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The Lawyer Who Lit the Fuse of the American Revolution

By Philip Foglia

Fifteen years before America declared independence, a little-recognized and long-forgotten lawyer lit the fuse that started the Revolutionary War. While American schoolchildren can recite the opening refrain from Longfellow's epic poem, "The Midnight Ride of Paul Revere," the story of the prelude to the "Shot Heard Round the World" first fired by British soldiers at Lexington and later on Concord Green, the name James Otis, Jr. is not on the tip of anyone's tongue. Yet, Otis led the first significant protest to British oppression, which ultimately led to armed conflict by a ragtag group of colonial soldiers against the strongest military power on earth. His sister, Mercy Otis Warren, was an eyewitness to the seminal events and wrote the first comprehensive history of the Revolution.

The Navigation Act, Taxes and Writs of Assistance

More than a century prior to the American Revolution, the Navigation Acts mandated that the colonists trade exclusively with the British Empire, severely limiting colonial commerce and establishing royal dominance in North America. In 1733, Britain established the Molasses

Act, heavily taxing all non-British imported sugars with the dual purpose of raising revenue for the Crown and protecting sugar profits in the British West Indies. Sugar was an important commodity in colonial America because it was distilled into rum and then grog, an immensely popular intoxicant that colonists also believed had medicinal value.

In the early 1760s, the Crown granted even greater powers of enforcement over the colonies. In response to the royal initiatives, colonial mariners became proficient at smuggling and piracy, successfully neutering Parliament's maritime laws. Frustrated by this evasion of British law, in 1760 the Newcastle administration under King George III imposed new customs laws and taxes on the American colonies under the guise of recouping costs associated with its defense of the colonies during the French and Indian War.

In response, colonial resistance on the high seas intensified. As a counterpunch, the Crown then authorized Writs of Assistance. The Writs were general search warrants that could be utilized by government agents to search for smuggled goods in homes, warehouses, ships

or anywhere else they wished. With no legal need for a sworn declaration, notice, or probable cause, the Crown ran roughshod over colonial ports. The colonists were not amused. Not only were they being taxed by Parliament without any representation but the sacred principle that every “Englishman’s home is his castle” was being ignored. The colonists were very well aware that they were being treated as second-class citizens – or not even British citizens at all.

James Otis, Jr.

Enter Harvard-educated lawyer James Otis, Jr. Born into prosperity in the Cape Cod farming village of West Barnstable in 1725, Otis was the oldest of 13 children in a family descended from early Pilgrim settlers.¹ His father, James Otis, Sr., an attorney, was a member of the Colonial Council in Massachusetts and later a judge. His sister, Mercy Otis Warren, considered one of the first proto-feminists, was a poet, playwright and historian, whose writings were influential in helping foment the American Revolution.

Otis graduated from Harvard in 1743 and pursued a legal education under the tutelage of Jeremiah Gridley, a prominent attorney and a member of the General Court of Massachusetts. The youthful Otis began practicing in Plymouth but soon moved to Boston where he built a reputation as a brilliant lawyer and skilled politician. He won appointment in 1756 as a Justice of the Peace in the Vice Admiralty Court. He became its Advocate General in 1760 and was tasked with enforcing the dreaded maritime laws that primarily restricted the colonists’ trade to the British Empire.

The Vice Admiralty Court

The Vice Admiralty Court was not merely a provincial court but rather a branch of the High Court of Admiralty sitting in London. To add insult to injury, the colonists’ cases could be tried anywhere in the British Empire, resulting in many such cases being venued in Nova Scotia, which added to the burdens of defense.

In truth, the British simply saw the colonies as an endless supply of raw materials for the mother country and the Court was the primary vehicle for keeping the colonists under the British thumb. The Court brutally enforced the Navigation Acts to ensure that colonies traded only with England, and any non-English goods shipped to the colonies had to pass through England to be taxed. In addition, any colonial exports had to first go to an English port to be taxed before being sent elsewhere. All the Crown’s measures were designed to keep the American colonies in an economically subordinate position. The American response was often violent and lawless, justifying the Crown’s widespread use of the warrantless searches known as Writs of Assistance.

This was an unprecedented tactic because in the decades preceding the American Revolution, warrantless searches other than searches incident to an arrest were largely unknown to British citizens and their colonial counterparts. The Writs of Assistance were available if authorized under seal of the king according to his unfet-

Otis led the first significant protest to British oppression.

tered discretion as codified in the 1662 Act of Frauds. However, the Writs were valid only during the life of the monarch who authorized them and indeed were not used in the American colonies.² The Writs of Assistance previously issued by King George II had expired following his death. Fed up with defiance by his American colonists, in 1760 King George III authorized new Writs to bring the colonial smugglers and pirates to heel.

From Loyalist to Patriot

Otis was only 31 years of age when he was appointed to the Court, and a loyal, conservative subject of the Crown. However, all that changed in 1761. His growing disenchantment with the oppressive maritime laws and his abhorrence of the newly imposed Writs of Assistance, which as Advocate General he would have to defend, made Otis reconsider his alliance with the Crown. The final straw emerged when Royal Governor Francis Bernard did not appoint James Otis, Sr. Chief Judge of Boston’s highest court, as was widely expected, but instead chose Thomas Hutchinson for the post. (Hutchinson would go on to later infamy for his dealings with colonial Massachusetts during the turmoil of 1775, thereby becoming the most despised man in the colonies and a target of the newly formed Sons of Liberty.) Increasingly uncomfortable with his official position of defending the Crown along with anger at what he believed to be an outrageous affront to his father, Otis, Jr. resigned his position as Advocate General.

Motivated perhaps by principle or revenge, soon after his resignation Otis was recruited by and accepted representation of a group of 53 Boston merchants to fight the extended authority of the Writs of Assistance. A countersuit was filed by British customs agent James Paxton, thus labeling the matter the “Paxton Case” for posterity. Appearing pro bono, Otis challenged the legality of the writs, which enabled British authorities to enter any colonist’s home without advance notice, probable cause or reason given, as having little or no precedent in English law.

In a five-hour oration, Otis argued his case at the Massachusetts State House,³ informing the tribunal that he “was solicited to argue this cause as Advocate General;

and because I would not, I have been charged with desertion from my office. I renounced that office and I argue this cause from the same principle; and I argue it with greater pleasure, as it is in favor of British liberty.” Otis reminded the judges that the arbitrary use of power by the Crown “in former periods of history cost one king of England his head and another his throne.” Provocative words for sure but buttressed by an appeal to law as he declared that “[i]t [the Writs of Assistance] appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book.” Turning a memorable phrase, Otis declared,

[A] man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.⁴

Otis presciently predicted that use of the Writs will result in “tumult and in blood.”⁵ John Adams, who as a young attorney was present for Otis’s oral argument against the Writs of Assistance, declared years later in a letter to William Tudor, “Then and there, the child independence was born.”⁶ About Otis’s speech Adams also wrote, “I solemnly say I have never known a man whose love of country was more ardent or sincere, never one who suffered so much, never one, whose service for any ten years of his life were so important and essential to the cause of his country, as those of Mr. Otis from 1760 to 1770.”⁷

But Otis did not merely rail against the Writs, he set out parameters for the legal issuance of writs: “to search such and such houses, specially named, in which the complainant has before sworn that he suspects his goods are concealed.” Short of these safeguards, Otis argued, “Every one with this writ may be a tyrant . . . also may control, imprison or murder anyone within the realm.” Otis offered an alternative process, warrants for stolen goods that would be directed to special officers to search certain houses specifically set forth in the writ based upon an oath “that he suspects such goods to be concealed in those very places he desires to search.”⁸ Otis also wisely argued that the invasion be ultimately determined by a judge, a right we take for granted today.

A direct line can be drawn from Otis’s argument to John Adams’s authorship of Article 14 of the Massachusetts Declaration of Rights in 1780 that listed four protected objects – persons, houses, papers and effects – to our cherished Fourth Amendment.⁹

Although Otis’s argument did not prevail, the patriot cause was advanced mightily and he was thrust into political ascendancy as the acknowledged leader in the

defense of the colonists’ liberties. Colonists had rightly concluded that the mother country had carved them out of their basic rights, the most cherished embodied in the concept of every Englishman being a king in his own home. This disrespect was the beginning of the end of British rule in America, and Otis was the catalyst.

Leading the Opposition

His passionate and articulate opposition in the Writs case propelled Otis to a position of leadership as a stalwart of opposition to British rule – along with John Hancock and Sam Adams. Otis’s popularity was evidenced by his selection as a Massachusetts representative to the Stamp Act Congress and his repeated election to the Massachusetts House of Representatives. While widely admired by his contemporaries, Otis was despised by the royal governor, Thomas Hutchinson.

Otis became intimately aligned with fellow Harvard-educated firebrand Samuel Adams and they inundated Boston’s editors with propaganda leaflets that the Loyalist *Boston Evening Post* labeled “mad rant and porterly reviling.”¹⁰ Otis professed far more radical views at an earlier stage than Adams, but while Otis’s radicalism was of ideas, Adams directed violent unruly street toughs in action. One such mob trashed the home of Royal Governor Hutchinson, breaking down its massive doors and setting fires in each room of the mansion. Adams also orchestrated the Boston Tea Party. He was considered so dangerous by British military officials that they sent thousands of troops to arrest him and John Hancock, as well as to seize weapons and gunpowder, at Lexington on April 18, 1775, the date now celebrated as Patriot’s Day.

Although Otis adopted the economic arguments Adams proposed, including non-importation and boycott, he was even more aggressive, warning British authorities that colonists would start smuggling on an even grander scale and start engaging in the commercial production of wool, which the British had banned.¹¹ Otis angrily stormed out of the Stamp Act Congress when it condemned the Stamp Act but proclaimed that “subordination to Parliament is universally acknowledged.”¹² Otis went on to author a number of revolutionary pamphlets advocating the rights of colonists and railing against oppressive legislation emanating from Parliament. His “The Rights of the British Colonies Asserted and Proved” (1764) was a rabid repudiation of the Sugar Act.¹³ He opened his essay with a summary of what the great philosopher John Locke had opined about the conditions under which a people might legitimately rebel against their government, which was viewed by the British as treason. He emphasized the theories of natural rights, arguing that the power of Parliament was limited and that it could not justifiably tax the colonists since the colonists were not represented in that body.

Predictably, Otis became a persona non grata to the Crown. When Otis was elected as Speaker of the Massa-

chusetts General Court in 1766, the royal governor vetoed his position, effectively disenfranchising the populace. Angered by reports that customs commissioners considered him an enemy of the King, Otis authored a scathing article in 1769 denouncing Commissioner John Robinson and three others, upping the ante by stating that he asked for personal satisfaction (a duel) but had not received a response. At an English coffeehouse shortly thereafter, he was set upon by Commissioner Robinson and at least three other Tories. During the attack Robinson viciously struck Otis in the head with his walking stick, causing serious brain injuries that tested his sanity for the duration of his life. Sam Adams later claimed that Robinson had conspired to assassinate Otis.

The consummate lawyer, Otis took John Robinson to court for compensation and won, magnanimously accepting a public apology as the fruit of his court victory. However, the attack effectively ended Otis's revolutionary activities and deprived the Patriot movement of one of its most effective and cogent voices. He retired from public life and his increasing incapacity required that his brother be appointed his guardian. Otis moved to Andover where he lived out the remainder of his life. In a letter to his sister Mercy Otis Warren, he wrote, "I hope, when God Almighty in his righteous providence, shall take me out of time into eternity that it will be by a flash of lightning." On May 23, 1783, James Otis, Jr., the firebrand patriot and lawyer, was in the doorway of his home chatting with friends who were sitting inside when a storm erupted. As thunder shook the house unmercifully, a bolt of lightning struck him dead. A reminder to all to be careful what you wish for.

Otis is buried in Granary Burial Ground in Boston, interred in the Cunningham Tomb owned by his wife's family.

Mercy Otis Warren

Mercy Otis Warren achieved fame in her own right. She was present at numerous important Patriot meetings with her brother, where she was well regarded for her intellect and zeal, befriending Abigail Adams and later Martha Washington. Cokie Roberts, in her beautifully written book *Founding Mothers*, observed, "No political campaign can succeed without propagandists. . . . In colonial times the pamphlet was the delivery system of choice, and one of the great pamphleteers of the time was a woman – Mercy Otis Warren."¹⁴ After her brother was beaten by Commissioner Robinson, Otis Warren stepped up her own revolutionary activities. She authored numerous provocative Patriot essays and poems, most published anonymously in newspapers. Her most effective propaganda, however, were her three satirical plays, a first for an American woman, although they were printed, not performed, since Puritan Boston forbade live performances. (Boston did not have a theater until 1794.¹⁵) Each play explores the moral decay of the

Crown's administration of government in Massachusetts. Governor Hutchinson was a particular target of her venomous pen, which painted him as a villain named Rapatio, a hypocritical, crass, oppressive policymaker. Governor Hutchinson despised Mercy Otis Warren as much as he had her brother. In 1781, Otis Warren and her husband had the pleasure of purchasing the estate of the banished and humiliated Hutchinson.

Perhaps Otis Warren's greatest work, however, was her *History of the Rise, Progress and Termination of the American Revolution*, written in three volumes, completed in 1805 and 25 years in the making. As Otis Warren points out in her preface, she was uniquely positioned to chronicle the events leading up to the Revolution because she had direct experience of them and knew well many of the leaders who took part in the various military campaigns.

James Otis, Jr. lived long enough to see the Continental Army win the war, and he had the satisfaction of knowing that his daughter's father-in-law, General Benjamin Lincoln, was presented with the sword of surrender from General Cornwallis at Yorktown. Unfortunately, Otis's tragic and untimely death in May 1783 occurred just months before the conclusion of the peace treaty that officially ended the war with the British Empire and recognized the United States of America. He also could not bask in the pride of seeing his younger brother Samuel Allyne Otis sworn in as United States Senator from Massachusetts, where he served until 1814. ■

1. See generally William Tudor, *The Life of James Otis of Massachusetts* (Boston: Wells & Lilly 1823).

2. British Act of Frauds 5(2) (1662).

3. Ironically, his adversary, the Attorney for the Crown, was his former mentor Jeremiah Gridley.

4. James Otis, *Against Writs of Assistance*, February 24, 1761, National Humanities Institute (1998), www.nhinet.org/ccs/docs/writs.htm.

5. *Id.*

6. John Adams, letter to William Tudor (1818).

7. John Adams, *Political Essays* (Boston: Hews & Goss 1819).

8. 2 *The Works of John Adams*, app. A at 524–25 (Little Brown & Co. 1856).

9. The Fourth Amendment to the U.S. Constitution reads: 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

10. Harlow Giles Unger, *Lion of Liberty* 32 (DaCapo Press 2010).

11. John K. Alexander, Samuel Adams, *The Life of an American Revolutionary* 32 (Rowman and Littlefield 2011).

12. Henry Lawrence Gipson, *The Coming of the Revolution, 1763–1775* 100 (N.Y.: Harper & Brothers 1954).

13. As noted, the Sugar Act of 1764 was a revision of the unenforced Molasses Act of 1733 that imposed duties on sugar and molasses imported into the colonies. Sugar was mostly distilled into rum, a popular drink in the colonies.

14. Cokie Roberts, *Founding Mothers, The Women Who Raised Our Nation* 45 (Harper Collins 2004).

15. *The Adulateur* (1772), *The Defeat* (1773) and *The Group* (1775).

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