

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

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Josiah Philips led a gang of militant loyalists who terrorized Virginians in the former counties of Norfolk and Princess Anne at the outbreak of the Revolutionary War. He was attainted in 1778 by an act of the Virginia General Assembly, drawn up by none other than Thomas Jefferson. For some years the Philips case was thought to be an early example of what we now call “judicial review,” following an account given by St. George Tucker in his 1803 edition of Blackstone’s *Commentaries*.¹ Tucker’s claim that judges had refused to enforce the act of attainder was eventually debunked; apparently, Philips was captured before the grace period in the act expired and then indicted for robbery and convicted after trial.² Still, memory of the “Phantom Precedent” lingered on. Writing in 1953, lawyer William Crosskey took palpable satisfaction in setting the record straight. The Philips “precedent,” he wrote, “has been exploded . . . since 1914.” The case “had nothing whatever to do with judicial review,” and was

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¹ 1 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference* 293 (1803) (1765).

² Jesse Turner, *A Phantom Precedent*, 48 *Am. L. Rev.* 321 (1914); Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 77-80 (1914); W. P. Trent, *The Case of Josiah Philips*, 1 *Am. Hist. Rev.* 444 (1896).

only ever thought to because Edmund Randolph “deliberately misrepresented” the facts at the Virginia ratifying convention, hoping to aid passage of a proposed federal Constitution.³

It is worth revisiting the Philips case. As it turns out, one can read the *same sources* Crosskey read without concluding Edmund Randolph to be a liar. Judge Tucker, as well, might have been right (or perhaps, *could* have been right) that Virginia judges refused to give effect to the act of attainder. I will explain how below. But what’s most interesting about the Philips case is not whether we can add it to our stockpile of “precedents” for judicial review, a reserve for which there is surely no longer any need. The best reason to return to the attainder of Josiah Philips is that the case has much to teach us about the boundary between civil and military justice in revolutionary Virginia, and, in turn, about the development of a doctrine of separation of powers and the institutional structure of republican government. In these respects, the case remains historically rich, challenging and complex in the very best sense, and of direct relevance for our construction of fundamental law today.

The Philips case is a wartime case. It reveals how the governor and assemblymen of Virginia thought about and exercised their respective powers in conducting an imperial civil war. In the course of that conflict the assembly asserted powers to suspend the ordinary course of law and to authorize the governor to summarily detain and remove individuals suspected to be dangerous to the public. Likewise, where ordinary forms of civil justice and police failed, the assembly itself acted summarily to ensure that justice was done and the public protected. In these ways, and others, the general assembly inherited and exercised aspects of royal authority.⁴

³ 2 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 944, 945 (1953).

⁴ Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 83-85 (2005); Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 *Law & Hist. Rev.* 153, 166-77 (2015).

Jefferson and Virginia's governor, Patrick Henry, viewed the bill of attainder as one such summary proceeding, which the governor might employ with the concurrence of the assembly. Still, the assembly was subject to some limits. The laws of war, part of the modern law of nations, prohibited Virginia from punishing British belligerents, who were instead to be held as prisoners of war.⁵ Militant loyalists like Philips thus raised a difficult set of questions, which required Jefferson, Henry, Randolph and even judges like Tucker to settle the boundary between civil and military justice. Could a militant like Philips be punished? If he could be punished, should he be punished by military authority under the laws of the war? Or should he be punished for treason by civil authority? And if he were punished by civil authority, could it be by summary proceeding like a bill of attainder? Or was he entitled to a trial by jury?⁶

My proposal is to rework the Philips attainder from this perspective. Eventually the questions I have just posed will occupy the foreground, but I want to work toward them organically and there is some need to set the stage. I begin in Part I with a review of what we know about the case, relying on the record as we have it. The discussion here is brief and largely synthetic, but valuable, I think, for refreshing our recollection and for identifying live issues. In Part II I turn to statements of Randolph, Henry, Jefferson and Tucker that have been the source of much of the mystery surrounding the Philips case. Taking their statements at face value, I suggest that the mystery is largely a result of re-telling the story over time, adjusting emphasis and filling gaps in accordance with purposes and assumptions then dominant. The Philips story tells us something about republican institutions and their legal capacities—but what it tells us is a

⁵ John Fabian Witt, *Lincoln's Code: The Laws of War in American History* 16-23 (2012).

⁶ In the various treatments of the Philips attainder, only Leonard Levy acknowledges this dimension of the case. Leonard W. Levy, *Origins of the Bill of Rights* 72-77 (1999). Levy's treatment, however, is brief and, it should be said, permeated by an evident disapproval of Jefferson.

function, in part, of context. With this frame, I turn in Part III to the issues of treason, preventive justice, the law of war, and the powers of the representative assembly, which lie at the heart of the case as I see it. If we are charitable to the principal players, as I think we should be, we can see them struggling to work out an institutional regime for the wartime administration of justice and police that preserved the security, self-governance, and territorial ambitions of the Commonwealth of Virginia.

I. Josiah Philips Circa 1778

The Josiah Philips gang was not unique in the Revolutionary War period, although its methods were not widely representative either. Resistance in most loyalist strongholds probably looked like Queens, New York, where the ‘disaffected’ simply ignored the orders of the ad hoc whig assemblies attempting to govern, and later welcomed or even joined an invading British army.⁷ Elsewhere loyalism mixed with a kind of organized crime. In Maryland, for example, on the eastern shore of Chesapeake Bay, Hamilton Callilo and Thomas Moore led a gang engaged in “piracy and robbery mixed with loyalism,” for which Callilo was made an outlaw.⁸ In Pennsylvania, the Doan family robbed tax collectors and destroyed state property into the 1780s, for which several members were also outlawed.⁹ The Nugent and Shockey gang made a name for itself in robbery and counterfeiting, offenses to which a number of loyalist syndicates became

⁷ Claude Halstead Van Tyne, *The Loyalists in the American Revolution* 87-89 (1902); Alexander Clarence Flick, *Loyalism in New York During the American Revolution* 37-57 (1901).

⁸ Bradley Chapin, *The American Law of Treason* 59 (1964).

⁹ *Respublica v. Doan*, 1 Dall. 86 (Pa. Sup. Ct. 1784); Anne M. Ousterhout, *A State Divided: Opposition in Pennsylvania to the American Revolution* 213-14 (1987).

dedicated.¹⁰ These militant, criminal loyalists posed a serious challenge for the new state governments formed in 1776 and 1777. States like New York, Pennsylvania and Virginia struggled to administer civil justice and protect citizens across their expansive territories, and in some cases militants were able to operate in essentially ungoverned areas. As we will see in Philips's case, it was the militants' presence in those spaces—where civil process did not run and magistrates could not police—that required the use of institutions like outlawry and attainder.

Philips was a laborer from Princess Anne county, in the very southeast portion of Virginia.¹¹ He became disaffected with the movement towards independence. In August 1775 he was seen “command[ing] an ignorant disorderly mob, in direct opposition to the measures of this country.”¹² Some two years later, in June 1777, Colonel John Wilson, head of the Norfolk County militia, reported to the governor that Philips and two other men were the leaders of “a party of desperadoes,” who had “commenced to rob and murder . . . peaceful citizens.”¹³

Governor Patrick Henry issued a proclamation offering a reward for the arrest of the ringleaders,

¹⁰ Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, Pa. Mag. Hist. & Bio. 287, 298 (1966).

¹¹ I rely, in what follows, on sources utilized by earlier commentators. Among these are Jefferson's letters, although I set aside his claims thrown into question by Randolph's account, which are discussed in Part II below. Principal sources here in Part I include: Trent, *supra* note 2, at 445-49; William Wirt, *The Life of Patrick Henry* 234-42, 462-68 (rev. ed. 1836) [hereinafter “Life of Henry”]; Letter from Thomas Jefferson to Louis H. Girardin (Mar. 12, 1815), in 8 *The Papers of Thomas Jefferson: Retirement Series* 334-38 (J. Jefferson Looney ed. 2011) [hereinafter “Girardin Letter”]. William Wirt's *Life of Henry* contains transcriptions of documents that are now apparently lost, and some of these I quote below. W. P. Trent extends and corrects Wirt's account by reference to the journals of the Privy Council and House of Delegates. Other early histories, although cited in the literature on Philips's case, are largely derivative. H. J. Eckenrode, *The Revolution in Virginia* 190-94 (1916); 1 William Wirt Henry, *Patrick Henry: Life, Correspondence and Speeches* 611-13 (1891); 4 John Burk, Skelton Jones & Louis Hue Girardin, *The History of Virginia* 305-06 (1816).

¹² *The Proceedings of the Convention of Delegates for the Counties and Corporations in the Colony of Virginia* 9 (1775) (1816).

¹³ Henry, *supra* note 11, at 611.

and Philips was captured that winter, only to escape sometime in early 1778.¹⁴ He proved difficult to recapture, in part because of the geography of the “Dismal Swamp,” where Philips apparently had his hideout, and in part because of “the disaffection which prevailed in that quarter.”¹⁵ The gang had supporters—or at least few were willing to cross them. In May 1778, a muster of three militia companies to go after Philips raised only 10 men, and the expedition failed. Several days later, the expedition's commanding officer was killed in an ambush near his home, being “fired on by four men concealed in [his neighbor's] house.” Colonel Wilson wrote to Governor Henry on May 20, informing him of the attack, and complaining of “disaffection” in area residents, who sympathized with “Philips and his notorious gang.” The fate suffered by the commanding officer would surely visit others, he predicted, unless “the relations and friends of those villains” were removed from the area.¹⁶

Henry received Wilson’s letter several days later and shared it immediately with Jefferson, who was then a leading member of the House of Delegates. According to Jefferson, “we both thought the best proceeding would be by bill of attainder.”¹⁷ Around the same time, Henry showed the letter to his Privy Council, an executive council elected by the legislature, which advised the governor to forward the letter to the legislature and to order a company of regulars to the area.¹⁸ On May 27 Henry sent the correspondence to Benjamin Harrison, then

¹⁴ Trent, *supra* note 2, at 445 n.2, 446 n.1 (citing *Journal of the Privy Council (MS)*, 1777-8, at 166, 246). The proclamation was issued on the advice of Henry's council. 2 *The Papers of Thomas Jefferson* 192 (Julian P. Boyd ed., 1950).

¹⁵ Wirt, *Life of Henry*, *supra* note 11, at 234.

¹⁶ Letter from County Lieutenant John Wilson to Patrick Henry (May 20, 1778), in Wirt, *supra* note 11, at 235-36.

¹⁷ Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814), in 7 *The Papers of Thomas Jefferson: Retirement Series* 548-49 (J. Jefferson Looney ed., 2010).

¹⁸ Trent, *supra* note 2, at 446 (citing *Journal of the Privy Council (MS)*, 1777-8, at 260).

Speaker of the lower house, under a cover memo that may have been written by Jefferson.¹⁹ The cover memo described an “insurrection in Princess Anne and Norfolk,” which Henry had sought, unsuccessfully, to “quell” using the county militias. Colonel Wilson had requested that the governor “remov[e] such families as are in league with the insurgents,” but, Henry continued, “thinking that the executive power is not competent to such a purpose, I must be leave to submit the whole matter to the assembly, who are the only judges how far the methods of proceeding directed by law are to be dispensed with on occasion.”²⁰ Henry’s belief that the assembly had to authorize suspension of “the methods of proceeding directed by law” departed, significantly, from a mass removal conducted some nine months earlier. On that instance Henry had removed disaffected and “suspected” persons on the advice of his counsel, and the assembly had later indemnified him.²¹

¹⁹ Trent, *supra* note 2, at 446.

²⁰ Letter from Patrick Henry to Benjamin Harrison (May 27, 1778), in Wirt, *Life of Henry*, *supra* note 11, at 237.

²¹ In April 1776, prior to independence, a colonial Committee of Safety had ordered the removal of disaffected persons from Norfolk and Princess Anne, but then retracted its resolution in May. Robert Leroy Hildrup, *The Virginia Convention of 1776: A Study in Revolutionary Politics* 119 (unpublished Ph.D. dissertation, University of Virginia, 1935). After the appearance of the British navy in the Chesapeake next year, Governor Henry and his council decided to remove disaffected persons from the area; then, in October 1777, the assembly indemnified the governor and council for the decision (as they described it) "to remove and restrain, during the imminence of the danger, at a distance from the post and encampments from the [Virginia] militia, and from other places near the ports and harbours of this commonwealth, certain persons who affections to the American cause were suspected, and more especially such as had refused to give assurance of fidelity and allegiance to the commonwealth." An Act for indemnifying the Governour and Council, and others, for removing and confining Suspected Persons during the late publick danger, ch. 6, 9 *The Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619*, at 373-74 (William Waller Hening ed., 1821). Jefferson apparently drafted this bill (as he did the Philips attainder). Bill Indemnifying the Executive for Removing and Confining Suspected Persons (Dec. 16-26, 1777), in 2 *Papers of Jefferson*, *supra* note 14, at 119.

Speaker Harrison immediately referred Henry's letter to a committee of the whole house "on the state of the commonwealth." That committee deliberated the next morning, May 28, and then reported a resolution the same day. What Henry had called an "insurrection," the committee labeled treason. "Information being received," they wrote, "that a certain Philips, with divers others, . . . have levied war against this commonwealth . . . committing murders, burning houses, wasting farms, and doing other acts of enormity, in defiance of the officers of justice," it was resolved that Philips and "his associates, and confederates" should "render themselves to some officer" within June, or "such of them as fail so to do ought to be attainted of high treason."²² The assertion that the Philips gang had committed treason by murder and arson concealed a significant legal claim, namely, that the latter offenses constituted "levying war," one of the ancient varieties of treason.²³ In the interim, it would be "lawful for any person . . . to pursue and slay, or otherwise to take and deliver to justice . . . Philips, his associates and confederates."²⁴ Upon receipt of the resolution the House appointed Jefferson, along with lawyer and later Governor John Tyler, to a committee to draft a bill. A bill was docketed the same day, May 28, by clerk of the House Edmund Randolph.²⁵

²² Report of the Committee of the Whole House (May 28, 1778), in Wirt, *Life of Henry*, supra note 11, at 238-29.

²³ The question to which such offenses constitute levying war is answered by the doctrine of "constructive treason." By Chapin's analysis, an *insurrection* (as Henry had called it) would clearly be a form of constructive treason, but murder, arson and robbery might not. Chapin, supra note 8, at 7; Thomas P. Slaughter, "The King of Crimes": Early American Treason Law, 1787-1860, in *Launching the Extended Republic: The Federalist Era 58-78* (Ronald Hoffman & Peter J. Albert eds., 1996). Chapin observes that Virginia accepted the doctrine of constructive treason later in the war, at least in principle. Chapin, supra note 8, at 174.

²⁴ Report of the Committee of the Whole House (May 28, 1778), in Wirt, *Life of Henry*, supra note 12, at 239.

²⁵ *Journal of the House of Delegates of Virginia, May 4 – June 1, 1778*, at 34 (1778) (report and first reading on May 28); 9 *The Documentary History of the Ratification of the Constitution*

The draft bill, which was preserved and published as part of Jefferson's papers, is relatively unremarkable as an example of attainder. Indeed, its language and function would have been instantly recognizable to a student of parliamentary history—as Jefferson himself was—and it is likely that Jefferson emulated bills he had encountered in his reading.²⁶ Over most of its history, the bill of attainder had served as a device for the king and his allies to punish treasonous conduct by great men who were too powerful for the common law courts at Westminster or who could not be reached by their process. Bill proceeding in parliament operated as a kind of *summary legal procedure*, in the sense that it enabled the government to convict an individual whose serious criminal conduct was widely-known, without the presence of the accused or any presentation of testimonial evidence. Those involved largely spoke and wrote about bills of attainder as legal proceedings, a view that contrasts markedly with our own, which (if it acknowledges the bill of attainder at all) treats it as an exercise of legislative power. Proponents connected the bill of attainder to a body of continental legal commentary on summary

1004 n.5 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter "9 DHRC"] (noting that Randolph docketed the bill as clerk).

²⁶ Jefferson would have read of bills of attainder in his study of Hatsell's *Precedents* and Rushworth's *Collections*, among other sources. H. Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* 159-60 (1965) (describing Jefferson's study of Rushworth); Lewis Deschler, *Jefferson's Manual and the Rules of the House of Representatives* 115 n.a (1961) (quoting Jefferson, "I could not doubt the necessity of quoting the sources of my information, among which Mr. Hatsell's most valuable book is preeminent"); Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 119 *U. Pa. L. Rev.* 823, 836 (1971) (recommending the study of "Hatsell's *Precedents of the House of Commons*" and "Select Parliam^y debates of England and Ireland"); 2 *Catalogue of the Library of Thomas Jefferson* 233 (E. Millicent Sowerby, ed., 1953) (including volume 1 of the 1706 edition of the *Statutes at Large*, which indexed the attainders of Jack Cade and Elizabeth Barton); *id.* at 300 (volume 1 of Pemberton's *History of Tryals*, which described the attainder of Thomas Cromwell, among others). Jefferson could also have studied acts of attainder in Coke's Third *Institute*, in the section on Parliament, but the accounts given there were distorted to some degree by Coke's efforts to elevate the place of the common law above the 'law and course of Parliament.'

proceedings by describing the widely-known treasons it targeted as “notorious”—an expression that one encounters, remarkably, in sources as various as medieval bills of attainder (*notoriement* in Anglo-Norman) and bills passed in eighteenth-century America.²⁷ Across their long history, bills of attainder generally took two different forms. Some bills of attainder ordered an individual to submit himself to ordinary proceedings at common law, functioning like a kind of parliamentary writ of outlawry.²⁸ Modern commentators describe this first form as the “conditional” or “suspensive” attainder. It was suspensive in the sense that the attainted individual’s surrender would suspend his conviction, which might then be reinstated after a common-law proceeding. Anyone who failed to timely surrender would be attainted by force of the act alone, after expiration of a grace period. Other bills of attainder, such as those that applied to the dead, simply pronounced their targets guilty of a notorious offense. Commentators sometimes call this second form the “absolute” attainder.²⁹ Many bills, of course, combined these forms to reach different individuals with different effect.

²⁷ T. F. T. Plucknett, *The Origins of Impeachment*, 24 *Transactions Royal Hist. Soc’y* 47, 59-61, 63-67 (1941); Kenneth Pennington, *Two Essays on Court Procedure: The Jurisprudence of Procedure* 185, 205–06 (unpublished manuscript).

²⁸ 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 539, 554 (2d ed. 1898).

²⁹ Matthew Steilen, *Bills of Attainder*, 53 *Houston L. Rev.* 767, 770-74 (2016); Colin G. C. Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* 16, 83-148 (1974); J.G. Bellamy, *The Law of Treason in England in the Later Middle Ages*, 102-03, 177-205 (1970); J.R. Lander, *Attainder and Forfeiture, 1453-1509*, in 2 *Historical Studies of the English Parliament, 1399-1603*, at 92-124 (E.B. Fryde & Edward Miller eds., 1970); Zechariah Chafee, Jr., *Three Human Rights in the Constitution* 90-161 (1956); William Richard Stacy, *The Bill of Attainder in English History* (unpublished Ph.D. dissertation, University of Wisconsin-Madison, 1986).

Jefferson's bill was a suspensive attainder. It shared much in common with suspensive attainders employed elsewhere during the Revolution, such as Pennsylvania.³⁰ Following the committee resolution, the bill alleged that Philips had committed treason. "[C]ontrary to their fidelity," wrote Jefferson, the gang had "levied war against this Commonwealth," committing murder, arson, and robbery, "and still continue to exercise the same enormities."³¹ Jefferson's bill thus endorsed the legal position of the committee resolution, namely, that widespread murder, arson and robbery, accompanied by armed resistance, constituted levying war against the commonwealth. Judicial outlawry was too slow a process in these circumstances. To "outlaw the said offenders according to the usual forms and procedures of the courts of law would leave the said good people for a long time exposed to murder and devastation."³² Instead, the bill set out a suspensive attainder, giving Philips and his gang until an unspecified day in June to surrender. If Philips failed to surrender by the end of the grace period, he might be killed on sight; if he surrendered before, he could claim a common law trial. Notably, the bill also functioned as a charging document. Thus, if Philips did surrender before the end of the grace period, he was to be tried for treason, rather than indicted for another offense. Like other attainders at the time, Jefferson's bill was general in its scope, attainting Philip by name, but including also his unnamed "associates and confederates."³³ It did permit gang members to contest their affiliation

³⁰ Steilen, *supra* note 29, at 885-86; Levy, *supra* note 6, at 71-72; Chapin, *supra* note 8, at 55, 78-80; Van Tyne, *supra* note 7, at 190-242, 268-85; James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution (Part 2)*, 3 *Ill. L. Rev.* 147 (1909).

³¹ *Bill to Attaint Josiah Philips and Others*, in 2 *Papers of Jefferson*, *supra* note 14, at 189-90.

³² *Id.* at 190.

³³ *Id.* For another example of a general act of attainder, see the attainder of Ethan Allen by the state of New York in 1774, which applied to Ethan and the members of his gang. *An Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the more speedy and effectual punishing the Rioters*, 5 *The Colonial Laws of New York from the Year 1664 to the Revolution* 647 (James B. Lyon ed., 1894).

with Philips and to obtain a trial on this issue “according to the forms of law.”³⁴ The bill passed swiftly through the assembly. After its initial reading in the House of Delegates on May 28, the bill was read a second time on May 29 and a third time on May 30; Jefferson was ordered to carry the bill into the senate, which reported its concurrence on the same day.³⁵ Only minor changes were made to Jefferson’s draft, and Philips was given until the last day in June to surrender.³⁶

The research of Jesse Turner in 1914 revealed that Philips was in fact captured *before* the end of the grace period on the last day of June.³⁷ Excerpts from court records show that Philips was indicted by a grand jury on October 20, 1778, not for treason, but for robbery “of twenty-eight men’s felt hats . . . and five pounds of twine.”³⁸ Edmund Randolph, who had been clerk of the House of Delegates when Philips was attainted, was now the state Attorney General, and may

³⁴ Bill to Attaint Josiah Philips and Others, in 2 Papers of Jefferson, supra note 14, at 190.

³⁵ Journal of the House of Delegates of Virginia, May 4 – June 1, 1778, at 34, 35, 41, 48, 50 (1778) (first reading on May 28, second reading May 29, third reading May 30; senate concurrence reported by Holt on May 30; bill signed by speaker on June 1); Trent, supra note 2, at 447 & n.2 (correcting Wirt on the basis of the House Journal).

³⁶ An act to attaint Josiah Philips and others, unless they render themselves to justice within a certain time, c.12, 9 Statutes at Large, supra note 21, at 463-64. For a list of the differences between the bill and the act, see 2 Papers of Jefferson, supra note 14, at 193 nn.1-10.

³⁷ Turner, supra note 2, at 338-40. The document Turner discovered describes an examination of Philips by a judge on charges that he had committed a robbery, after which Philips is committed to jail. The date of the proceeding is June 11, 1778. *Id.* at 339 n.23. Prior to Turner, the view had been that Philips was captured in the late summer or autumn of 1778, after the grace period had expired. This view was based on statements made by Jefferson and entries in the Privy Council journal authorizing rewards for the capture. Girardin Letter, supra note 11, at 337; Trent, supra note 2, at 448; Wirt, *Life of Henry*, supra note 11, at 241.

³⁸ The original court records were destroyed during the civil war. Trent, supra note 2, at 448. See the excerpted indictment in Wirt, *Life of Henry*, supra note 11, at 465-66. Wirt told Jefferson sometime in 1815 or 1816 that he had discovered the records. Letter from Thomas Jefferson to William Wirt (Oct. 8, 1816), in 10 *The Papers of Thomas Jefferson: Retirement Series* 438 (J. Jefferson Looney ed., 2013).

have initiated this prosecution. Philips was tried by jury and found guilty, sentenced to death, and executed in December 1778.³⁹

II. Josiah Philips *Redux*

One of the great challenges of the Philips attainder is how the record freely admixes history and memory. Much of what we know about the case derives from later accounts given by Randolph, Henry, Tucker, and Jefferson, which rest, ostensibly, on personal recollection. Together, these statements raise a number of difficult questions; Edmund Randolph's account, in particular, seems at odds with the institutional records that have been preserved. There is no easy way to deal with these difficulties. My approach below is to excerpt the relevant statements and then consider what they might mean in context. Proceeding in this fashion gives us three groups: (A) statements by Randolph and Patrick Henry in the Virginia ratification convention of 1788; (B) an account given by St. George Tucker in annotations to his edition of Blackstone's *Commentaries*, published in 1803 but likely written in the early 1790s; and (C) a series of letters written by Thomas Jefferson between 1814 and 1816.

It is admittedly a bit tedious to try and sort all this out, but reexamining what Randolph, Henry, Tucker and Jefferson said about the Philips case does prove to have several benefits. First, it shows that Randolph's account, while erroneous in several minor respects, can be interpreted in a way that renders it largely accurate. There are errors in Randolph's retelling, to be sure, but they are best described as errors of emphasis, as the colorization one adds to a story to enhance its rhetorical effect. There is a second benefit as well. A close reading of the record suggests that

³⁹ Wirt, *Life of Henry*, supra note 11, at 466-68.

we have missed the *point* of Randolph's argument almost entirely. The perception that Randolph's account was grossly erroneous arises, I think, from a failure to think about the institution of the wartime representative assembly as did Randolph and his principal interlocutor, Henry. For them the assembly was the central repository of sovereignty in a republic and had critical legal functions in wartime, including the use of summary legal procedures like the bill of attainder. In exercising these functions the assembly was not limited to passing general, forward-looking laws—a constraint that would be ill-fitted to the nature of the task. If we try to imagine as they would have the different institutional forms sovereignty could assume in the prosecution of a civil war and the protection of a state's citizens, we can better understand what was at stake in arguments where the Philips case was adduced: the scope and limits of summary legal procedures. This perspective not only makes better sense of what Randolph said, but also provides a key for interpreting the claims made by Tucker and Jefferson. The basic question they all sought to answer was this: how should we divide and allocate the sovereign authority in wartime? How do we limit that authority so that it does not invade and corrupt the ordinary forms of civil justice?

A. Randolph and Henry in the Virginia Ratifying Convention

Philips's case made its first reappearance ten years after his execution, in the convention of Virginia delegates elected to ratify the proposed federal Constitution. On June 6, 1788, the fourth day of the convention, Governor Edmund Randolph—who had previously been clerk of the House of Delegates when Philips was attainted, and then Attorney General when Philips was indicted and convicted of robbery—adduced the attainder as an example of the legislature's

violation of the state constitution. The Virginia Constitution of 1776 did not prohibit attainders, but section 8 of the state's Declaration of Rights did grant defendants a right to confront their accusers, to compel the production of favorable evidence, and to have a jury trial. Randolph then described what had occurred for the benefit of the convention:

A man who was a citizen was deprived of his life, thus—from a mere reliance on general reports, a Gentleman in the House of Delegates informed the House, that a certain man (Josiah Philips) had committed several crimes, and was running at large perpetrating other crimes, he therefore moved for leave to attaint him; he obtained that leave instantly; no sooner did he obtain it, than he drew from his pocket a bill ready written for that effect; it was read three times in one day, and carried to the Senate: I will not say that it passed the same day through the Senate: But he was attainted very speedily and precipitately, without any proof better than vague reports! Without being confronted with his accuser and witness; without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed.⁴⁰

⁴⁰ 9 DHRC 972. Randolph's speech is taken from *Debates and other Proceedings of the Convention of Virginia 77-78 (1788)*, the first of three volumes of *Debates* published from shorthand notes taken by lawyer David Robertson, published in October 1788, several months after the convention concluded. 9 DHRC 902. Robertson sat in the galley, *id.*, a seat he described as "remote from the speakers, where he was frequently interrupted by the noise made by those who were constantly going out and coming in," *id.* at 905. Robertson could understand certain speakers better than others. Asked many years later to describe the accuracy of Robertson's record, John Marshall commented that "Gov: Randolph whose elocution was good was pretty well reported," but that "Mr. Henry was reported worst of all,— no reporter could Correctly reporte him." *Id.* at 905. George Mason was less sanguine, but for a different reason, accusing Robertson on multiple occasions of bias as a "federal Partizan." *Id.* at 904.

The account looks startlingly inaccurate. As we know, Philips's attainder did not pass through the House of Delegates in one day. Nor was Philips deprived of his confrontation or jury trial rights; he was indicted for robbery, tried by a jury and convicted. The errors are hard to understand, given Randolph's positions as clerk of the House and Attorney General; surely, no one was in a better position than Randolph to know what *had* happened. Yet perhaps even more surprising was the response Randolph's description drew from Patrick Henry one day later. Rather than challenge Randolph, Henry largely conceded the account. Philips, he argued,

was not executed by a tyrannical stroke of power <nor was he a Socrates>. He was a fugitive murderer and an out-law. . . . Those who declare war against the human race, may be struck out of existence as soon as they are apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws, in criminal cases. The enormity of his crimes did not entitle him to it. I am truly a friend to legal forms and methods; but, Sir, the occasion warranted the measure. A pirate, an out-law, or a common enemy to all mankind, may be put to death at any time. It is justified by the laws of nature and nations.⁴¹

But Philips had not been "struck out of existence" upon being apprehended! He had been given a trial. Henry's offhand remark that Philips was "not a Socrates" became a Federalist talking point in the first half of the convention. Randolph brought it up on June 9, John Marshall mentioned it

⁴¹ 9 DHRC 1038. DHRC incorporates corrections made by reporter Robertson in an 1805 edition of the Debates, which are set off by angle brackets. The 1788 edition of the Debates omits mention of Socrates from Henry's speech, but includes a footnote in Randolph's speech of June 9, which reads, "Mr. Henry had said that Philips was not a Socrates." Debates and other Proceedings of the Convention of Virginia 192 (1788).

on June 10, George Nicholas discussed it that day and then again on June 14 and 16, and Edmund Pendleton, president of the convention, discussed the attainder on June 12.⁴² Only Benjamin Harrison came to Henry's defense, cautioning that Philips "was a man, who, by the law of nations, was entitled to no privilege of trial."⁴³ Jefferson made no comment, as he was then in France.

B. St. George Tucker in Blackstone's Commentaries

The Philips attainder slept again. Fifteen years later, in 1803, leading Virginia judge St. George Tucker published an annotated version of Blackstone's *Commentaries on the Law of England*, which included a clause-by-clause commentary on the federal Constitution. Tucker had likely written the notes in the early 1790s for a course on law he gave at William and Mary.⁴⁴ When Tucker came to the prohibition of bills of attainder in article I, sections 9 and 10, he described them in no uncertain terms. "Bills of attainder," Tucker wrote, were "state-engines of oppression in the last resort, . . . supply[ing] the want of legal forms, legal evidence, and of every other barrier which the laws provide against tyranny and injustice in ordinary cases."⁴⁵ They were evident "in almost every page of English history for a considerable period." Tucker then turned to the Philips case:

⁴² Id. at 1086, 1116, 1127, 1333; 10 The Documentary History of the Ratification of the Constitution 1197 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

⁴³ 9 DHRC, supra note 40, at 1127.

⁴⁴ Tucker, supra note 1, at viii.

⁴⁵ Id. at 292-93.

In May, 1778, an act passed in Virginia, to attain one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the sentence, and he was put upon his trial, according to the ordinary course of law....This is a decisive proof of the importance of the separation of powers of government, and of the independence of the judiciary⁴⁶

But how could it be? Philips had, in fact, come in before the end of the grace period. He therefore could not have been executed under the act of attainder. Tucker knew several of the judges involved and may have discussed the matter with them.⁴⁷ From where, then, could Tucker have gotten the impression that the General Court refused to enforce the act?

C. *The Jefferson-Wirt and Jefferson-Girardin Exchanges*

Ten years later, in 1814, Jefferson finally learned of the afterlife of the attainder of Josiah Philips. In July William Wirt wrote Jefferson seeking information for a biography of Patrick Henry. Wirt noted that Henry had been “much censured by Mr Ed. Randolph” at the 1788 convention “on account of the attainder of a man by the name of Phillips.”⁴⁸ Could Jefferson provide any information? Jefferson responded the next month. Randolph’s censure of Henry was,

⁴⁶ Id. at 293.

⁴⁷ Trent, *supra* note 2, at 452 (“The learned judge has long been known . . . as a painstaking writer. Would he have permitted himself to make so important a statement without having investigated the subject carefully?”).

⁴⁸ Letter from William Wirt to Thomas Jefferson (July 27, 1814), in 7 Retirement Series, *supra* note 17, at 495; Trent, *supra* note 2, at 451.

he wrote, “without foundation.”⁴⁹ As Jefferson recalled it, Henry had informed him of Philips’s doings, and both men thought it best to proceed by bill of attainder. When Philips was captured, it was *Randolph* who decided not to have him executed according to the act. Randolph believed Philips “would plead that he was a British subject, taken in arms, in support of his lawful sovereign, and as a prisoner of war entitled to the protection of the law of nations.”⁵⁰ It was “safest” simply to indict him for robbery.

The next spring, in March 1815, Jefferson wrote a much fuller account of the affair to Louis Girardin, who was then at work continuing a classic history of Virginia.⁵¹ Judge Tucker, Jefferson wrote, had “instead of a definition of the functions of bills of attainder, . . . given a diatribe against their abuse.” But bills of attainder had “a proper office,” which was to reach fugitives from justice. “[W]hen a person, charged with a crime, withdraws from justice, or resists it by force, either in his own or a foreign country, . . . a special act is passed by the legislature, adapted to the particular case.”⁵² Properly formed, such an act should provide the defendant a chance to appear, but “declare[] that his refusal to appear shall be taken as a confession of guilt, . . . and pronounce[] the sentence which would have been rendered on his confession or conviction in a court of law.” The attainder of Philips had taken this form. He had been “too powerful to be arrested by the sheriff and his posse comitatus.” Proofs of Philips wrongdoing “were ample, his outrages as notorious as those of the public enemy, and well known to the members of both houses from those counties.” Philips’s alleged service in the English cause did not make it unlawful for Virginia to proceed by bill of attainder, since “an enemy in lawful war

⁴⁹ Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814), in 7 Retirement Series, *supra* note 17, at 548.

⁵⁰ *Id.* at 549.

⁵¹ Burk’s History of Virginia. 4 Burk et al., *supra* note 11, at 305-06.

⁵² Girardin Letter, *supra* note 11, at 334.

putting to death, in cold blood, the prisoner he has taken, authorizes retaliation, which would be inflicted with peculiar justice on the individual guilty of the deed.” Randolph had proceeded against him “as a murder & robber” anyway, against which Philips “pleaded that he was a British subject, authorized to bear arms by a Commission from L^d Dunmore, that he was a mere prisoner of war,” but the plea had been rejected and Philips executed “according to the forms and rules of the Common law.” Judge Tucker was wrong that the judges had refused to enforce the act, since its enforcement “was never proposed to them.”⁵³

D. Making Sense of Randolph's Account

The record raises two central questions. First, why did Randolph misrepresent the proceedings against Josiah Philips?⁵⁴ Or did he, somehow, forget? But then what of Henry’s response—did Henry forget *too*? Second, why did Tucker believe that the judges of the Virginia General Court had refused to enforce the act of attainder?

Begin with Edmund Randolph’s account of the Philips attainder at the Virginia Ratifying Convention. It seems highly unlikely that he should lie about the matter, given the attendance at

⁵³ Id. at 334, 336, 337. An examination of the records in the case, suggested Jefferson, would be appropriate, as he was “not so certain in my recollection of the details.” Id. at 337; Letter from Thomas Jefferson to William Wirt (Aug. 5, 1815), in 8 *The Papers of Thomas Jefferson: Retirement Series* 643-44 (J. Jefferson Looney 2011).

⁵⁴ Several commentators have suggested that Randolph lied. In addition to Crosskey, see Eckenrode, *supra* note 11, at 193. Notably, Jefferson is not among them. Letter from Thomas Jefferson to William Wirt (Oct. 8, 1816), in 10 *Retirement Series*, *supra* note 38, at 438 (“not that I consider mr Randolph as misstating intentionally, or desiring to bolster an argument at the expence of an absent person . . . and as little do I impute to mr Henry any willingness to leave on my shoulders a charge which he could so easily have disproved.”).

the convention of others who knew what had happened.⁵⁵ A clue to what Randolph was thinking can be found in his *History of Virginia*, composed between 1809 and 1813 and for many years available only in manuscript.⁵⁶ Randolph's *History* refers briefly to the Philips affair, and reiterates some of what he had alleged at the convention, but with an important addition. Here is what Randolph says:

It was generally believed that a banditti in the neighborhood of Norfolk had availed themselves of the cover and aid which a British squadron and British forces had lately afforded them for plunder and revenge by various atrocities on many citizens. One Josiah Philips . . . had eluded every attempt to capture him. . . . [T]he General Assembly, without other evidence than general rumor of his guilt, or the insufficiency of legal process in taking him into custody, on the motion of a member attainted him of high treason, unless he should surrender by a given day. In a very august Assembly of Virginia, it was contended that, as he deserved to die, it was unimportant whether he fell according to the technicality of legal proceeding or not. Probably he deserved death, although if a judgment can be formed of this by subsequent facts, *the prosecution against him being as against a robber, not a traitor, he was an offender less heinous than he was conceived to be.* His apology, too, was not perhaps admissible, although it was that he had never for a moment acquiesced in the Revolution . . . and that his loyalty was not for a

⁵⁵ Crosskey acknowledges this point. Crosskey, *supra* note 3, at 946.

⁵⁶ Edmund Randolph, *History of Virginia* xxxvii-xliv (Arthur H. Shaffer ed., 1970) (1809-1813). The Shaffer edition is the only printed version of the *History* of which I am aware, although parts of it were reproduced in various places by individuals who had seen the manuscript. Henry, *supra* note 11, at 435.

moment concealed, but he received on the first opportunity, and acted under, a military commission from the crown. He did not surrender within the time prescribed and was exposed, on being arrested, to the single question whether he was the person attainted and upon the establishment of the affirmative to be led to execution. He waived his apology because he would not exasperate his jury in his defense against robbery.⁵⁷

The first thing to note about this account is that it shows Randolph was aware that Philips was prosecuted for robbery. Randolph regards this fact as being perfectly consistent with his criticism of the attainder—in fact, Philips’s prosecution for *robbery* is part of what bothers Randolph most about the affair. This insight suggests a different interpretation of Randolph’s words at the Virginia ratifying convention in 1788. On that occasion, Randolph remarked that the House of Delegates had relied on only “vague reports” or “general reports,” and that these reports had alleged Philips merely to have committed “several crimes.” Randolph also emphasized the speed with which the bill passed through House, which had deprived Philips of an opportunity to appear and defend himself before the bill passed. Jefferson himself suggests just this interpretation of Randolph’s words in his letter to Louis Girardin. If, wrote Jefferson, “mr Randolph meant only that Philips had not these advantages *on the passage of the bill of Attainder*, how idle to charge the legislature with omitting to confront the culprit with his witnesses, when . . . their sentence was to take effect only on his own refusal to come in and be confronted.”⁵⁸ In contrast, Randolph did *not* deny that Philips had been tried. He stated, simply, that the bill had sentenced Philips to death (as it had, *conditionally*), and that Philips “was

⁵⁷ Randolph, *supra* note 56, at 268-69 (emphasis added).

⁵⁸ Girardin Letter, *supra* note 11, at 335 (emphasis added).

actually afterwards executed.” As Randolph put it in the *History*, Philips was “exposed” to execution upon capture, although actually prosecuted for robbery.

Randolph’s concern, then, was that the *bill of attainder* had passed without providing Philips an opportunity to appear. This was why he emphasized speed. The bill was drafted ahead of time, introduced “immediately” after the issue was raised, read “three times in one day,” passed by the Senate, and Philips attainted “very speedily and precipitately.” The entire proceeding was *fait accompli*, given legal sanction by the General Assembly. The narrative was attractive because it fit a classic objection against bills of attainder, which others were likely to know: that on such proceedings individuals were convicted without being afforded an opportunity to appear and defend themselves.⁵⁹ This objection was not usually employed against *suspensive* attainders. Jefferson’s response, quoted above, shows why: surely one cannot fault the assembly for proceeding against Philips without his appearance when the man refused to come in. That was *why* they had to proceed that way. Yet Randolph had a rejoinder to this point, which he described in the *History*: Should a citizen have to bear the risk that he be conditionally sentenced to death without notice by the legislature? “What was [Philips’s] peril, while he was roving abroad, devoted by a legislature to death unless he should surrender himself?”⁶⁰ And what could Philips have expected had he come in, given that the “denunciation of a government is almost the sure harbinger of condemnation?”⁶¹ Randolph’s rejoinder was especially powerful where it was alleged *merely* that Philips had committed “several crimes,” rather than challenged government itself by fomenting insurrection. If run-of-the-mill crimes were to be summarily prosecuted in the assembly any time judicial process failed, it risked “confounding” legislative

⁵⁹ Steilen, *supra* note 29.

⁶⁰ Randolph, *supra* note 56, at 269.

⁶¹ *Id.* Levy makes this point in his discussion of the case, without attributing it to Randolph. Levy 1999, 76.

and judicial powers, thereby undermining the procedural protections that applied to criminal prosecutions. The judicial functions of the assembly had to be narrowly circumscribed to clear cases of insurrection or civil war. Otherwise all of civil justice would be at risk. It was this point that Randolph had pressed in speech at the 1788 convention, which was devoted to showing the 'insecurity of justice' under Virginia's state constitution.

If Randolph aimed his attack at the suspensive attainder, then Henry focused his defense there as well. Henry had defended bills of attainder before, as Randolph knew. During deliberations in the 1776 convention that enacted Virginia's state constitution, Henry had argued forcefully against language in a draft declaration of rights prohibiting bills of attainder, citing cases not unlike Philips's. According to Randolph's *History*, "An article prohibiting bills of attainder was defeated by Henry, who with a terrifying picture of some towering public offender against whom ordinary laws would be impotent saved that dread power from being expressly proscribed."⁶² The guarantee of jury trials and confrontation in (what became) section 8 of the Declaration of Rights was objected to on a similar basis.⁶³ Henry's ally, the radical Thomas Ludwell Lee, also attempted to qualify a ban on ex post facto laws for this reason, proffering that such rules "were not natural laws, but might be changed by posterity as the law of necessity—the exigencies of life—might dictate," such as "when the safety of the State absolutely requires" that it act ex post facto.⁶⁴ At the federal convention, twelve years later, Henry found this position

⁶² Randolph, *supra* note 56, at 255; Hilldrup, *supra* note 21, at 202-03.

⁶³ Hilldrup, *supra* note 21, at 193 (reporting that Thomas Ludwell Lee or an ally "tried to attach to this section . . . an amendment . . . 'that no man, except in times of actual invasion or insurrection, can be imprisoned upon suspicion of crimes against the States, unsupported by legal evidence,'" which Hilldrup views as giving "martial law a constitutional sanction").

⁶⁴ *Id.* at 183. In committee, Henry and Lee had lost to the moderate "Tuckahoes," who insisted on such a ban to protect themselves from anti-Tory laws. *Id.* at 184. The ban, however, was rejected by the full convention.

much harder to stake out. He had, as we have seen, recognized an authority in the General Assembly to decide that the ordinary forms of justice should be suspended. Nevertheless, Henry opened his attack on the proposed federal Constitution by suggesting that it would deprive Virginians of the liberties they enjoyed.⁶⁵ The tactic made the Philips case awkward. Henry's strategy was to deny that Philips had enjoyed procedural rights to begin with; the legislature could proceed as they did, Henry argued, because Philips was a "fugitive" and "out-law," and a "common enemy to all mankind." The point was not unlike the one Jefferson would make years later, but Henry lost his grip on it during the speech, and his argument slipped into an indictment of Philips's moral character. The slippage proved fatal. As a result, the audience completely misunderstood Henry's observation about Socrates, whom he adduced *not* as an example of a virtuous man, but as an example of someone unjustly condemned and executed (ironically, by a jury). The point was supposed to be that Philips, unlike Socrates, had not been treated unjustly, but duly attainted as a fugitive. Yet even Henry's statement, at the end of his speech, that Philips's treatment was justified by the "laws of nature *and* nations" was ambiguous. Listeners understood Henry to be arguing that the immoral were not entitled to common-law protections.

So, why, then, did Randolph misrepresent what had happened to Philips? The answer is that he did not—at least, not where it counted. Randolph *was* guilty of exaggerating the speed with which the bill passed through the house. He was also mistaken, even as late as the *History*

⁶⁵ 9 DHRC, *supra* note 40, at 930 ("I expected to have heard the reasons of an event so unexpected to my mind, and many others. Was our civil polity, or public justice, endangered or sapped? . . . This proposal of altering our Federal Government is of a most alarming nature . . . you ought to be extremely cautious, watchful, jealous of your liberty; for instead of securing your rights, you may lose them forever."). When Randolph and Pendleton responded that Virginia was suffering from economic depression, Henry chided them, "You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but *how your liberties can be secured.*" *Id.* at 951-52 (emphasis added). For Randolph and Pendleton's comments, see *id.* at 934, 944.

of Virginia, that Philips had been captured *after* the grace period in the act expired. But this was not Randolph's concern. Randolph's concern was that a bill of attainder had passed merely on the basis of reports that Philips led a gang engaged in murder and arson, without offering Philips an opportunity to appear and defend himself. *This* was true, and it supported Randolph's contention that civil justice was insecure in Virginia. If the assembly could jettison judicial forms of process merely because it was wartime, then section 8 of the state's admirable Declaration of Rights would not be enough to protect Virginians' liberties. And it was at this proposition, naturally, that Patrick Henry aimed his response. The Philips case did not evidence a failure of justice, Henry argued, since everyone had known that Philips was not entitled to the protections of the common law. Swept up by his own argument, perhaps, Henry failed to raise what would surely have been a stronger point—that Philips was actually tried by a jury.⁶⁶ But blame can be spread around. Both men were careless (or artful) enough that their exchange seems to have been misunderstood by John Marshall, George Nicholas, and, we should imagine, by many others at the convention as well.

If I am right about this, it follows that Henry, Jefferson and even Randolph regarded the General Assembly as possessing significant legal powers. Their dispute was about the *scope* of these powers. This reinforces a reading of section 5 of the Virginia Declaration of Rights, which famously provided for a separation of powers, not as separating the legislative and judicial “powers” *by function*, but by person. Indeed, from one perspective, it was essential that a republican assembly have the authority to cure failures in justice caused by a breakdown in

⁶⁶ Girardin Letter 335 (“[Henry] must have known that Philips was tried and executed under the Common Law, and yet, according to this report, he rests his defence on a justification of attainder only. but all who knew mr Henry know that when at ease in argument, he was sometimes careless, not giving himself the trouble of ransacking either his memory or imagination for all the topics of his subject, or his audience that of hearing them.”).

judicial process. In appropriate cases, where the security of the whole people was at risk, the assembly might suspend the law in favor of summary or military proceedings, guided by the expertise of elite lawyers sitting there.⁶⁷ This was one way in which the representative assembly, and not the governor, inherited the king's obligations to protect his subjects and provide justice.⁶⁸ In Jefferson's mind, at least, such an allocation was preferable to vesting the authority in common-law courts, since judicial innovation was inconsistent with republican government, even where judges improvised on a long-established judicial writ like outlawry.⁶⁹

III. St. George Tucker and the Role of Courts in Wartime Governance

Jefferson saw an expansive role for the General Assembly in Virginia's republican government, but even he would later admit that it did not prove equal to the task. It was prone to the same corruption that had compromised Virginia's colonial government.⁷⁰ The state's admirable constitution was of no avail in this regard; as Jefferson complained in *Notes on the State of Virginia*, it was "no alleviation" to the threat of despotism that powers had been placed

⁶⁷ Section 7 of the Declaration of Rights the consent of the "representatives of the people" to suspend laws. On attainder, in addition to his Bill to Attaint Josiah Philips, see Jefferson's proposed "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," probably written in late 1778, provides that "No attainder shall work corruption of blood in any case." 2 Papers of Jefferson, supra note 14, at 503, 506-07 n.21.

⁶⁸ Crow, supra note 4, at 168-69.

⁶⁹ David Thomas Konig, Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication, in *The Many Legalities of Early America* 114-17 (Christopher L. Tomlins & Bruce H. Mann eds., 2001); A.G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810, at 163-67 (1981). The jury, too, was a basis of popular form of participation in government designed to check judicial discretion, but for which both education and expert guidance was required. Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall* 87-89, 95-96 (1990).

“in a plurality of hands,” as guaranteed by section 5 of the Declaration of Rights, since the Assembly had absorbed “[a]ll the powers of government, legislative, executive and judiciary,” inserting itself even into the ordinary course of justice.⁷¹ Over the course of the 1780s, then, some Virginians began to envision a shift in the institutional forms of magistracy. The General Assembly would have to be bound by “well-designed legal mechanisms.”⁷² One such mechanism was a stronger *national* authority; but another was the court of law, now inoculated from executive interference by a doctrine of ‘judicial independence,’ and improved by statutory reform and by the spread of common-law procedures.⁷³

This is the context in which we must take up St. George Tucker’s suggestion, in his edition of Blackstone’s *Commentaries*, that Virginia’s judges refused to enforce the act of attainder against Josiah Philips. Tucker was an early and vigorous proponent of employing the state’s courts as a ‘legal mechanism’ for checking the General Assembly. Tucker had taken this position as early as 1782 (around the same time Jefferson was writing *Notes*), in his argument as an amicus in another treason prosecution, known to us as *Commonwealth v. Caton*.⁷⁴ In *Caton*, the question was whether a provision governing pardons in Virginia’s Treason Act was consistent with the pardon clause in the state’s 1776 Constitution; and, if the former was

⁷⁰ Colbourn, *supra* note 26, at 172-73.

⁷¹ Thomas Jefferson, *Notes on the State of Virginia* 123-24 (1832) (1785). That the assembly interfered with the ordinary course of justice is how I understand the famous complaint that the Assembly had “in many instances, decided rights which should have been left to judiciary controversy.” *Id.* at 124.

⁷² Gerald Leonard, *Jefferson's Constitutions*, in *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* 378 (Denis Galligan, ed., 2014).

⁷³ Roeber, *supra* note 69, at 161; Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 *U. Pa. J. Const. L.* 479, 540-50 (2014).

⁷⁴ *Argument in the Case of the Prisoners* (Oct. 31, 1782), in 3 *St. George Tucker’s Law Reports and Selected Papers, 1782-1825*, at 1741-48 (Charles F. Hobson ed., 2013); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 *U. Pa. L. Rev.* 491, 520-29 (1994).

“repugnant” to the latter, whether the Court of Appeals could declare the act void.⁷⁵ Tucker took the second question first and argued straightaway that the court must have such an authority, concomitant to its power “to explain the Laws of the Land as they apply to particular Cases.”⁷⁶ Moreover, this power was the courts’ alone. For if the General Assembly, too, could “explain the Laws judicially, that is to decide in *particular Cases*,” then “the Judiciary, who are by the Constitution appointed as a counterpoise to it [i.e., the assembly], is entirely annulled.” Here Tucker seems to have been responding to Edmund Randolph, also appearing in the case as the state’s Attorney General. Randolph had agreed that a law repugnant to the constitution was void, but *not* that a court of law could declare it void. In other words, he had *opposed judicial review*. In correspondence to friends, Randolph suggested that the people themselves might resolve the validity of the Treason Act, and that a different institution—a council of revision—could enforce the constitution in the future.⁷⁷

⁷⁵ Pendleton’s Account of “The Case of the Prisoners” (*Caton v. Commonwealth*), in 2 *The Letters and Papers of Edmund Pendleton, 1734-1803*, at 416, 417 (David John Mays ed., 1967); *Commonwealth v. Caton*, 4 Call 5 (1782).

⁷⁶ *Argument in the Case of the Prisoners*, *supra* note 74, at 1742.

⁷⁷ Edmund Randolph, Notes on Virginia laws. Includes pardons for traitors. 2, Manuscript/Mixed Material, Library of Congress, <https://www.loc.gov/item/mjm021836> (“That, however adverse the law, which vests this power in the general assembly may be, to the constitution, no court of judicature can pronounce its nullity.”). My interpretation of Randolph’s argument differs markedly from William Treanor’s. I am indebted here in more than the usual degree to Professor Steinfeld, who pointed out to me that Treanor conflates two questions Randolph clearly separates in his notes: “1. [whether] the treason law [should] be declared void, so far as it is repugnant to the constitution,” and “2. If it can be declared void, can any court of judicature pronounce its nullity?” *Id.* at 8. Treanor treats the first question as equivalent to judicial review, but I don’t think the reading can be sustained. Randolph describes his answer to the first question as “the decision of my own mind” as to when “the right of resistance commences.” *Id.* at 9, 11. The reference here seems to be to popular resistance to unconstitutional laws, that is, enforcement ‘out of doors,’ rather than in a court of law. Moreover, the reporter Daniel Call records Randolph as arguing against judicial review. *Caton*, 4 Call. at 7 (“The attorney general, in reply, insisted . . . that the court were not authorized to declare it [the Treason Act] void.”). Treanor suggests that

From an early date, then, Tucker saw a constitutional role for courts of law as a check on the republican assembly, and in this regard he was distinguished from Randolph. But how might the General Court have checked the General Assembly in the Philips case? It is perfectly possible, as Dumas Malone suggested years ago, that Edmund Randolph—who, recall, was also Attorney General when Philips was captured—decided to prosecute Philips for robbery *after consulting with the judges of the General Court*.⁷⁸ Jefferson later denied that the judges had refused to enforce the act, but a consultation would have been ambiguous, and we should not be surprised if Jefferson, writing to Wirt in 1815, was prone to emphasize the executive discretion it implied, while Tucker in the early 1790s saw the stricter logic of judicial duty. Perhaps, then, the judges expressed an objection to the act of attainder in some way, leading Randolph to prosecute Philips for robbery. But why would the judges have objected? How was the act of attainder relevant? If Philips was captured before the expiration of the grace period in the attainder, why should Randolph have sought out their views on it?

A. *The Law of Treason and the Law of War*

Call is in error and that the portion of Randolph's notes stating an opposition to judicial review describe the state's 'official' position, to which Randolph was personally opposed. Treanor, *supra* note 74, at 511. Yet there is little reason for such gymnastics other than Treanor's identification of Randolph's first and second questions, and for that identification I can find little justification in the text itself. Randolph did support judicial review five years later at the Philadelphia Convention, but as a supplement to a council of revision. 1 *The Records of the Federal Convention of 1787*, at 28 (Max Farrand ed., 1937). In the weeks before the argument in *Caton*, Randolph had written to James Madison that there was talk of creating a "council of revision," comprising in part members of the assembly, in order to "to keep the legislature in future cases within its just limits." Letter from Edmund Randolph to James Madison (Oct. 26, 1782), Manuscript/Mixed Material, Library of Congress, <https://www.loc.gov/item/mjm012317>.

⁷⁸ 1 Dumas Malone, *Jefferson and His Time: Jefferson the Virginian* 292 (1948).

The answer to this question has to do with the boundaries between the law of war and the law of treason. Jefferson’s bill of attainder charged Philips with having “levied war against this Commonwealth” by committing murder, arson, and robbery. It conditionally attainted him of “high treason,” of course—but *it also functioned as an indictment*, ordering Philips and his gang to surrender for “their trials for the treasons, murders and other felonies” they had committed.⁷⁹ High treason, however, could only be committed by an individual who owed allegiance to the sovereign.⁸⁰ At its core, wrote Blackstone in 1769, high treason was a crime that amounts “either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign.”⁸¹ When American assemblies sought to establish independent state governments in 1776 and 1777, one of the first acts or ordinances they passed was one defining treason and describing who owed the state allegiance.⁸²

1. The problem of allegiance

Virginia addressed treason and allegiance in two separate acts of assembly. The Treason Act (the one litigated in *Caton*) was passed in October 1776, but it was not until May 1777 that the General Assembly addressed the matter of allegiance, obligating “all free born male

⁷⁹ 2 Papers of Jefferson, supra note 14, at 190; c.3, 9 Statutes at Large, supra note 21, at 464. There is a grammatical error in both the Jefferson draft and the act of attainder. The act of attainder orders Philips and his associates to turn themselves in “in order to their trials for the treasons, murders and other felonies.” Boyd suggests that Jefferson omitted the word “stand.” 2 Papers of Jefferson, supra note 14, at 193 n.6.

⁸⁰ Edward Coke, *The Third Part of the Institutes of the Lawes of England* 4-5, 10-11 (1817) (1644); *Calvin’s Case* (K.B. 1608), 1 *The Select Writings of Sir Edward Coke: The Reports* 166, 174-227 (Steve Sheppard ed., 2003).

⁸¹ 4 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference* 74 (1803) (1769).

⁸² One can find the relevant citations in Chapin, supra note 8, at 36-41.

inhabitants of this state, above the age of sixteen years” to swear an oath of allegiance before a justice of the peace.⁸³ The latter act began by reciting that “allegiance and protection are reciprocal,” which was a standard view, but which concealed a difficult problem in this case, explaining why allegiance was joined to a compulsory oath. The problem was this: if allegiance followed from protection, then someone whom the state had never protected could not owe the state allegiance. This might be thought to describe Josiah Philips; after all, he had been attainted *by act* because he resided *in an ungoverned area* (the “Dismal Swamp”), where the state was unable to execute the law and judicial process did not run. This meant that a court of law trying Philips for treason would have to determine whether he was even capable of the crime. Three years later, in 1781, this very issue came before the Supreme Court of Pennsylvania in *Respublica v. Chapman*.⁸⁴ There the defendant challenged his attainder for treason by the state’s Supreme Executive Council on grounds that he had not owed the state allegiance at the time he joined the enemy in December 1776. On that date the state had not yet enacted a constitution or formed a regular government. Still, wrote Chief Justice Thomas McKean, “there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws,” administered by council and convention, to which allegiance was due.⁸⁵

⁸³ 9 Statutes at Large, *supra* note 21, at 168 (“An act declaring what shall be Treason.”); *id.* at 281 (“An act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes.”).

⁸⁴ *Respublica v. Chapman* (Pa. 1781), 1 A.J. Dallas, Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania, Before and Since the Revolution 53 (1790).

⁸⁵ *Id.* at 57. McKean nevertheless went on to instruct the jury that the state’s treason law implied a period of election in which individuals were free to join either side, and Chapman was discharged. Recognizing a period of free election was, says Chapin, an “act of grace,” but states generally recognized such a period, concluding in the passage of a treason law. Chapin, *supra* note 8, at 71-72.

The same issue stood at the center of the Philips case, and in this respect his capture before the end of the grace period in the act of attainder was irrelevant.

But the problem was not limited to cases like Chapman's and Philips's. The difficulties posed by allegiance were, in fact, widespread. Prosecution for lesser state crimes, such as the myriad "treasonous misdemeanors" concocted by state legislatures, also raised the question of allegiance.⁸⁶ In Virginia, for example, shortly after enacting its treason law, the General Assembly passed "An Act for the punishment of certain offences," defining a variety of offenses short of treason, including seditious libel, exciting the people to resist government, discouraging enlistment, and other offenses.⁸⁷ These crimes, which Blackstone had called "contempts . . . against the king's person and government," could also be regulated on a preventive basis, under a regime of "preventive justice."⁸⁸ And, indeed, preventive regulation of sedition and treasonous misdemeanor was common during the Revolution, forming perhaps the mainstay of what Willard Hurst has described as the "[s]ummary executive action" so typical of the time.⁸⁹

⁸⁶ Young, *supra* note 10, at 296. The best study of these offenses in the context of the Revolution remains Van Tyne, *supra* note 7

⁸⁷ An act for the punishment of certain offenses, c.5, 9 Statutes at Large, *supra* note 21, at 170-71. The act was repealed and replaced by a similar statute in May 1780. An act affixing penalties to certain crimes injurious to the independence of America, but less than treason, and repealing the act for the punishment of certain offenses, c.14, 10 The Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619, at 268-70 (William Waller Hening ed., 1822).

⁸⁸ Tucker, *supra* note 81, at 251. On the ideology of police offenses and preventive justice, see Dubber, *supra* note 4, at 47-62.

⁸⁹ James Willard Hurst, *The Law of Treason in the United States* 83 (1945). To be sure, publicists described a similar principle under the law of war. Thus, according to Vattel, a nation at war could demand good behavior of unarmed *enemies*, disarming or even imprisoning those whom were not trusted. Emer de Vattel, *The Law of Nations*, Bk.III, c.VIII, ss.147, at 353 (tr. 1797) (1758).

The absence of allegiance was thus a natural defensive plea against charges of treason and related offenses. Aware of this, Attorney General Randolph would have had good reason to seek out the views of the General Court on the issue of Philips's allegiance. The judges, for their own part, might reasonably have expected that issue to come before them. Not only was it raised by the language of the act of attainder, which directed Philips's trial for treason, but such questions had come before English courts in a variety of postures for over 100 years, as evidenced by a variety of authorities they knew, including Calvin's Case.⁹⁰ If Randolph did inquire into the view of the judges of the General Court and discovered they harbored serious objections, he may have concluded that it was best not to proceed under the act of attainder at all, but bring a new indictment for a felony like robbery, which still carried a death sentence. This would account for both Jefferson's recollection that Randolph had declined to prosecute under the act, and Tucker's statement that the judges had refused to do so. As historian Henry Young has shown, it was the same path followed by state attorneys in Pennsylvania, tasked with prosecuting loyalists who had "operated as uninstructed guerrillas, rendering themselves liable to prosecution for nearly every felony."⁹¹

2. The problem of belligerent status

Philips had grounds for a second defensive plea as well, namely, that he was an enemy belligerent and entitled to protection under the customary law of war. Indeed, references to Philips's status under the law of war and the law of nations litter the record. When Patrick Henry first addressed the attainder at the Virginia ratifying convention in 1788, he suggested that

⁹⁰ Paul Halliday, *Habeas Corpus: From England to Empire* 32, 162-73, 205-06 (2010).

⁹¹ Young, *supra* note 10, at 296-98.

Philips's treatment was justified by the law of nations.⁹² Randolph picked up on the point in his response to Henry two days later, pointing out that Philips "had a commission in his pocket" when he was arrested, making him "therefore only a prisoner of war."⁹³ Marshall and Nicholas missed the issue in their comments, but Benjamin Harrison—who had been speaker of the House of Delegates when the bill of attainder passed—did address it, asserting that Philips "by the law of nations, was entitled to no privilege of trial."⁹⁴ Everyone with personal knowledge of the matter brought up Philips's status under the law of war. It figured centrally as well in Jefferson's subsequent recollections of the case. In his first account, given to Wirt in August 1814, Jefferson noted that Philips had been "covering himself, without authority, under the name of a British subject," and that Randolph believed Philips would enter such a plea against the attainder, arguing that he was "a prisoner of war entitled the protection of the law of nations."⁹⁵ He used similar language in a letter to Girardin the next year.⁹⁶ And Randolph's *History*, written around the same time, asserted that Philips's "apology" to the charges against him was that "he had never for a moment acquiesced in the Revolution . . . but he received on the first opportunity, and acted under, a military commission from the crown."⁹⁷

If Philips had accepted a military commission from the crown "on the first opportunity," as Randolph stated, and had done so before he owed allegiance to Virginia, then it likely made

⁹² 9 DHRC, *supra* note 40, at 1038.

⁹³ *Id.* at 1087.

⁹⁴ *Id.* at 1127.

⁹⁵ Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814), in 7 Retirement Series, *supra* note 17, at 548-49.

⁹⁶ Girardin Letter, *supra* note 11, at 337 ("[Philips] pleaded that he was a British subject, authorized to bear arms by a Commission from Ld Dunmore, that he was therefore a mere prisoner of war, and under the protection of the law of nations."); *id.* ("I recommend an examination of the records . . . I am not sure of . . . whether his plea of alien enemy was formally put in and overruled.").

⁹⁷ Randolph, *supra* note 56, at 268-69.

him an enemy.⁹⁸ An enemy could not commit treason.⁹⁹ Moreover, a central commitment of the publicist tradition was that a captured enemy should be held as a prisoner of war, and could not be put to death or otherwise punished.¹⁰⁰ At the Virginia ratifying convention, Henry had raised this cluster of issues by describing Philips as “[a] pirate, an out-law, or a common enemy to all mankind.”¹⁰¹ Henry’s language followed the *Commentaries*, where Blackstone had described a “crime of piracy” against the law of nations. The pirate, wrote Blackstone, “has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind.”¹⁰² Society could, in self-defense, kill the pirate or outlaw, and states had created summary procedures for dealing with such cases. It was this label, then—*pirate*—that Randolph sought to rebut by raising the issue of the military commission. If Philips had possessed a military commission, as was rumored, then he could not be a pirate, but was instead a belligerent following British orders.¹⁰³ Jefferson was not present at the convention to

⁹⁸ This was the conclusion reached by Chief Justice Thomas McKean in an advisory opinion for President Reed of Pennsylvania’s Supreme Executive Council. Letter or Opinion of C. J. McKean to Pres. Reed, 1779, 7 Penn. Arch., 1st Ser. 644-46 (1853).

⁹⁹ Tucker, *supra* note 81, at 74-75; Coke, *supra* note 80, at 10-11 (1817).

¹⁰⁰ Vattel, *supra* note 89, Bk.III, c.vIII, ss.140, 149, at 347-48, 354-55. Grotius tells us that prisoners of war who surrender on condition of their safety are not to be put to death. Grotius, *De Iure Belli ac Pacis*, Liber III, Caput XIV, at 522 (1913) (1646) (“Easdem ob causas vitam salvam paciscentium, sive in praelio, sive in obsidione non repudianda dedito.”). On the publicist tradition and the treatment of prisoners, see 1 James Kent, *Commentaries on American Law*, Lec.V, at 88-89 (1826), and on the theory of ‘regular war’ more generally, Stephen C. Neff, *Justice Among Nations: A History of International Law* 147-51, 163-65, 194-98 (2014); Witt, *supra* note 5, at 16-19.

¹⁰¹ 9 DHRC, *supra* note 40, at 1038.

¹⁰² Tucker, *supra* note 81, at 71.

¹⁰³ Vattel, *supra* note 89, Bk.III, c.XV, ss.223-31, at 399-402 (“The generals, officers, soldiers, privateersmen, and partisans, being all commissioned by the sovereign, make war by virtue of a particular order. . . . [I]t is an infamous proceeding . . . to take out commissions from a prince, in order to commit piratical depredations on a nation which is perfectly innocent with respect to them. The thirst of gold is their only inducement; nor can the commission they have received

hear this exchange between Henry and Randolph, but he certainly understood the issue, and made clear in his letter to Girardin that the existence of a commission was in fact beside the point. Even if Philips had been commissioned, argued Jefferson, “an enemy in lawful war *putting to death, in cold blood, the prisoner he has taken, authorizes retaliation*, which would be inflicted with peculiar justice on the individual guilty of the deed, should it to happen that he should be taken.”¹⁰⁴ Here Jefferson was likely referring to Vattel’s *The Law of Nations*, a work he had closely studied, which described “a kind of retaliation sometimes practiced in war, under the name of reprisals.” Reprisals were a dangerous business; according to the practice, the sovereign might respond to an enemy’s killing of innocent prisoners by “hang[ing] an equal number of his [i.e., the enemy’s] people . . . [and] notifying him that we will continue thus to retaliate, for the purpose of obliging him to observe the laws of war.”¹⁰⁵ Jefferson, apparently, found the idea compelling, or at least its logic difficult to resist, as he followed something like this course as Governor of Virginia in combating British-led “Indian warfare” in the western territories.¹⁰⁶

The legal issues here are clearly quite complex, but (fortunately) we have no immediate need to referee them. Whether or not one accepts Jefferson’s argument, it is easy to see that

efface the infamy of their conduct, *though it screens them from punishment.*” (emphasis added)). As Kent described customary law on this point, citing Vattel, even an uncommissioned pirate could not be punished. Kent, *supra* note 100, Lec.V, at 91.

¹⁰⁴ Girardin Letter, *supra* note 11, at 337.

¹⁰⁵ Vattel, *supra* note 89, Bk.III, c.VIII, s.142, at 348-49.

¹⁰⁶ Witt, *supra* note 5, at 28-29, 33-37. Nor was Jefferson the only of our figures to invoke such limitations. Patrick Henry, too, argued that, under the law of nations, Philips’s conduct exempted him from protection as a prisoner of war, due to “the enormity of his crimes.” 9 DHRC, *supra* note 40, at 1038; Vattel, *supra* note 89, Bk.III, c.VIII, s.141, at 348 (“There is, however, one case, in which we may refuse to spare the life of an enemy who surrenders It is when that enemy has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war.”). Benjamin Harrison also seems to have shared their views. Harrison had commented that Philips was “a man, who, by the law of nations, was entitled to no privilege of trial.” 9 DHRC, *supra* note 40, at 1127.

Philips's status engendered serious difficulties for a treason prosecution, since a prisoner of war could not normally be tried for treason.¹⁰⁷ If Randolph consulted the judges of Virginia's General Court on this point, they may have expressed their view that the law of nations forbade a trial of Philips for treason, as ordered by the act of attainder—a use of the law of nations not unlike the one James Duane would make in the later case of *Rutgers v. Waddington*.¹⁰⁸ The issue was one the General Court was certainly competent to consider; King's Bench in England had long determined prisoner of war status on petitions for writ of habeas corpus, and had even discharged enemy aliens charged with treason.¹⁰⁹ Randolph may have discovered that the judges would be amenable to hearing charges of robbery. Against robbery, a defensive plea that Philips was an enemy belligerent was unlikely to succeed, since belligerents were supposed to preserve the lives and property of unarmed civilians.¹¹⁰

¹⁰⁷ Halliday describes one exception to the bar on trying prisoners of war for treason. In captivity a prisoner of war became a 'local subject' of the sovereign, and could be tried for treason or felony for conduct after assuming that status. Halliday, *supra* note 90, at 172.

¹⁰⁸ 1 Julius Goebel, Jr., *The Law Practice of Alexander Hamilton* 414-18 (1964). In *Rutgers* the court gave force to the law of nations as part of the common law of the New York, effectively vindicating national treaty commitments. For an account of the broad role this generation saw for federal courts in matters of foreign policy and national security, see William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (1995), especially chapters 4 and 5.

¹⁰⁹ Halliday, *supra* note 90, at 170.

¹¹⁰ Vattel, *supra* note 89, s.147, at 352-53. For later defenses of this position, with some citations to publicist literature, see Kent, *supra* note 100, at 87; William Winthrop, *Military Law and Precedents* 778, 780 (2d ed. 1896) ("It is forbidden by the usage of civilized nations, and is a crime against the modern law of war, to take the lives of, or commit violence against, non-combatants and private individuals not in arms As to [private property], the strict war right of seizure has been very materially qualified by modern usage. Private property . . . is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character."). As I understand it, the General Court would not have heard prosecution for this offense under the law of war; the point is, rather, that such an offense would have made it unlikely that a jury would accept a plea of enemy status as a defense to the civil crime of robbery.

We should be able to see now why Randolph was so critical of the passage of the bill of attainder against Philips, despite the fact that it was suspensive in form. The case clearly involved complex factual and legal questions, several of which were contested. Was Philips a British subject? Did he have a military commission? Did that commission predate his obligation of allegiance to Virginia? Did Philips forfeit his right to protection as a prisoner of war by his treatment of civilians? The General Assembly had offered Philips no opportunity to appear and contest these issues before the bill passed. And after it passed, he could have far less hope to press a jury to his side.

B. The Institutional Forms of Law in Wartime

The terms of dispute about Philips's attainder capture an evolution in the role of the assembly in the last decades of the eighteenth century, and the confusion this change could trigger when assembly procedures or powers were contested. Writing in July of 1776, Massachusetts lawyer and Yale graduate Joseph Hawley had described attainder in traditional terms, suggesting that "high treason ought to be the same in all the United States;--*saving to the legislature of each colony or state the right of attainting individuals by an act or bill of attainder.*"¹¹¹ The behavior of "[o]ur tories," thought Hawley, made this power necessary "for the general safety." The distinction implied that the state legislatures would be *subject to* a law of treason, applying that law to cases in the manner of courts, rather than punishing individuals arbitrarily. This view was still relatively common at the time, and shortly after Hawley's letter we find it expressed in the influential treatise Hatsell's *Precedents*. Hatsell described the bill of

¹¹¹ Letter from Joseph Hawley to Elbridge Gerry (July 17, 1776), in 4 *The Founders' Constitution* 430 (Philip P. Kurland & Ralph Lerner eds., 1987) (emphasis added).

attainder as “an extraordinary power,” a “deviation from the more ordinary forms of proceeding by indictment or impeachment” appropriate “where, from the magnitude of the crime, or the imminent danger to the state, it would be a greater public mischief to suffer the offense to pass unpunished, than even to over-step the common boundaries of the law.”¹¹² Such was the case with the “most powerful offenders.” Jefferson, likely under Hatsell’s influence, described this same use for bills of attainder, observing, in a letter to Girardin, that Philips had been “too powerful to be arrested by the sheriff and his posse comitatus.”¹¹³ Patrick Henry, too, had sounded this note in defending bills of attainder in the state constitutional convention of 1776, expressing concern for “some towering public offender against whom ordinary laws would be impotent.”¹¹⁴

This perspective on the bill of attainder fit quite naturally with at least one of the republican conceptions of the constitutional place of the assembly. Matters of war and peace were, by the 1760s, firmly in the hands of metropolitan institutions, but threats to civil government or the domestic police of individual colonies were regularly handled by governor, council and assembly.¹¹⁵ Maintaining security and government were royal obligations, and naturally discharged in individual colonies by means of royally chartered bodies. When, several decades later, colonies began to reconstitute themselves as republican states, their assemblies

¹¹² 4 John Hatsell, *Precedents of Proceedings in the House of Commons* 89-90 (3d ed. 1796) (1781).

¹¹³ Girardin Letter, *supra* note 11, at 336.

¹¹⁴ Randolph, *supra* note 56, at 255.

¹¹⁵ Jack P. Greene, *The Constitutional Origins of the American Revolution* 50-51 (2011); Andrew C. McLaughlin, *Foundations of American Constitutionalism* 133-38 (1961 ed.). For the role that provincial governments might play within the empire in ensuring domestic security, see the discussion of Ethan Allen’s attainder in Daniel Huslebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*, at 103-04, 347 n.146 (2005); Steilen, *supra* note 29.

continued to take on matters of police and justice, and Jefferson, for one, thought the assembly to be their proper home.¹¹⁶ As one commentator recently put it, Jefferson “went about the project of constituting a republican polity by relocating and transforming the power of sovereign judgment and its jurisdiction within constitutional structure to varied assemblies of the people.”¹¹⁷ Of course, not all the institutions of the imperial constitution could be jettisoned. The new republican states, Jefferson thought, required a national body (that is, an imperial body) to support the union and adjudicate disputes.¹¹⁸ Federal institutions were thus internal to Jefferson’s republicanism. Also internal were constraints imposed by law, given effect in a variety of institutional forms. The constraint of law was especially important when it came to matters of treason. Writing to George Wythe in 1778, Jefferson recommended model language for a state treason statute that prohibited both the assembly and the courts of law from declaring constructive treasons.¹¹⁹ Treason law had to be given (in the words of a modern commentator) “firm definition,” even if state assemblies were to retain the power to attain by bill, in order to

¹¹⁶ See, for example, Jefferson’s first draft of a constitution for Virginia, which provides that an administrator “shall possess the powers formerly held by king,” but excludes the prerogative powers of “Declaring war or peace,” “issuing letters of marque or reprisal,” and “erecting courts,” among others, which are “to be exercised by the legislature alone.” 1 *The Papers of Thomas Jefferson* 342 (Julian P. Boyd ed., 1950).

¹¹⁷ Crow, *supra* note 4, at 168; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 73-83 (2004). Crow and Bilder are concerned with equity. As Crow describes, equity’s intolerance of hardship and obstruction of justice grew out of the royal obligations to address these sufferings, and drew on royal authority to address obstructions of justice, adjust procedural requirements and ignore technical failures in pleading. These were leading themes in equity jurisprudence, and Jefferson made note of them in his study of that body of law. Edward Dumbauld, *Thomas Jefferson’s Equity Commonplace Book*, 48 *Wash. & Lee L. Rev.* 1257, 1273-80 (1991).

¹¹⁸ Peter S. Onuf, *The Mind of Thomas Jefferson* 74-75 (2007); Leonard, *supra* note 72, at 372-73.

¹¹⁹ 2 *Papers of Jefferson*, *supra* note 14, at 493-94.

ensure domestic security and cure failures in civil process.¹²⁰ This was, more or less, the same view Joseph Hawley had endorsed: a uniform substantive law of treason, supplemented by a power in each assembly to attain.

It would take only a few decades for this view of the bill of attainder to weaken considerably, while at the same time a transformation in the constitutional role of the assembly was occurring. Writing in the years around 1810, Edmund Randolph observed in his *History* that the assembly's power to attain derived "from some connection with the character of grand inquest of the Commonwealth."¹²¹ This was a rather traditional, legal view of the bill of attainder. The English House of Commons had begun to describe itself as a grand inquest in the 1620s to justify its role in impeachment, a process universally regarded as a form of judicature. And it was judicature in the General Assembly that most worried Randolph, since it posed a risk of "confounding . . . judicial with legislative authority." And yet, in the nearly the same breath, Randolph also suggested that the General Assembly's power to attain "may probably exist in the sphere of Virginia legislative power, *as an attribute to legislation itself*."¹²² Side-by-side the two views of attainder made little sense. If attainder were an attribute to legislation, then how might it pose a danger of confounding judicial and legislative powers?

The view that a bill of attainder was a kind of legislation, as opposed to a summary legal procedure, gathered considerable strength in the last decades of the eighteenth century. It proved attractive to lawyers engaged in marking out a new role for courts of law in American constitutional systems. We have already how St. George Tucker supported this role from a relatively early period. It is unsurprising, then, that in his annotations to the *Commentaries* he

¹²⁰ The commentator is Willard Hurst. Hurst, *supra* note 89, at 87-89.

¹²¹ Randolph, *supra* note 56, at 269.

¹²² *Id.* (emphasis added).

described the bill of attainder as “a legislative declaration of guilt.”¹²³ Jefferson would later call Tucker’s account a “diatribe,” but others took the same view. James Wilson’s *Lectures on Law*, written around the same time as Tucker’s annotated *Commentaries*, described bills of attainder as “legislative verdicts.”¹²⁴ They were arbitrary, dispensing entirely with “legal forms, legal evidence, and . . . every other barrier which the laws provide against tyranny and injustice in ordinary cases,” and thus are put to “nefarious purposes” in every age.¹²⁵ Bills of attainder were not an expression of general will, or the reasonable public opinion—the proper objects of laws enacted by a popular legislature—but private, factional will.¹²⁶ Attainder in the assembly thus became a leading example of the legislative excesses of the 1780s, against which the leading Federalists complained and for which they prescribed judicial review as a beneficiary brake. In Federalist 78, Alexander Hamilton included the bill of attainder among the “specific exceptions to the legislative authority” which “can be preserved in practice no other way than through the medium of the courts.”¹²⁷ On this understanding, then, bills of attainder implicated the separation of powers not because they confounded judicial and legislative functions—they were purely legislative—but because they tested the independence of the judiciary, upon which the efficacy of a constitutional ban would depend.

¹²³ Tucker, *supra* note 81, at 293.

¹²⁴ James Wilson, *Lectures on Law*, Part II, Lecture VI, in 2 *The Works of James Wilson* 548 (Robert Green McCloskey ed. 1967) (1790).

¹²⁵ Tucker, *supra* note 81, at 293.

¹²⁶ The depository of popular sovereignty in an assembly whose acts express the general will is characteristic of what Philip Pettit has called the “Franco-German tradition of republicanism,” associated in particular with Rousseau. Philip Pettit, *Two Republican Traditions*, in *Republican Democracy: Liberty, Law and Politics* 169, 186-88, 199 (Andreas Niederberger & Philipp Schink eds., 2013). On “public opinion” and the French Enlightenment, see Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* 63-66, 79-83 (2009).

¹²⁷ Number 78, *The Federalist*, By Alexander Hamilton, James Madison, and John Jay 491 (Benjamin Fletcher Wright, ed., 1961).

In this way, Federalists were now claiming for the courts of law an interest in the royal authority that had been deposited in popular assemblies after independence. The assembly of the 1770s had assumed what were, under the imperial constitution, curial or conciliar tasks: managing the allocation of authority throughout the dominions and the forms that ‘the law of the land’ would take in various institutional settings.¹²⁸ But the conduct of the assembly, especially in matters of domestic police and the civil administration of justice, showed the inadequacies of the arrangement. For this there were a number of remedies, but principal among them was the common-law court, or, more precisely, the form that law took in the common-law court. Courts called on to play this constitutional role employed natural law with particularly great effect; although principles of natural law had long been relevant, even in English courts, they now became central to an emerging judicial doctrine of implied limitations on legislative power.¹²⁹ To secure this package of institutional and doctrinal reforms, proponents argued that *law* was the proper repository of *courts*, and that the forms and processes employed by the popular assembly were not, in fact, *properly regarded as law at all*, but instead arbitrary expressions of factional will. The sense that a sovereign people met in assembly was possessed of a sui generis body of law suited to times of crisis and disorder was lost. The rule of the common law became, in effect, the rule of law *simpliciter*.¹³⁰

¹²⁸ Halliday, *supra* note 90, especially chapter 5. After the Glorious Revolution, some of the conciliar functions related to the suspension of ordinary forms of law were delegated by Parliament.

¹²⁹ R. H. Helmholz, *Natural Law in Court* 142-70 (2015).

¹³⁰ Compare this to the posture assumed by common lawyers in the disputes leading up the English Civil War, who elevated the common law to constitutional status despite the desire for law reform and the hatred of common lawyers. Alan Cromartie, *The Rule of Law, in Revolution and Restoration: England in the 1650s*, at 55, 57-61 (John Morrill ed., 1992).

Jefferson, always hard to pin down, moved in a somewhat different direction, and in this respect he presaged another major institutional development to come. Jefferson had never believed in a human faculty of reflective reason, supposedly promoted by the form of proceedings in a court of law; for him, the reason of a people was organically connected to a particular time and place, and to a shared body of experiences.¹³¹ Its natural repository was not the courts, but the legislature. And if the legislature should need to be checked by another institution, the preferable alternative was a fully coordinate *executive*, whose connection to all the people would be renewed at times of crisis by their mobilization through political parties.¹³² The law of crisis would become a matter of his responsibility.¹³³

¹³¹ Stimson, *supra* note 69, at 90-100.

¹³² Leonard, *supra* note 72, at 383-87.

¹³³ That development did not occur in earnest until the presidency of Abraham Lincoln. Prize Cases, 67 U.S. (2 Black) 635 (1863); *Ex Parte Merryman*, 17 F. Cas. 144 (1861).