The Josiah Phillips Attainder and the Institutional Structure of the American Revolution

This is a study of the Case of Josiah Philips, a militant loyalist who led a terror campaign at the opening of the Revolutionary War and was attainted by an act of the Virginia General Assembly in 1778. In his edition of Blackstone’s Commentaries, St. George Tucker asserted that judges on Virginia’s General Court had refused to enforce the attainder. It has long been thought that Tucker’s claim was false. Here I return to the Philips sources from a new perspective, reinvigorate Tucker’s claims, and show how the case continues to be of interest. As I read it, the case is centrally concerned with a constitutional dispute over the role of the general assembly during wartime. In particular, Philips’s treatment by the General Assembly exposed a disagreement about the proper scope of residual judicial powers in a republican assembly. Republicans like Thomas Jefferson saw the assembly as the proper institutional repository of summary legal processes in wartime, derived from the king’s obligation to do justice. Jefferson was opposed by men like Edmund Randolph, who were concerned about the corrupting effect of such processes on ordinary forms of civil justice. At issue was the institutional structure of wartime judicial authority.