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**John Adams v. William Brattle:  
A Non-Debate on Judicial Tenure**

**Thomas S. Martin**

If we consider the social, political, and economic milieu of the eighteenth-century British empire as a system in dynamic equilibrium -- call it the "Whig synthesis" -- it is undeniable that its equilibrium was profoundly shaken and perhaps even destroyed by events in New England in the early 1770s. Despite its internal tensions and disagreements, the empire was unified and stable as late as 1763, basking in the recent victory over the French. Psychologically the North American colonists were at one with their cousins across the Atlantic, even those at Whitehall and Westminster.

Twelve years later, a series of events and new ideas ("chaotic attractors" in systems language) had so thoroughly disrupted this equilibrium that civil war broke out, eventuating in the separation of the colonies from the mother country. In 1763, Britons and Americans could communicate easily, using key terms like "representation" and "liberty" that carried the same meaning for nearly everyone. By 1775 -- so rapidly that the participants were not fully aware of the fact -- supporters and opponents of American independence had grown so far apart that their political and philosophical discussions were incommensurable. They used the same words, but meant entirely different concepts; neither patriots nor loyalists realized the depth of the semantic abyss. We have always known that Boston

was the focus of this pre-Revolutionary war of words; now we can also see how fundamental the breach really was. The date is not so easily identified as the place; but a good guess would be the late autumn and early winter of 1772-1773. Poised on the very brink of this precipitous slide into disequilibrium, we find a debate on judicial tenure between John Adams and William Brattle. It has not received much attention from historians, because it is on a dull and obscure constitutional point, and also because Adams "won" so handily -- Brattle and the loyalists failed to mount an effective response.

Great events are sometimes precipitated by the asking of the most finespun questions. Not that colonial Americans were unaware of the controversy over judicial tenure -- it had been a matter of general concern for decades; but only a few lawyers and other dabblers in juristic arcana really understood the problem in context. To most people it was simply a question of whether judges were "independent." Until the seventeenth century all English judges were appointed *durante bene placito*, at the pleasure of the Crown. As judges were royal officers, this practice seemed logical. But during the reign of James I this, like so many other assumptions, came under fire. As Parliament came into its own and began its methodical assault on the royal prerogative, an independent judiciary came to be seen as an indispensable pillar of the emerging democracy (what would later be called 'Whiggism'). Charles I tried to appease the Commons by appointing several justices *quamdiu se bene gesserint*, that is, for life, assuming their good behavior.<sup>1</sup> The post-Restoration Stuarts recovered the authority to appoint judges at pleasure, and they mightily abused the privilege. The Glorious Revolution solved this problem -- or so it was thought. In the Act of Settlement (1701), the principle of life tenure during good behavior was explicitly established, though the Act did not take effect right away (it was primarily concerned with the

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<sup>1</sup> The common-law expression can be rendered *quamdiu se bene gesserint* or *quamdiu bene se gesserint*; in either case it means "while they behave themselves." Adams and Brattle used both forms indiscriminately. The singular is *gesserit*.

Protestant succession). One anomaly remained: all royal commissions, even those granted for life, were traditionally held to expire at the demise of the Crown, and had to be renewed. An act made in the first year of George III removed this annoyance.<sup>2</sup>

For many reasons -- but principally, neglect on the part of Whitehall -- the position of judges in the American colonies was unclear. Governors were instructed not to specify any length of tenure in the commissions they signed, and (with a few notorious exceptions) this was taken to mean that colonial justices served *durante bene placito*. After 1754, the governors were told explicitly that their judicial appointments must be made "during pleasure only."<sup>3</sup> Resistance in the colonial assemblies was faint but constant, occasionally erupting in factional battles but bound up with other local issues. Not until 1772 did the matter of judicial tenure become a prime weapon of the growing patriot party. For decades the colonists had been more or less willing to accept tenure during pleasure, because their assemblies paid the judges; if they could not be fired, their salaries might be withheld, though this option was almost never exercised. But in late 1772 news leaked out that the North ministry intended to pay the royal governors and the Massachusetts justices out of the customs revenues.

Here was a golden opportunity for the Boston radicals, who were struggling to keep alive a flame that had burned very

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<sup>2</sup> Here is Blackstone on the subject: "And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2. that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament." William Blackstone, Commentaries on the Laws of England (London, 1765), I: 258.

<sup>3</sup> Bernard Bailyn and Jane N. Garrett, eds., Pamphlets of the American Revolution, 1750-1776, Volume I, 1750-1765 (Cambridge, 1965), I: 250. Bailyn's introduction to A Letter to the People of Pennsylvania (pp. 249-255) is the best general summary of the judicial tenure controversy

low since the Boston Massacre trials. Samuel Adams and his cohorts had been carefully planning an extra-legal revolutionary apparatus, the Committees of Correspondence. Every Bay Colony town was to have a committee; Boston was to lead the movement, or more precisely, get behind it and push. Full public acceptance of these groups as a sort of alternative government required some compelling issue; Adams had to demonstrate that the "real" government did not have the people's interests at heart. The salaries controversy seemed made to order.<sup>4</sup> In October the patriots called for a town meeting to debate the issue. Governor Hutchinson refused to cooperate with the meeting's formal requests for information -- as Adams expected -- and accordingly, a Committee of Correspondence was appointed. During early November this group, which included among others James Otis, Josiah Quincy, Joseph Warren, and Samuel Adams, drew up a report and submitted it to the town meeting on November 30. As a pamphlet entitled *Votes and Proceedings of the Town of Boston*, the report was widely circulated throughout the colony. The "Boston Pamphlet," as it was usually known, summarized all the colonial grievances of the past decade, and has earned a place as a key document in the pre-Revolutionary era. Judicial salaries and tenure, though the catalyst for the Committee's appointment, were mentioned only in the sixth article:

The British Parliament have shewn their wisdom in making the Judges there as independent as possible both on the Prince and the People, both for place and support; But our Judges hold their Commissions only during pleasure . . . . How alarming must it then be to the Inhabitants of this Province, to find so wide a difference between the Subjects in Britain and America, as the rendering

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<sup>4</sup> See Richard Brown, Revolutionary Politics in Massachusetts: The Boston Committee of Correspondence and the Towns, 1772-1774 (Cambridge, 1970), 49.

the Judges here altogether dependent on the Crown for their support.<sup>5</sup>

Thus the stage was set for the Adams-Brattle newspaper confrontation.

All across the province town meetings were called, and most passed resolutions echoing the Boston Pamphlet. The grassroots movement envisioned by the radicals was materializing, exactly as planned. The town of Cambridge met on Monday, December 14, to appoint its own committee of correspondence and to approve a lengthy resolution against (among other items) "the shocking report that the judges of the superior court of judicature, and other officers, [may] have salaries affixed to their offices, dependent on the crown and ministry, independent of the grants of the commons of this province." By these changes "our lives and properties will be rendered very precarious," and "through an undue influence the streams of public justice will be poisoned." The town instructed its representative, Captain Thomas Gardner, to seek "a speedy redress of all our grievances." The resolution was printed in the *Boston Gazette* a week later.<sup>6</sup>

The Cambridge resolution had not been adopted unanimously. William Brattle, a senior member of the Massachusetts Council and perhaps the town's leading citizen,

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<sup>5</sup> The original Votes and Proceedings of the Town of Boston can be found in the Boston Town Records for 1772, Document # 9: Boston Record Commissioners, Boston Town Records, 1770-1777, (Boston, 1887), XVIII: 390. It has been reprinted many times elsewhere.

<sup>6</sup> Boston Gazette, December 21, 1772. The Gazette was a leading patriot newspaper. Brattle's views would be published in the similarly named but loyalist Massachusetts Gazette and Boston Post-Boy, for clarity herein called the Post-Boy. In quotation from this newspaper debate I have on occasion, for the sake of narrative flow, dispensed with final ellipses. Internal ellipses and original spellings are retained.

had done his best to prevent the matter from coming to a vote. Often known as "General Brattle," as he held a militia commission, this loyalist came from a prominent clerical family. His first wife had been a daughter of Governor Saltonstall. After graduating from Harvard in 1722, Brattle had sat in the Assembly for Cambridge and was later appointed to the Council. According to Lorenzo Sabine, "a man of more eminent talents and of greater eccentricities had seldom lived." At one time or another Brattle had practiced both medicine and law, and had also preached. "He possessed the happy faculty of pleasing the officers of Government and the people."<sup>7</sup> Until, that is, December of 1772.

Even before the Boston Committee of Correspondence began its work, Brattle was known to be a supporter of the ministry's new policy. On October 27, John Adams met with Otis to discuss the news from London, and then spent the rest of the day in court. That evening he dined with the justices. "Brattle was there, and chatty," according to John Adams' diary.<sup>8</sup> The General was something more than chatty at the December town meeting. He rose to attack vehemently any vote on, or even discussion of, the Boston Pamphlet, on the grounds that the warrant for calling the meeting mentioned only the matter of judges' salaries. His own notes on the meeting<sup>9</sup> were soon developed in a letter published on January 4 in the *Post-Boy*. John Adams' account of the meeting (though he was not there) parallels Brattle's own, and we may assume that the "General's" report was more or less accurate. He told the meeting that Massachusetts judges already held office *quamdiu se bene*

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<sup>7</sup> Lorenzo Sabine, Biographical Sketches of Loyalists of the American Revolution (Boston, 1864), I: 250-251; Brown, Revolutionary Politics, p. 112.

<sup>8</sup> Adam's diary, October 27, 1772, in Charles Francis Adams, ed., The Works of John Adams (Boston, 1865), II, 302.

<sup>9</sup> Brattle's journal is in a large collection of "Letters and Documents relating to Harvard College and Cambridge" in the Boston Public Library, folio 78.

*gesserint*, and that salaries from the Crown would render them entirely independent, which after all was what the patriots so ardently wished. He was willing to debate this point with any member of the Boston committee, "here in town meeting; nay, I will dispute it with them in the newspapers."<sup>10</sup>

Adams was not at all impressed. He "was so elated with that applause which this insane harangue procured him from the enemies of this country, that in next Thursday's [sic] Gazette<sup>11</sup> he roundly advanced the same doctrine in print, and, the Thursday [sic] after, invited any Gentleman to dispute with him upon his points of law." Adams was delighted to take the bait. "These vain and frothy Harrangues and Scribblings," he told his diary,

would have had no Effect upon me, if I had not seen that his Ignorant Doctrines were taking Root in the Minds of the People, many of whom were in Appearance, if not in Reality, taking it for Granted, that the Judges held their Places during good Behaviour.

Upon this I determined to enter the Lists, and the General was very soon silence. -- Whether from Conviction, or from Policy, or Contempt I know not.<sup>12</sup>

William Brattle could not have known that his remarks at the Cambridge town meeting would provoke such a storm of controversy. But like many loyalists he must have worried that his point of view was deliberately being kept from the public. Even after more than two centuries his first letter (written at home on December 16, and printed on January 4) breathes

<sup>10</sup> Boston Post-Boy, January 4, 1773.

<sup>11</sup> i.e., the Massachusetts Gazette and Boston Weekly News-Letter, on December 17 and 24, 1772.

<sup>12</sup> Adams's diary, March 4, 1773, in Works, II: 315.



righteous indignation. The truth about the town meeting must be told, and the perfidious resolution about to be printed in the *Gazette* must be refuted.

In the first place, the meeting was called expressly to debate the matter of the judges' salaries, and so had no business talking about judicial tenure. But as that subject had been raised, "I spake my mind very freely upon said clause. I said, in my opinion we were too premature in acting upon this matter at present."<sup>13</sup> No doubt more news would soon come from London, and the townsmen might later regret that they had gone on record against a mere rumor.

One can imagine the audience lapsing into shocked silence when Brattle "observed that no man in the province could say whether the appointments and therefore the salaries granted to the judges were *durante bene placito*, or *quamdiu bene se gesserint*," like those of judges in England. No doubt the pompous General now had the attention of everyone in the room, and it is interesting to speculate about what must have been passing through the patriots' minds. It was Brattle's opinion that American judges served during good behavior, even if their salaries were granted "only during the king's pleasure." He "always thought the judges' salaries should be independent both upon the king and the people . . . and would exert himself in a constitutional way" to correct this irregularity. The problem could easily be solved if the Massachusetts assembly would vote higher salaries for the judges *quamdiu bene se gesserint*. No doubt the people, the government in London and the judges themselves would applaud such a solution.<sup>14</sup>

Would the ministry really withdraw its proposal so easily, a townsman might have asked at that point? Of course, Brattle would respond: the king had no wish to control the judges, but merely to pay them what they deserved. "Had there

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<sup>13</sup> Boston Post-Boy, January 4, 1773.

<sup>14</sup> *Ibid.*

been an adequate salary granted," he wrote, "I believed [sic] we should have never heard of any grant from the king to them."<sup>15</sup>

Adams did not comment on whether the meeting had the authority to discuss this matter, and in his first response ironically wished Brattle well in his efforts to prove that American judges served *quamdiu se bene gesserint*. But he read "with surprise and grief" the General's next assertion.<sup>16</sup> It was well known that the commissions of American judges made no mention of their tenure. To the patriots, this was a dangerous omission and a potential source of tyranny. But "I was very far from thinking," Brattle wrote, "there was any necessity of having *quamdiu bene se gesserint* in their commissions; for they have their commissions now by that tenure as truly as if said words were in."<sup>17</sup>

True, Adams replied, the commissions were not specific. "But will it follow that, because both clauses are omitted, therefore the judges are in for life? Why should it not as well follow that they are in only at pleasure?" Common law and the history of the prerogative, in fact, supported the latter view. "And if this is true, it is to be hoped General Brattle will have influence enough to prevail that the commissions, for the future, may be granted expressly *quamdiu se bene gesserint*; but until that is done, . . . our judges hold their places only at will."<sup>18</sup>

But to pursue Brattle's reasoning: in the first place, neither the Massachusetts charter nor the common law required that judges hold commissions; it was their nomination and subsequent appointment that secured them in their offices. The written commission was a mere confirmation of the appointment. Adams addressed this point in this third letter. "The authorities," he remarked,

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<sup>15</sup> Ibid.

<sup>16</sup> Boston Gazette, January 11, 1773.

<sup>17</sup> Boston Post-Boy, January 4, 1773.

<sup>18</sup> Boston Gazette, February 15, 1773.

. . . seem to show very plainly that the judges . . .  
. . . can be created only by writ, or by letters-patent;  
and although these may be said not to be  
commissions, yet they are surely something more  
than nomination and appointment.

In support, Adams quoted Coke, Bacon, various examples of patents, and a statute of 27 Henry VIII to demonstrate that these letters-patent were indeed commissions.<sup>19</sup>

In the second place, Brattle continued, the Massachusetts governor and council (of which he was a member) did not claim any power over judges' commissions: "it would be most dangerous to suppose and allow it, and tyranny in them to assume it." Rather, the General Court had always "determined what powers and authorities unto the judges do appertain."<sup>20</sup>

In his January 25 letter, Adams agreed that the charter gave the governor and council only the power to nominate and appoint, and that only the legislature might establish courts. But since no judge could exercise his authority without a commission in hand, the power to nominate and appoint must include the power to grant such commissions. Otherwise the courts created by the legislature could have no judges at all.<sup>21</sup>

It was Brattle's third point that provoked Adams' lengthiest and most learned response. The "greatest sages of the law," Brattle wrote, had long since determined that the common law of England grants judges "an estate for life, provided they behave well." The Act of Settlement, "that enacts that the words *quamdiu bene se gesserint* shall be in the judges' commissions," was no innovation; Parliament was merely confirming the common law, which had recently been so abused by the Stuarts. If further proof was needed, Brattle recalled that

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<sup>19</sup> Boston Gazette, January 25, 1773.

<sup>20</sup> Boston Post-Boy, January 4, 1773.

<sup>21</sup> Boston Gazette, January 25, 1773.

although this statute was not to take effect until the death of Queen Anne, many judges were commissioned *quamdiu bene se gesserint* during her reign. This could not have happened had the principle not already been established as common.<sup>22</sup>

Brattle had quoted Chief Justice Holt on this question. Adams assumed (correctly) that he was referring to the case of *Harcourt v. Fox*, but Adams had a different interpretation. Surely *quamdiu bene se gesserint* was compatible with the principles of the Glorious Revolution; but when Holt decided the case in question, no act of Parliament had yet established such tenure, "and it is certain, from Lord Coke and from all history, that [it] was not settled by the common law of England."<sup>23</sup>

It would be tedious to follow Adams' learned argument from the *Harcourt* case, which occupies much space in his subsequent letters.<sup>24</sup> Historians and the few legal scholars who have looked at the essay all agree that Adams had law, reason, and the constitution on his side. But Brattle was not satisfied, and he painted himself even further into a corner in his second letter.

The "General" ended his first inquiry, though, with a recapitulation of his original debate with the Cambridge

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<sup>22</sup> Boston Post-Boy, January 4, 1773.

<sup>23</sup> Boston Gazette, January 11, 1773.

<sup>24</sup> Harcourt v. Fox (12 Mod. 42). The Earl of Clare was appointed *custos rotulorum* by James II, and he employed Harcourt as his clerk of the peace, *quamdiu bene se gesserit*. Then Clare was removed, and a statute of 1 William and Mary specified that the clerk might hold office only so long as the *custos* who appointed him. The new *custos*, Bedford, appoint Fox to the position. Harcourt then brought suit to recover his job. Chief Justice Holt found in favor of Harcourt, and this sanctioned the principle of *quamdiu bene se gesserit*. In an *obiter dictum* Holt averred that he himself enjoyed the same tenure, and on this shaky ground Brattle founded much of his argument. *Obiter dicta* enjoy great influence in precedent, but are not binding in the same way as the main decision.

townsmen. The Boston Pamphlet must not be voted on or even discussed, since the meeting was not called for that purpose.

[T]hen I read the law, which is in the words following, -- 'That no matter or thing shall be voted or determined, but what is inserted in the warrant for calling said meeting.' It was answered that they knew that law very well, but they had a right to act and determine upon such interesting subjects as were contained in said letter and resolves, founded upon the law of nature.

Brattle repeated that Massachusetts had "plain standing laws," and hoped that the townfolk did not "view ourselves in a state of nature" on this or any other occasion. Of course the meeting's appeal to natural law was hardly an affirmation that Cambridge was in a state of nature; but Brattle overlooked this nicety, and "in the most public manner, protested against their proceedings." He certainly did not "look upon [himself] in a state of nature," and he reminded his listeners that if they accepted his view of the judges' commissions, they could avoid

placing themselves in so bad a situation as to be in a state of nature, and to be governed by the laws of nature in direct repugnance and opposition to the well known standing laws of the province, founded upon the eternal reason and nature of things.

The townsmen listened politely, but "notwithstanding, the vote passed."<sup>25</sup>

Adams did not reply to this argument, and so it has been largely ignored by historians. His succeeding letters concentrated on the judicial tenure argument. In fact the question of the Cambridge meeting's competence is central to the evolving loyalist philosophy and the breakdown of the Whig

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<sup>25</sup> Boston Post-Boy, January 4, 1773.

synthesis. In eighteenth-century parlance, the law of nature was supreme only in a state of limited civil society. We can now discern the nature of the incommensurability, Brattle's worldview is integrative or holistic, emphasizing the fundamental nature of human *society*. Adams thought in terms of the human *individual*, whose rights and obligations are more fundamental than those of the group. While using the same arguments and terminology, these two men -- representative of the loyalist and patriot ideologies -- could not communicate. In Brattle's opinion, society -- that is, the law -- dictated what could be discussed in Town Meeting. Adams, supposing that the individuals present had a right to discuss whatever they wished -- thus 'making law' for that particular gathering -- did not even bother to respond to what must have seemed a pointless assertion.

Two days after Brattle's first letter appeared in the *Post-Boy*, Governor Hutchinson addressed the General Court, launching the famous controversy that would overshadow all other colonial debates of that winter and spring. It is not unlikely that Hutchinson consulted with Brattle and other Council members, though the Council and Governor were not at that time seeing eye to eye. For the colonies to appeal to the law of nature, Hutchinson told the assembly, must "be considered as an objection against a state of government, rather than against any particular form." The sovereign authority which he represented must be entire and supreme, or it was no authority at all:

The acts and doings of authority, in the most perfect form of government, will not always be thought just and equitable by all the parts of which it consists; but it is the greatest absurdity to admit the several parts to be at liberty to obey, or disobey, according as the acts of such authority may be approved, or disapproved by them, for this

necessarily works a dissolution of the government.<sup>26</sup>

The "General" must have felt vindicated -- at least until Adams' first letter was published in the *Gazette*.

Brattle's blustery epistle of January 25 stands in sharp contrast to the scholarship and subtle humor of Adams' two intervening essays. He complimented Adams on his learning, but regretted that the patriot spokesman seemed bent on proving that judges "may be legally displaced, merely by the arbitrary will and pleasure" of the sovereign. Such "tory principles" could not be suffered.

I, on the other hand, have and now declare as my opinion, that the governor and council can no more constitutionally and legally remove any one justice of the superior court, as the commissions now are, unless there is a fair hearing and trial, and then a judgment that he hath behaved ill, than they can hang me for writing this my opinion.<sup>27</sup>

This, to Adams, was "the most important question of all." The power to remove judges is a prerogative power "and it is with great reluctance that I frankly say, I have not been able hitherto to find sufficient reason to convince me that the governor and council have not, as the law now stands, power to remove a judge, as the commissions now are, without a trial and judgment for ill behavior."<sup>28</sup> He was, or course, right. To witness John Adams defending the royal prerogative is nevertheless a charming irony,

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<sup>26</sup> Speeches of His Excellency Governor Hutchinson, to the General Assembly of the Massachusetts-Bay (Boston, 1773), pp. 6-7.

<sup>27</sup> Boston Post-Boy, January 25, 1773. From this point on, all Brattle quotations are from this letter.

<sup>28</sup> Boston Gazette, February 8, 1773.

Did Brattle miss Adams' point? For one of his learning and experience, this seems unlikely. Probably he was merely seizing an opportunity to call Adams a tory -- a name at that time regarded as insulting by patriots and loyalists alike. On the other hand, did he not realize how foolish he would look to his readers? Though Adams produced another seven letters, dissecting every line Brattle had written, this was to be the "General's" final effort.

He could think of two cases in Massachusetts in which judges had been removed without cause, "but these were arbitrary, illegal, unconstitutional measures, and do not determine what the law is," any more than Stuart tyranny had undermined the common law of England. "Arbitrary measures never did, after people had come to their senses, and I hope never will, determine what the law is." Brattle's condemnation of arbitrariness is perhaps significant. It is certainly an integrative notion that individuals, even kings, must not act against the common wisdom.

If a government is corrupt, he continued, it may define 'good behavior' as it pleases, and then *quamdiu bene se gesserint* and *durante bene placito* are synonymous. "But this is not our unhappy case." That was a most pertinent observation, and one to which Adams did not reply. Adams had also written that "the king cannot grant salaries in any other manner than *durante beneplacito* [sic]," and that the act of 1 George III, c. 23 gave the sovereign no power to grant salaries during good behavior.<sup>29</sup> "The above assertions, -- without the least color of proof, but Mr. Adams' word for it, -- I deny." It is a prerogative of the king, not of Parliament, to grant salaries to judges. No matter by what tenure a judge had been commissioned, he would hardly remain in office long if the king withdrew his salary. Brattle weakened his own case by belaboring this point. "For what if they are during good behavior? . . . Will they not in this case be as dependent upon the crown as if their commissions were to determine by the will of the king?"

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<sup>29</sup> Boston Gazette, January 18, 1773.



The act of 1761 had been made "that the king might not pay them out of the civil list, but out of another fund, namely, out of the revenue; here the above-mentioned acts says nothing about *durante beneplacito*; and therefore, if there is a grant made to the judges, that grant stands upon the same footing with the salaries granted by the king to the judges in England."<sup>30</sup>

Adams made short work of this argument. It made no sense to differentiate the civil list from the "revenue" or from any other source of public money. All these came mediately or immediately from Parliamentary grants. "And without the aid of parliament the crown could not pay a porter." In any case Adams could point to several acts of Parliament establishing salaries for judges. But the Massachusetts justices had never been paid from the civil list.<sup>31</sup>

Nowhere in this debate is it more clear that Adams and Brattle were talking past, not to, one another: their interpretations of common law and Whig ideology were incommensurable. To Brattle there was a distinct difference between the civil list and the general revenue; the former was the king's to use as he pleased, and if judges were paid from this fund, the king could certainly grant the salaries *durante beneplacito*. But the "revenue" was at the disposal of the Commons, who could presumably make grants *quamdiu bene se gesserint* -- they could, of course, do whatever they pleased. As royal officers the judges should be paid by the king, but not necessarily out of his own 'pocket.' The implication is that the royal prerogative, while it might be limited by Parliament, did not spring from it; that is, prerogative power is not a grant from the people or their representatives, but a pervasive and fundamental feature of the British nation and constitution. Adams, writing from an individualist standpoint, made no such distinction. To him the people's legislature was the sole fount of authority, and the king its servant. From this position it

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<sup>30</sup> Ibid., February 22, 1773.

<sup>31</sup> Ibid.

made no difference whether judges were paid out of this fund or that; all had the same source.

Continuing, Brattle took up Adams' challenge to produce a Massachusetts lawyer who agreed with his interpretation. He produced two, but unfortunately neither was able to speak for himself -- both had been for some years in their graves. Brattle had studied law under the "Honorable Mr. Read," who he compared to Justinian. Also, "the late Judge [Robert] Auchmuty was of the same mind." Adams gently suggested that perhaps Brattle had misinterpreted Mr. Read, just as he had misinterpreted Chief Justice Holt.<sup>32</sup>

As for other authorities, Brattle continued, "it surprises me much" that Adams could forget Thomas Powis, who had argued in the Harcourt case that by common law, "all officers of courts of justice, . . . were in for their lives, only removable for misbehavior in their offices." In the same trial, Serjeant Levinz<sup>33</sup> had referred to Charles I's appointment of Justice Archer *quamdiu se bene gesserit*. At that time appointment *durante bene placito* was not to be found anywhere in the common law, nor in any statute, "and I challenge Mr. Adams, and so I would my Lord Coke if he was alive, to show that it [did], and even that there ever was such a statute." Moreover, commissions granted after the Glorious Revolution and before the accession of George I were *quamdiu se bene gesserint*.

But according to Adams these commissions had been void, because common law and statute had earlier established the principle of *durante bene placito*. Brattle disagreed. King William and Queen Mary, "that came over to save an almost ruined and undone people by the tyranny of their predecessors," would hardly have commenced their reign "by going directly against the law" in making *quamdiu* appointments. On the contrary, tenure during good behavior had always been the

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<sup>32</sup> Boston Gazette, February 22, 1773. "Mr. Read" is actually John Reed, Boston's most eminent attorney in the 1720s and 1730s.

<sup>33</sup> Sir Thomas Powis and Sir Creswell Levinz were Harcourt's attorneys. Brattle misspelled the latter as "Levenz."

practice. The Stuarts had violated the principle, and William III had restored it. The Act of Settlement, by specifying that after Anne's death the words *quamdiu se bene gesserit* should appear in commissions, "plainly proves what I have advanced to be law, is law, or else great dishonor is reflected upon King William, Queen Mary, and Queen Anne."

This tortured line of reasoning, Adams thought, required a deeper exploration of the nature of the common law. In his February 1 letter he pointed out that Powis and Levinz were attorneys in the long-ago Harcourt case, not judges; and so their pronouncements did not have the force of law. He was surprised that Brattle cited Powis as one of "greatest sages of the law. . . . Does Sir Thomas Powis produce the Dome-Book itself in support of his doctrine?"<sup>34</sup>

Certainly Justice Archer had been appointed *quamdiu se bene gesserit*; but the king had no power to make such a grant. Charles I may have been under extreme pressure from Parliament, but could not constitutionally give away his prerogative. Charles II and James II had dismissed several judges at pleasure. This was a reassertion of the old prerogative, not an innovation, as Brattle apparently believed. In fact the General had failed to prove "that the king at common law, that is, from time immemorial, granted patents to these judges during good behavior, or that he, the king, had his election to grant them either *durant beneplacito* or *quamdiu se bene gesserint*, as he pleased." Brattle would have to show "that a patent without either of these clauses conveys an estate for life. None of these things has he done, or can he do." Were *quamdiu se bene gesserint* patents constitutionally void, or not? It mattered little: "had the king seen fit to have removed them by writ, it would have been legally in his power, notwithstanding that clause in their commissions."

What of Holt's decision in the Harcourt case? The Chief Justice had agreed with Powis and Levinz that his own commission, at least, was *quamdiu se bene gesserit*. Since no statute at that time mentioned tenure during good behavior,

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<sup>34</sup> Boston Gazette, February 1, 1773.

Holt's opinion must have been drawn from the common law. Would the universally respected Holt, asked Brattle, have accepted an illegal commission? "I leave the world to determine." When King William died in 1701, Holt accepted a renewal of his commission from Queen Anne. Adams had wondered why this re-appointment was necessary, if Holt held a life tenure. "Every civil officer's commission holden *quamdiu bene se gesserit*," Brattle reminded him. "died with the demise of the king, till the act made in the present King's reign."

Adams was not satisfied with this explanation, and in his letter of February 8 felt compelled to examine the case of *Harcourt v. Fox* at greater length. In the first place, Brattle had quoted Holt out of context. He "has discovered a degree of art in managing his lordship's words," Adams wrote, using language that might easily have provoked a challenge to a duel. The case involved not judges, but the singular office of clerk of the peace. Holt's remarks on judicial tenure "had no direct relation to the point . . . . It was only said incidentally, and not explained." Worse, Brattle implied that Holt had given his sanction to the common-law arguments of Powis and Levinz. "I hope this was the effect of haste, inadvertence, any thing rather than design in the General."<sup>35</sup>

Brattle's final point, though stated aggressively, was a kind of retreat. Adams seemed to think that there was "a material difference" between commissions *quamdiu se bene gesserint* and *durante bene placito*. In fact there was not; both types of tenure labored under similar conditions. Brattle cited a number of judicial opinions to the effect that all life appointments are contingent upon good behavior. Adams did not think this worth answering; he had already demonstrated that all life-tenure commissions were void at common law. Brattle's final words were: "Upon the whole . . . my haranguing in the town meeting in Cambridge hath not received any sufficient legal answer; and notwithstanding my veneration for Mr. Adams' authority, it by no means prevails with me to give credit to his

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<sup>35</sup> Boston Gazette, February 8, 1773.

doctrine. Nor do his reasons in support of it weigh with me even so much as his authority."<sup>36</sup>

William Brattle's arguments clearly represent an integrative and holistic Whig world-view. Judges simply cannot, regardless of appointment *quamdiu se bene gesserint* or *durante bene placito*, be so independent that no one can remove them. Adams' response, though more comprehensive and erudite, is not quite so obviously individualist; after all he was a Whig too. But the almost complete incommensurability between the two men is typical of the late stages of a the breakdown of a political paradigm, in this case Whiggism. This debate, like others between patriots and loyalists, was no real debate at all: it was a mere exposition of fundamentally different constitutional opinions, rooted in dialectically opposed world-views. By late 1772 the two sides in the American conflict were no longer communicating. Adams himself had some inkling that the controversy was a watershed in the collapse of the Whig synthesis. "It is thus that little Incidents produce great Events," he wrote in his diary. "I have never known a Period, in which the Seeds of great Events have been so plentifully sown as this Winter . . . ."<sup>37</sup> Indeed, the several months between the Cambridge town meeting and Adams' last letter saw the mobilization of the Committees of Correspondence, the publication of a number of significant pamphlets and newspaper letters, and of course the great debate between Thomas Hutchinson and the Massachusetts legislature. Adams probably was not thinking about the opening of North America's first museum in Charleston, or of its first penitentiary in Philadelphia, or the publication of Phyllis Wheatley's poems, all of which happened that January and February.

It is clear that both Brattle and Adams considered themselves good Whigs, and they were by their own definitions. The result is an interesting irony; each seems to defending a theory of judicial tenure that rightly belongs to the opposing

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<sup>36</sup> Boston Post-Boy, January 25, 1773.

<sup>37</sup> Adams, Diary, March 4 1773.

camp. They agreed that judges ought to be independent, though Adams wanted them independent of the Crown, and Brattle, of the people. They agreed that judges ought to serve *quamdiu bene se gesserint*, and that such tenure fell under the rubric of the common law. But Adams would have the people interpret the law, and Brattle took it for granted that this was a prerogative issue. They agreed that the independence of judges was in part determined by the source of their salaries. But this mattered more to Adams, who in individualist fashion distinguished sharply between funds coming directly from a legislature and funds coming directly from the King, even if ultimately from Parliament. In this controversy, however, the question of tenure far overshadowed that of salary. The common law problem is the real heart of the debate: if the commissions of Massachusetts judges did not specify what their tenure was to be, then the common law must decide. But who speaks for the common law?

Historians have ignored what was for Brattle a key point, the warrant for calling the Cambridge town meeting of December 14, 1772. This document mentioned the judges' salaries, but not judicial tenure. Brattle's efforts to persuade what must have been a very rowdy gathering on this point was a resounding failure, but it reveals his deep commitment to an integrative world-view. Natural law, which by definition was open to interpretation by the rational powers of each human being, must not take precedence over "the plain standing law of the province," which was enacted for the good of the community, not the individual.

Since London had not yet clarified the matter of the judge's salaries, Brattle did not think it wise to make any decisions based on rumor. The Massachusetts judges, he claimed, served *quamdiu se bene gesserint*, regardless of the manner in which their salaries were paid. Here is a serious flaw in his argument. If the king or anyone else could cut off a judge's salary, such action would obviously affect that judge's tenure. Brattle even contradicted himself on this question, and his decision to drop out of the newspaper debate may have been connected to his realization of that error. But it is important to remember that he had proposed to eliminate this problem at the

outset, simply by asking the Assembly to raise the judges' salaries.

Brattle argued that commissions were not required by the terms of the charter: nomination and appointment were sufficient to secure a judge in his office. He further assured his readers that the governor and council claimed no authority over the superior court and its jurisdiction. Adams demonstrated that the letters-patent of appointment were in fact commissions. But from an integrative point of view Brattle's argument makes sense. The tenure of any office was to be determined by the common law, and not at the whim of the people or even of their representatives: "Wherever there is an office there is a trust, wherever there is a material breach of trust there is a forfeiture, and not otherwise."<sup>38</sup> Brattle's interpretation of the charter was correct, but he sidestepped the Board of Trade's instructions to the governors regarding the wording of commissions. As a member of the Council, he could not have been ignorant of those instructions.

Tenure *quamdiu bene se gesserint*, Brattle averred, was clearly provided for in common law. Here he was simply wrong, as Adams brilliantly demonstrated; and this is the only facet of the controversy to which historians have paid much attention. Brattle's claim arises from his integrative philosophy of government. Justices must be independent of the people as well as of the Crown. If their tenure is at pleasure, they are defenseless against the person or persons who may hold the executive power. Kings come and go, but the community of the realm is immortal. And so is the common law, which by its very nature must stand for permanence of tenure.

William Brattle does not tell us why he gave up the contest with Adams after only two letters, but it not difficult to figure out. According to one historian: "Brattle, out-quoted, out-cited, and mistaken, quickly lost interest in the argument and stopped replying to Adams' essays."<sup>39</sup> Bernard Bailyn called

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<sup>38</sup> Boston Post-Boy, January 4, 1773.

<sup>39</sup> Brown, Revolutionary Politics, p. 100.

the General's letters "wrong in principle and wrong in fact. They were bad law, bad history, and bad politics."<sup>40</sup> All of this is quite true, perhaps; but we must not dismiss Brattle's ideas simply because he was wrong. They provide a valuable insight into the loyalist mind during the last stages of the Whig ideology's collapse. Reading between the lines, and considering carefully the integrative and individualistic connotations behind certain key words, we can discern -- perhaps for the first time in the Revolutionary period -- a total incommensurability. Once patriots and loyalists ceased to agree on those connotations, consciously or otherwise, the Revolution was inevitable.

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<sup>40</sup> Bailyn, Pamphlets, p. 254.