11; According to Charles Mullett, it has been “rumors piled on rumors” which have “made him the author of a clarion call to revolt,” (Charles Mullett, *Fundamental Law and the American Revolution, 1760-1776* [New York: Columbia University Press, 1933], 81).

<sup>62</sup> The following narrative tracing the career of Otis's speech is based on a number of helpful sources. Samuel A. Green, “Otis Against the Writs of Assistance,” in *Proceedings of the Massachusetts Historical Society*, 2nd Ser., 6 (1891): 190-196, gives a good account of the earliest publications of the speech. For more on the circumstances leading to the appearance of the speech in 1773, see Smith, *Writs of Assistance Case*, 236-239. See also Jerald Banninga, “James Otis on the Writs of Assistance: A Textual Investigation,” *Speech Monographs* 27 (1960): 351-352. See the Appendix to this chapter for a definitive and annotated text.

<sup>63</sup> See Wroth and Zobel, *Legal Papers of John Adams*, 2:123-134. There is some confusion as to the proper title for the notes John Adams took during the trial, and kept among his legal papers. Adams himself is responsible for some of the confusion. Charles Francis Adams first published these trial notes in the second volume of his grandfather's *Works* in 1856, where they are described as the “abstract of the argument.” However, that document is not the same text that most other scholars refer to as the Abstract of Otis's speech. The same notes from the trial appeared again in print in 1865

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as “John Adams’s Report of the First Argument,” in Gray, “Writs of Assistance,” 469-482. L Kinvin Wroth and Hiller B. Zobel reprint the notes as the “Adams’ Minutes of the Argument,” in *Legal Papers*, 2:123-134. But what Wroth and Zobel call “Minutes” are not the same “Minutes” that Adams refers to in his *Autobiography* as having appeared in George Richards Minot’s *Continuation of the History of the Province of Massachusetts Bay* in 1803 (*Diary and Autobiography* 3:276). That text is what later is commonly referred to as the Abstract of Otis’s speech. Smith seems to get it right when he refers to the trial notes as “John Adams’s contemporaneous notes,” (*Writs of Assistance Case*, 543-547).

<sup>64</sup> In a diary entry dated “April, 1761,” Adams refers to the “Abstract,” which by then was apparently complete (*Diary and Autobiography* 1: 210). To read Adams’s Abstract out loud, and slowly, takes about eighteen minutes. However, in his *Autobiography*, Adams stated that “the argument continued several days,” although he was likely referring to the length of the entire hearing, and not only Otis’s speech (*Diary and Autobiography* 3:276). In a letter to William Tudor, Adams said the Otis speech was “four or five hours,” (Adams to Tudor, 1 June 1818, *Works of John Adams* 10:314). Francis Bernard, Governor of Massachusetts at the time of the case, also recalled the trial lasting “three days successively” (Francis Bernard to William Franklin, 24 March 1768, cited in Smith, *Writs of Assistance Case*, 258). Adams also drafted similar digests of the arguments by the other attorneys in the case.

<sup>65</sup> Smith, *Writs of Assistance Case*, 319.

<sup>66</sup> On the various surviving versions of Adams’s “Abstract of the Argument,” see Wroth and Zobel, *Legal Papers of John Adams* 2:123, 134-35.

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<sup>67</sup> Wroth and Zobel note that “no copy in JA’s hand has been found,” although Adams’s original was “the common parent” of all the versions subsequently published. See *Legal Papers of John Adams* 2:135. In a letter to Hezekiah Niles of 5 February 1819, Adams reports that in 1767 he had sent to Jonathan Sewell “a copy of the notes I had taken of Mr. Otis’s argument against writs of assistants.” The 1767 letter to Sewell has been lost, but we do know that Adams had not sent the original Abstract, since it was still among his papers when Austin sent it to the *Massachusetts Spy* in 1773. See *Papers of John Adams*, ed. Robert J. Taylor (Cambridge: The Belknap Press, 1977), 1:211.

<sup>68</sup> See Smith, *Writs of Assistance Case*, 237-238. Smith prints the *Massachusetts Spy* version of the speech in his “Appendix J” (551-555). He argues that “there is no evidence that the *Spy* gave other than a straight rendition of what the original Abstract actually said” (245). Wroth and Zobel also use the same version as the basis for what they describe as “the most complete rendition possible today” of Adams’s “Abstract of the Argument” (*Legal Papers of John Adams* 2:134-144).

<sup>69</sup> George Richards Minot, *Continuation of the History*, 91-99. In the margin of his book, Minot indicates that his source is “M.S. minutes taken at the bar,” (99). How Minot came to possess the “minutes” he claimed to have, and what version of them he used for his *History*, has been a matter of considerable scholarly investigation. Smith’s treatment of the relevant issues is thorough and convincing, and deals with textual variations at a level of detail beyond the scope of this essay (*Writs of Assistance Case*, 231-268). See also: Green “Otis Against the Writs of Assistance,” and Banninga, “James Otis on the Writs of Assistance.” My own speculation, for which I have only circumstantial evidence, is that Minot had a copy of the Abstract provided by William Tudor, Adams’s law clerk. Tudor



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was in the office at the same time as Jonathan Williams Austin. If Austin knew of the “Abstract,” then most assuredly so did Tudor, and he may have made his own copy. As Adams noted, George Richards Minot was Tudor’s law student and perhaps obtained the “minutes” he claimed to possess from *his* mentor. (Adams to Tudor, 29 March 1818, Wroth and Zobel, *Legal Papers of John Adams*\_2:106-107.).

At the same time, Minot opens his account of the Otis speech by “lamenting that we cannot recover at this day many elegant rhetorical touches and weighty arguments, which were unavoidably omitted.” This preface is remarkably similar to a passage added to the end of the Adams “Abstract” in later editions. That passage, however, did not originate with Minot, but appeared only in the manuscript version of the “Abstract” in Joseph Hawley’s *Commonplace Book*. See Wroth and Zobel, *Legal Papers of John Adams* 2:144. This would suggest that Minot had Hawley’s version (or a copy of it) as his source, or that the passage was in the original version by Adams (or a copy of that made by Tudor or someone else.).

<sup>70</sup> “I took a few minutes, in a very careless manner,” Adams wrote, “which by some means fell into the hands of Mr. Minot, who has inserted them in his history” (*Diary and Autobiography* 3:276). See also John Adams to Mercy Otis Warren, 20 July 1807, *Correspondence between John Adams and Mercy Warren*, ed. Charles Francis Adams (1878; reprint, New York: Arno, 1972), 340, and Wroth and Zobel, *Legal Papers of John Adams* 2:106-107. As the testimony of Adams makes clear, Henry Steele Commager and Milton Cantor are incorrect in asserting that it was G. R. Minot who “expanded these notes into a version of the argument,” *Documents of American History*, vol. 1, 10th

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Edition (Englewood Cliffs, NJ: Prentice Hall, 1988), 45-47. See also Oliver, *History of Public Speaking in America*, 50; *Baskerville People's Voice*, 27.

<sup>71</sup> Adams to Tudor, 16 November 1816, *Works of John Adams* 10:230- 232.

<sup>72</sup> Adams to Tudor, 18 December 1816, *Works of John Adams* 10:233.

<sup>73</sup> Adams to Tudor, 29 March 1817, *Works of John Adams* 10:247-248. Adams had apparently lost the original abstract when Jonathan Williams Austin removed it from his legal papers and given it to the *Massachusetts Spy* in 1773.

<sup>74</sup> See *Niles' Weekly Register* 14 (March 7, 1818): 17-20; (May 9, 1818): 177-179; (June 13, 1818): 257-260; (July 11, 1818): 339-340; (July 25, 1818): 364-369. Adams knew that Niles not only had a weekly outlet to the general public, but also that the Baltimore editor was collecting material for his own historical work on the Revolution. In 1822, Niles published *Principles and Acts of the Revolution in America: or, An attempt to collect and preserve some of the speeches, orations, & proceedings, with sketches and remarks belonging to the men of the Revolutionary period in the United States* (Baltimore: William Ogden Niles, 1822), but it did not include Otis's speech.

<sup>75</sup> *Novanglus and Massachusettensis*, 229. The editors deleted the speech text from the Adams letter to Tudor, but included the reference to the published version in the Minot book.

<sup>76</sup> Adams to Warren, 20 July 1807, *Correspondence between John Adams and Mercy Warren*, 340. See Adams's own copy of volume 2 of George Richards Minot's *Continuation of the History of the Province of Massachusetts Bay* (pp. 91-99) in the John

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Adams Collection, Boston Public Library. Charles Francis Adams used the markings in his grandfather's edition of Minot as the basis for the "correct version" he published in the *Works of John Adams* 2:523.

<sup>77</sup> Adams to Tudor, 29 March 1817, *Works of John Adams* 10:246.

<sup>78</sup> *Niles' Weekly Register* 14 (April 25, 1818): 137-140. In the letter from Adams to Tudor published by Niles, Adams tells Tudor "the underscored lines are interpolations," and then for good measure quotes both passages. Horace Gray argues that the offending passages were likely in the original Adams Abstract, and that in striking them Adams "was guided by his taste rather than his notes or his memory," ("Writs of Assistance," 479). Wroth and Zobel (*Legal Papers of John Adams*, 2:142) agree, as does M. H. Smith (*Writs of Assistance Case*, 239-246). Smith, however, establishes definitively that later copiers did take significant liberties with the manuscript, adding a passage from an English legal case of 1765 that could not possibly have originated with Otis.

<sup>79</sup> *Niles' Weekly Register* 14 (April 25, 1818): 138. The Biblical reference is to the final judgment as described in 1 Timothy 4:16: "For the Lord himself shall descend from heaven with a shout, with the voice of the archangel, and with the trump of God: and the dead in Christ shall rise first" (KJV).

<sup>80</sup> *Niles' Weekly Register* 14 (April 25, 1818): 138. The Biblical reference is to Genesis 9:25: "And he said, Cursed be Canaan, a servant of servants shall he be unto his brethren" (KJV). In addition to these two passages, one other variation has appeared in the final lines of some versions of the "Abstract": "It is the business of this court to demolish this monster of oppression, and to tear into rags this remnant of Starchamber tyranny-&c. The court suspended the absolute determination of this matter. I have omitted many

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authorities; also many fine touches in the order of reasoning, and numberless Rhetorical and popular flourishes” (see note 69 above). Because these lines never appeared in print during Adams’s lifetime he did not remark on them in any of his letters concerning the speech. But this passage was added early, as the lines appear in the manuscript copy in Joseph Hawley’s *Commonplace Book*. The first sentence of the passage, according to Horace Gray, was also in the manuscript copy, now lost, of Israel Keith (“*Writs of Assistance*,” 482). The editors of Adams’s legal papers include the passage as part of the “most complete rendition possible,” (Wroth and Zobel, *Legal Papers of John Adams* 2:134, 144). However, M. H. Smith has shown that at least the first sentence of the passage is taken from the case in English law of *Entick v. Carrington* (1765) and cannot have been original with Adams, (*Writs of Assistance Case*, 241).

<sup>81</sup> Tudor, *Life of Otis*, 494.

<sup>82</sup> The senior William Tudor, to whom Adams had written many letters about Otis, died July 8, 1819. In 1817 the younger Tudor, Otis’s biographer, wrote to Adams that he had “been constantly gratified in reading your most interesting letters to my father. I hope you may continue them from time to time, so that they may form documents which will tell hereafter,” (Tudor, Jr. to Adams 2 February 1817, *Adams Papers* microfilm reel 436). In the biography, Tudor lamented that Otis had “passed two entire days in destroying all his correspondence and other writings, and thus annihilated many records of his public services, and some literary productions, that would have furnished rich materials for his own history and that of his times,” (*Life of Otis*), 475. Adams had shared the same account with Hezekiah Niles, having learned from Otis’s daughter about

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how her father destroyed his papers (Adams to Niles 14 January 1818, *Works of John Adams* 10:277).

<sup>83</sup> Tudor, *Life of Otis*, 61.

<sup>84</sup> Tudor, *Life of Otis*, 87-88. The remark quoted here is taken from the letter to Hezekiah Niles of 14 January 1818 (*Works of John Adams* 10:276). The letter to Niles had also been published in *Novanglus and Massachusettensis*, 229-231, which is probably how Tudor came to know of it.

<sup>85</sup> Tudor, *Life of Otis*, 63-68.

<sup>86</sup> Minot, *Continuation of the History*, 2:94.

<sup>87</sup> Tudor, *Life of Otis*, 65.

<sup>88</sup> Minot, *Continuation of the History* 2:98-99. Neither Smith (*Writs of Assistance Case*), nor Wroth and Zobel (*Legal Papers of John Adams*), consider the Tudor version, or make note of the shortened text Tudor popularized, despite that fact that both spend considerable effort in documenting other textual variations.

<sup>89</sup> *Works of John Adams* 2:523.

<sup>90</sup> Jerald Banninga, "James Otis on the Writs of Assistance," 351. Banninga examined the following anthologies: David Josiah Brewer, ed. *The World's Best Orations*, vol. 8 (St. Louis: 1899); Chauncey M. Depew, ed., *The Library of Oratory* vol. 2 (Akron: 1902); Alexander Johnston and James Albert Woodburn, eds., *American Orations* vol. 1 (New York, 1896); Thomas B. Reed, ed., *Modern Eloquence* vol. 14 (Philadelphia:

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1903). To Banninga's list we can add Guy Carleton Lee, *Orators of America* (New York: G. P. Putnam's Sons, 1900); Alexander K. McClure, ed., *Famous American Statesmen & Orators* vol. 1 (New York: F. F. Lovell, 1902); William Jennings Bryan, ed., *The World's Famous Orations*, vol. 8 (New York: Funk and Wagnalls, 1906); Julian Hawthorne, ed., *Orations of American Orators*, vol. 1 (New York: The Co-Operative Publication Society, 1900).

The one exception I could find was Samuel Bannister Harding, ed., *Select Orations Illustrating American Political History* (1908; New York: Macmillan, 1930). Harding acknowledges that his text "differs in some essential particulars from the version usually printed" (6). Based on that text, his source was clearly Minot. In 1954, Paul M. Angle published the version that had been corrected by Charles Francis Adams (*By These Words: Great Documents of American Liberty in Their Contemporary Settings* [New York: Rand McNally, 1954], 30-37).

The Tudor version has also survived. See Houston Peterson, ed., *A Treasury of the World's Great Speeches* (New York: Grolier, 1965) and James Andrews and David Zarefsky, eds., *American Voices: Significant Speeches in American History, 1640-1945* (New York: Longman, 1989). Most of the internet versions available today are also from Tudor, though the source is seldom cited. For a discussion of Tudor's influence see Baskerville, *People's Voice*, 27-29.

<sup>91</sup> Adams to Tudor, 11 August 1818, *Works of John Adams* 10:344. In the same letter, Adams suggested that perhaps Tudor's "inquisitive and ingenious son" might take up that important historical work. Earlier he had given similar hints to Hezekiah Niles. In a letter to Niles he wrote that "it is greatly to be desired, that young men of letters in all the

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States, especially in the thirteen original States, would undertake the laborious, but certainly interesting and amusing task, of searching and collecting all the records, pamphlets, newspapers, and even handbills, which in any way contributed to change the temper and views of the people, and compose them into an independent nation.” He told Niles that “in 1760 and 1761,” there was “an awakening and a revival of American principles and feelings,” and that among those who sparked that revival was “first and foremost, before all and above all, James Otis.” (Adams to Niles, 13 February 1818, *Works of John Adams* 10: 283-284).

<sup>92</sup> Adams to Tudor, 9 July 1818, *Works of John Adams* 10:326.

<sup>93</sup> “Tudor’s Life of James Otis,” *North American Review* 16 (April, 1823): 341.

<sup>94</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:314. In the body of this letter, the “heads of discourse” are each expanded to paragraph length. In many anthologies, portions of the letter form part of the “text” of the speech by Otis presented to readers, and the excerpts are typically introduced with an editorial note such as that provided by William Jennings Bryan: “Of this famous speech by Otis,” he explained, “we have no report beyond this point except in the account which John Adams wrote down in the third person, as given in the paragraphs which follow,” (Bryan, ed. *World’s Famous Orations*, 8:32). See also McClure, *Famous American Statesmen and Orators* 1:54. For a recent instance of the publication of these “heads of discourse” see Andrews and Zarefsky, *American Voices*, 38-39.

<sup>95</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:317.

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<sup>96</sup> The letters are arranged chronologically, but interspersed with others to different correspondents. See *Works of John Adams* 10:244-362.

<sup>97</sup> Gray, "Writs of Assistance," 469. Gray, like several other scholars, sometimes seems to mistake Adams's correspondent, William Tudor Sr., with the author of the Otis biography.

<sup>98</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:107.

<sup>99</sup> Smith, *Writs of Assistance Case*, 383. Sandra Gustafson concludes that Adams offered a "mythic narrative," marked by "nostalgic enthusiasm," that "overstated the event for posterity," and "cast the impact of Otis's passion in terms that drastically collapse the sequence of events leading to war with Britain," *Eloquence is Power: Oratory & Performance in Early America* (Chapel Hill: University of North Carolina Press, 2000), 142-43, 152.

<sup>100</sup> Charles Francis Adams, *Works of John Adams* 10:362n. See also Bancroft, *History of the United States*, 4:417; John Gorham Palfrey, *History of New England*, vol. 5 (Boston: Little, Brown & Co., 1890), 236, 239.

<sup>101</sup> Adams to Tudor, 9 June 1818, *Works of John Adams* 10:317. The client was Mrs. Ames, mother of Fisher Ames, Federalist orator of the early republic.

<sup>102</sup> Adams to Tudor, 14 July 1818, *Works of John Adams* 10:332.

<sup>103</sup> Adams to Tudor, 9 June 1818, *Works of John Adams* 10:319.

<sup>104</sup> Adams to Tudor, 11 August 1818, *Works of John Adams* 10:344.

<sup>105</sup> Adams to Tudor, 11 August 1818, *Works of John Adams* 10:343, 346.



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<sup>106</sup> Adams to Tudor, 9 July 1818, *Works of John Adams* 10:326.

<sup>107</sup> Adams to Tudor, 9 July 1818, *Works of John Adams* 10:326-327.

<sup>108</sup> It is worth noting that at the time of the writs of assistance trial, William Tudor Sr. was not yet eleven years old. He did not serve as Adams's law clerk until after his graduation from Harvard in 1769.

<sup>109</sup> Adams to Tudor, 30 July 1818, *Works of John Adams* 10:338.

<sup>110</sup> Adams to Tudor, 21 August 1818, *Works of John Adams* 10:351.

<sup>111</sup> I will rely on the text given as "Adams's 'Abstract of the Argument'" in Wroth and Zobel, *Legal Papers of John Adams* 2:139-144. In his copy of Minot's *History*, Adams offered a marginal correction, substituting "discerned" for "descend," (John Adams Collection, Boston Public Library).

<sup>112</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:107; Charles Francis Adams, *Works of John Adams* 10:362n.

<sup>113</sup> Compare, for example, Adams to Tudor, 1 June 1818, *Works of John Adams* 10:315, with James Otis, "Rights of the Colonies Asserted and Proved," *Pamphlets of the American Revolution: 1750-1776*, ed. Bernard Bailyn, vol. 1 (Cambridge: Belknap Press, 1965), 423.

<sup>114</sup> Adams to Tudor, 5 April 1818, *Works of John Adams* 10:298-312. The pamphlet is published in *Some Political Writings of James Otis*, part I, *University of Missouri Studies* ed. Charles F. Mullett, vol. 4 (Columbia: University of Missouri, 1929), 11-44.

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<sup>115</sup> Adams to Wirt, 7 March 1818, *Works of John Adams* 10:292-294. See also Otis, “Rights of the Colonies Asserted and Proved,” 408-482; Adams to Tudor, 13 September 1818, in *Works of John Adams* 10:356.

<sup>116</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:314.

<sup>117</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10: 314.

<sup>118</sup> Otis, “Vindication of the Conduct of the House of Representatives,” 22-24.

<sup>119</sup> Otis, “Rights of the Colonies Asserted and Proved,” 426.

<sup>120</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:315.

<sup>121</sup> Otis, “Rights of the Colonies Asserted and Proved,” 439.

<sup>122</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:315-316.

<sup>123</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:127.

<sup>124</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:127n.

<sup>125</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:127

<sup>126</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:144 (capitals in original).

<sup>127</sup> Otis, “Rights of the Colonies Asserted and Proved,” 449.

<sup>128</sup> Adams to Tudor, 1 June 1818 *Works of John Adams* 10:316.

<sup>129</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:140.

<sup>130</sup> Otis, “Vindication of the Conduct of the House of Representatives,” 24.

<sup>131</sup> Otis, “Rights of the Colonies Asserted and Proved,” 430.

<sup>132</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:316.

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<sup>133</sup> Otis, “Vindication of the Conduct of the House of Representatives,” 43.

<sup>134</sup> Otis, “Rights of the Colonies Asserted and Proved,” 436.

<sup>135</sup> Adams to Tudor, 1 June 1818, *Works of John Adams* 10:316.

<sup>136</sup> The abstracts of the arguments by Gridley and Thacher are available in Wroth and Zobel, *Legal Papers of John Adams* 2:134-139, and in Gray, “Writs of Assistance,” 469-482. See also Quincy, *Reports*, 51-57, wherein are published summaries of the arguments given in the November rehearing of the case, as well as the abstract of the argument by Robert Auchmuty, second attorney for the Crown, who did not participate in the case at the February term.

<sup>137</sup> Adams to Tudor, 9 July 1818, *Works of John Adams* 10:325. For example, Adams says Otis introduced “the statute of King James II., chapter 4, ‘An act for granting to his Majesty an imposition upon all tobacco and sugar imported, &c.’” Adams also mentions the act controlling the trade in “wines and vinegar,” and the act regulating commerce in “foreign bone-lace, cutwork, embroidery, fringe, band-strings, buttons, and needlework.” See also the letter of Adams to Tudor, 11 August 1818, (*Works of John Adams* 10:343-346), in which Adams mentions the Molasses Act. In writing to Tudor, it is obvious that Adams was assisted by reference to his own law books and quoted directly from the statutes he claimed Otis had cited in 1761.

<sup>138</sup> Adams to Tudor, 14 July 1818, *Works of John Adams* 10:328.

<sup>139</sup> Adams to Tudor, 17 July 1818, *Works of John Adams*, 10:334. Sixteen years earlier, Adams had summarized Otis’s argument in the same way. “The Views of the English Government towards the Collonies and the Views of the Collonies towards the English Government, from the first of our History to that time, appeared to me to have directly in

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Opposition to each other, and were now by the imprudence of Administration, brought to a Collision” (*Diary and Autobiography* 3:276).

<sup>140</sup> Adams, in fact, addresses this concern directly in a letter to Tudor. He referenced the second edition of Joshua Gee’s *Trade and Navigation of Great Britain Considered*, printed in 1767. “This new edition,” Adams wrote, “could not be the edition that Mr. Otis produced in 1761.” The previous edition of Gee’s work was published in 1731. Adams to Tudor, 27 July 1818, *Works of John Adams* 10:335.

<sup>141</sup> See Joshua Child, *A New Discourse of Trade* (1690; London: J. Hodges, W. Meadows, C. Corbet, J. Jackson, J. Stagg, and J. Bevill, 1745); Joshua Gee, *The Trade and Navigation of Great Britain, Considered* (London: Samuel Buckley, 1731); John Ashley, *Memoirs and Considerations Concerning the Trade and Revenues of the British Colonies in America* (London: C. Corbett, 1740); Malachy Postlethwayt, *Britain’s Commercial Interest Explained and Improved* (London: D. Browne, 1757); Jeremiah Dummer, *A Defence of the New England Charters* (London: W. Wilkins, 1721).

<sup>142</sup> See Otis, “Rights of the Colonies Asserted and Proved,” 479.

<sup>143</sup> Adams to Tudor, 11 August 1818, *Works of John Adams* 10:343.

<sup>144</sup> Adams to Tudor, 11 August 1818, *Works of John Adams* 10:343.

<sup>145</sup> Otis, “Vindication of the Conduct of the House of Representatives,” 30; Otis, “Rights of the Colonies Asserted and Proved,” 466.

<sup>146</sup> Adams to Tudor, 17 June 1818, *Works of John Adams* 10:321.

<sup>147</sup> John Adams to Hezekiah Niles, 14 January 1818, *Works of John Adams* 10:276.

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<sup>148</sup> John Adams to Abigail Adams, 3 July 1776, *Adams Family Correspondence*, ed. L. H. Butterfield (New York: Atheneum, 1965), 2:28.

<sup>149</sup> Tudor, *Life of Otis*, 37.

<sup>150</sup> Wroth and Zobel, *Legal Papers of John Adams* 2:140.

<sup>151</sup> Adams to Tudor, 21 August 1818, *Works of John Adams* 10:351.

<sup>152</sup> Otis, "Rights of the Colonies Asserted and Proved," 454. Vernon L. Parrington grasped the importance of this aspect of Otis's argument, saying: "In relation to current English constitutional practice it was at once revolutionary and reactionary. It implied a double attack upon parliamentary sovereignty, first in limiting its powers by a super-parliamentary constitution, and then subjecting its acts to judicial review" (*Main Currents in America Thought*, Vol. 1, *The Colonial Mind* [New York: Harcourt Brace & World, 1927], 315). However, Gordon Wood offers a different interpretation of Otis's meaning. See *The Creation of the American Republic, 1776-1787* (New York: Norton, 1969), 262-264.

<sup>153</sup> Adams to Tudor, 9 June 1818, *Works of John Adams* 10:319. See also Adams to Jedidiah Morse, 29 November 1815, *Works of John Adams* 10:183.

<sup>154</sup> Adams to Tudor, 6 August 1818, *Works of John Adams* 10:338. The historical question is critical. Most scholars would seem to agree with James Benson who holds that "the phrase 'taxation without representation' was probably John Adams's." See "James Otis and the 'Writs of Assistance' Speech—Fact and Fiction," 263. However, Gustafson maintains that "Otis critically shaped the developing argument against

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parliamentary authority in the colonies, including the chief controversy--taxation without representation," *Eloquence is Power*, 154.

<sup>155</sup> Adams to Tudor, 16, August 1818, *Works of John Adams* 10:348.

<sup>156</sup> Wroth and Zobel, *Legal Papers of John Adams*\_2:138. The question of the sequence of the speeches, and especially of the position of Gridley's remarks in that sequence, is addressed thoughtfully by Smith (*Writs of Assistance Case*, 267-292). But Smith dismisses these remarks as "far-fetched as well as overblown," and as "double-speak," and concludes that perhaps Gridley meant them ironically. He also holds out the possibility that in composing the Gridley abstract, Adams "may have gotten some help from Gridley himself" (285).

<sup>157</sup> Adams to Tudor, 13 September 1818, *Works of John Adams* 10:355. William Tudor, Jr. was convinced that Otis was first to advance the argument. Otis, he wrote, "awakened at the same moment, a close and attentive watchfulness in America of every movement of government; and united the idea of taxation and representation, inseparably, in the mind of every citizen" (*Life of Otis*, ix).

<sup>158</sup> Otis, "Vindication of the Conduct of the House of Representatives," 19, 21. Otis also quoted John Locke on the limits of the taxing power of the government, who "must not raise taxes on the property of the people, without the consent of the people, given by themselves or deputies" (23).

<sup>159</sup> Otis, "Rights of the Colonies Asserted and Proved," 446. See also Thomas Hutchinson to Richard Jackson, 3 August 1763, cited in Waters, *Otis Family*, 150. Alex Tuckness

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described Otis's pamphlet argument as "an important example of Lockean justification for resistance," presented "in relatively full form at an early stage." See "Discourses of Resistance in the American Revolution," *Journal of the History of Ideas* 64 (2003): 551.

<sup>160</sup> Otis, "Rights of the Colonies Asserted and Proved," 450-451.

<sup>161</sup> Bernard Bailyn, *Pamphlets of the American Revolution*, 411.

<sup>162</sup> Adams to Tudor, 11 August 1818, *Works of John Adams* 10:345-346.

<sup>163</sup> "Tudor's Life of James Otis," *North American Review* 16 (April, 1823): 337-353.

Tudor also sent a copy of his work to Thomas Jefferson, who in reply wrote that "the character of Mr. Otis the subject of this work is one which I have always been taught to hold in high estimation, and I have no doubt that the volume will on perusal be found worthy of its subject," Thomas Jefferson to William Tudor [Jr.], 14 February 1823, manuscript in "Tudor-Adams correspondence, 1774-1823," Massachusetts Historical Society.

<sup>164</sup> Richard A. Samuelson, "The Constitutional Sanity of James Otis: Resistance Leader and Loyal Subject," *Review of Politics* 61 (1999): 523. Nearly every commentator on Otis has some remark to make about the "mental cloud" under which Otis suffered later in his career (the phrase is from Alexander McClure, and is one of the more charitable descriptions of Otis's mental illness [*Famous American Statesmen & Orators*, 50] See also Tudor, *Life of Otis*, 474-485, and Peter Shaw, *American Patriots and the Rituals of Revolution* [Cambridge: Harvard University Press, 1981], 78). The matter of Otis's political inconsistency also has been widely addressed. Even John Adams said there was "a slack after planting" (Adams to Tudor, 11 March 1818, *Works of John Adams* 10:297). See also: Ellen Elizabeth Brennan, "James Otis: Recreant and Patriot," *New England*

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*Quarterly* 12 (1939): 691-725; James R. Ferguson, "Reason in Madness: The Political Thought of James Otis," *William and Mary Quarterly*, 3rd Ser., 36 (1979): 194-214. For a treatment of these issues that is especially unsympathetic to Otis see Shipton, "James Otis," 247-287.

<sup>165</sup> Ellen Elizabeth Brennan, "James Otis: Recreant and Patriot," 695.

<sup>166</sup> Morison, "Otis, James," 103; T. H. Breen, "Subjecthood and Citizenship: The Context of James Otis's Radical Critique of John Locke," *New England Quarterly* 71 (1998): 381. See also Bailyn, *Pamphlets of the American Revolution*, 409-417.

<sup>167</sup> Bancroft, *History of the United States*, 4:417; Green, "Otis Against the Writs of Assistance," 191; Dickerson, "Writs of Assistance as a Cause of the Revolution," 43; Tyler, *Literary History*, 33.

<sup>168</sup> Dickerson, "Writs of Assistance as a Cause of the Revolution," 43.

<sup>169</sup> Frese, "James Otis and Writs of Assistance," 508.

<sup>170</sup> Gipson, *The Coming of the Revolution*, 39.

<sup>171</sup> Bancroft, *History of the United States*, Vol. IV, 417-418.

<sup>172</sup> Tyler, *Literary History*, 39. See also Tudor, *Life of Otis*, 90-92.

<sup>173</sup> Hutchinson, *History of the Province* 3:69.

<sup>174</sup> Morison, "Otis, James," 104.

<sup>175</sup> Ceasar Rodney to John Adams, 6 September 1818, *Niles's Weekly Register* 15 (October 10, 1818): 100. See also Adams to Morse, 29 November 1818, *Works of John Adams* 10:184.



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<sup>176</sup> Dickinson to Otis, quoted by Shipton, “James Otis,” 272.

<sup>177</sup> John Dickinson, Letter IX, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies*, ed. R. T. H. Halsey (New York: The Outlook Company, 1903), 93. See also M. H. Smith, *Writs of Assistance Case*, 492-495.

<sup>178</sup> Smith, *Writs of Assistance Case*, 239-240, 496. See also Green, “Otis Against the Writs of Assistance,” 191. Horace Gray, “Writs of Assistance,” 501-504 established that the Connecticut dispute had been underway since 1768. See also Dickerson, “Writs of Assistance as a Cause of the Revolution,” 52-54. Joseph Hawley, a Boston lawyer who was also a member of the Massachusetts Committee of Correspondence in 1773, had in his commonplace book a copy of Adams’s “Abstract” of Otis’s Writs of Assistance speech. See Wroth and Zobel, *Legal Papers of John Adams* 2:144.

<sup>179</sup> Breen, “Subjecthood and Citizenship,” 379. On the relevance of Otis’s political thinking to the larger cause, see Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge: Belknap Press, 1967), 204-209.

<sup>180</sup> Leonard W. Levy, “Origins of the Fourth Amendment,” *Political Science Quarterly* 114 (1999): 84.

<sup>181</sup> William Cuddihy and B. Carmon Hardy, “A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution,” *William and Mary Quarterly* 3<sup>rd</sup> ser., 37 (1980): 394.

<sup>182</sup> Article XIV, Massachusetts Constitution. Other early state constitutions contained similar provisions.

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<sup>183</sup> Thomas Y. Davies, “Recovering the Original Fourth Amendment,” *Michigan Law Review* 98 (1999): 724.

<sup>184</sup> Levy, “Origins of the Fourth Amendment,” 85. See also Davies, “Recovering the Original Fourth Amendment,” 547-724.

<sup>185</sup> Gray, “Writs of Assistance,” 521.

<sup>186</sup> Morison, “Otis, James,” 102.

<sup>187</sup> Jared Sparks, quoted by Charles K. Edmunds, “The Character of James Otis,” in Ridpath, *James Otis*, 111.