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Matthew Steilen

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# ARTICLE

## BILLS OF ATTAINDER

*Matthew Steilen\**

### ABSTRACT

What are bills of attainder? The traditional view is that bills of attainder are legislation that punishes an individual without judicial process. The Bill of Attainder Clause in Article I, Section 9 prohibits the Congress from passing such bills. But what about the President? The traditional view would seem to rule out application of the Clause to the President (acting without Congress) and to executive agencies, since neither passes bills.

This Article aims to bring historical evidence to bear on the question of the scope of the Bill of Attainder Clause. The argument of the Article is that bills of attainder are best understood as a summary form of legal process, rather than a legislative act. This argument is based on a detailed historical reconstruction of English and early American practices, beginning with a study of the medieval Parliament rolls, year books, and other late medieval English texts, and early modern parliamentary diaries and journals covering the attainders of Elizabeth Barton under Henry VIII and Thomas Wentworth, earl of Strafford, under Charles I.

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The Article then turns to America, where it illustrates the influence of English practices in revolutionary New York and Pennsylvania, drawing primarily on legislative records, correspondence, memoirs, and early histories. The Article then leverages this historical research to argue in favor of interpreting the Bill of Attainder Clause to apply to summary legal proceedings conducted by the Executive.

#### TABLE OF CONTENTS

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 769 |
| II.  | ATTAINDER IN ENGLAND.....  | 774 |
|      | A. <i>Early English Attainders</i> .....   | 776 |
|      | B. <i>Parliamentary Attainder in the Modern Period</i> .....                           | 796 |
|      | 1. <i>Under the Tudors</i> .....   | 796 |
|      | 2. <i>Under the Stuarts</i> .....  | 804 |
|      | C. <i>Attainder in English Legal Literature</i> .....                                  | 818 |
|      | 1. <i>Coke in the Institutes</i> .....   | 820 |
|      | 2. <i>After Coke</i> .....   | 822 |
| III. | ATTAINDER IN BRITISH NORTH AMERICA .....   | 826 |
|      | A. <i>New York</i> .....   | 831 |
|      | 1. <i>The Attainder of Ethan Allen</i> .....   | 832 |
|      | 2. <i>Revolutionary New York</i> .....   | 835 |
|      | 3. <i>The New York Constitution of 1777</i> .....                                      | 843 |
|      | 4. <i>The Confiscation Act</i> .....   | 846 |
|      | B. <i>Pennsylvania</i> .....   | 857 |
|      | 1. <i>Revolutionary Pennsylvania</i> .....   | 859 |
|      | 2. <i>The Pennsylvania Constitution of 1776</i> .....                                  | 866 |
|      | 3. <i>The Quaker Banishment</i> .....  | 873 |
|      | 4. <i>The "Act for Attainder of Divers Traitors"</i> .....                             | 880 |
| IV.  | UNDERSTANDING THE BILL OF ATTAINDER CLAUSES.....                                       | 889 |
| V.   | CONCLUSION.....  | 896 |
|      | APPENDIX: ENGLISH ACTS OF ATTAINDER AND SIMILAR<br>PROCEEDINGS CITED IN THIS WORK..... | 898 |

*The history of Parliament, upon which I am going to touch, is an English heritage, with a remainder to Americans. Legislative practice to-day in Nebraska and Minnesota can be traced back to early seventeenth-century or late Tudor usages at Westminster. If then Americans sometimes venture upon the interpretation of English institutions, you must be lenient. If you are chary of granting us any legal rights upon your history, you will not, I hope, refuse us some courtesy title in it.*

—Wallace Notestein, 1924

## I. INTRODUCTION

What are bills of attainder?<sup>1</sup> The familiar answer, endorsed by our Supreme Court, is that bills of attainder are legislative acts that specify an individual or group and impose punishment without judicial process.<sup>2</sup> They are legislative punishments, or legislative judgments—an attempt to use legislative power to accomplish a judicial task.

Today there is relatively little legislative punishment, at least at the federal level.<sup>3</sup> But while we see few legislative punishments, *executive* punishments without judicial process are not uncommon. In September 2011, for example, a predator drone strike in Yemen killed an American citizen named Anwar Al-Aulaqi. The Department of Defense and Central Intelligence Agency, which believed Al-Aulaqi posed an imminent threat to national security, had added him to a secret “kill list[].”<sup>4</sup> The government maintains other lists as well, including blacklists and watch lists of individuals with suspected ties to terrorism. Individuals on these lists suffer a range of civil disabilities.<sup>5</sup> Naming, listing, and

1. See U.S. CONST. art. I, § 9, cl. 2 (“No Bill of Attainder . . . shall be passed.”); U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . .”).

2. *E.g.*, *United States v. Lovett*, 328 U.S. 303, 315–16 (1946).

3. There are some acts that can be plausibly so described. See, for example, the de-funding of the community organization ACORN after allegations of fraud and embezzlement. Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177, 1206 (2011).

4. See *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 81–82 (D.D.C. 2014) (dismissing Al-Aulaqi’s bill-of-attainder claim for lack of legislative action); Complaint at 2–5, *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (No. 12-1192); see also Marisa Young, Note, *Death from Above: The Executive Branch’s Targeted Killing of United States Citizens in the War on Terror*, 2014 U. ILL. L. REV. 967, 983. Young documents the Obama administration’s preference for targeted killing, which has risen, according to her sources, from 42 targeted killings between 2004 and 2008 under President George W. Bush, to 321 strikes, killing 2374 people, under President Obama. *Id.* at 973–74.

5. See Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 466–73 (2013) (discussing the lack of incentive to address watch-list “false positives”); Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1205–07 (“Once blacklisted, a person is legally barred from otherwise lawful activities that others are free to pursue, such as flying on an airplane, opening a bank account, or sitting on a park bench.”).



punishing has been a favored strategy for some time; lists of subversive and disloyal organizations were a prominent feature of Cold War efforts to prevent the spread of communism on the home front.<sup>6</sup> In one such case that came before the Supreme Court, Justice Hugo Black observed that “blacklists possess almost every quality of bills of attainder.”<sup>7</sup> He found the similarity troubling. “I cannot believe,” he continued, “that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices.”<sup>8</sup> Black’s construction has never garnered a majority of the Court. As the federal district court put it in litigation following Al-Aulaqi’s death, the Bill of Attainder Clause “requires *legislative action*,” and no “formal action of either the House or Senate was taken to approve the strike.”<sup>9</sup> No mention was made of the 2001 Authorization for Use of Military Force, on which the President’s authority arguably rested.<sup>10</sup>

This Article is a historical study of bills of attainder. Its concern is Justice Black’s concern—whether we ought to regard our constitutional prohibition of bills of attainder as applying to executive acts. The argument of the Article is that bills of attainder are not, in fact, best understood as legislative punishments or legislative judgments. For most of their history, they have been regarded instead as a *summary form of legal process*. Specifically, the bill of attainder is a form of legal proceeding that requires neither (1) the production of evidence nor (2) the presence of the accused. If, as Laurence Tribe suggested years ago, the constitutional ban on bills of attainder is directed at process “by legislative *method*,” rather than process “by a particular *body*,” the ban might reasonably be applied to administrative or executive action that approximates the legislative method.<sup>11</sup>

The study that follows has three Parts. Part II begins with an account of the genesis and early development of bills of attainder during the late medieval period in England, beginning roughly in 1400 and running until 1485, when Henry Tudor assumed the

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6. See, e.g., Internal Security Act of 1950, Pub. L. No. 81-831, § 7, 64 Stat. 987, 993 (requiring each “Communist-action organization” and “Communist-front organization” to register with the U.S. Attorney General).

7. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 144 (1951) (Black, J., concurring).

8. *Id.*

9. *Al-Aulaqi*, 35 F. Supp. 3d at 82.

10. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

11. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 500 (1st ed. 1978) (quoting *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 105, 121 (1965)).

throne. The last major study of bills of attainder in this period by a legal academic was written by Zechariah Chafee in 1956.<sup>12</sup> The study remains valuable, but much has happened in the interim. I draw in particular on the medieval Parliament rolls, which were collected and published in a modern scholarly edition in 2005.<sup>13</sup> Access to other important sources, including the year books (early reports of pleadings in cases),<sup>14</sup> rolls (medieval administrative records),<sup>15</sup> and chronicles and related texts,<sup>16</sup> has also improved considerably, and I utilize a range of these materials below. After describing the medieval origin of attainder, I turn to the modern period and illustrate the persistence of the medieval understanding of attainder in letters, parliamentary diaries, and journals. The view of attainder as an *ex post facto* exercise of legislative power emerged only in 1641, during the disastrous attainder of the earl of Strafford. In the eighteenth century it was one of several competing views, as the English legal commentary shows. All the English attainders I discuss are collected in a table attached as an appendix.

Part III is an account of early American bills of attainder. Rather than simply survey the bills enacted by the colonies and states—work that has already been done<sup>17</sup>—I reconstruct the political and legal context of wartime New York and Pennsylvania,

12. ZECARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 90–161 (1956). Ryan Alford's article mentions several early convictions on the King's personal record, but the overriding focus of his work is seventeenth-century legal commentary. See Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1203–09.

13. See Paul Brand, *General Introduction to 1 THE PARLIAMENT ROLLS OF MEDIEVAL ENGLAND, 1275–1504*, at 1–21 (C. Given-Wilson et al. eds., 2005) [hereinafter PROME]. The collection is also available online at <http://www.sd-editions.com/PROME/home.html>.

14. The Selden Society continues to publish year books, which I cite below, including very late reports for the reign of Henry VIII. David Seipp at Boston University has created a searchable online database of printed year book reports (Seipp's Abridgement), which I use here. See *Legal History: The Year Books*, B.U. SCH. LAW, <http://www.bu.edu/law/seipp> (last visited Feb. 6, 2016).

15. One source I use below is the University of Houston online database, *The Anglo-American Legal Tradition*, which contains both digitized manuscript and printed rolls over a 500-year period. See *Anglo-American Legal Tradition*, U. HOUS., <http://aalt.law.uh.edu> (last updated Aug. 2015).

16. A number of important medieval chronicles containing information about English Parliaments are now available in scholarly editions. Below, I rely on *THE PLUMPTON LETTERS AND PAPERS* (Joan Kirby ed., 1996), Thomas Christmas & John Vertue, *A Colchester Account of the Proceedings of the Parliament of 1485*, in *PARLIAMENTARY TEXTS OF THE LATER MIDDLE AGES* (Nicholas Pronay & John Taylor eds., 1980), and *THE CROWLAND CHRONICLE CONTINUATIONS: 1459–1486* (Nicholas Pronay & John Cox eds., 1986), as well as other similar texts.

17. See, e.g., CLAUDE HALSTEAD VAN TYNE, *THE LOYALISTS IN THE AMERICAN REVOLUTION* (1902); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution* (pts. 1 & 2), 3 ILL. L. REV. 81, 147 (1909).

both of which employed bills of attainder. I begin with the attainder of Ethan Allen and the Green Mountain Boys in Charlotte County, New York, territory that eventually became Vermont. Allen's attainder demonstrates continuity between English and early American practices. I use records to show the use of similar procedures by the New York Provincial Congress and its secret wartime committees during the Revolutionary War. Drawing on legislative records, letters, and other period texts, I then describe the genesis and reception of the Confiscation Act, which attainted leading New York loyalists and confiscated their land. Part III turns next to a study of Pennsylvania, beginning with the revolutionary period. Excluded from the provincial Assembly and Governor's Council, radical Whigs in Pennsylvania formed extraconstitutional committees and military associations much like those in New York. State records show how these bodies employed summary proceedings to identify, seize, and detain individuals thought to threaten the Revolutionary movement, in particular pacifist Quakers. Unlike New York, radicals in Pennsylvania were victorious at their Constitutional Convention and created a unicameral state legislature in the image of these radical committees. As the war split the state in two, the Pennsylvania Assembly passed an act of attainder to punish individuals who left to join or support the enemy. The act empowered the state's executive, the Supreme Executive Council, to add to the list of those attainted, and some 500 individuals were attainted of high treason in this way.

The material described in Parts II and III fits into a larger narrative about bills of attainder. The arc of the narrative is something like this: Bills of attainder originated in Parliament in response to a set of specific problems. Those problems were various, but almost all of them involved a need to lawfully punish rebels or traitors who were absent, usually because they had fled the realm or been killed. Process at common law required presence, but process by the "law and course of parliament" did not. Where an offense was known to members of Parliament—where it was, as they said, "notorious"—Parliament could proceed against absents, without the introduction of evidence.<sup>18</sup> Over time this form of proceeding was put to new uses. Under Henry VIII, it

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18. See T.F.T. Plucknett, *The Origin of Impeachment*, 24 TRANSACTIONS ROYAL HIST. SOC'Y 47, 59–68 (1942) (tracing the use of "notorious" conduct from instant conviction to summary forms of legal proceeding); Kenneth Pennington, *Two Essays on Court Procedure: The Jurisprudence of Procedure* 185, 205–06 (unpublished manuscript) (on file with author) (describing the significance of notoriety in medieval European procedural jurisprudence and Gratian's position that notorious (*manifestis*) crimes did not require a trial for entry of judgment).

was deployed against individuals *in custody*, but who could not be indicted for treason because their acts were not treasonous under English law. And under Charles I, bills of attainder were used to condemn individuals who had been, essentially, *exonerated* by a failed judicial proceeding—impeachment. As attainder pushed outward, it heightened concerns that had existed all along, until eventually its legitimacy was brought into serious question. American lawyers in the late eighteenth century were aware of this arc. The best-read of them knew its full trajectory; nearly all of them knew its end point. And so during the Revolutionary War the proper use of the bill of attainder was heavily contested. There were prominent, trained lawyers who defended bills of attainder, and in fact attainder saw considerable use during the conflict. Others among the elite opposed bills of attainder. This group—which Daniel Hulsebosch has called the “cosmopolitan minority”—was upset by the use of attainder to punish otherwise innocent loyalists, and it was their voice that prevailed after the war and the experience of legislative excess in the 1780s.<sup>19</sup>

Part IV applies this narrative to the problem of the scope of the Bill of Attainder Clause in Article I, Section 9. The narrative suggests that the principal aim of the Bill of Attainder Clauses was not to prevent legislative punishments, at least in the sense of punishments *in the legislature*. Nor were the clauses primarily intended to separate the legislative and judicial functions of government, as the leading commentary argues, although this concern was indeed prominent at the time.<sup>20</sup> Untangling legislative and judicial power became the office of the Fifth Amendment Due Process Clause and of analogous provisions in state constitutions.<sup>21</sup> In contrast, the principal concern of the Bill of Attainder Clauses was *how we deal with those of us who join our*

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19. See Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 826–29, 837 (2006) (noting that this opposition group, which argued that antilyoyalist legislation hindered the states’ ability to reintegrate with European commerce, would go on to be called Federalists).

20. The leading commentary is a 1962 student comment written by John Hart Ely. See Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343–48 (1962). On Ely’s authorship of the comment, see Alan M. Dershowitz, In Memoriam, *John Hart Ely*, 117 HARV. L. REV. 1743, 1743–44 (2004). In an important article written fifteen years later, Raoul Berger vigorously contested the historical accuracy of Ely’s claims about the connection between the ban on attainder and separation of powers. See Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 379–90 (1978).

21. See, e.g., JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 46–48 (2003); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 126–31 (1957).

*enemies*. What process do we give the disloyal, the subversive, and the traitor? Whether or not we give them full common law process, the Bill of Attainder Clauses require that we give them more than bill process.<sup>22</sup> That means they should be allowed to appear and demand evidence for the allegations against them. In this sense, the Bill of Attainder Clause is a constitutional floor for wartime process afforded those who owe us allegiance.<sup>23</sup> It is the Civil War Process Clause. This construction is at once broader and narrower than the dominant view; it is narrower in the sense that it excludes so-called legislative punishments *having nothing to do with state crime*, but it is broader in the sense that it applies to summary forms of legal proceeding *conducted outside the legislature*, when those proceedings are aimed at the disloyal.

## II. ATTAINDER IN ENGLAND

A study of bills of attainder must begin by identifying them. What counts as a bill of attainder? Answering this question proves harder than one might expect.

One cannot identify bills of attainder in the late medieval period simply by looking for the words “attainder” or “attaint.” The terms are ambiguous. Their familial appear quite early and were employed to different ends over time. For example, we know there are important differences between the meaning of the common Anglo-Norman term “atteindre” in the thirteenth century and the more technical uses to which its descendants were put beginning in the late fourteenth century.<sup>24</sup> The early meaning is something like “to convict,” the later meanings various.<sup>25</sup> Because the early meaning is “to convict,” if one looks through the Parliament rolls or year books of this period for “atteindre,” “attainder” or “attaint,” one finds mostly convictions in a royal court.

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22. Cf. Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 922–23 (2006) (arguing that prosecutions for treason must observe certain procedural forms and occur in an Article III court).

23. Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (describing due process protections in a war setting).

24. T.F.T. Plucknett, *Presidential Address: Impeachment and Attainder*, 3 TRANSACTIONS ROYAL HIST. SOC'Y 145, 155 (1953).

25. John P. Collas, *Introduction to 70 SELDEN SOCIETY*, at ix, xxi–lx (1951). According to Collas, the Anglo-Norman term meant “to reach” or “to attain,” and it was used to express “judicial conviction,” in the sense that conviction was the end “reached” or “attained” by pleading (although the use was intransitive). In the middle of the fourteenth century, the Latin “convictus” began to be applied to “merely the fact of being found guilty.” *Id.* at xxxiv. At some point, association with the Latin “tingere,” meaning “to taint,” contaminated the French “atteindre.” See *id.* at xxxvii; 1 OXFORD ENGLISH DICTIONARY 761 (2d ed. 1989) (deriving “attainder” from the French *ateindre*: “to strike, touch, affect, accuse, convict, condemn”).

Convictions, however, are not my interest—at least, not *all* convictions. I *am* interested in a conviction if it consists in, or results from, the right parliamentary procedures. But how to identify these procedures? The approach I take here is to begin with what I want: working from core examples of bills of attainder, about which there is relatively little dispute, I describe *purposes* they served, and then group together procedures that serve the same purposes and are roughly similar in form. The resultant body of material is still complex. I count at least six purposes for English bills of attainder: (1) securing the land of barons who opposed the victorious side in civil war; (2) supporting a royal “system of control” and “probation” for powerful families;<sup>26</sup> (3) convicting and punishing “special offenders” who posed a threat to the stability of the realm or to royal succession;<sup>27</sup> (4) locating or convicting fugitives from justice; (5) validating, enforcing, or supplementing proceedings in common law courts; and (6) removing powerful ministers. The diversity of purposes is considerable enough that I do not insist on firm boundaries between attainder and related procedural devices, like appeal of treason. We should think of there being a *family* of procedures in Parliament that served these ends, rather than discrete types.

The result is a kind of institutional history of parliamentary attainder. This history, truncated even as it is, requires some space for telling, but here are its central claims: *First*, in the earliest period, parliamentary attainder was largely a device of royal power<sup>28</sup> controlled by the King’s ministers or allies and nearly always directed through Parliament without opposition.<sup>29</sup> The King used bills of attainder to reach or punish individuals in circumstances where judicial process could not run. Many of these individuals were great men who threatened the kingdom in some way, although, as I said, attainders were diverse and this is not true of all. The King’s control over this process suggests that it was closely tied to his obligations to do justice and protect his subjects, which were threatened by overpowerful men as well as by more mundane administrative failures. *Second*, it seems relatively clear that bills of attainder exploited the special status and character of the King’s high court of Parliament. This court could proceed

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26. J.R. Lander, *Attainder and Forfeiture, 1453 to 1509*, 4 HIST. J. 119, 138, 146 (1961).

27. Stanford E. Lehmborg, *Parliamentary Attainder in the Reign of Henry VIII*, 18 HIST. J. 675, 677 (1975).

28. J.S. BOTHWELL, *FALLING FROM GRACE: REVERSAL OF FORTUNE AND THE ENGLISH NOBILITY, 1075–1455*, at 44–45 (2008).

29. J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 211 (1970).

against the absent, including men outside of the realm; and it might convict such individuals of notorious offenses without a presentation of evidence. Sources show, however, that the English never fully accepted attainder proceedings, and there is evidence of resistance to condemning the absent from the end of the medieval period. In the modern period we see similar complaints about condemning without sufficient evidence. *Third*, in the seventeenth century, a cultural embrace of the common law<sup>30</sup> and the development of impeachment brought expressly judicial forms of process into Parliament—what that period called “judicature.”<sup>31</sup> Attainder did not fare well in comparison. The attainder of the earl of Strafford in 1641 showed that party politics could distort summary legal proceedings, and thus emerged a new view of the bill of attainder as an *ex post facto* use of absolute or legislative power. Finally, *fourth*, Sir Edward Coke’s influential criticisms of attainder in *The Institutes of the Laws of England* must be read in the context of Parliament’s embrace of the common law in the period before the Civil War, which entailed a rejection of older, summary forms of justice. When one examines other commentators, it is clear that the wider body of English legal literature supported multiple views of the bill of attainder: a traditional view that they were process according to the law and course of Parliament, and a modern view that they were *ex post facto* law.

### A. *Early English Attainders*

The first parliamentary attainders occurred in the fifteenth century. The practice developed organically.<sup>32</sup> Bits and pieces of

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30. See ALAN CROMARTIE, *THE CONSTITUTIONALIST REVOLUTION 181–83*, 234 (2006); see also JEFFREY GOLDSWORTHY, *PARLIAMENTARY SOVEREIGNTY* 46 (2010) (describing the seventeenth century as the “classical age of common law constitutionalism”).

31. COLIN G.C. TITE, *IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND* 83–88 (1974).

32. BELLAMY, *supra* note 29, at 178–82. John Bellamy is largely responsible for illustrating the connection between late-fourteenth century parliamentary practices and attainders in the fifteenth century. Before his monograph, *The Law of Treason*, the prevailing view dated parliamentary attainder to the 1459 act convicting the Yorkists in the Wars of the Roses. This is the view usually ascribed to Maitland, Stubbs, and Holdsworth, but none of these great students of English legal history devoted much attention to acts of attainder. See *id.* at 178; William Richard Stacy, *The Bill of Attainder in English History* 10 (Aug. 20, 1986) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author) (“Deceived by the ease and frequency with which the various factions in the Wars of the Roses attained one another, historians have described the Lancastrians’ use of an act of attainder . . . as the introduction of a revolutionary new weapon. This, as J.G. Bellamy has demonstrated, is quite mistaken. The origins of parliamentary attainder are to be found in the fourteenth century.”). For the older view, see, for example, 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 381 (3d ed. 1922); F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 215–16 (1st ed. 1908); 3

things were combined, always opportunistically, but shaped by that period's "keen sense of technicality"<sup>33</sup> and by a desire to resolve political disputes with "peaceful and 'legal' procedure[s]."<sup>34</sup> The Statute of Treasons enacted in 1352 had identified several kinds of treason, saving for the King and his Parliament the determination of what else would count.<sup>35</sup> As it happened, cases referred to Parliament for this purpose were rarely tried in common law courts; instead, they remained in Parliament, which dealt with offenders by one means or another.<sup>36</sup> Most famously, in 1388, leading members of the country aristocracy brought an "appeal of treason," a kind of private criminal suit, against the courtiers and ministers controlling Richard II.<sup>37</sup> Richard called a Parliament to hear the matter.<sup>38</sup> In the interim most of the

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WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 273, 480 (5th ed. 1903). *But see, e.g.*, L.W. VERNON HARCOURT, *HIS GRACE THE STEWARD AND TRIAL OF PEERS* 388–90 (1907) ("For a considerable period after [1459], all judicial process in parliament . . . was . . . completely superseded by bill of attainder . . ."); 3 T.F. TOUT, *CHAPTERS IN THE ADMINISTRATIVE HISTORY OF MEDIAEVAL ENGLAND* 432–33 (1928) (describing roots of attainder in the fourteenth century).

33. Plucknett, *supra* note 24, at 152–54.

34. BOTHWELL, *supra* note 28, at 36, 38–40.

35. Statute of Treasons of 1352, 25 Edw. 3 c. 2, in 4 *ENGLISH HISTORICAL DOCUMENTS* 1327–1485, at 398 (A.R. Myers ed., 2006) ("[I]f any other case, supposed treason, which is not specified above, should come before any justices, the justices shall wait . . . till the case be shown and declared before the king and his parliament, whether it ought to be judged treason or some other felony."). The statute was likely enacted in response to an expansion of treason and related offenses by Edward III's judges. *See, e.g.*, BELLAMY, *supra* note 29, at 59–60, 80; ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348–1381*, at 24–26 (1993).

36. BELLAMY, *supra* note 29, at 181. The one known example is the case of John Imperial. *See Select Cases in the Court of King's Bench Under Richard II, Henry IV and Henry V*, in 88 *SELDEN SOCIETY* 14–21 (1971). Many treason cases were never referred to Parliament but remained in the courts, including most of the cases arising out of the peasants' revolt. *See* BELLAMY, *supra* note 29, at 103–05.

37. *See* 3 Rot. Parl. 229–36, in 7 *PROME*, *supra* note 13, at 84–98; THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 204–05 (5th ed. 1956) ("Appeals of Treason"); 3 TOUT, *supra* note 32, at 426–33. Appeal of treason may have been related to (or intended to invoke) appeal of felony—the ancient form of private prosecution that proceeded to trial by battle—but we do not really know.

38. 3 TOUT, *supra* note 32, at 426–30. There is an old dispute as to whether the appellants originally intended to proceed before a different body, the Court of the Constable and Marshal, also known as the Court of Chivalry. *E.g.*, M.V. Clarke, *Forfeitures and Treason in 1388*, 14 *TRANSACTIONS ROYAL HIST. SOC'Y* 65, 83–85 (1931). *Contra, e.g.*, MAY MCKISACK, *THE FOURTEENTH CENTURY, 1307–1399*, at 451–52, 452 n.1 (1959); NIGEL SAUL, *RICHARD II 191–92* (1997). Had the appeal occurred before the Court of Chivalry, Gloucester could not have prosecuted it (he was the Constable, and thus presided over the court), but civil law likely would have applied, which would have worked to the advantage of the appellants. *See* Alan Rogers, *Parliamentary Appeals of Treason in the Reign of Richard II*, 8 *AM. J. LEGAL HIST.* 95, 96, 99–100 (1964). On civil law in the Court of Chivalry, see *Pounteny v. Gournay*, YB 13 Hen. 4, Hil. 8 (1412), *reprinted in* 51 *SELDEN SOCIETY* 21, 23 (1933) ("[S]ome men distinguish between where such a deed is executed within the domain of the King, in which case the suit shall be tried by the common law of the King,



appellees fled, which at common law should have prevented entry of judgment.<sup>39</sup> The Lords in Parliament, however, concluded that the appeal was not governed by the common law, but by “the laws and course of parliament,”<sup>40</sup> which would award default judgment where they “well knew” the truth of the charged treason.<sup>41</sup> Nine days later, the Lords declared that fourteen of the charges laid out in the appeal constituted treason, adjudged the appellees guilty, and sentenced them to death.<sup>42</sup> The traitors’ goods and lands were ordered forfeit and their heirs “disinherited for ever.”<sup>43</sup>

The wheel of fortune would turn, of course. A decade later it was Richard, rather than his aristocratic opponents, who was in a position to make use of parliamentary appeal. In 1397, suspecting designs against him, Richard obtained an extension of the law of treason to include plots to depose the King.<sup>44</sup> He then prevailed on one of the Lords Appellant, the earl of Nottingham, to lodge an

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and where it is executed beyond his domain, in which case it is triable in the Constable’s court.”).

39. At common law, failure to appear resulted not in default judgment, but in outlawry. See Rogers, *supra* note 38, at 108. The absence of the appellees was likely the most important legal problem the appeal faced, but it may not have been the only one; the record is not clear. See 3 Rot. Parl. 236, in 7 PROME, *supra* note 13, at 99–100 (describing the judges’ discussions as to “the proper procedure in the process of appeal” and their view that the appeal of treason was not conducted according to the law of the land or civil law); Paul Brand, *Introduction to 7 PROME*, *supra* note 13, at 55 (identifying absence as the issue); SAUL, *supra* note 38, at 192 (same).

40. 3 Rot. Parl. 236b, in 7 PROME, *supra* note 13, at 100. The Lords also dismissed the suggestion that the appeal failed to conform to the civil law. The Parliament roll does not expressly identify what in “the laws and course of parliament” the Lords thought established the validity of the appeal.

41. See 3 Rot. Parl. 237a, in 7 PROME, *supra* note 13, at 101 (“[B]ecause our said lord the king and the lords of parliament *well knew that their said allegation was true*, and that the said archbishop, duke, earl, and Robert Tresilian, appealed as above, had been thus solemnly summoned, and yet had failed to appear, their default was recorded.” (emphasis added)). On the role of notoriety in the judgment, see BELLAMY, *supra* note 29, at 181.

42. 3 Rot. Parl. 237a–b, in 7 PROME, *supra* note 13, at 101–02 (“[T]he said lords of parliament . . . adjudged the said archbishop, duke, earl, and Robert Tresilian, appealed as above, guilty and convicted of the treasons . . .”); 4 ENGLISH HISTORICAL DOCUMENTS, *supra* note 35, at 156–58 (account from Favent’s *History*); Clarke, *supra* note 38, at 85–87. On the role played by the Statute of Treasons in the Lords’s declaration, compare BELLAMY, *supra* note 29, at 113 (used), with Clarke, *supra* note 38, at 90–92 (not used) (“They were not bold enough to make a parliamentary declaration of treason, though they had not hesitated to go behind the statute of 1352 in giving judgement on the articles of the appeal.”).

43. Clarke, *supra* note 38, at 93. In many cases the families of the appellees were able to recover their interests in land. See C.D. Ross, *Forfeiture for Treason in the Reign of Richard II*, 71 ENG. HIST. REV. 560, 560–68 (1956) (surveying the means by which the appellees’ heirs were able to reclaim their titles and lands).

44. Extension of the Law of Treason of 1398, 21 Rich. 2 c. 3, in 2 STATUTES OF THE REALM 98–99; BELLAMY, *supra* note 29, at 114. The statute was repealed after Richard’s deposition. See *id.* at 115–16.

appeal of treason against his former co-appellants.<sup>45</sup> They were arrested. One of them, the duke of Gloucester, mysteriously died in captivity before the Lords in Parliament heard the appeal against him.<sup>46</sup> Richard's allies likely murdered Gloucester, but his early death nonetheless posed a problem for the King. Had Gloucester been pronounced guilty of treason, his lands would have been forfeit to Richard; in this respect, parliamentary declarations of treason mimicked conviction for treason in a court of common law, which traditionally resulted in forfeiture of land to the King.<sup>47</sup> Yet posthumous forfeiture for treason was impermissible unless taken in open war or on the battlefield.<sup>48</sup> Apparently, if Richard was to lawfully acquire Gloucester's lands, other means had to be devised. In the end, the appeal simply continued. The Parliament of September 1397 treated Gloucester's death like its predecessor had treated the absence of the appellees in 1388. Commons declared it notorious ("*notoriement*") that Gloucester had assembled "with a great number of men armed and arrayed to wage war against the king."<sup>49</sup> They prayed that he "be adjudged a traitor . . . [a]nd that all his lands, tenements, goods and chattels, notwithstanding his death, should be forfeit to the king," and the Lords and King agreed.<sup>50</sup>

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45. Plucknett, *supra* note 24, at 149. Nottingham and several others laid the appeal in council, which was referred to Parliament. MCKISACK, *supra* note 38, at 479. Other lesser figures, like Sir Thomas Mortimer, were impeached. Mortimer fled and was ordered to surrender to the King

to answer and be at law in that regard. And if he should not come and surrender himself to the king within the said three months, as said above, that he would be adjudged a traitor to the king and to the kingdom, and convicted and attainted of all the treasons of which he is appealed: and that all his castles, manors, lands and tenements, reversions, fees, advowsons, and every other manner of hereditament as well of fee tail as of fee simple . . . also all the lands and tenements with which other persons were enfeoffed to his use . . . should be forfeit to the king and to his heirs.

3 Rot. Parl. 380–81, in 7 PROME, *supra* note 13, at 416–18. The language suggests that there was not a clear line between impeachment and appeal.

46. See 3 Rot. Parl. 378, in 7 PROME, *supra* note 13, at 411–12.

47. See, e.g., BOTHWELL, *supra* note 28, at 88–90; 2 FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 500 (2d ed. 1898) (contrasting treason with felony in the fourteenth century and noting that "while the felon's land escheated to his lord, the traitor's land was forfeited to the king").

48. See, e.g., MCKISACK, *supra* note 38, at 481 & n.3; Plucknett, *supra* note 24, at 155–56. This rule is likely customary law, but it was reflected in the language and structure of the statute of 1361, 34 Edw. 3 c. 12, in 1 STATUTES OF THE REALM 367–68.

49. 3 Rot. Parl. 378a, in 7 PROME, *supra* note 13, at 412. PROME's editors translate the Anglo-French term "*notoriement*" as "well known," but Plucknett has argued that Commons was invoking the ancient rule of instant conviction by notoriety. See *id.*; see also Plucknett, *supra* note 24, at 150–51; Rogers, *supra* note 38, at 120–21.

50. 3 Rot. Parl. 378a–b, in 7 PROME, *supra* note 13, at 412; see MCKISACK, *supra* note 38, at 481–82. The phrase "notwithstanding his death" (*non obstante sa morte*) is underlined on the roll. Gloucester lost lands held in fee simple and those held in fee tail and to his use. See 3 Rot. Parl. 378b, in 7 PROME, *supra* note 13, at 412.

After another turn of the wheel left Richard deposed a year later, appeal of felony was banned from Parliament.<sup>51</sup> Perhaps it was too late. By then, Parliament had developed into a leading venue for baronial politics, and the political problems for which appeal had provided a legal solution remained.<sup>52</sup> Thus, for example, the need remained to reach fugitives from justice, to punish them by speedy and effective process, and to discourage flight altogether. The common law judgment of outlawry, used for this purpose by courts of law, was cumbersome, and more efficient methods arose to meet the need.<sup>53</sup> In 1394 (*prior* to the 1399 ban on parliamentary appeal), the dukes of Lancaster and Gloucester had appealed Thomas Talbot in Parliament; Talbot was given three months to appear before the King's Bench or "be held convicted and attainted of treason by award of this parliament."<sup>54</sup> In 1406 (*after* the ban), the earl of Northumberland and Lord Bardolf were appealed of treason in the Court of Chivalry, a military court with jurisdiction over matters arising under the law of arms.<sup>55</sup> The Court of Chivalry referred the question of the proper procedure to the Lords in Parliament,<sup>56</sup> who made a long series of findings about the activities of Northumberland and Bardolf, and ordered the men to "bring themselves in person before our said lord the king . . . to answer for the aforesaid treasons . . . [or] be

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51. 3 Rot. Parl. 442a-b, in 8 PROME, *supra* note 13, at 69 ("Also, the request of the said commons: that henceforth, no appeal of treason . . . should be received or accepted in parliament, but rather in your other courts within your realm, provided that it can be concluded in your said courts . . . And that any person who in future is accused or impeached in your parliament . . . by the lords, the commons of your realm, or by any person, should be allowed a defence and response to his accusation or impeachment, and, following his reasonable response, a record, judgment or trial; as from ancient times has been done and is the custom through the good laws of your realm."); see also 4 Rot. Parl. 349b, in 10 PROME, *supra* note 13, at 404-05 (prohibiting appeals of felony in Parliament arising out of conduct that took place outside the realm of England, and requiring that appeals of felony arising out of conduct within the realm of England "be sued, tried and determined by the common law of the said realm").

52. On Parliament's place, see BOTHWELL, *supra* note 28, at 43; SAUL, *supra* note 38, at 191-92 ("Parliament by the later fourteenth century had established for itself a recognized position as the only appropriate setting for major state trials."); and Galliard Lapsley, *Some Recent Advance in English Constitutional History (Before 1485)*, 5 CAMBRIDGE HIST. J. 119, 141-46 (1936).

53. A judgment of outlawry required that the defendant be appealed or indicted and fail to appear at five successive county courts. *E.g.*, 2 POLLACK & MAITLAND, *supra* note 47, at 578-82; Jane Y. Chong, Note, *Targeting the Twenty-First Century Outlaw*, 122 YALE L.J. 724, 745-46 (2012).

54. 5 CALENDAR OF THE CLOSE ROLLS, 1392-1396, at 294 (1925).

55. See BELLAMY, *supra* note 29, at 182-83; M.H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES 27-28* (1965) [hereinafter KEEN, *THE LAWS OF WAR*]; M.H. Keen, *Treason Trials Under the Law of Arms*, 12 TRANSACTIONS ROYAL HIST. SOC'Y 85, 86-87, 87 n.1, 93 (1962) [hereinafter Keen, *Treason Trials*].

56. 3 Rot. Parl. 604a, in 8 PROME, *supra* note 13, at 407.

convicted and attainted” of them.<sup>57</sup> When repeated proclamations failed to bring in the men, the Lords stripped them of their titles and ordered their lands forfeit to the King.<sup>58</sup> Four years later, in 1410, Commons petitioned King Henry IV to “ordain in this present parliament” a punishment for Hugh de Erdswick for rioting.<sup>59</sup> Henry and the Lords issued a writ for the arrest of Erdswick, along with other named rioters, and proclaimed that the men should surrender themselves before the King’s Bench or stand “convicted of the trespasses, crimes, and felonies specified . . . and all their goods and chattels, lands and tenements . . . be forfeit.”<sup>60</sup> Unsurprisingly, Erdswick never appeared and was convicted by “act and ordinance in Parliament.”<sup>61</sup> Thus we arrived, almost unnoticeably, at the “suspended attainder act” or “suspensive act of attainder.”<sup>62</sup>

Even more important to the King than reaching fugitives was acquiring title to the lands of traitorous nobles, just as Richard had strained to do against Gloucester. Again parliamentary attainder met the need. In a leading study of early practice, J.R. Lander described how attainder in Parliament emerged as part of a royal “probation system” for the great men of the realm.<sup>63</sup> We saw above that conviction for treason traditionally resulted in forfeiture of land to the King. Conviction could be reversed by pardon, however, and the King might grant a pardon if the attainted “worked [his] way back” into royal favor.<sup>64</sup> In fact, a

57. 3 Rot. Parl. 606a, in 8 PROME, *supra* note 13, at 411.

58. 3 Rot. Parl. 606a–07, in 8 PROME, *supra* note 13, at 411–13 (“[I]f they are caught they shall be hanged, drawn and beheaded . . . [a]nd . . . the king shall have the forfeiture of all the castles, lordships, manors, lands, tenements, rents, services, fees and advowsons, and any other possessions with which the said Henry Percy [i.e., Northumberland] and Thomas Bardolf, or either of them, had been or was enfeoffed or seized in fee simple . . .”). See also the judgment delivered against Thomas Haxey in Parliament “by advice of the Lords and the [royal] assent,” 2 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 314 (Zechariah Chafee, Jr. ed., 1963) (alteration in original), which is sometimes described as an attainder. See, e.g., CHAFEE, JR., *supra* note 12, at 102.

59. 3 Rot. Parl. 630a, in 8 PROME, *supra* note 13, at 471–72.

60. 3 Rot. Parl. 632a, in 8 PROME, *supra* note 13, at 475–76.

61. 1 CALENDAR OF THE PATENT ROLLS, 1413–1416, at 242 (1910) (recording a pardon to John and William Myners, associates of Erdswick mentioned in the Parliament Rolls, and describing them as having been “convicted of divers trespasses, misprisions, felonies, rebellions, insurrections, contempts and inobediences by reason of defaults . . . which defaults were recorded against them before the said king in his Bench by virtue of an act and ordinance in Parliament on 20 January, 11 Henry IV, at Westminster against them and others”).

62. See BELLAMY, *supra* note 29, at 188; Stacy, *supra* note 32, at 17. Stacy identifies Erdswick as the first act of attainder. *Id.* at 17–18.

63. Lander, *supra* note 26, at 146. In this respect, attainder supplemented the system of recognizances for good behavior and suspended fines used by Henry VII. *Id.*

64. *Id.* at 132, 139. In this case, pardons were typically letters patent issued under the great seal. *Id.* at 122–23. For the attainted to be restored to his land, however, required

number of attainted men survived long enough to redeem themselves and recover their lands from the crown or from royal patentees; others died but were redeemed by family members.<sup>65</sup> In some cases, restoring a baron to family land surely served the King's interests, since, as Bishop Stubbs noted, landowners generally had "a stake in the country, a material security for [their] good behavior"—although the calculation could be complex.<sup>66</sup> At the same time, the threat of attainder worked as a bridle, since forfeiture was generally thought to render tenure vulnerable to legal challenge, even when followed by a pardon.<sup>67</sup>

The practice of acquiring, holding, granting, and returning land was thus vital to Plantagenet kingship. Indeed, Richard's mismanagement of this system lay at the heart of his troubles. The King ignored powerful barons and gifted lands instead to arrivistes; for his enemies—real and imagined—he sought absolute ruin.<sup>68</sup> Unsurprisingly, the Lancastrian and Yorkist kings who followed Richard adopted a different course, and employed Parliaments to give precise scope to forfeitures and to

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an act of Parliament as well, at least before 1485, when Parliament first authorized the King to restore forfeit land by patent. *See, e.g.*, YB 13 Hen. 4, Mich., pl. 18 (1411), in Seipp's Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=16275> (last visited Feb. 6, 2016). Lander states the general rule as well. *See* Lander, *supra* note 26, at 124.

65. *See* Lander, *supra* note 26, at 131–33, 143–46; Lehmborg, *supra* note 27, at 677. According to Lander's study, in the period between 1453 and 1504, 397 individuals were attainted by act of Parliament (exempting members of a royal house); around 64% of the attainers were eventually reversed with nobility enjoying the highest rate of reversal. Lander, *supra* note 26, at 121, 149. As Lander describes it, reversal usually was not contemplated by the act of attainder itself; the King and his administration simply did not enforce the letter of the law. *See id.* at 144. In the case of John, earl of Oxford, however, the attainer act "expressly spared his life." *Id.* at 131–32, 132 n.53.

66. Lander, *supra* note 26, at 145 (quoting 3 STUBBS, *supra* note 32, at 630). For instance, when a pardon was granted a long time after the attainer, "resumption" of the forfeited land was likely to upset the patentee to whom the King had made a grant of the land. This often set off protracted legal, political, and sometimes even military battles. *See* YB 4 Edw. 4, Mich., pl. 1 (1464), in Seipp's Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=19634> (last visited Feb. 6, 2016); YB 3 Edw. 4, Mich., pl. 19 (1463), in Seipp's Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=19581> (last visited Feb. 6, 2016); Michael Hicks, *Attainder, Resumption and Coercion, 1461–1529*, 3 PARLIAMENTARY HIST. 15, 19–20 (1984) ("The hundred or so Yorkist aristocrats imperilled by reversals of attainers predictably clung to what they had."); Lander, *supra* note 26, at 127 (discussing the case of Sir Thomas Fulford and John Staplehill). The strategy of forfeiture depended to some degree on the strength of the attainted and the patentee, the amount of land, how broadly the land had been distributed, the value of the land, and on the existence of remedies for patentees if the patent was "resumed" (such as royal payments).

67. *See* BELLAMY, *supra* note 29, at 184, 204; Lander, *supra* note 26, at 142.

68. *See* SAUL, *supra* note 38, at 178, 182–83 (discussing Richard's treatment of Gloucester and Robert de Vere, his favorite); ANTHONY TUCK, *RICHARD II AND THE ENGLISH NOBILITY* 102 (1974) (same); Ross, *supra* note 43, at 574–75 ("Richard abandoned all moderation in his attempt to destroy his enemies for ever.").

quiet title.<sup>69</sup> Thus, in March 1401 King Henry IV and the Lords in Parliament “declared and adjudged” the earls of Kent, Huntingdon, and Salisbury to be traitors and concluded “that they should forfeit as traitors all the lands and tenements that they held in fee simple” at the time of their treason the previous year.<sup>70</sup> As it happened, Kent, Huntingdon, and Salisbury were already dead, having been summarily executed after their coup failed. The function of the declaration, then, was not to bring the men to justice but to give the crown “sound title to the rebels’ possessions.”<sup>71</sup> Similarly, in 1431, Commons petitioned the Lords and King to reaffirm earlier proceedings against the great Welsh baron, Owen Glendour, including a common law judgment of outlawry and a statute naming him a traitor.<sup>72</sup> Again, the aim of this “Ordinance” was not to bring Glendour to justice—he had been dead for fifteen years—but to quiet the claims of his heirs, who asserted that prior process against Glendour was invalid for errors “in Writing,” misspellings, omissions, and other procedural defects.<sup>73</sup> An act of Parliament invalidated these claims. The last sentence of the ordinance spelled out a notable exception: claims to Glendour’s entailed land.<sup>74</sup> Apparently, an important royal captain, Sir John Scudamore, had married Glendour’s daughter, Alice, herself an heir to Glendour lands held in fee tail.<sup>75</sup>

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69. See Hicks, *supra* note 66, at 16–20; Lander, *supra* note 26, at 144. The approach of the Lords Appellant in 1388 makes for an interesting contrast with Richard’s management practices. After the appeal and forfeiture, the Lords obtained the passage of a statute declaring the sale of forfeited estates “firm and established” in an effort to protect those sales from subsequent challenge. The lands were then sold to “all ranks of society, merchants, king’s clerks and knights prominent among them . . . [in order] to create a vested interest which would uphold the stability of the forfeitures in years to come.” Ross, *supra* note 43, at 570–71; see also SAUL, *supra* note 38, at 199. This suggests that Saul’s emphasis on complaints about Richard’s profligacy may be misplaced; the problem was not that Richard was giving away lands instead of using them to offset royal expenses but to whom he was gifting those lands.

70. 3 Rot. Parl. 459b, in 8 PROME, *supra* note 13, at 109–10.

71. BELLAMY, *supra* note 29, at 184. See also the example of Sir Henry Percy and Sir Thomas Percy, whose armed uprising was “adjudged” to be treason by King and Lords in Parliament in 1404, excepting those who had been granted a royal pardon. 3 Rot. Parl. 524b–25a, in 8 PROME, *supra* note 13, at 232–33. Henry Percy is known to history as “Hotspur” from Shakespeare’s Henry IV, Part 1.

72. 9 Hen. 6 c. 3, in 2 STATUTES OF THE REALM 264–65 (stating that the legal sufficiency of prior proceedings “is ordained and stablished[] by the Authority of this present Parliament”). An earlier statute attainting Glendour of treason has not been found. See 4 Rot. Parl. 377b, in 10 PROME, *supra* note 13, at 466–67 (describing proceedings against “Glendower”).

73. 9 Hen. 6 c. 3, in 2 STATUTES OF THE REALM 265. The commission of the royal justices who had pronounced the judgment of outlawry apparently was flawed.

74. *Id.*

75. See Stacy, *supra* note 32, at 21–22, 22 n.32. Apparently, however, Scudamore pressed his claims too far. See the petition from the earl of Somerset asking the King to quash actions brought by “Skidmore” claiming the inheritance; the King granted the petition. See 4 Rot. Parl. 440a–b, in 11 PROME, *supra* note 13, at 115–16.

Parliament could thus determine a precise scope for forfeitures, free from limitations that applied under the common law.<sup>76</sup>

This use of attainder proved attractive to the Lancastrians and the Yorkists in the dynastic struggles of the late fifteenth century. Both houses used Parliament to lay claim to each other's lands, and mass attainder (and restorations) dominated the Parliaments of 1459, 1461, 1484 and 1485.<sup>77</sup> The 1459 Parliament provided a model for dynastic attainder, but attainders in this period were also aimed at commoners, and these sometimes diverged in language, form or effect. In the well-known case of Jack Cade, who in 1450 led a rebellion in Kent, Commons petitioned the King "to ordain by the authority of the said parliament that he be attainted of these treasons" and his lands forfeit, adding the unique request that "his blood issue [be]

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76. Lands held to use or in fee tail could not be forfeit at common law. See JOHN BELLAMY, *THE TUDOR LAW OF TREASON* 211 (1979); K.J. Kesselring, *Felony Forfeiture in England, c.1170-1870*, 30 *J. LEGAL HIST.* 201, 206 (2009).

77. See BELLAMY, *supra* note 29, at 177. Thus, in 1459, following the battle of Blore Heath, Parliament concluded that the duke of York and his allies should be "reputed, taken, declared, adjudged, deemed and attainted of high treason" and forfeit all English lands, whether held by them or to their use, in fee-simple or fee-tail. 5 Rot. Parl. 349a-b, in 12 PROME, *supra* note 13, at 459-61. Notably, the act did not contain a suspensive death sentence for York, who had fled England and not been given legal process. For attainder acts from this period with similar language and form, directed at members of the royal houses and their noble allies, see, for example, 5 Rot. Parl. 226, in ENGLISH CONSTITUTIONAL DOCUMENTS, 1307-1485, at 174 (Eleanor C. Lodge & Gladys A. Thornton eds., 1935) ("Please hit youre Highnesse to graunte, ordeyne and establissh, by the Avyse and Assent of the Lordes Spirituelx and Temporelx in this present Parlement assembled, that by Auctorite of this same Parlement, the seid William de la Pole be adjudged, demed, declared, published and reputed, as Traytor to you . . ."); 5 Rot. Parl. 478b, in 13 PROME, *supra* note 13, at 46 ("It is announced and adjudged, by the assent and advice of the lords spiritual and temporal and commons, being in this present parliament, and by authority of the same, that the said Henry, late called King Henry VI, . . . shall stand and be, by the said advice and assent, convicted and attainted of high treason. And it is ordained and decreed, by the said advice, assent and authority, that the same Henry shall forfeit to our same liege lord King Edward IV [all his lands, including those held to his use]."); 6 Rot. Parl. 246b-47a, in 15 PROME, *supra* note 13, at 26-29 ("[I]t is announced, ordained, enacted and adjudged by the king's highness, by the assent and advice of the lords spiritual and temporal and the commons of this his realm of England assembled in this present parliament, and by authority of the same, that [named persons] shall stand and be convicted and attainted of high treason, and forfeit to the king and his heirs [all their lands, including those held to their use]."); 6 Rot. Parl. 276a-b, in 15 PROME, *supra* note 13, at 108 ("[B]e it enacted, decreed and ordained, judged and declared that the said Richard, late duke of Gloucester, otherwise called King Richard III . . . shall stand and be convicted and attainted of high treason . . . and forfeit to our said sovereign lord [all his lands, including those held in fee simple, fee tail, for life, or to use]."); 6 Rot. Parl. 545b, in 16 PROME, *supra* note 13, at 381 ("Be it enacted, ordained and decreed, by the lords spiritual and temporal and the commons assembled in this present parliament, and by authority of the same, that [certain named persons] shall be convicted, adjudged and attainted of high treason, and forfeit to the king our sovereign lord [all lands held in fee simple, fee tail, or to use].").

corrupted and made legally incapable forever.”<sup>78</sup> The petition was granted, but the King and Lords made no declaration that Cade’s crimes were treason—they likely were not<sup>79</sup>—making the forfeiture provisions of questionable validity. Cade was a “cutter of woolen cloth,”<sup>80</sup> not a man of significant property, and thus the forfeiture and the corruption of blood provisions may have been inserted to put those with property, in the words of the petition, “in fear of acting thus in [the] future.”<sup>81</sup> The aim was therefore something like maintaining order.<sup>82</sup> Two years later, in 1453, Commons asked the King “to ordain and establish” that Sir William Oldhall, apparently involved in a number of plots, “be taken, deemed, considered and held as a traitor and a person attainted of high treason.”<sup>83</sup> Oldhall had already been twice outlawed at common law, his property forfeit and granted to the earl of Pembroke, among others.<sup>84</sup> During this time, Oldhall was apparently holed up in a church in London, where he claimed he was effectively under house arrest.<sup>85</sup> At least one function of the attainder was to secure Pembroke’s interest against a plea that at common law someone jailed could not forfeit land on a judgment of outlawry.<sup>86</sup> The act contained no death sentence for Oldhall, whose case was otherwise left to the courts.<sup>87</sup>

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78. See 5 Rot. Parl. 224b, in 12 PROME, *supra* note 13, at 202–03. At least in the late fourteenth century, the prevailing view was that lands held to use had to be forfeit by act of Parliament. See Kesselring, *supra* note 76, at 205–06. The rolls expressly include the estate of Alice, wife of the earl of Salisbury. 5 Rot. Parl. 349a–b, in 12 PROME, *supra* note 13, at 461.

79. See BELLAMY, *supra* note 76, at 24.

80. CHAFEE, JR., *supra* note 12, at 98.

81. 5 Rot. Parl. 224b, in 12 PROME, *supra* note 13, at 202–03; cf. Lehmborg, *supra* note 27, at 683 (“[T]he act is clearly a political measure, not a financial one, for the offenders had little property . . .”).

82. There was reputed to be a connection between Cade and the Yorkists. See 5 Rot. Parl. 346a, in 12 PROME, *supra* note 13, at 454.

83. 5 Rot. Parl. 265b–66a, in 12 PROME, *supra* note 13, at 307–08. Although the bill is captioned as a Commons petition (“Item, various commons petitions were presented in the same parliament by the commons of it, the tenors of which, with their answers, follow here.”), it actually originated in Lords and may have been controlled by Pembroke. HOWARD L. GRAY, *THE INFLUENCE OF THE COMMONS ON EARLY LEGISLATION* 87–89, 115 n.62 (1932).

84. 5 Rot. Parl. 266a, in 12 PROME, *supra* note 13, at 308–09 (noting that Oldhall disobeyed the King many times); BELLAMY, *supra* note 29, at 196–97.

85. BELLAMY, *supra* note 29, at 195–96.

86. *Id.* at 196–97.

87. For another example, see the case of John Spynell, who was attainted of felony in 1487 for conspiring “to kill, murder and destroy various of the king’s great officers”; Spynell and his associates were sentenced to die, but their lands were forfeited “as if they were convicted and attainted of felony by process of the common law,” which meant, in this case, not to the King. 6 Rot. Parl. 402b, in 15 PROME, *supra* note 13, at 379–80; see William R. Stacy, *Richard Roose and the Use of Parliamentary Attainder in the Reign of Henry VIII*, 29 HIST. J. 1, 3 (1986).



Parliamentary attainders in the fifteenth century were thus a mixed lot, and this complicates an effort to define “attainder” or give a verbal formula for identifying its instances. The difficulties are easy to illustrate. The examples above are arguably all acts of Parliament, which means, by the late fifteenth century, that they received the assent of Commons, Lords, and King.<sup>88</sup> Indeed, in this period most of what we call “bills” of attainder took the form of common petitions, that is, requests advanced by Commons, putatively for the common good of the realm, a form of parliamentary proceeding sometimes associated with early legislation. Still, as late as 1489, parliamentary attainder occasioned enough confusion, or perhaps disagreement, that the necessity of actually obtaining Commons’s assent was disputed. An entry in the year books of Henry VII tells us that “in the parliament the king wished that so-and-so be attainted and lose his lands: and the Lords assented and nothing was said of the Commons. Wherefore all the Judges hold clearly that it was not an Act. Wherefore he was restored.”<sup>89</sup> If the entry indicates uncertainty about whether parliamentary attainder had to take the form of a full-blooded act,<sup>90</sup> then similar processes—appeal of

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88. S.B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 140–41 (1936).

89. YB 4 Hen. 7, Mich., pl. 11 (1488), in Siepp’s Abridgement, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=21331> (last visited Feb. 6, 2016). The translation is from KENNETH PICKTHORN, EARLY TUDOR GOVERNMENT, HENRY VII, at 119 (1934). Crucially, Pickthorn translates “rien fuit parle des Comons” as “nothing was said of the Commons,” in contrast to the paraphrase given by William Lloyd, “a bill of attainder was assented to by the King and Lords, but not the Commons.” W. H. Lloyd, *Pylkington’s Case and Its Successors*, 69 U. PA. L. REV. 20, 22 (1920) (emphasis added). Lloyd’s paraphrase implies that Commons refused its assent. Gwilym Dodd has noted that, in the fifteenth century, parliamentary petitions presented to the Lords might be granted with Commons having “no recorded part in their dispatch at all.” GWILYM DODD, JUSTICE AND GRACE: PRIVATE PETITIONING AND THE ENGLISH PARLIAMENT IN THE LATE MIDDLE AGES 177 & n.59 (2007). More generally, Dodd usefully cautions against making too much of the distinction between common petitions and private petitions, by associating the former exclusively with legislation promoting the general good and the latter with private justice. *Id.* at 126–27, 146–47. Indeed, one can read the close relationship, described above, between appeal of treason (a private accusation) and attainder (usually by common petition) as substantiating Dodd’s position at the turn of the fourteenth century. See the discussion *supra* notes 51–62 and accompanying text.

90. Another interpretation is that the text evidences continuing disagreement about whether it was necessary to obtain Commons’s assent for an act. In the course of an attack on declaratory theories of Parliament, Morris Arnold advanced the position that there was an important distinction between “statute” and “act,” and that the latter, but not the former, were sometimes “said to be judgments.” Morris S. Arnold, *Statutes as Judgments: The Natural Law Theory of Parliamentary Activity in Medieval England*, 126 U. PA. L. REV. 329, 335–36 (1977). Even if, as Arnold says, “act” is most often used to describe either the outcome of petitions filed by individuals, or filed on their behalf, against other individuals . . . or grants made by the King to certain individuals at their urging,” it seems strange that the question of Commons’s assent would have been in doubt at such a late date, especially given the result in *Pilkington’s Case*. *Id.* at 336; see *infra* note 92. Perhaps

treason, declaration under the Statute of Treasons, or judgment by the Lords—might also count as parliamentary attainders, despite lacking the assent of Commons.<sup>91</sup> Perhaps those involved regarded all these procedures as part of an undifferentiated practice of ‘state trials,’ or proceedings against great men, which, in one form or another, had become common in Parliament at the end of the fourteenth century; the assent of Commons might be required, then, not for *conviction* in such a proceeding, but only for parliamentary forfeiture of a traitor’s *land*.<sup>92</sup> The latter purpose was not always pressing, and at least one suspensive attainer in this period made no express mention of forfeiture, although it may have been implied.<sup>93</sup> Perhaps, then, parliamentary attainer need not take the form of an act.

There are other complications as well. Nearly all of the examples above include an expression best translated as “attainted,” but not all do,<sup>94</sup> and in many early fifteenth-century

we should say that there were *two kinds of judgments in Parliament*: those that required Commons’s assent (acts) and those that did not. Or perhaps in the parliamentary context, acts were *contrasted with* judgment, which belonged to Lords and King, while in the context of pleading in a common law court, acts were *treated as* judgments insofar as they recorded the response to a petition.

91. The editors of PROMÉ note that on the back of the Parliament Roll containing the 1388 appeal was written “attainers,” although the label was not contemporary with the roll. See 7 PROMÉ, *supra* note 13, at 99 n.61.

92. The interpretation is somewhat in tension with *Pilkington’s Case*, a matter in the Exchequer Chamber in which Justice Markham argued that the Lords’s alteration of language in a suspensive attainer, to which Commons had assented, voided the act. YB 33 Hen. 6, Pasch, pl. 8 (1455), in Seipp’s Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=18943> (last visited Feb. 6, 2016); see CHRIMES, *supra* note 88, at 231–33. My interpretation does fit other important evidence. Recall that the King could reverse an act of attainer by royal pardon under letters patent, but to restore an attainted person to his estate required an act of Parliament and thus the assent of Commons. In contrast, in 1399 Commons made clear that it did not see itself sharing in the power of judgment. See 3 Rot. Parl. 427b, in 8 PROMÉ, *supra* note 13, at 36 (“[T]he commons . . . explained to the king that since judgments of parliament belong solely to the king and the lords, and not to the commons, except in cases where it pleases the king of his special grace to bring such judgments before them, for their benefit, that no record should be kept in parliament to the prejudice of the said commons that they were or would be party to any judgments given or to be given henceforth in parliament. To which reply was made to them by the archbishop of Canterbury, on the king’s command, that the same commons are petitioners and suitors, and that the king and the lords have always had, and shall have of right, the duty of judgments in parliament, in such manner as the same commons had explained.”).

93. 4 Rot. Parl. 497b–98a, in 11 PROMÉ, *supra* note 13, at 206–07 (detailing the suspensive attainer of William Pulle for rape). In addition, consider the attainer of Jack Cade, see 5 Rot. Parl. 224b, in 12 PROMÉ, *supra* note 13, at 202–03, where the forfeiture function could not have been prominent, and the attainders of commoners who had committed gruesome or outstanding felonies, for example, 5 Rot. Parl. 14b–16a, in 11 PROMÉ, *supra* note 13, at 271–73 (Lewis Leyson, for abduction, rape and murder, and providing for escheat of land to the mesne lord). Similar examples are discussed in Stacy, *supra* note 32, at 18–20.

94. See, e.g., 3 Rot. Parl. 630, in 8 PROMÉ, *supra* note 13, at 471–76 (attainer of Erdeswick); 9 Hen. 6, c. 3, in 2 STATUTES OF THE REALM 264–65 (attainer of “Glendour”).

acts of Parliament, "attainted" refers to something like conviction or judgment in a common law court.<sup>95</sup> The petitionary clauses and enacting language also vary. Even if we limit our attention to the Wars of the Roses, we see that petitioners in Parliament asked the King to "ordeyne, establissh and enact" that rebelling Yorkists be "reputed, taken, declared, adjudged, demed and atteynted of high treson."<sup>96</sup> The same expressions appear in earlier attainders, which also might "convict" their targets.<sup>97</sup> Draftsmen were evidently not at a loss for words. It is difficult to determine whether these terms had, as of yet, a technical import; the phrasing may have been redundant, out of caution, or it may have been contradictory.<sup>98</sup> Other variations in language and substance are also worth noting. While all of the attainders above identify their targets by name, other acts utilized general descriptions, straddling the border between specific and general parliamentary acts.<sup>99</sup> Crimes and punishments varied as well. Most attainders in

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95. See, e.g., Statute of Riots, 4 Rot. Parl. 25a–26a, in 9 PROME, *supra* note 13, at 57–59 ("[A]ny such rioters attainted of great and grievous riots shall be imprisoned for one whole year at least, without being let out of prison on bail, mainprise, or in any other way during the aforesaid year. And that rioters attainted of lesser riots shall be imprisoned for as long as seems appropriate to the king or to his council."); 4 Rot. Parl. 79a, in 9 PROME, *supra* note 13, at 153–54; 4 Rot. Parl. 114a, in 9 PROME, *supra* note 13, at 223–24. This usage of "attainted" is relatively consistent in the parliamentary rolls of this period.

96. 5 Rot. Parl. 349a–b, in 12 PROME, *supra* note 13, at 460–61; see also 5 Rot. Parl. 478b, in 13 PROME, *supra* note 13, at 46 ("declared and adjudged"; "convicted and atteinted of high treason").

97. See, e.g., 3 Rot. Parl. 632a, in 8 PROME, *supra* note 13, at 475–76 ("ordained and agreed (*accorde*)"; "convicted (*convictz*)"); 5 Rot. Parl. 265b–66a, in 12 PROME, *supra* note 13, at 308 ("ordain and establish").

98. In the course of describing the development of statutes, Richardson and Sayles observed the "wordiness" and confusion in the enacting language in the early fourteenth century. See H.G. RICHARDSON & G.O. SAYLES, *The Early Statutes*, in *THE ENGLISH PARLIAMENT IN THE MIDDLE AGES*, at XXV 34–36 (1981) (suggesting that enacting expressions commonly were strung together and may have not had precise meanings). However, Bellamy has suggested that the mature mid-fifteenth century practice was to both "ordain" and "adjudge" (or "award" or "declare") a person attainted of treason. See BELLAMY, *supra* note 29, at 186. Notably, the distinction between ordinance and statute does not seem borne out by the enacting language used in attainders.

99. For an interesting example, see the 1414 Statute Concerning Murders, which was a general statute that contained a conditional suspensive attainder as a kind of enforcement mechanism. See 4 Rot. Parl. 26a–b, in 9 PROME, *supra* note 13, at 59–61 ("And if they do not come on the said day when the proclamation is returned, they shall be considered and adjudged convicted and attainted . . ."). A similar example is the 1429 Statute on Lawlessness. See 4 Rot. Parl. 356a, in 10 PROME, *supra* note 13, at 419–21 ("[I]f they do not come on the day when such a proclamation is returned, then they should be taken and adjudged as convicted, and attainted as is said above."). A third example comes from the attainder of William King and his gang, which contains language that, although strictly ambiguous, may be a general attainder. See 5 Rot. Parl. 213b, in 12 PROME, *supra* note 13, at 178–79 ("[A]fter that attaint any manner of person or persons who wilfully receives or abets him or them thus attainted, knowing him or them to be so attainted . . ."). Other general acts in this period appear to provide for attainder as an alternative form of legal process to establish guilt of a general offense. See, e.g., 4 Rot. Parl. 291a, in 10 PROME,

Parliament concerned high treason, but some targeted mere felonies;<sup>100</sup> and while none of the examples discussed above contain a death sentence, other parliamentary attainders arguably did, although they comprise a substantial minority.<sup>101</sup> In some cases parliamentary attainder occurred without any parallel judicial process,<sup>102</sup> while in other cases it supplemented or amended process in a common law court.<sup>103</sup>

But if we cannot identify parliamentary attainder by verbal formula, it does not imply that we really are dealing with different kinds of things. Almost all attainders in Parliament had several of the features described above, and they are unified by their institutional setting. And here we must pay particularly close attention. Parliaments were a friendly venue for royal power, especially after mid-century.<sup>104</sup> They were tractable in ways the common law courts were not, and this seems especially so with regards to attainder. It is almost certainly a misunderstanding to imagine a 'House of Commons' bravely refusing an attainder

*supra* note 13, at 266–67 (specifying a punishment for unsubstantiated accusations “if [the accuser] is attainted or convicted thereupon” (emphasis added)); 4 Rot. Parl. 293a, *in* 10 PROME, *supra* note 13, at 270–71 (similar).

100. See, e.g., 5 Rot. Parl. 16a–17a, *in* 11 PROME, *supra* note 13, at 274–76 (attainder of Peter Venables for felony); 6 CALENDAR OF THE PATENT ROLLS, 1452–1461, at 310–11 (describing an attainder of felony not recorded in the Parliament rolls).

101. See, e.g., 4 Rot. Parl. 66b, *in* 9 PROME, *supra* note 13, at 123–24 (“[It] is adjudged by the same duke of Clarence and all the aforesaid lords and magnates that the same Richard earl of Cambridge and Henry Lord Lescrope are traitors to the lord king and his realm of England, and that, for plotting, planning, conspiring and concealing so many crimes and treasons concerning the death and destruction of the same lord king and the magnates, as stated above, they should be drawn, hanged and beheaded.”); 4 Rot. Parl. 202b, *in* 10 PROME, *supra* note 13, at 86–88 (John Mortimer); 4 Rot. Parl. 447b, *in* 11 PROME, *supra* note 13, at 129–31 (John Carpenter). Lehmborg’s claim that “no statutory attainder of the period before 1509 makes mention of the death penalty” is not supported by the evidence unless one excludes the cases above, which might be described as mere judgments or confirmations of process at common law. See Lehmborg, *supra* note 27, at 677. John Mortimer’s case is discussed in 50 SELDEN SOCIETY, at xxiv–xxvii (1933).

102. See, e.g., 5 Rot. Parl. 224b, *in* 12 PROME, *supra* note 13, at 202–03 (Jack Cade); 5 Rot. Parl. 349a–b, *in* 12 PROME, *supra* note 13, at 460–61 (Yorkists).

103. For examples of parliamentary attainders directed at individuals already convicted in a court of law, see 4 Rot. Parl. 66b, *in* 9 PROME, *supra* note 13, at 123–24 (attainder of Richard, earl of Cambridge, Lord “Lescrope,” and Sir Thomas Grey). William Oldhall had suffered a judgment of outlawry. See 5 Rot. Parl. 265b–66a, *in* 12 PROME, *supra* note 13, at 307–09. Bellamy also identifies the case of Sir Thomas Mortimer, but the Parliament roll describes this only as a judgment. See 4 Rot. Parl. 202a–b, *in* 10 PROME, *supra* note 13, at 86–88. For other examples, see Lehmborg, *supra* note 27, at 676 n.8.

104. See BELLAMY, *supra* note 29, at 197, 211; A.R. Myers, *Parliament, 1422–1509*, *in* THE ENGLISH PARLIAMENT IN THE MIDDLE AGES 141, 141–43, 182 (R.G. Davies & J.H. Denton eds., 1981) (“And though by the fifteenth century parliament had developed from an occasion into an institution . . . with unique composition and powers, it was still predominantly the king’s assembly . . .”).

sought by the King.<sup>105</sup> Medieval Commons never did such a thing, at least so far as we know.<sup>106</sup> At the very end of the period, in 1485, we read of members expressing displeasure at the proposed attainder of a deceased King. One writer reports that “ther was many gentlemen agaynst” the bill attainting Richard III and his allies, but, he adds, “it wold not be, for yt was the kings pleasure.”<sup>107</sup> The apparently contentious bill passed one day after

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105. See H.G. Richardson, *The Commons and Medieval Politics*, 28 TRANSACTIONS ROYAL HIST. SOC'Y 21, 32 (1946) (noting that Commons had little role in “statecraft”); see also A.L. Brown, *Parliament, c. 1377-1422*, in THE ENGLISH PARLIAMENT IN THE MIDDLE AGES, *supra* note 104, at 109, 131-32 (similar); PICKTHORN, *supra* note 89, at 91-97 (similar).

106. See BELLAMY, *supra* note 29, at 211 (“Despite these examples of popular participation in the passing of bills of attainder . . . the royal power was paramount. Apart from one instance in 1414 there is no evidence of opposition by the commons and lords to any attainder bill proposed by the king or his ministers, much less of successful resistance.”); Lander, *supra* note 26, at 134 & n.68 (“[A]t the beginning of [Henry VII’s] reign opposition to wholesale attainders made itself heard, so far as we know, for the first time in Parliament.”). Bellamy’s qualification that there was resistance by the Lords to a bill of attainder at the Leicester Parliament in April 1414 is generous to the evidence. In that Parliament, Thomas Montague petitioned the King to ask the Lords to review the declaration and judgment entered by King and Lords in Parliament in 1401 against his father, John, formerly the earl of Salisbury. See 4 Rot. Parl. 17b-19b, in 9 PROME, *supra* note 13, at 39-46. Given that the Commons did not assent to the “declaration and judgment” against Salisbury, see 3 Rot. Parl. 459a-b, in 8 PROME, *supra* note 13, at 109-10, it can only marginally count as parliamentary attainder. More importantly, even if we assume that the boundaries between attainder and other parliamentary processes were not firm (as we should), the 1414 petition only evidences Montague’s opposition to his father’s attainder—not a significant opposition in the Lords to an attainder bill supported by the King. Petitions by a family member for restitution of inheritance forfeited for treason were hardly uncommon in this period, *cf.* Lander, *supra* note 26, at 131-34 (concluding that most attainders after 1453 were reversed), and, in fact, Montague again petitioned for reinstatement of his inheritance at Parliament in 1421, this time successfully. See 4 Rot. Parl. 141b-42b, in 9 PROME, *supra* note 13, at 293-96. There was criticism of the attainder of the Yorkists in the Coventry Parliament of 1459, but that largely came from outside of Parliament. See BELLAMY, *supra* note 29, at 197-98, 211.

107. Letter from Thomas Betanson, Priest, to Sir Robert Plumpton (Dec. 13, 1485), in 8 THE PLUMPTON LETTERS AND PAPERS, *supra* note 16, at 63; see also Christmas & Vertue, *supra* note 16, at 188 (reporting that the bill of attainder “sore was questioned with”); THE CROWLAND CHRONICLE CONTINUATIONS, *supra* note 16, at 195 (observing “much argument” and “rebuke” (*inreptione*) over the attainders). Paul Cavill has argued that we should read the oft-quoted Betanson letter as evincing that “a sizeable number of M.P.s was willing vociferously to defend men who—according to the bill of attainder—had treasonably levied war against the king,” and that “[e]ven on a question as fundamental as loyalty to their new king, M.P.s put their heads above the parapet.” P.R. Cavill, *Debate and Dissent in Henry VII’s Parliaments*, 25 PARLIAMENTARY HIST. 160, 164 (2006) [hereinafter Cavill, *Debate and Dissent*]. Cavill bases his reading on two other fragments, but it is difficult to tell why he thinks members were “defending” Richard, or, indeed, that “a sizeable number” “vociferously” refused to demonstrate “loyalty” to King Henry. The only evidence that reveals the content of the objections in Commons is a chronicle, the *Crowland Chronicle Continuations*, which describes a concern with the King’s ability to summon an army if the baronry thinks “they will lose life, goods and inheritance complete.” THE CROWLAND CHRONICLE CONTINUATIONS, *supra* note 16, at 195. The remaining fragment does not describe the nature of the objections at all. Cavill cites an entry in the Colchester red paper

being introduced, and surely stands as evidence of what has been called Henry's "almost total" control of Parliaments—at least in this domain.<sup>108</sup> The record of the Lords in Parliament is largely the same: the Lords overwhelmingly supported parliamentary attainders backed by the King.<sup>109</sup> This may be because the King's supporters dominated Parliaments at which attainders could be expected,<sup>110</sup> or because only a few noble voices mattered, most of whom were also ministers or royal advisers and had already participated in the councils where major decisions were actually made.<sup>111</sup> Perhaps neutrals thought it wisest to stay away, judging the risk of ignoring a parliamentary summons to be less than the dangers of attendance.<sup>112</sup> And those who did attend may have hoped to gain from the misfortune of the condemned.

Yet these, in a sense, are all *political* explanations, and for a full understanding of the matter we should consider another perspective as well. To say that kings dominated their parliaments in matters of attainder is not to deny that parliaments were, in this period, a kind of high court capable of providing legal process.<sup>113</sup> It was common at the time to describe Parliament as a "high court," as is well known.<sup>114</sup> The expression can be

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book that "there ware questionns moved for the comenwell of thise false persons whiche hath reyned many dayes amongs us, and (non) conclusyon," Cavill, *Debate and Dissent*, *supra*, at 163, but there is no basis for connecting the entry to the subsequent attainders, and, in any case, the expression "thise false persons" implies a *negative* view of Richard and his retinue, not a sympathetic one, making the meaning of the sentence obscure. In a subsequent treatment of the same episode, Cavill is more cautious, concluding that the "grounds for this opposition are matters for conjecture." P.R. CAVILL, *THE ENGLISH PARLIAMENTS OF HENRY VII, 1485–1504*, at 42 (2009) [hereinafter CAVILL, *ENGLISH PARLIAMENTS*]. For my purposes the only crucial distinction is between criticisms of members, even many members, and wholesale opposition by a Commons intent on seizing the initiative in government. The evidence suggests the former, but nothing like the latter. As J.S. Roskell put it in a related context, "Restiveness in opposition is not power . . . Bickering, wrangling, petulance and resentment are nothing of themselves." 1 J.S. ROSKELL, *PARLIAMENT AND POLITICS IN LATE MEDIEVAL ENGLAND*, at VIII 462–63 (1981).

108. Christmas & Vertue, *supra* note 16, at 188; JENNIFER LOACH, *PARLIAMENT UNDER THE TUDORS* 54 (1991).

109. See BELLAMY, *supra* note 29, at 197, 211.

110. *But see* 1 ROSKELL, *supra* note 107, at II 199 (concluding that attendance by the Lords in "times of great political stress" was good).

111. See Brown, *supra* note 105, at 117, 138.

112. See 1 ROSKELL, *supra* note 107, at II 171, 189 ("[I]t is very likely that some saw fit to be circumspect, or were otherwise sickened by a return to the political savagery of Edward II's time, and so stayed away . . . Absence as well as presence might be regarded as paying investment in bitter circumstances like these.").

113. See, e.g., YB 19 Hen. 6, Pasch, pl. 1 (1441), in Seipp's Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=17995> (last visited Feb. 6, 2016) ("[T]he Parliament is the king's court, and the highest court he has, . . . and attainders and forfeitures that are adjudged in . . . Parliament are revenues of this Court . . .").

114. CHRIMES, *supra* note 88, at 73–75.

overemphasized; the point here is not that late medieval parliaments simply declared immutable customary law<sup>115</sup> or were essentially judicial in function.<sup>116</sup> Parliaments of the fifteenth century were certainly political events, and the attainder of great men served vital political functions, as I have been at some pains to show. Still, these were functions *associated in the first instance with the King*, and in particular with his obligations to give justice and peace to his subjects. To say that the late medieval Parliament was a court, then, is to say, *first*, that it was conducted according to a body of procedures whose core elements were already quite old by the time attainder appeared there, and which the King's ministers could influence, or, in some cases, even control.<sup>117</sup> Lords were to be summoned to Parliament by writ of summons and knights of the shire by writ of election, issued out of chancery;<sup>118</sup> proceedings begun by petition or bill;<sup>119</sup> deliberation conducted in a disputational form familiar from the King's courts (perhaps more so at century's end), under the leadership of a royal agent like the speaker;<sup>120</sup> and decisions set down by the clerk (another royal

115. Jeffrey Goldsworthy informs us, with no small sense of satisfaction, that "this argument has long been discredited." JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT* 38 (1999).

116. See J.G. Edwards, *'Justice' in Early English Parliaments*, in 1 *HISTORICAL STUDIES IN THE ENGLISH PARLIAMENT, ORIGINS TO 1399*, at 279, 296–97 (E.B. Fryde & Edward Miller eds., 1970). Early English Parliaments did a substantial amount of justice, both in ordinary matters and in matters of high politics. See DODD, *supra* note 89, at 9, 25–48; ALAN HARDING, *MEDIEVAL LAW AND THE FOUNDATIONS OF THE STATE* 170–86 (2002). This is different than saying their function was essentially "judicial," as Edwards showed.

117. See *Modus Tenendi Parliamentum*, in *PARLIAMENTARY TEXTS OF THE LATER MIDDLE AGES*, *supra* note 16, at 32, 36–37 (purporting to describe parliamentary procedure in the fourteenth century); 2 JOSEF REDLICH, *THE PROCEDURE OF THE HOUSE OF COMMONS* 4–5 (A. Ernest Steinthal trans., 1908) (attributing "the internal law of Parliament" to customary origins); see also YB 7 Hen. 7, Trin., pl. 1 (1492), in SEIPP'S ABRIDGEMENT, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=21477> (last visited Feb. 6, 2016) ("[E]very court will be held according to the manner in which it has been accustomed to be as a court, whether it be the exchequer, king's bench, chancery, or the court of parliament, which is the highest and most solemn court that the king has . . ."). The translation is from CHRIMES, *supra* note 88, at 75.

118. This is described in the fourteenth-century *Modus Tenendi Parliamentum*, in *PARLIAMENTARY TEXTS OF THE LATER MIDDLE AGES*, *supra* note 16, at 80–83. For a fifteenth-century account of summons, see YB 19 Hen. 6, Pasch, pl. 1 (1411), in Seipp's Abridgement, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=17995> (last visited Feb. 6, 2016) ("The parliament is the king's court and the highest court he has . . . and by his authority and his writ the other parties will be called in his Court to answer: thus are the lords by his writ called to come to his Parliament, and also as knights, and burgesses, etc. to be elected by his writ . . ."). A defendant might be summoned by King's writ, EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES* 38 (1644) [hereinafter COKE, *FOURTH PART*], or, of course, he might already be in the custody of Parliament.

119. See *Modus Tenendi Parliamentum*, in *PARLIAMENTARY TEXTS OF THE LATER MIDDLE AGES*, *supra* note 16, at 88; CHRIMES, *supra* note 88, at 219–21.

120. 2 HOLDSWORTH, *supra* note 32, at 432. Both deliberation and bill procedure firmed considerably through the course of the fifteenth century. See Myers, *supra* note 104, at 167–79.

agent) in Parliament's roll, which formed a definitive record of its proceedings.<sup>121</sup> Ventilated under these rules, parliamentary attainder was the act of a court of record,<sup>122</sup> a status that became extremely important in matters of high politics in the late fourteenth century.<sup>123</sup> *Second*, these procedures were *not* those of a common-law court, or even those that Parliament traditionally employed when hearing private petitions seeking the King's justice. Indeed, they fell markedly short of both; as we've seen, in cases where an offense was well-known or "notorious," there seems to have been no requirement to produce *any* evidence in support of accusations.<sup>124</sup> Notorious treasons may have been regarded as matters of common knowledge, obviating factual proof. As one commentator pithed it, attainder in Parliament was "*royal legalised summary process*," and the King's capacity to dominate and direct that process was "the ultimate expression of the potential summary power of the late medieval executive."<sup>125</sup> It was here, then, in a high court of Parliament, with its customary procedures and powers, that the King could ensure the preservation of justice and peace, curing failures in administration caused by the treacheries of overpowerful men, or, in some cases, by limitations in the common law and its courts.<sup>126</sup>

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121. *Modus Tenendi Parliamentum*, in PARLIAMENTARY TEXTS OF THE LATER MIDDLE AGES, *supra* note 16, at 91; CHRIMES, *supra* note 88, at 225–31; see YB 4 Hen. 7, Pasch, pl. 6 (1489), in Seipp's Abridgment, <http://bu.edu/phpbin/lawyearbooks/display.php?id=21355> (last visited Feb. 6, 2016).

122. In 1489, King's Serjeant Vavasour described an act of attainder as a "matter of Record." YB 4 Hen. 7, Pasch, pl. 6 (1489), in Seipp's Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=21355> (last visited Feb. 6, 2016). On Parliament's status generally as a court of record, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 50 (2008). Hamburger cites Coke for the proposition that Parliament is a court of record—hardly a disinterested authority in the context of the 1620s—but the question whether a medieval English Parliament is a court of record is very different from whether the early Stuart House of Commons was. For a discussion of these issues, see S.E. Thorne, *Courts of Record and Sir Edward Coke*, 2 U. TORONTO L.J. 24, 47–49 (1937).

123. See DODD, *supra* note 89, at 157–58 (describing why "high profile legal cases" began to be recorded on the Parliament roll in the late fourteenth century).

124. See CAVILL, ENGLISH PARLIAMENTS, *supra* note 107, at 34; PICKTHORN, *supra* note 89, at 119–20 (suggesting that "no more . . . was indispensable [for passage of an act of attainder] than the reading of a bill in the parliament chamber and its acceptance by the king").

125. BOTHWELL, *supra* note 28, at 45 (emphasis added).

126. Compare this account of summary proceedings in Parliament with the development of summary procedure in European courts, described recently by R.H. Helmholz:

Th[e] express adoption of abbreviated procedure may seem antithetical to principles of justice, but it happened, and it is not hard to see why. Full compliance with the *ordo iuris* could be a millstone around the neck of a conscientious office of justice. It could extend the length of hearings, increase costs, facilitate evasion of court orders, and in the end allow malefactors to escape their just deserts. The complexities of a process designed to prevent unfairness could themselves be used



*Third*, I noted above that “notorious” was used in medieval continental jurisprudence to describe summary legal procedures. If we think of parliamentary attainder as a cognate form of legal proceeding, it does much to explain the substance of objections voiced against it by contemporaries. Attainder was not uncontroversial, but neither was it regarded as a sham, or with the skepticism that attached to “instant conviction” for treason on “the king’s personal record of a man’s guilt,” a unilateral power exercised by Edward II in the fourteenth century and that may have extended to battlefield encounters in the fifteenth century.<sup>127</sup> The extensive attainders in Henry VI’s 1459 Parliament of Devils did cause enough anxiety to invite written defenses.<sup>128</sup> Yet even in this setting, writes John Bellamy, the leading historian of the English law of treason, neither “the royal lawyers, the king, nor the Lancastrian courtiers who probably set things in motion were taxed by the Yorkists with abusing the law or with unfair practice within parliament.”<sup>129</sup> In particular, there was no complaint that Parliament had utilized legislative power to accomplish a judicial function; as Theodore Plucknett has put it, such “a criticism would

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to do just the opposite: to pervert justice. . . . No procedural system should encourage that result, and adoption of summary procedure was intended to provide a way of preventing the injustices made possible by manipulation of procedural technicalities.

R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 47 (2015). As Helmholtz shows, a common complaint against summary proceedings was that “all men were entitled to adequate notice in litigation so that they might defend themselves against unjust deprivation of their property.” *Id.* at 48, 101–02.

127. Plucknett, *supra* note 24, at 154. Plucknett says the practice “had since been rejected.” *Id.*; see also Plucknett, *supra* note 18, at 56–64. In contrast, Keen and Bellamy trace it into the fifteenth century. See BELLAMY, *supra* note 29, at 202, 204; Keen, *Treason Trials*, *supra* note 55, at 85–88. But even Bellamy concedes that the “medieval fear of legal irregularity and lack of due process” led Henry VI and Edward IV to utilize parliamentary attainder to secure good title to forfeited lands. BELLAMY, *supra* note 29, at 202; see also BELLAMY, *supra* note 76, at 228–29 (describing the procedure and placing it within the development of “martial” law); KEEN, *THE LAWS OF WAR*, *supra* note 55, at 40 (“Summary procedure was always allowed in military cases . . . [and] most usually employed . . . where cases were tried directly in the field. . . . There would be nothing harsh or unjust about proceeding upon such a case *summariè et de plano, sine strepitu et figura justicie, solum facti veritate inspecta* [summarily and plainly, without clamor and the form of justice, only the truth of the act having been examined].”).

128. See 12 PROME, *supra* note 13, at 448–51; J.P. Gilson, *A Defence of the Proscription of the Yorkists in 1459*, 26 *ENG. HIST. REV.* 512, 512–25 (1911) (containing a fragment of the political pamphlet, *Somnium Vigilantis*, defending the attainder of the Yorkists). Margaret Kekewich challenges Gilson’s conclusions that the pamphlet was written by Sir John Fortescue and that it was written after the act of attainder passed, rather than while the council was debating on the proper course of action. See Margaret Kekewich, *The Attainder of the Yorkists in 1459: Two Contemporary Accounts*, 55 *BULL. INST. HIST. RES.* 25, 28–30 (1982).

129. BELLAMY, *supra* note 29, at 197.

have been unintelligible.”<sup>130</sup> The only constitutional issue raised was that the accused Yorkists had not been permitted to appear and answer the charges against them.<sup>131</sup> But rather than show that “parliamentary attainders were not judicial proceedings,” this complaint suggests that they *were*, or at least, that they were held to the same standard and thought to poorly approximate proceedings before a royal judge at common law.<sup>132</sup> The same complaint had been directed in earlier periods at summary proceedings of an indisputably legal nature. Having an opportunity to appear and defend oneself was a recurrent theme in what might be called the due process statutes of Edward III.<sup>133</sup> It was voiced, as well, in the 1399 petition to end parliamentary appeals of treason, where Commons requested that “any person who in future is accused or impeached in your parliament . . . by the lords, the commons of your realm, or by any person, *should be allowed a defence and response to his accusation or impeachment*, and, following his reasonable response, a record, judgment or trial.”<sup>134</sup> Like proceedings before the King in council, before a constable or military captain under the law of arms, or before a justice of the peace in the country, it was thinking of parliamentary appeals and attainders as summary legal proceedings that invited contemporaries to draw a comparison to the process afforded at common law.

In this regard, it is of interest that King Henry gave his assent to the 1399 petition, quoted above—but only in part. He refused the request to allow “a defence and response” to all accusations made in Parliament.<sup>135</sup> Why should he? The King’s power in Parliament to condemn the absent for their notorious offenses was crucial to its legal function in matters of high politics.<sup>136</sup> Acts of

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130. Plucknett, *supra* note 24, at 156.

131. BELLAMY, *supra* note 29, at 198.

132. The quoted language is from CAVILL, *ENGLISH PARLIAMENTS*, *supra* note 107, at 34.

133. Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 266–68 (1975) (“[F]or the contemporaries of that parliament [of 1354] the words ‘without being brought in to answer’ were at least as significant as ‘due process of law.’” (quoting 28 Edw. 3 c. 3, in 1 STATUTES OF THE REALM 345)); see also COKE, *FOURTH PART*, *supra* note 118, at 37–38 (discussing these statutes and the significance of being present to answer charges).

134. 3 Rot. Parl. 442a–b, in 8 PROME, *supra* note 13, at 69 (emphasis added); see also Rogers, *supra* note 38, at 116 & n.94 (describing John of Gaunt’s statement to the former Lord Appellant, the earl of Arundel, that Arundel would be tried by the law of England “not by your law, for by that law you would be denied a hearing”).

135. 3 Rot. Parl. 442a–b, in 8 PROME, *supra* note 13, at 69–70.

136. See Plucknett, *supra* note 18, at 60–62. For example, consider *Roger de Mortimer’s Case* identified by Chafee in 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 58, at 285–88. Mortimer was in custody but not given an opportunity to appear and defend

attainder *had* to bind the absent; in some cases, that was the *point*. But Henry's refusal hardly ended the matter; as we will see, the concern persisted, and a discomfort with proceeding against absents would be expressed repeatedly in the modern period.

### B. *Parliamentary Attainder in the Modern Period*

1. *Under the Tudors.* Early Tudor governance brought few changes to parliamentary attainder. The King and his ministers remained the "dominant force in parliament,"<sup>137</sup> and attainder was put largely to its traditional uses.<sup>138</sup> When Henry VIII assumed the throne in 1509, "attainder by parliament was an established means of dealing with special offenders, particularly those who posed a threat to the security of the king and his realm."<sup>139</sup> Happily, Henry had little need for it in the first years of his rule, and between 1509 and 1531, only one act of attainder passed out of Parliament.<sup>140</sup> All this changed with the Reformation.<sup>141</sup> Treason figured centrally in Henry's efforts to suppress opposition to the annulment of his marriage and the various anti-clerical policies of the Reformation Parliament.<sup>142</sup> It was not until 1534, in the sixth session of that Parliament, that Henry's ministers were able to formulate an acceptable bill expanding the law of treason and to secure its enactment.<sup>143</sup> Treason would now cover those who "slanderosly and maliciously publish and pronounce, by express writing or words, that the King our sovereign lord should be

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himself. The Lords, charged by the King to make judgment, said "that all the matters contained in the said articles were notorious and known by them & the people . . . Wherefore the said Earls, Barons, and Peers, as Judges of Parliament, by assent of the King in the same Parliament, awarded and adjudged: That the said Roger, as traitor and enemy of the King and of the Realm, should be drawn . . . and hanged." *Id.* at 286.

137. Cavill, *Debate and Dissent*, *supra* note 107, at 175; see also PICKTHORN, *supra* note 89, at 91-108.

138. See CAVILL, *ENGLISH PARLIAMENTS*, *supra* note 107, at 34-41; LOACH, *supra* note 108, at 54-55; Lehmborg, *supra* note 27, at 681. Henry VII did resort to attainder more than Edward IV and was generally less likely to return forfeited lands. See Lander, *supra* note 26, at 144-45.

139. Lehmborg, *supra* note 27, at 677.

140. 14 & 15 Hen. 8 c. 20, in 3 *STATUTES OF THE REALM* 246-58; BELLAMY, *supra* note 76, at 211. Much earlier in his reign, Henry VIII had attempted to attain in Parliament Sir Richard Empson and Edmund Dudley, hated ministers and speakers of Commons under his father, but the bill fell in the Lords. Lehmborg, *supra* note 27, at 677 & n.14. In 1532, Parliament attainted Rhys ap Griffith, who a year earlier had been found guilty of treason by the King's Bench and executed. See 23 Hen. 8 c. 34, in 3 *STATUTES OF THE REALM* 415-16.

141. Lehmborg, *supra* note 27, at 681.

142. See G.R. ELTON, *POLICY AND POLICE: THE ENFORCEMENT OF THE REFORMATION IN THE AGE OF THOMAS CROMWELL* 264-65 (1972).

143. *Id.* at 282-87.

heretic, schismatic, tyrant, infidel or usurper of the crown," a category that would include Henry's most vocal opponents.<sup>144</sup> At the same time—both before and after the passage of the Treason Act—Henry and Cromwell made use of acts of attainder.<sup>145</sup>

The most important of the early Reformation attainders was aimed at Elizabeth Barton, the "Nun of Kent" who forecast Henry's death should he divorce Catherine of Aragon and marry Anne Boleyn.<sup>146</sup> Barton was a well-known figure. In 1525 she had been miraculously cured of disease at the local chapel in Court-at-Street.<sup>147</sup> Barton then joined a Benedictine convent near Canterbury, where she developed a large following for her prophecies, sometimes delivered in a trance and before a crowd of onlookers, who on at least one occasion numbered three or four thousand.<sup>148</sup> In the early 1530s her prophecies turned to the dangerous subject of Henry's marriage. Barton was remarkably fearless, prognosticating—on several occasions, to Henry's face—that if the King married Boleyn, he would lose his crown within a month and die "a villaynes dethe."<sup>149</sup> At one point, she rather colorfully claimed to have seen the particular spot reserved for Henry in hell.<sup>150</sup> From a distance the matter seems odd or even humorous, but at the time it was extremely serious; in July of 1533, Henry had been conditionally excommunicated by the pope, arguably removing his subjects' duty of obedience<sup>151</sup> and creating an environment in which Barton's predictions could trigger disorder or insurrection.<sup>152</sup> Yet if Barton's proclamations threatened the stability of the kingdom

144. Treason Act of 1534, 26 Hen. 8 c. 13, in *THE TUDOR CONSTITUTION* 62 (G.R. Elton ed., 1960). The 1534 Act is sometimes said to have made mere words treason, but the matter is not a clear one. See, for example, the distinction between treason and felony drawn by Chief Justice Fyneux in Buckingham's case, YB 13 Hen. 8, Pasch, pl. 1 (1521), *reprinted in* 119 *SELDEN SOCIETY* 57 (2002).

145. See BELLAMY, *supra* note 76, at 23, 28–29.

146. See 25 Hen. 8 c. 12, in 3 *STATUTES OF THE REALM* 446–51.

147. Diane Watt, *Reconstructing the Word: The Political Prophecies of Elizabeth Barton (1506–1534)*, 50 *RENAISSANCE Q.* 136, 140 (1997). The disease may have been epilepsy. *Id.* at 143.

148. See A. Denton Cheney, *The Holy Maid of Kent*, 18 *TRANSACTIONS ROYAL HIST. SOC'Y* 107, 110–11 (1904); Watt, *supra* note 147, at 140, 142–44, 144 n.42.

149. 25 Hen. 8 c. 12, in 3 *STATUTES OF THE REALM* 449. On her audiences with the King, see G.W. BERNARD, *THE KING'S REFORMATION: HENRY VIII AND THE REMAKING OF THE ENGLISH CHURCH* 90 (2005). Barton met other high ranking officials as well, with whom she was also "outspoken"; as Watt notes, she "issued Archbishop Warham and Cardinal Wolsey threats of the divine punishment . . . and she warned Pope Clement VII that God would plague him if he failed to rule in favor of Katherine of Aragon." Watt, *supra* note 147, at 151.

150. Watt, *supra* note 147, at 151–52.

151. William Rockett, *The Case Against Thomas More*, 39 *SIXTEENTH CENTURY J.* 1065, 1079 (2008).

152. Cheney, *supra* note 148, at 118; Watt, *supra* note 147, at 136–37, 155–57. On the period relationship between magic, prophesying, and treason, see generally ELTON, *supra* note 142, at 49–64. Prophesying could "disturb hearers and infringe security," or might be used strategically to "spread alarm." *Id.* at 63–64.

and even the life of the King, they did not fit naturally with existing treason law. Predicting the King's death had been held treason under a provision of the 1352 Statute of Treasons covering those who "compass or imagine" the King's death<sup>153</sup> (words whose core meaning was likely plotting against the King<sup>154</sup>), but many of Barton's prophecies had been conditional. The King would die, she had said—if he continued to reject Catherine.<sup>155</sup> Royal justices summoned to a council in November 1533 refused the King's entreaty that they declare Barton guilty of high treason for concealing treasonous dreams, on the sensible grounds that she had reported her visions to the King himself.<sup>156</sup> Apparently, the presence at the council of many of the realm's bishops and nobles had not sufficiently awed the judges,<sup>157</sup> but Parliament would be another matter. When the Reformation Parliament met for its fifth session several months later in early 1534, a bill was introduced into the upper house attainting Barton.<sup>158</sup>

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153. BELLAMY, *supra* note 76, at 29; 2 POLLOCK & MAITLAND, *supra* note 47, at 506–07. For the provision of the statute in question, see Statute of Treasons of 1352, 25 Edw. 3 c. 2, in 4 ENGLISH HISTORICAL DOCUMENTS, *supra* note 35, at 398.

154. See Alec Myers's translation in 4 ENGLISH HISTORICAL DOCUMENTS, *supra* note 35, at 398.

155. See BELLAMY, *supra* note 76, at 29.

156. Letter from Chapuys to Charles V (Nov. 20, 1533), in 6 LETTERS AND PAPERS OF HENRY VIII, at 576, 576–77 (James Gardiner ed., 1882) (describing the meeting, and commenting, "the King insists . . . that the said accomplices of the Nun be declared heretics for having given faith to her, and also be guilty of high treason for not having revealed what concerned the King; consequently their goods should be confiscated. To which the judges during the last three days will not agree, as being without any appearance of reason, even as to the last, since the Nun a year ago had told the King of it in person."). There is some confusion about the status of this assembly. William Rockett calls it a "special commission," Rockett, *supra* note 151, at 1080–81, 1080 n.47, citing to Elton and Bellamy and Bernard, but none of these authors adduces evidence of such a commission; nor is there evidence, of which I am aware, of an indictment, information, or complaint that initiated a case before the judges, or of a judgment that concluded such a case. Rockett acknowledges that the special commission did not conduct a trial, making it, apparently, a commission of inquiry only. *Id.* at 1081. Yet Chapuys says the King had wanted the judges to declare Barton "guilty" of high treason, not just to perform a factual inquiry. Letter from Chapuys to Charles V, *supra*, at 577. Bernard refers to the assembly as a "meeting," BERNARD, *supra* note 149, at 93, and Bellamy refers to it as a "specially assembled council," BELLAMY, *supra* note 76, at 28. The sermon denouncing Barton may have referred to the meeting as a "council," although the reference is ambiguous. See L.E. Whatmore, *The Sermon Against the Holy Maid of Kent and Her Adherents, Delivered at Paul's Cross, November the 23rd, 1533, and at Canterbury, December the 7th*, 58 ENG. HIST. REV. 463, 466 (1943) (first occurrence).

157. See Letter from Chapuys to Charles V, *supra* note 156, at 576–77 (describing the conference of "the principal judges, and many prelates and nobles, who have been employed three days, from morning to night, to consult on the crimes and superstitions of the Nun and her adherents"); Letter of Chapuys to Charles V (Nov. 24, 1533), in 6 LETTERS AND PAPERS OF HENRY VIII, *supra* note 156, at 582–83 (noting that "although some of the principal judges would sooner die than make the said declaration, yet, when the King comes to dispute, there is no one who will dare contradict him unless he wishes to be reputed stupid or disloyal"); see also BELLAMY, *supra* note 76, at 23, 29.

158. 1 HL Jour. (1533) 68. See also the contents of the Parliament roll, in 7 LETTERS AND PAPERS OF HENRY VIII, at 23 (James Gairdner ed., 1883).

The attainder act that emerged pressed the case against Barton at length and in grand terms, probably reproducing what had been a draft indictment intended for use after the November council.<sup>159</sup> The King, we are told, had become "afflicted and sore incombred in hys conscience" upon discovering that his queen, Catherine, was not a virgin when they married.<sup>160</sup> Catherine had been previously married to Henry's late brother, Arthur, but only very briefly; now it turned out that Arthur had "carnally knowen" her.<sup>161</sup> A dutiful Henry sought counsel on the matter from "excellent Clerkes lerned in dyvynyte," who told him that the marriage was, sadly, "pryhbyted and detested" by the laws of God.<sup>162</sup> It was only then that the King requested "lawfull sepacyon and devorce."<sup>163</sup> All of this was godly; all of it had been forced on Henry by matters outside of his control. Yet there were those in the realm who sought to exploit the event for their own purposes. The nun Barton had feigned her trances to please a conservative monk, Edward Bocking, who disapproved of Henry's divorce; together, the two advanced Bocking's cause by condemning Henry before the masses in staged affairs. Their show caught the attention of a group of disputatious clergy, whose members repeated Barton's revelations in their own sermons, hoping to undermine Henry's government and, even, to endanger his life. For this, the act concluded, Barton and her circle should be "convycte and atteynted of High treason," sentenced to "suffer suche execucion and paynes of deth as in cases of high treason hath byn accustomed" and to forfeit their lands.<sup>164</sup> Several leading clerics, whose conduct evidenced a belief in Barton's prophecies, would be "convicte and attaynted of mesprisyon [misprision] and conceyement of treason," to "suffer imprisonment of their bodyes at the Kynges wyll" and loss of chattels.<sup>165</sup> Many others were deserving of like punishment, but would be "acquyted and clerely pdoned."<sup>166</sup> The new queen, Anne Boleyn, had mercifully intervened with Henry on their behalf.

As Stanford Lehmborg succinctly put it, the Barton attainder was "filled with propaganda."<sup>167</sup> Cromwell, likely its principal author, had

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159. BELLAMY, *supra* note 76, at 28–29.

160. 25 Hen. 8 c. 12, in 3 STATUTES OF THE REALM 446.

161. *Id.*

162. *Id.* In another passage describing the same event, Henry was said to have "most prudently most delibatly most gentyly most mekely and most charytably pceded in the inserchyng and knowing of the valyditie and invalyditie of the seid detested and unlawfull marriage." *Id.*

163. *Id.*

164. *Id.* at 450.

165. *Id.* at 450–51.

166. *Id.* at 451.

167. Lehmborg, *supra* note 27, at 683.

managed a “shrewd mixture of savage outrage against the malefactors and mild forgiveness of common people misled by them,” and his act would now be read to the public in all English counties and towns.<sup>168</sup> Listeners would hear about the King’s piety, Barton’s treachery, the conspiracies of unreformed clergy, the threat to the security of the realm and the King’s life, and then Barton’s death sentence—a penalty uncommon in earlier attainders, but which would now become the norm.<sup>169</sup> They had heard this message before; at the November council, for example, Chancellor Audley spoke on “the great wickedness of the said nun” to a crowd “from almost all the counties of this kingdom.”<sup>170</sup> Several days after Audley’s speech, on November 23rd, Barton was displayed on a scaffold before an audience in London, where she confessed to fabricating her trances and prophecies, and then listened as Abbott John Salcot denounced her, hissing (for example) that the “original ground of this ungracious conspiracy is *this nun here present*.”<sup>171</sup> The government planned a series of sermons throughout England for the coming months, which would be followed by the publication of the attainder act.<sup>172</sup> On April 20th, one month after the act passed, Barton and most of her circle were publicly executed in London; the same day, “the most part of the city” were made to swear an oath of succession, recognizing the “King and his legitimate issue by the Queen’s grace.”<sup>173</sup>

Barton’s attainder was thus used to great effect in the campaign to quiet discontent with Henry’s marriage. It is worth asking how it could have played this role if attainder was, as G.R. Elton suggested, a “drastic instrument[] of repression” that “lacked that air of legality” otherwise characteristic of Cromwell’s ministry.<sup>174</sup> The criticism implies a distinction between attainder and legal process that is at odds with important strands of evidence. Concerns expressed about the case focused on the fact that Barton and her circle were not *heard* in Parliament. As one

168. *Id.* at 682–83.

169. *Id.* at 682.

170. Letter from Chapuys to Charles V, *supra* note 156, at 576–77.

171. Whatmore, *supra* note 156, at 464 (containing the text of the sermon); see BERNARD, *supra* note 149, at 93; Cheney, *supra* note 148, at 112–13. The text of the attainder act loosely follows that of the sermon (or vice versa).

172. Chapuys reported that Barton and her circle will be taken through all the towns in the kingdom to make a similar representation, in order to efface the general impression of the Nun’s sanctity, because this people is peculiarly credulous, and is easily moved to insurrection by prophecies, and in its present disposition is glad to hear any to the King’s disadvantage.

Letter of Chapuys to Charles V, *supra* note 157, at 582–83; see also Cheney, *supra* note 148, at 112–13.

173. Richard Rex, *The Execution of the Holy Maid of Kent*, 64 BULL. INST. HIST. RES. 216, 218–19 (1991).

174. ELTON, *supra* note 142, at 275.

writer put it, "They were attainted of high treason and condemned without any answer making of themselves."<sup>175</sup> When the bill was first put into the House of Lords, it had included Sir Thomas More among those attainted for misprision, on the grounds that he had exchanged letters with Barton.<sup>176</sup> The Lords read the bill three times, as was customary, but then (instead of passing it) determined to "find out whether it suited the royal will" for "More, and the others named in the pronounced bill," to be called before the Star Chamber "to hear what they can say for themselves."<sup>177</sup> In the council, Cromwell informed Henry that the Lords were "so precisely bente to heare him [i.e., More], in his owne defence, make awneswere himself, that if he were not put oute of the bill, it wold without faile be vtterlye an overthrowe of all."<sup>178</sup> After some wrangling, More's name was deleted, but others also absent from Parliament were left in the bill.<sup>179</sup> The ailing bishop of Rochester, John Fisher, was attainted for misprision despite making suit "that no act of condemnation may be suffered to pass against him before he is heard."<sup>180</sup> Absence, then, was not a bar to proceeding, but it was a kind of antinomy, and a matter of legal and political concern for those who might later claim the spoils of attainder. On another occasion, Henry was reported to have inquired with the

175. Cheney, *supra* note 148, at 118 (quoting B. Mus. Arundel MSS. 152, fol. 49).

176. See WILLIAM ROPER, *THE LIFE OF SIR THOMAS MORE* 64 (Elsie Vaughan Hitchcock ed., 1935); Letter from Thomas More to Thomas Cromwell (Feb./Mar. 1533), in *THE CORRESPONDENCE OF SIR THOMAS MORE* 469–70 (Elizabeth Frances Rogers ed., 1947). More had been chancellor at the opening of the Reformation Parliament and as such had presided over the Lords until resigning in 1532. LOACH, *supra* note 108, at 66.

177. 1 HL Jour. (1534) 72. William Rockett suggests that More himself asked to be able to appear and make a defense, but the text is ambiguous. Rockett, *supra* note 151, at 1084 (citing ROPER, *supra* note 176, at 64 ("Att [the] Parliament folowing, was there put into the lordes house a bill to attaint the Nonne . . . To which bill Sir Thomas Moore was a suter personally to be receaved in his owne defens to make awnswer." (alteration in original))).

178. ROPER, *supra* note 176, at 70.

179. STANFORD E. LEHMBERG, *THE REFORMATION PARLIAMENT, 1529–1536*, at 194–95 (1970). Before More's name was deleted, he appeared before Cromwell, Chancellor Audley, Archbishop Cranmer and the duke of Norfolk, where he apparently made a virtuosic defense of his conduct. ROPER, *supra* note 176, at 65–69. This inclined Cromwell against summoning More before the Lords. Rockett, *supra* note 151, at 1086. Henry suggested that he personally appear at the same time as More, perhaps hoping to "overawe" the Lords, but Cromwell counseled against it. LEHMBERG, *supra*, at 195.

180. Letter from Fisher to the Lords of the Parliament (Feb. 26, 1534), in 7 *LETTERS AND PAPERS OF HENRY VIII*, *supra* note 158, at 100. The Lords expressly excluded summoning the bishop, who had written a letter indicating that he would be unable to attend because he was "seriously ill." 1 HL Jour. (1534) 72. In addition to the language quoted above, the bishop wrote that he "trusts that they will not suffer any act to be passed against him until the cause is duly heard," and that if "they think there was negligence in him for not revealing it to the King, beseeches them to ordain no new law, but let him stand to the law heretofore made." Letter from Fisher to the Lords of the Parliament, *supra*, at 99–100.



King's Bench "whether a man that was forthcomming might be attainted of High Treason by Parliament, and *never called to his answer*."<sup>181</sup> The justices answered

that it was a dangerous question, and that the High Court of Parliament ought to give examples to inferiour Courts for proceeding according to justice, and no inferiour Court could do the like; and they thought that the High Court of Parliament would never do it. But . . . they said, that if he be attainted by Parliament, it could not come in question afterwards, whether he were called or not called to answer.<sup>182</sup>

It was attainder of the absent, not attainder *as such*, which "lacked that air of legality" so important to a politics of mass opinion.<sup>183</sup> Indeed, this issue of absence would reappear throughout the Tudor period.<sup>184</sup>

The Reformation Parliament was a transformative event. Parliament emerged, it is said, as a legislative assembly with "a permanent place of political importance" in the English constitution.<sup>185</sup> Contemporaries were wont to rest the authority of this assembly on its representative character,<sup>186</sup> which was an old and serviceable point,<sup>187</sup> but the discussion above suggests it could not yet ground a comprehensive theory of Parliament. A concern with being permitted to appear makes little sense in a fully representative legislative body, assuming one is represented

181. COKE, FOURTH PART, *supra* note 118, at 37 (emphasis added). Coke suggests that the occasion of the question was the attainder of Thomas Cromwell. *See id.*

182. *Id.*

183. Other commentators have pressed the point that the government used acts of attainder to circumvent the law of treason, see, for example, K.J. Kesselring, *A Draft of the 1531 'Acte for Poysoning,'* 116 ENG. HIST. REV. 894, 894, 898 (2001). But there is little evidence of which I am aware that suggests such a concern in Barton's case. The government's argument that Barton had committed treason was not implausible. Although some of her prophecies were indeed "conditional," there were precedents enough for conviction on the basis of conditional statements, which Bellamy has described. *See* BELLAMY, *supra* note 76, at 29; ELTON, *supra* note 142, at 299–300. Other Barton prophecies were not conditional at all: after Henry and Anne had been married for a month without the predicted cataclysm, Barton "reinterpreted" her vision to mean that Henry was no longer King in the eyes of God. *See* BERNARD, *supra* note 149, at 92.

184. In addition to the case of Thomas Cromwell, see *infra* text accompanying note 231 (noting Cromwell's absence at his attainder). *See also* Stacy, *supra* note 32, at 289 n.60 ("In 1549 the Commons objected, unsuccessfully, to the government's refusal to allow Lord Seymour to speak in the Commons against his attainder. A few years later M.P.s refused to pass a bill punishing Bishop Cuthbert Tunstall when his appearance was denied, and in Queen Elizabeth's reign even Mary Stuart's enemies agreed that she must be heard in her own defense if attainted.")

185. THE TUDOR CONSTITUTION, *supra* note 144, at 229–30; *see, e.g.*, 4 HOLDSWORTH, *supra* note 32, at 184–87.

186. *See* CROMARTIE, *supra* note 30, at 73–74.

187. *See* CHRIMES, *supra* note 88, at 76–79.

there. After all, a *representative* assembly is competent to bind *absent* constituents to most legislation by giving its consent. Nor does the concern make sense if attainder is merely low politics, or, more darkly, an effort to actively subvert common law protections; for in either case, appearance would presumably have little value. The shape of the worry suggests, instead, that parliamentary attainder retained a connotation of “royal legalized summary process” in a kind of court, perhaps incident to Parliament’s power to give “judgement” by bill procedure “in matters criminall or civill, for land or for heritage,” described by contemporary Sir Thomas Smith.<sup>188</sup> If anything, the process had grown more judicial across time; there are some indications that, by the sixteenth century, parliamentary deliberation on a bill of attainder might involve the introduction of both witness testimony and documentary evidence.<sup>189</sup> If there were no complaints about a lack of judicial process for Barton, then that was because attainder by the law and course of Parliament *was* a form of legal process, and, anyway, there was little value to further judicial process where the prisoner had confessed.<sup>190</sup>

This view is consistent with the pattern of activity in the remainder of Henry’s reign, during which the government regularly attainted individuals it believed to pose a threat to the succession or the Reformation.<sup>191</sup> Henry and his ministers put attainder to its traditional uses, such as securing the King’s title to land,<sup>192</sup> or reaching fugitives indicted at common law (thus affording common law process),<sup>193</sup> although these latter

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188. THOMAS SMITH, *DE REPUBLICA ANGLORUM* 64 (L. Alston ed., 1906) (1583). The power of Parliament to give judgment by passing a bill is distinct from the power of judgment in the Lords. *Compare id.*, with PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 20–21 (2010) (“In the House of Lords, Parliament produced judgments acting retrospectively on deeds already done by some person or persons, just as King’s Bench or an assize court might do.”).

189. See BELLAMY, *supra* note 76, at 211–12 (“[T]he bill of attainder might be examined and argued over in both or either of the two houses of parliament at some length, with evidence being considered and witnesses heard.”); 4 HOLDSWORTH, *supra* note 32, at 185 & n.3. William Stacy argues that none of this was necessary for an attainder to be valid. See Stacy, *supra* note 87, at 14.

190. Coke tells us that confession would result in attainder. EDWARD COKE, *THE FIRST PART OF THE INSTITUTES*, s.745 (16th ed. 1809); see EDWARD COKE, *THE THIRD PART OF THE INSTITUTES* 13 (6th ed. 1680) [hereinafter COKE, *THIRD PART*].

191. See Lehmborg, *supra* note 27, at 685, 691; Stacy, *supra* note 87, at 12–13.

192. See, e.g., 27 Hen. 8 c. 58, in 3 *STATUTES OF THE REALM* 629 (detailing the posthumous attainder of More for purposes of invalidating an indenture set up to avoid forfeiture).

193. See 25 Hen. 8 c. 34, in 3 *STATUTES OF THE REALM* 490–91 (attainting John Wolf); 31 Hen. 8 c. 15, *cited and discussed in* Lehmborg, *supra* note 27, at 686 & n.43 (attainting Michael Throckmorton, John Hillyard, Thomas Goldwell, and William Peto, who were “not tried because they had fled abroad”). See the summary of the attainder in 14 *LETTERS AND PAPERS OF HENRY VIII* pt. 1, at 402–03 (James Gairdner & R.H. Brodie eds., 1894); the original is on parchment.

attainers did not take their medieval suspensive form.<sup>194</sup> The conservative aristocratic opposition, led by the duke of Norfolk, used attainder to remove and condemn Cromwell, his hated adversary.<sup>195</sup> Attainers were also used to amend the general law of treason,<sup>196</sup> and several acts attainted individuals by definite description (rather than proper name) and applied to future conduct.<sup>197</sup> In short, the widespread use of attainder is in tension with its depiction as a "drastic instrument of repression" that "lacked [an] air of legality"; the period view would appear to be more complex.

In all, Henry's Parliaments attainted 130 persons over thirty-eight years, executing thirty-four of them.<sup>198</sup> This was to be the heyday. After Henry's reign, attainder in Parliament went into marked decline. Parliaments under Henry's son and successor, Edward VI, passed two acts of attainder, as did the Parliaments of Mary and Elizabeth, yielding six acts in the next fifty-six years.<sup>199</sup> In no instance under Mary or Elizabeth was attainder used to determine a capital offense in lieu of a common law trial.<sup>200</sup>

2. *Under the Stuarts.* If the age of attainder had largely passed by the time James I came to the throne, the age of antiquarianism had only recently begun, and in the first decades

194. BELLAMY, *supra* note 76, at 213.

195. The attainder act is not included in the Statutes of the Realm. For its text, see 4 GILBERT BURNET, *THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND* 415–23 (Nicholas Pocock ed., 1865).

196. See, e.g., 22 Hen. 8 c. 9, in 3 *STATUTES OF THE REALM* 326 (attainting Richard Roose and declaring future murders by poison to be high treason); 28 Hen. 8 c. 24, in 3 *STATUTES OF THE REALM* 680–81 (attainting Lord Thomas Howard for agreeing to marry the king's niece and continuing, "be it further enacted . . . that yf any Manne . . . hereafter take upon hym to espouse marye or take to his wyff any of the Kyngs children . . . [he] shalbe demed and adjudged a Traytour . . ."); 33 Hen. 8 c. 21, in 3 *STATUTES OF THE REALM* 857–60 (attainder of queen Catherine Howard for infidelity, and creating crimes of misprision of the queen's infidelity); David M. Head, "Beyng Ledde and Seduced by the Devyll": *The Attainder of Lord Thomas Howard and the Tudor Law of Treason*, 13 *SIXTEENTH CENTURY J.* 3, 3–4 (1982); Kesselring, *supra* note 183, at 894, 898.

197. See 26 Hen. 8 c. 25, in 3 *STATUTES OF THE REALM* 529–30 ("And further be it enacted . . . that all suche persons whiche be or hereafter have ben conffortours abbettours partakers confederates or adherents unto the said Erle . . . shall in lyke wise stonde and be atteynted adjudged and convycted of High Treason."); 28 Hen. 8 c. 18, in 3 *STATUTES OF THE REALM* 674–75 ("And be it further enacted . . . that all suche psones which be or hertofore have been confortours abbettours partakers confederats or adherents unto the seid Thomas Fittzgaralde late Erle . . . shall in lyke wyse stande and be atteynted . . .").

198. Lehmborg, *supra* note 27, at 701; Stacy, *supra* note 87, at 13.

199. Lehmborg, *supra* note 27, at 702 & nn. 88–90. Several of these acts attainted multiple persons. See 1 M. c. 16, in 4 *STATUTES OF THE REALM* 217; 13 Eliz. c. 16, in 4 *STATUTES OF THE REALM* 549–50; 29 Eliz. c. 1, in 4 *STATUTES OF THE REALM* 766–67.

200. Stacy, *supra* note 32, at 242.

of the seventeenth century the House of Commons sought to rediscover its ancient powers of judicature by examining the medieval Parliament rolls.<sup>201</sup> They duplicated our researches here; but their conclusions were somewhat different. Commons resuscitated (or created, really) a largely forgotten medieval proceeding, impeachment, which later came to displace attainder.<sup>202</sup> Why should Commons feel the need to search out powers of judicature? The obvious structural answer—that Commons was searching for a form of criminal proceeding that did not require the King's assent<sup>203</sup>—cannot be the whole of the matter, because what impeachment in fact *was*, and what procedures it required, were propositions both uncertain and indeterminate. Views on these matters had to be put forth and then survive the course of conflict in the Parliaments of the early 1600s.<sup>204</sup> Nor does the answer fit the politics of the period: Conrad Russell has observed that impeachment “was a procedure which could only be made effective with the King's consent,” and that no minister whom the King desired to protect was impeached before 1640.<sup>205</sup> By the time impeachment appeared, or reappeared, private bill proceedings in general had already undergone significant changes. At the turn of the sixteenth century, proceedings on such bills were more judicial in form than attainders had been under Henry VIII and in the medieval period.<sup>206</sup> Something was moving Parliament men in this direction. Whatever it was, what emerged from the procedural developments of the 1620s was a self-consciously judicial form of proceeding.<sup>207</sup> Attainder now had to operate in its shadow.<sup>208</sup>

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201. See TITE, *supra* note 31, at 25–26; cf. J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30–40 (2d ed. 1987) (describing the seventeenth-century historiography of the common lawyers and parliamentarians, who based much of their views on the supposed ancient, customary character of the common law).

202. Stacy, *supra* note 32, at 240.

203. See, e.g., CHAFEE, JR., *supra* note 12, at 107.

204. See TITE, *supra* note 31, at 5–6, 21–23, 41–47, 101–10.

205. Conrad Russell, *Parliamentary History in Perspective, 1604–1629*, 61 *HISTORY* 1, 7, 19 (1976). Russell may have treated the matter of parliamentary judicature too lightly in his analysis of this period. On difficulties with Russell's administrative view of Parliament in the 1620s, see CROMARTIE, *supra* note 30, at 191, 219–20.

206. See Sheila Lambert, *Procedure in the House of Commons in the Early Stuart Period*, 95 *ENG. HIST. REV.* 753, 757–58 (1980) (describing the “special set of precedents” in private bill procedure, including “notice to the parties,” the provision of “copies of bills” to affected parties, and, on some occasions, invitation “to appear in person or by counsel,” and noting that private bills in this period were “used to settle or confirm many transactions relating to property”).

207. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 1, 7 (1973).

208. I distinguish between bills of attainder and parliamentary judicature, but this is not universal. See, e.g., THOMAS ERSKINE MAY, *A TREATISE UPON THE LAW, PRIVILEGES,*

**Gunpowder plot.** At the beginning of this period, however, attainder still remained present enough in the minds of members of Parliament to suggest itself as an appropriate response to domestic terrorism. After the Gunpowder Plot failed to destroy Westminster in late 1605, Commons considered attainting the plotters and their Catholic allies, some of whom had died trying to escape and some of whom were in flight and sought by the government.<sup>209</sup> On January 24, 1606, Sir Robert Wingfield moved in Commons that “a short Act might be made for Punishment” of the plotters, out of concern that the punishment specified by law was not severe enough.<sup>210</sup> Sir Robert Hitcham spoke against the motion, recommending that “the Common Law should have his Proceeding first,” which might then be confirmed by “this Court.”<sup>211</sup> Members fumbled to combine the ideas. Nicholas Fuller suggested that prisoners might be arraigned before a common law court in the presence of the lower house, the matter stayed, a law “made for the Punishment” in Parliament, and common law proceedings resumed; Speaker Sir Edward Phelips proposed that “those that be dead, are to be attainted by the House, and Evidence given at the Bar,” adding that “for the rest, a Confirmation of their Attainders” (in common law court) would be appropriate; William Wiseman thought that members’ “Consciencs being informed” by the arraignment, Commons itself might purport to give “Judgment.”<sup>212</sup> To these suggestions Solicitor General Sir John Dodderidge replied, simply, that there was “never any Precedent.”<sup>213</sup> Although some members were willing to support traditional uses for attainder—condemning those who had died in rebellion or fled the realm, and confirming common law proceedings—there seems to have been a preference for *judicial* proceedings, but put under Commons’s control in some way.<sup>214</sup>

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PROCEEDINGS AND USAGE OF PARLIAMENT 382 (1844). It is difficult to reconcile the focus in Commons on asserting powers of “judicature” (their word) with Erskine May’s characterization of bills of attainder as “undoubtedly, the highest form of parliamentary judicature.” *Id.* May’s description is unsubstantiated by any reference to medieval or early modern authority, and it appears to be an unstable amalgam of late eighteenth-century private bill procedure, which was quasi-judicial, and a preference for *common law* judicial proceedings—a preference that likely emerged in the sixteenth century and that displaced the earlier view that proceedings in Parliament were governed by Parliament’s own law and usage. See also THOMAS ERSKINE MAY, A TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 594 (12th ed. 1917), quoted in BERGER, *supra* note 207, at 29.

209. See 1 SAMUEL R. GARDINER, HISTORY OF ENGLAND 263, 270–71 (1887).

210. 1 HC Jour. (1606) 259; see also 1 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 1063–64 (1806).

211. 1 HC Jour. (1606) 259.

212. *Id.*

213. *Id.*

214. See 1 HC Jour. (1606) 259 (suggesting “a Trial in this House”); THE PARLIAMENTARY DIARY OF ROBERT BOWYER, 1606–1607, at 7 (David Harris Willson ed., 1931) (describing Holcroft’s motion that the suspects “might be tried in the parliament”).

On April 3rd Commons received a bill drafted by the Lords, which "was intended to confirm . . . common-law proceedings."<sup>215</sup> It, too, occasioned debate, as Commons tried to sort out whether it should hear the parties or their counsel.<sup>216</sup> Speaker Phelips "wished the House to consider if it be not fitt to heare Counsell at the Barr to prove the Parties guilty," a position to which the rest of Commons "seemed to incline" and which had apparently held sway in the Lords.<sup>217</sup> A search of the precedents was directed.<sup>218</sup> On April 10th, the Commons heard counsel for one of the defendants, but then balked when Solicitor General Dodderidge sought to present evidence of guilt.<sup>219</sup> If the members of Commons were *judges*, then Dodderidge, himself a member, would by presenting evidence at the bar of the Commons assume the roles of "counsellor" and judge, creating a conflict of interest. In the end, Commons allowed Attorney General Edward Coke to "informe the House in the Matter of Fact, as by way of advise, . . . but not at Barr."<sup>220</sup> On April 29th, Coke made the government's case, walking through not only the allegations in the attainder bill, but through the history of the practice in general: he described the attainder of Jack Cade "after his Death" (now 150 years in the past), an attainder under Henry VII passed "to no other Purpose, but" to give the King title to the defendant's lands, and the attainder of Cromwell under Henry VIII, who was, said Coke, "never called to his Answer."<sup>221</sup> Counsel for the defendants was heard the next day, and the bill of attainder passed on May 13th.<sup>222</sup> As suggested by Coke's arguments, it included those who had been convicted at common law and executed, those who had died resisting capture or while in custody before indictment, and those who had fled "beyond the Seas," all of whom forfeited their lands

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215. Stacy, *supra* note 32, at 243.

216. See 4 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 217 (1796).

217. THE PARLIAMENTARY DIARY OF ROBERT BOWYER, *supra* note 214, at 100.

218. *Id.* at 101.

219. See 1 HC Jour. (1606) 296.

220. THE PARLIAMENTARY DIARY OF ROBERT BOWYER, *supra* note 214, at 116. The Commons Journal suggests that when Coke eventually presented the government's case, he did come "to the Bar" of the House, 1 HC Jour. (1606) 301, but Bower says he stood "without the Barr," THE PARLIAMENTARY DIARY OF ROBERT BOWYER, *supra* note 214, at 139.

221. 1 HC Jour. (1606) 301-02. Coke said he would speak first "against the living," and then "against the dead." *Id.*

222. 4 HATSELL, *supra* note 216, at 217-18. Bowyer's diary suggests that counsel for the defendants did not challenge the evidence presented by Coke, but "desired Provision for their [i.e., defendants'] Tytles and Rights, to be inserted into the Bill of Attaindor," an echo of the medieval practice of including exceptions and savings clauses in parliamentary attainders. THE PARLIAMENTARY DIARY OF ROBERT BOWYER, *supra* note 214, at 139-40.

to the King.<sup>223</sup> The purposes of medieval attainder, it seems, were still relevant.<sup>224</sup>

*The rise of impeachment.* In the end, the role Commons assumed in the Gunpowder Plot attainder resembled more the English jury of presentment, forerunner of the grand jury, than it did the English judge. And it was this analogy that Commons would later draw to justify its active role in impeachment, describing itself as “the grand inquest of the nation.”<sup>225</sup> Such an assembly was, at its heart, *active*; it could respond to crises and to abuses of power on its own initiative, independent of the ministry.<sup>226</sup> The following years saw something like this development. In 1620 England was “plunged into a severe depression,” and when Parliament assembled in January 1621, grievances about monopolies and their effect on trade took

223. See 3 Jac. 1 c. 2, in 4 STATUTES OF THE REALM 1068–70. Those attainted by the bill are identified on page 1069. Robert “Winter,” Thomas “Winter,” Guy Fawkes, Robert Keyes, Ambrose “Rookewood,” John Graunt, Thomas Bates, and Sir Everard Digby had already been convicted at common law, attainted and executed; Robert Catesby, Thomas “Pearcy,” John Wright, and Christopher Wright were killed evading capture; Francis Tresham had died in custody in the Tower of London before being indicted; and Hugh Owen was in flight.

224. For a case in the Parliament of 1610 presenting similar issues, see the “bill of particulars” brought against Sir Stephen Proctor, holder of a commission to investigate and collect royal debts. 2 PROCEEDINGS IN PARLIAMENT, 1610, at 412–14 (Elizabeth Read Foster ed., 1966). Proctor asked to be represented by counsel in Commons but was refused. 1 HC Jour. (1610) 442. The Lords subsequently granted the request. 1 PROCEEDINGS IN PARLIAMENT, *supra*, at 137–38. Proctor’s petition to the Lords complained that few Englishmen were “condemned and punished, in so high a Nature, upon naked Relations, without Oath, legal Trial, or Hearing of the Defendant to plead and prove for himself in lawful and just Defence what he may.” 2 HL Jour. (1610) 644. Clayton Roberts observed that while the bill was called a “bill of particulars,” the proceeding against Proctor was essentially an attainder. CLAYTON ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND 13 n.2 (1966). The bill voids Proctor’s commission, strips him of his knighthood and right to bear arms, subjects his lands and goods to bankruptcy proceedings to pay complaints against him, bars him from court, and prohibits him from taking future offices, stating that he “shall from henceforth forever stand and be disabled and made incapable forever to have, use, or exercise any office, place judicial or ministerial.” 2 PROCEEDINGS IN PARLIAMENT, 1610, *supra*, at 413–14. There was some support for an attainder; at one point during the matter, Francis Moore moved to “attaynt [Proctor] of a *premunire*,” suggesting a theory (like the one in the final bill) that Proctor had acted falsely “by colour of a patent.” See PARLIAMENTARY DEBATES IN 1610, at 124–25 (Samuel Rawson Gardiner ed., 1862).

225. *E.g.*, Plucknett, *supra* note 18, at 47.

226. See Wallace Notestein, *The Winning of the Initiative by the House of Commons* (1924), reprinted in STUDIES IN HISTORY 172, 177–78 (Lucy S. Sutherland ed., 1966). Sheila Lambert has criticized Notestein’s influential study, arguing that the bill proceedings, petitions, and committee structures utilized in the early Stuart period were not innovative and that the crown retained control over proceedings in that house. She devotes little attention to judicature, however, describing Commons’s efforts to punish patentees and ministers over whom it had no jurisdiction as “getting out of hand”—which is, of course, simply a tendentious way of describing an effort to bring about constitutional change, some of which was unwelcome to the council and crown. See Lambert, *supra* note 206, at 753, 777.

center stage.<sup>227</sup> In the next two Parliaments, Commons addressed itself to these grievances, asserting powers to investigate and void royal patents that conferred monopolies, and then to punish patentees themselves.<sup>228</sup> Early in 1621, Coke—now a member of the House of Commons and chairman of its “committee of grievances”—investigated a patent for the licensing of inns held by Sir Giles Mompesson.<sup>229</sup> Around the same time, he delivered two speeches detailing Parliament’s judicial powers, which it might employ in punishing Mompesson.<sup>230</sup> Coke described one such form of judicial power on February 28th, “Complaints and Examinations of greevances have been ancient in the Howse of Commons,” which might itself try matters of fact; but “they [i.e., Commons] have often resorted to the Lords for Judicature.”<sup>231</sup> On March 8th Coke argued that proceedings before the Lords had been thought appropriate when “Commons complained” about the abuses of someone close to the crown.<sup>232</sup> Mompesson’s fate took something like this course, worked out in negotiation with the Lords over the following weeks.<sup>233</sup> The Lords would hear testimony of Mompesson’s wrongdoing from sworn members, pronounce judgment, and deliver a sentence, which the King then approved.<sup>234</sup>

Mompesson’s case is often described as the revival of impeachment, but it was not for this reason a replacement of

227. STEPHEN D. WHITE, *SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH,”* 1621–1628, at 86–87, 116–19 (1979).

228. See Elizabeth Read Foster, *The Procedure of the House of Commons Against Patents and Monopolies, 1621–1624*, in *CONFLICT IN STUART ENGLAND* 57, 67–71, 75, 77–78 (William Appleton Aiken & Basil Duke Henning eds., 1960) (“The Commons had, in fact, evolved out of the old private Bill procedure a method of investigation and of passing judgment very like a court procedure. . . . [Commons] undertook the investigation of patents and monopolies because there was no adequate remedy elsewhere. Less and less, men turned to the Privy Council for redress of grievances, partly because the very men who sat there had obtained or passed the grants . . . . Thus circumstances added stature to the House of Commons’s traditional role as petitioners for redress of grievances.”).

229. For a vivid description of Mompesson’s abuse of this patent and his other patents, see ROBERTS, *supra* note 224, at 24–25.

230. See 4 COMMONS DEBATES, 1621, at 115–17 (Wallace Notestein et al. eds., 1935) (speech of February 28, 1621); 1 PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS, IN 1620 AND 1621, at 133–34 (1766) (speech of March 8, 1621 in Commons); 2 COMMONS DEBATES, 1621, *supra*, at 193–99 (speech of March 8, 1621 in the Lords). For an account of the delivery of the speeches, see WHITE, *supra* note 227, at 149–50.

231. 4 COMMONS DEBATES, 1621, *supra* note 230, at 115.

232. See 2 COMMONS DEBATES, 1621, *supra* note 230, at 196. The first example given is of John de la Lee, “steward of the king’s house.” *Id.* at 195. Thus, contrary to one revisionist view of the origin of parliamentary judicature, Coke’s account of judicature before the Lords did justify the Mompesson impeachment. See J. Stoddart Flemion, *Slow Process, Due Process, and the High Court of Parliament: A Reinterpretation of the Revival of Judicature in the House of Lords in 1621*, 17 HIST. J. 3, 8 (1974).

233. See TITE, *supra* note 31, at 96–108; WHITE, *supra* note 227, at 148–53.

234. TITE, *supra* note 31, at 108.



attainder. If impeachment became the preferred method for attacking patentees, the contrast between this form of judicature and the bill proceeding of attainder did not crystallize until sometime later, as a parliamentary opposition began to take shape and to sight those in royal favor.<sup>235</sup> Motion towards this end was not along a straight line, and circumstances could render attainder viable or even attractive well into the period. In 1626 a bill of attainder against patentee Edmund Nicholson passed out of Commons, perhaps because members sensed that Nicholson's case was controversial and doubted impeachment could succeed, but the attainder generated familiar controversies and failed in the Lords.<sup>236</sup> The same Parliament saw a failed *impeachment* of the royal favorite, the duke of Buckingham, on so thin a proof as "common fame."<sup>237</sup> In the Parliament of 1628, Commons considered both an attainder and an impeachment in its effort to punish royal chaplain Roger Manwaring, who had preached that the King could levy taxes without Parliament's consent.<sup>238</sup> Manwaring had told Charles that he possessed "a *Power Divine*," authority not given to mere "*multitudes of men*" (such as Parliaments), and that "To *Kings*, . . . nothing can be denied"—clearly a reference to the recent "forced loans" Charles had extracted.<sup>239</sup> Member Francis Rous argued to Commons's committee on religion that Manwaring's statement was "treason," and Richard Spencer moved that the committee recommend an attainder to the full house.<sup>240</sup> When the recommendation came before Commons on May 14th, however, it met immediate

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235. Cf. WHITE, *supra* note 227, at 144 ("[D]espite the relative novelty of Parliament's judicial actions during the 1620s, its use of judicial powers in these years did not constitute radical political action. The Commons never attacked men whom the king really wished to defend and usually used procedures whose legitimacy could not be questioned by either the king or the Lords. . . . Only during the later 1620s did the Commons use Parliament's newly developed judicial power as a political weapon against the king's intimates. . . ."). According to Conrad Russell's essay, this date fell over a decade later, in 1640. See Russell, *supra* note 205, at 3, 7.

236. See 1 HC Jour. (1625) 822 (recording a motion that Nicholson "be heard by his Counsel"); *id.* at 826 (ordering that Nicholson be heard by counsel in Commons); 3 HL Jour. (1626) 569 (reporting that bill is "fit to sleep"). While there was debate about the proper procedure in Nicholson's case, Stacy argues persuasively that the major objection was probably substantive. See Stacy, *supra* note 32, at 271–72.

237. ROBERTS, *supra* note 224, at 12; see also TITE, *supra* note 31, at 184–85. As Philip Hamburger describes, "common fame" in the late sixteenth and early seventeenth centuries "seems often to have been used rather loosely in connection with High Commission proceedings to include most sorts of suspicion, however poorly verified." PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 552 n.11 (2014).

238. See 3 WILLIAM COBBETT, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 335–38 (1809).

239. Harry F. Snapp, *The Impeachment of Roger Maynwaring*, 30 HUNTINGTON LIBR. Q. 217, 218 (1967).

240. 3 COMMONS DEBATES, 1628, at 262 & n.68, 405, 410, 416 (Robert C. Johnson et al. eds., 1977).

resistance. John Pym suggested that the Lords would object to an attainder beginning in Commons because the bill would have to be based on testimony given under oath, which Commons could not administer.<sup>241</sup> Of course, administering an oath would only be necessary if witnesses were going to appear, and thus it seems Pym was not envisioning attainder as a *summary* form of proceeding. John Selden, the leading antiquarian of the period, remarked that it would not be “fit” to proceed by bill, which he thought limited to its medieval suspensive form. “In H. 6 and E. 4 times many attainders were,” he said, “but in the bill a time was given to the party to come in, or else to stand attainted”; thus a bill might be passed against Manwaring only if he was summoned before the Lords.<sup>242</sup> Selden’s claims were inaccurate, as we have seen. They were challenged by Spencer, but in the end Commons elected to bring their accusations before the Lords.<sup>243</sup> Manwaring was eventually heard and convicted by the Lords, but Charles prorogued Parliament and pardoned him.<sup>244</sup>

In hindsight, of course, Charles’s favor appears quite reckless. Chaplain Manwaring had earned this pronounced royal concern, at least in part, by choosing appropriate sides in a legal dispute about Charles’s authority to raise funds using forced loans.<sup>245</sup> Charles’s supporters urged that the kingdom was at war, and the King’s need to defend England from its continental enemies supplied him with a “reason of state” to extract financial supply by order under privy seal.<sup>246</sup> This claim of “necessity” was met in the lower house by appeals to the common law, in which, it was said, limits to royal authority could be discovered, at least when the claimed “prerogative” threatened Parliament’s very existence.<sup>247</sup>

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241. *Id.* at 406, 410; TITE, *supra* note 31, at 212–13. For a discussion of Commons’s authority to administer an oath, see Foster, *supra* note 228, at 82 n.63. One objection was that, as a representative body or “grand inquest,” Commons was supposed to be self-informing.

242. 3 COMMONS DEBATES, 1628, *supra* note 240, at 406, 410, 413.

243. *Id.* at 406, 414. It seems likely that Commons’s decision to proceed by impeachment was influenced by their disappointment with the King’s first response to the Petition of Right on June 2nd. See WHITE, *supra* note 227, at 270–71; cf. Elizabeth Read Foster, *Petitions and the Petition of Right*, 14 J. BRIT. STUD., Nov. 1974, at 21, 23 (describing Commons’s “investigation of the state of the realm” launched after the King’s first response to the Petition of Right).

244. See 3 HL Jour. (1628) 845–46, 848–49; 3 COBBETT, *supra* note 238, at 338–40, 351–56; Snapp, *supra* note 239, at 229–30.

245. Manwaring stood at the end of what was a long line of ecclesiastical irritants to Commons. See, e.g., ROBERTS, *supra* note 224, at 16.

246. David S. Berkowitz, *Reason of State in England and the Petition of Right, 1603–1629*, in STAATSRÄSON: STUDIEN ZUR GESCHICHTE EINES POLITISCHEN BEGRIFFS 165, 180–81, 184–85 (1975).

247. See J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 70 (1961); Berkowitz, *supra* note 246, at 188, 197. Alan Cromartie sees somewhat of a looser connection. CROMARTIE, *supra* note 30, at 226 (“The radicalism disclosed by these debates [over the forced loan] owed something to the king’s own intervention. . . . But though the king could hardly have done better if he had tried to raise his subjects’ hackles, the single

Whether or not these researches withstand scrutiny (perhaps not), they surely complicated any subsequent effort by common lawyers themselves to utilize summary criminal proceedings in Parliament, such as bills of attainder. For now, common law procedures had constitutional significance. The conflict over forced loans thus tended to sharpen a distinction between parliamentary judicature (defined by references to the common law) and other forms of proceedings, and in so doing to cast a shadow over the use of bill proceedings to determine allegations of serious crime.<sup>248</sup> The roles in which impeachment cast Commons and Lords seemed comfortably judicial, and, perhaps not by accident, they soon hardened into expectation.<sup>249</sup>

***Attainder of Strafford.*** In the spring of 1641, Thomas Wentworth, earl of Strafford, was impeached, attainted, and put to death.<sup>250</sup> Wentworth had enjoyed a remarkable career. In 1628 he had supported the Petition of Right as a member of Commons.<sup>251</sup> Shortly after, he famously switched sides and entered royal service; the King made him Lord Deputy of Ireland,

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most striking political fact about this parliament was the availability of common law ideas through which a lawyer-dominated Commons was now able to articulate resistance.”)

248. Broader trends also pointed in this direction. What might be called a “cultural” embrace of the common law had been unfolding in England for some time, and Commons was hardly immune from its effects. See CROMARTIE, *supra* note 30, at 181–82, 190–91; POCOCK, *supra* note 201, at 50–53. Back in February 1621, Coke had criticized private bills as “suspected, unless . . . all the Friends of the Party whom it concerneth be well known; and . . . the Matter seen and looked into; for much Prejudice may and often doth come and happen by these private Bills.” 1 PROCEEDINGS AND DEBATES IN 1620 AND 1621, *supra* note 230, at 89; see also 1 HC Jour. (1614) 487 (statement of Sir Henry Poole) (arguing that a private act “crosseth the Course of the Common Laws” and moving that those affected be heard in committee and “sustain no Prejudice”), cited in Lambert, *supra* note 206, at 759 n.2 (describing this speech and “many” similar speeches in 1621). Members may have harbored similar concerns about proceedings in the prerogative courts of Star Chamber and Chancery. See Frances Helen Relf, *Introduction to NOTES OF THE DEBATES IN THE HOUSE OF LORDS xxxii* (1929) (arguing that the Lords’s development of appellate jurisdiction was “part of the larger movement the lawyers in the House of Commons directed against Chancery and the other Council-made courts which . . . was an effort to do away with all legal proceedings except those in the Common Law Courts”). Relf’s thesis has been challenged. See Flemion, *supra* note 232, at 6.

249. See WHITE, *supra* note 227, at 159–60.

250. For the attainder, see 16 Car. 1 c. 38, in 5 STATUTES OF THE REALM 177–78. Much has been written about Strafford’s impeachment and attainder. Modern studies include D. ALAN ORR, *TREASON AND THE STATE: LAW, POLITICS AND IDEOLOGY IN THE ENGLISH CIVIL WAR* 61–100 (2002); CONRAD RUSSELL, *THE FALL OF THE BRITISH MONARCHIES, 1637–1642*, at 274–302 (1991); C.V. WEDGWOOD, *THOMAS WENTWORTH, FIRST EARL OF STRAFFORD, 1593–1641: A REEVALUATION* 337–79 (1961); Terence Kilburn & Anthony Milton, *The Public Context of the Trial and Execution of Strafford*, in *THE POLITICAL WORLD OF THOMAS WENTWORTH, EARL OF STRAFFORD, 1621–1642*, at 230, 232–41 (J.F. Merritt ed., 1996); Conrad Russell, *The Theory of Treason in the Trial of Strafford*, 80 ENG. HIST. REV. 30 (1965); William R. Stacy, *Matter of Fact, Matter of Law, and the Attainder of the Earl of Strafford*, 29 AM. J. LEGAL HIST. 323 (1985). Important period sources include 1 EDWARD EARL OF CLARENDON, *THE HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND* (Oxford Univ. Press 1839) (1717), and JOHN RUSHWORTH, *THE TRYAL OF THOMAS EARL OF STRAFFORD* (1680).

251. See JOHN H. TIMMIS III, *THINE IS THE KINGDOM* 26 (1974).

where he developed a reputation for being harsh and autocratic.<sup>252</sup> It was Strafford's service in Ireland that became the focus of articles of impeachment against him, but probably more important was a general sense that he sought "to reject legal restrictions, and consequently to obviate the need to secure other people's co-operation for his actions."<sup>253</sup> Somewhat ironically, Strafford himself proved an able lawyer and mounted an effective defense at trial.<sup>254</sup> Representing himself on issues of fact, Strafford ably exposed weaknesses in Commons's proof: a key witness to treasonous words was apparently deaf;<sup>255</sup> others bore well-known grudges or had their testimony impugned by contradiction.<sup>256</sup> Only one witness could substantiate the most damaging charge in the impeachment—that Strafford had advised the King to use an Irish army to subdue England—and others contradicted him, the whole matter becoming bogged down in questions about whether Strafford had meant England or Scotland when he said the army might be used in "this kingdom" and "here."<sup>257</sup> Through it all, Strafford and his counsel maintained that even if the charges were proven, none would amount to treason under English law.<sup>258</sup> The merits of Strafford's legal argument have been much debated.<sup>259</sup> Whether or not the alleged conduct amounted to treason under English law (common law treason, constructive treason under the 1352 Statute of Treasons, or some other theory), the challenge was strong enough to raise serious doubts, and when the trial drew to a close in late April, many expected an acquittal.<sup>260</sup>

It was only then, when the impeachment had essentially failed, that a bill of attainder was introduced in the lower house.<sup>261</sup> The context could hardly have been less fortuitous. The bill passed out of the house on April 21st, but not before being criticized in a dramatic speech by Lord George Digby, who had served as a

252. See, e.g., *id.* at 26–32.

253. RUSSELL, *supra* note 250, at 284; see also ORR, *supra* note 250, at 72–73.

254. Strafford was granted many of the privileges available to criminal defendants at common law. See Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2073–74, 2074 n.60 (2002) (reviewing 3 PROCEEDINGS IN THE OPENING SESSIONS OF THE LONG PARLIAMENT: HOUSE OF COMMONS AND THE STRAFFORD TRIAL: 22 MARCH – 17 APRIL 1641 (Maija Jansson ed., 2001)).

255. See, e.g., Stacy, *supra* note 250, at 326.

256. See, e.g., WEDGWOOD, *supra* note 250, at 340–41, 344, 346–49.

257. *Id.* at 346–48.

258. *Id.* at 343.

259. For a discussion of that debate, see ORR, *supra* note 250, at 67–70; Russell, *supra* note 250, at 41; and Stacy, *supra* note 250, at 326.

260. Lerner, *supra* note 254, at 2087–88; see CLARENDON, *supra* note 250, at 365–68 (describing the closing arguments).

261. 2 HC Jour. (1641) 118, 120.

prosecutor during the impeachment.<sup>262</sup> Digby's speech shows, quite clearly, the unstable place that bills of attainder had come to occupy in a setting where Parliament enjoyed (and had exercised) its powers of judicature. Digby conceived of attainder, in some sense, as a legal proceeding; near the beginning of his remarks he reminds the other members "of the difference between Prosecutors and Judges" and that while "fervour" had served the house well in impeachment, "*Judges we are now.*"<sup>263</sup> But this did not mean Commons were not *also* legislators, or that it might not invoke its legislative authority. After presenting his legal argument that the evidence did not support a charge of treason, Digby observed that Commons might "Enact, That [Strafford's conduct] shall be Treason for the future," adding, "God keep me from giving Judgment of Death . . . upon a Law made *a posteriori.*"<sup>264</sup>

Commons, said Digby, had *two* powers, judicial and legislative, that it might exercise over Strafford. Both powers could be exercised by passing a bill:

[T]here is in Parliament a double Power of Life and Death by Bill, a Judicial Power, and a Legislative; the measure of the one, is what's legally just; of the other, what is Prudentially and Politickly fit for the good and preservation of the whole. But these two . . . are not to be confounded in Judgment: We must not piece up want of legality with matter of convenience . . .<sup>265</sup>

Note that the contrast Digby draws is *not* between impeachment as a judicial power and bill procedure as a legislative power. It is between *two kinds of bill procedure*: one guided by "what's legally just," and the other by prudential judgment and politics. *Bill procedure could be judicial*. The problem, then, was not the bill of attainder per se, but its "legislative" use in cases where judicial proceedings had revealed the conduct in question to be legal.<sup>266</sup> In such circumstances, Digby argued, an act of attainder would be "a Law made *a posteriori.*"<sup>267</sup>

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262. See CLARENDON, *supra* note 250, at 376–77.

263. RUSHWORTH, *supra* note 250, at 51 (emphasis added); see also CHAFEE, JR., *supra* note 12, at 112.

264. RUSHWORTH, *supra* note 250, at 52.

265. *Id.* at 53.

266. William Stacy has observed that Strafford's attainder is the first time in English history that bill of attainder is described as a "legislative" proceeding. Stacy, *supra* note 32, at 288 n.58.

267. Several other members also criticized the bill of attainder before its passage on April 21st, but in terms that express a legal view of the proceeding. For example, Sir Simonds D'Ewes, who supported an attainder, opposed the insertion of a clause prohibiting its use as a precedent in cases of treason at law. As D'Ewes put it, if such a clause were

Digby's opposition in the upper house, led by Oliver St. John, took much the same position. According to St. John, proceeding by bill was *not* a means of avoiding the judicial power of the Lords, but implicated the "judicatory" in both Lords and Commons.<sup>268</sup> Bill procedure did not mean legislative power. St. John clarified:

My Lords, What hath been said, is because that this proceeding of the Commons by way of Bill, implies the use of meer Legislative Power, in respect new Lawes are for the most part past by Bill. . . . [Y]et it was not the onely ground that put the Commons upon the Bill; they did not intend to make a new Treason . . . .<sup>269</sup>

He followed with an elaborate *legal* argument, divided into five headings that showed that Strafford's conduct was treasonous.<sup>270</sup> But if Strafford was guilty of treason, why resort to bill proceeding? There were two reasons. First, proceeding by bill "was to Husband time, . . . [and] the speediest and surest way" to attainder.<sup>271</sup> It was, in other words, a summary procedure. Bills did not require the production of *any* evidence "at all," and hence they obviated the resolution of difficult legal questions about whether the testimony of one witness was sufficient to convict for treason under the law of England.<sup>272</sup> Second, if the legal arguments St. John advanced "should faile, . . . it's just and necessary to resort to the Supream Power in Parliament," or what

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inserted "it would be a great dishonor to the business, as if we had condemned him because we would condemn him. For if his offenses be not treason till we make it so, certainly my voice shall never go to condemn him for it." 4 PROCEEDINGS IN THE OPENING SESSION OF THE LONG PARLIAMENT: HOUSE OF COMMONS, 19 APRIL–5 JUNE, 1641, at 40 (Maija Jansson ed., 2003). D'Ewes's journal states that "Divers spoke after me . . . They who spoke for [the attainder] showed that they conceived that this bill would amount unto a declaration of treason within the statute *de anno* 25 E. 3 . . ." *Id.*; see CLARENDON, *supra* note 250, at 376–77; WEDGWOOD, *supra* note 250, at 367; Lerner, *supra* note 254, at 2090; Stacy, *supra* note 250, at 336.

268. RUSHWORTH, *supra* note 250, at 675, 677; see also CROMARTIE, *supra* note 30, at 258. Cromartie reads the Digby and St. John speeches as demonstrating the Strafford bill of attainder was primarily legal in character, as I do, but he collapses the distinction between the common law and summary forms of legal process, which makes the decision to proceed by bill inexplicable. More generally, Cromartie's reading allows him to fold the Strafford attainder into his basic narrative about the constitutionalization of the common law, but by collapsing the distinction between common law processes and other forms of legal process he precisely inverts the significance of the attainder in his own story. The moment was regarded as a failure—a kind of backsliding—and not as a triumph of common law reforms.

269. RUSHWORTH, *supra* note 250, at 676.

270. The legal argument takes up the vast bulk of St. John's speech. See *id.* at 678–701.

271. *Id.* at 677.

272. *Id.* ("[W]hereas in their way of Bill, private satisfaction to each mans Conscience is sufficient, although no Evidence had been given in at all.")

St. John called “meer Legislative Power.”<sup>273</sup> The case for legislative power was a strong one.<sup>274</sup> *Contra* Digby, its use would not result in attainder by an *a posteriori* or *ex post facto* law. This is because Strafford had enjoyed constructive notice, as his offenses were “*Malum in se* [and] against the Dictates of the dullest Conscience.”<sup>275</sup> There was certainly precedent to expect such action; St. John adduced a list of acts of attainder for high treason that had targeted conduct not treasonous under existing law, citing the familiar examples of Elizabeth Barton (“pretending Revelations”), Richard Roose (“Poysoning”), and several others.<sup>276</sup>

Even at this late date, then, bills of attainder might be defended as a form of summary legal process, at least in some circumstances.<sup>277</sup> The difficulty was to hold on to this idea in a context where Parliament also possessed powers of judicature—and, perhaps more importantly, in a case in which those powers had been exercised and failed. The situation left a summary process like attainder exposed to the currents of factional politics, and there are good reasons to believe that these forces corrupted subsequent proceedings against Strafford. Edward Hyde, earl of Clarendon, expressed the view that the bill of attainder would not have passed were it not for the discovery of the so-called Army Plot, which involved the King’s efforts to seize the Tower of London and free Strafford.<sup>278</sup> Around the time the news of the plot broke, on May 3rd, mobs began to appear outside Parliament, demanding Strafford’s conviction.<sup>279</sup> One by one, Lords began to absent

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273. *Id.* at 678, 701.

274. *Id.* at 701.

275. *Id.* at 703.

276. *See id.* at 704–05. St. John included on his list John Kirkby, who was convicted by common law for treason for the murder of Ambassador John Imperial following Parliament’s declaration that the murder constituted treason. *Id.* St. John also cited the appeal of treason of Judge Robert Tresilian for offering the legal opinion that impeachment required the King’s assent. *Id.* St. John described the proceeding as an attainder. *Id.* at 705.

277. Contrast Conrad Russell’s description of the contrast between attainder and impeachment, which is remarkably static, and which seems blind to the active shaping of both parliamentary judicature and bill procedure. Russell, *supra* note 250, at 287 (“Impeachment, as a judicial process, involved the continuation of a trial before the Lords, whereas attainder, as a legislative procedure, could simply enact that Strafford’s offences were to be treason.”). Thus, Russell notes that the bishops refused to vote for the attainder, but having already committed himself to the proposition that attainder (unlike impeachment) was a legislative procedure, he cannot explain this, speculating that “they appear to have thought that they would face too much hostility” by voting. *Id.* at 296. As Roberts notes, the bill of attainder only passed out of Commons with the support of men who believed that the impeachment managers had proved treason under the law of England, not because there was a widespread acceptance that attainder was merely legislative. *See* ROBERTS, *supra* note 224, at 93.

278. CLARENDON, *supra* note 250, at 396–97, 408, 420–21.

279. *See* RUSSELL, *supra* note 250, at 293–94.

themselves from Parliament, claiming various excuses.<sup>280</sup> At last, those who remained concluded that common's had proved its allegations, and asked the royal judges present in Parliament whether "the earl of Strafford doth deserve to undergo the paines and forfeitures of high treason by law."<sup>281</sup> The judges said yes and the bill was passed. Fearful for the lives of his family, Charles gave his assent to the bill, and Strafford was executed on May 12th.<sup>282</sup>

The text of the act securing Strafford's condemnation is not especially noteworthy. Like the medieval attainders that preceded it, the act provided for the forfeiture of Strafford's lands—surely a boon Charles would have preferred to decline, and thus an odd vestige of the medieval constitution.<sup>283</sup> Like most modern English attainders, the act also sentenced Strafford to death.<sup>284</sup> It repeated the most successful of the legal charges from the articles of impeachment, adding, rather hopefully, that the "Offences hath bin sufficiently proved against the said Earle upon his Impeachment."<sup>285</sup> Of course, it was impossible for the act to have any such meaning. What remained in the memory was not sufficient proof, but *insufficient* proof combined with factionalism and hysteria.<sup>286</sup> Speaking of the act's passage, Clarendon described "faction in both houses [and] the rage and fury of the people."<sup>287</sup>

Strafford's was not the last English attainer. Three years later, proceedings against the archbishop William Laud unraveled in much the same fashion, with initial efforts to observe common law forms ending in an ordinance of attainer.<sup>288</sup> In 1657 the Long

280. *Id.* at 296–97.

281. Stacy, *supra* note 250, at 342.

282. CLARENDON, *supra* note 250, at 420–22; Russell, *supra* note 250, at 300.

283. See 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 58, at 292; 16 Car. 1 c. 38, in 5 STATUTES OF THE REALM 178.

284. 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS, *supra* note 58, at 292.

285. *Id.*

286. This view was reflected in the reversal of Strafford's attainer, which was enacted in 1662. See 14 Car. 2 c. 29, in 5 STATUTES OF THE REALM 424 (characterizing Strafford's attainer as an effort by "the turbulent Partie" to secure his death by a bill whose passage was secured by "tumultuous Persons"). The same view of Strafford's attainer was expressed during Fenwick's proceedings in 1696. See 13 COBBETT, *supra* note 238, at 634 (quoting the repeal and describing the attainer as "very evil and unjust"); see also RICHARD WEST, A DISCOURSE CONCERNING TREASONS, AND BILLS OF ATTAINDER 95 (1716) ("That Earl's Case [i.e., Strafford] was commonly thought to be very hard: For considering the particular Defence which he made to every Article; and that *no one Fact* was prov'd clearly against him, which was in it self Treason, People generally concluded, that Personal Malice against the Earl, or some other sinister Design, was more consulted in that Prosecution, than the Desire or Love of Justice. This *Act of Attainder* has now for Fifty Years been constantly represented to the People as the Highest Act of Injustice . . .").

287. CLARENDON, *supra* note 250, at 421; see also RUSSELL, *supra* note 250, at 301.

288. Ordinance for Beheading the Archbishop of Canterbury, (1644) I ACTS & ORDS. INTERREGNUM 608, 608–09; see ROBERTS, *supra* note 224, at 130–31; Nicholas Robert



Parliament passed "An Act for the attainder of the rebels in Ireland," which "declared and adjudged" large numbers of Irish "convicted and attainted" of treason, confiscating their lands.<sup>289</sup> After the Restoration in 1665, a suspensive attainder ordered the surrender of three filibusters abroad "notoriously knowne" to be adhering to the Dutch, who were then at war with England.<sup>290</sup> Others named by royal proclamation were required to return to England within three months, and those who served the Dutch in the future "shall be and are hereby attainted of High Treason."<sup>291</sup> Parliamentary attainder thus continued to be used to cure failures in process caused by absence from the realm. Over time, however, attainders became less common. In the decades that followed, there were fewer parliamentary attainders for treason while noncapital "bills of pains and penalties," a new development, became regular.<sup>292</sup> Members occasionally expressed support for attainting those whose flight had rendered process at common law impossible.<sup>293</sup> But suggestions that Parliament condemn someone without permitting him to appear or without adequate proof were extremely controversial.<sup>294</sup> Those who regarded the bill of attainder as an exercise of legislative power were primarily concerned with rebutting the charge of *ex post facto* law, although they might agree that it was prudent, or just, for Parliament to abstain from condemning the absent or without testimonial proof.<sup>295</sup>

### C. *Attainder in English Legal Literature*

The contexts described above are of key importance in understanding the treatment of attainder in English legal

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Charles Forward, *The Arrest and Trial of Archbishop William Laud* 107, 153, 158–63 (Mar. 2012) (unpublished M.A. thesis, University of Birmingham).

289. *An Act for the Attainder of the Rebels in Ireland*, (1657) II ACTS & ORDS. INTERREGNUM 1250, 1250–62. The act established a process for individuals to assert and prove their right to forfeit lands, which made the act part of a large-scale effort to resettle Irish Catholics, not unlike the effect of American confiscation acts on loyalists after the Revolutionary War. *See infra* Part II.A.4.

290. 17 Car. 2 c. 5, *in* 5 STATUTES OF THE REALM 578.

291. *Id.*

292. *See* Stacy, *supra* note 32, at 422, 501–02.

293. *See, e.g.*, 1 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 334 (Anchitell Grey ed., 1763) (Sir John Monson); 13 COBBETT, *supra* note 238, at 633 (Sir Thomas Powys).

294. *See, e.g.*, 1 DIARY OF THOMAS BURTON 20–37 (1828) (quoting Solicitor General William Ellis: "It were fit you should have the party before you at this bar, to hear what he will say to the Report when it is read to him, which is the most orderly in point of law. It is the course of proceedings in all criminal cases. This done, I shall freely give my consent for his punishment . . .").

295. *See, e.g.*, A LETTER TO A FRIEND, IN VINDICATION OF THE PROCEEDINGS AGAINST SIR JOHN FENWICK, BY BILL OF ATTAINDER 3–9 (1697); WEST, *supra* note 286, at 98–106.

literature. Several of the leading discussions of attainder are a product of the early Stuart period. In some sense, this is surprisingly late. But setting aside the Parliament rolls and year books, we find relatively few discussions of attainder from the period that saw its greatest use, roughly 1410 to 1540. Sir John Fortescue, perhaps the leading English jurist of the fifteenth century, does not raise the issue in either of his major works, *De Laudibus legem Angliae* and *The Governance of England*, despite having been attainted himself.<sup>296</sup> His only contribution to the topic thus lies in the year books, which record his participation in a number of cases involving acts of attainder.<sup>297</sup> Christopher St. German mentions attainder in several places in *Doctor and Student*, whose two dialogues were composed between 1523 and 1530, on the cusp of the English Reformation; but the mentions are brief and clearly ancillary to other topics.<sup>298</sup> Thirty years later, in *De Republica Anglorum*, Sir Thomas Smith describes the powers of Parliament in terms that include bills of attainder (“The Parliament . . . changeth rightes, and possessions of private men”), but again the matter invites no special attention.<sup>299</sup> It is, apparently, simply one of a number of governmental tasks to which the queen is competent in her Parliament, where, as we saw above, she might give judgment in

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296. On Fortescue’s own attainder, see Shelley Lockwood, *Introduction* to JOHN FORTESCUE, *ON THE LAWS AND GOVERNANCE OF ENGLAND*, at xviii–xix. (Shelley Lockwood ed., 1997) The closest Fortescue comes to the subject in his writings is chapter 14 of *The Governance of England*, where he advocates for royal resumption of crown lands by act of Parliament. *See id.* at 112.

297. *See, e.g.*, Pilkington’s Case, YB 33 Hen. 6, Pasch, pl. 8 (1455), *discussed supra* note 92; YB 19 Hen. 6, Pasch, pl. 1 (1441), *in* Seipp’s Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=17995> (last visited Feb. 6, 2016). J.P. Gilson and several others have suggested that Fortescue was the author of *Somnium Vigilantis*, a pamphlet defending the attainder of the Yorkists in 1459, but the attribution has been disputed. *See supra* note 128. Whether or not Fortescue wrote it, the piece devotes no attention to the manner of proceeding, but is concerned instead with the substantive question of whether the Yorkists should be treated as traitors. *See* Kekewich, *supra* note 128, at 27.

298. Christopher St. German, *Doctor and Student*, reprinted in 91 SELDEN SOCIETY, at xiv–xv (1974). For example, St. German’s “Student” describes for the civilian “Doctor” the various forms of process available at common law for prosecuting a man suspected of being hired to kill another, including indictment and appeal of murder (the latter being a form of private criminal suit). The two forms treat a suspect’s silence differently. If an “appele [is] brought of the murdre [and the suspect] stand dombe & wyll not answer to the murdre,” says the Student, “he shall be attaynted of the murdre and shall forfeyte lyfe landes and goodes”; in contrast, a suspect indicted for murder who remains silent is “pressyd to deth” (a form of torture designed to force the suspect to enter a plea) and forfeits only his goods. *Id.* at 264–65. The reader is tempted to compare attainder with default judgment, or perhaps summary judgment, at least in cases of appeal, but the matter is uncertain and St. German never returns to it. *See* YB 4 Edw. 4, Pasch, pl. 37 (1464), *in* Seipp’s Abridgment, <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=19626> (last visited Feb. 6, 2016).

299. *See* SMITH, *supra* note 188, at 49, 58.

criminal or civil causes by passing a bill.<sup>300</sup> None of these writers finds any special difficulty with attainder, whether it occurs in Parliament or elsewhere.<sup>301</sup>

1. *Coke in the Institutes.* The matter is much different when we come to Coke, who gives attainder its first detailed treatment in the *Institutes*, written largely in the 1620s and early 1630s. Coke's analysis occurs principally in three places. In the First *Institute*, Coke distinguishes attainder from conviction and judgment. "The difference between a man attainted and convicted is, that a man is said convict before hee hath judgement . . . And when he hath his judgement upon the verdict, confession, or recreancie . . . then is he said to be attaint."<sup>302</sup> Both judgment and "attaint" follow conviction, assuming there is no lawful objection to entry of judgment, and attainder is in turn a consequence of judgment. What, then, of cases where someone is attainted *without* judgment? Those cases are treated as outlawry, a process recognized at common law.<sup>303</sup> Lost is a sense of attainder as a *kind* of judgment, a result of a summary legal proceeding that differs from the common law.<sup>304</sup> In its place, Coke offers an etymology that collapses attainder into the legal *status* that follows judgment or outlawry: "Aptly is a man said to be attainted, *attinctus*, for that by his attainder of treason or felonie his bloud is . . . stained and corrupted . . ."<sup>305</sup> As we have seen, the assertion that "attainder" had a Latin root is likely false.<sup>306</sup>

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300. *Id.* at 64. With respect to the curial nature of Parliament evident in the text, the editor describes Smith as "under the influence of traditional theory"—showing how late in the day this theory remained natural—and identifies bills of attainder as an example of how Parliament's status as a "court" did not imply an exclusively judicial function. *Id.* at xxviii–xxix, xxxiii. John Hooker, perhaps less under the influence of traditional theory than Smith, failed to even mention private bill procedure in his own tract on Parliament, *The Order and Usage of the Keeping of a Parliament in England*, published in 1572. See VERNON F. SNOW, PARLIAMENT IN ELIZABETHAN ENGLAND: JOHN HOOKER'S *ORDER AND USAGE* 60 (1977). For the sections of Hooker's work describing the nature of Parliament and bill procedure, see *id.* at 145–47, 156–62, 165–72, 181, 189–91.

301. The treatment of attainder in Henry Finch's *Nomotexnia*, which may have been written near the turn of the sixteenth century, fits into this category as well, although it focuses more on treason than property law. See HENRY FINCH, LAW, OR, A DISCOURSE THEREOF; IN FOUR BOOKS 206–08, 223–24, 324–25 (1759).

302. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES s.745, 390b–391a (19th ed. 1832).

303. Coke divides attainders into "two manner," one "after appearance" and another "upon proces to bee outlawed, which is an attainder in law." *Id.* at s.745, 390b.

304. *Cf.* Collas, *supra* note 25, at xxx–xxxi.

305. 2 COKE, *supra* note 302, at s.745, 391b.

306. See the discussion of Collas, *supra* note 25. Baker asserts in the *Manual of Law French* that the French term derived from the Latin *tingere*, meaning "to stain," but both Collas and the editors of the Oxford English Dictionary disagree, and Baker cites neither

Coke's account in the First *Institute* has two principal consequences. First, by separating conviction and judgment, it allows for the learned lawyer to interpose himself between the jury and the defendant's punishment.<sup>307</sup> Second, it undercuts the claim that there are alternative forms of legal process for punishing treason. Attainder had to follow a valid judgment at common law, the demesne of the learned lawyer. Thus, in his commentary on the 1352 Statute of Treasons in the Third *Institute*, Coke insists that the occurrence of the term "attaint" in the act "necessarily implieth that he [i.e., the suspect] be proceeded with, and *attainted according to the due course, and proceedings of Law*, and not by absolute power."<sup>308</sup> Thus, he continues, if a suspect "die before the attainder of Treason, he forfeiteth nothing, because . . . he is not attainted."<sup>309</sup> The defect in such proceedings was in part evidentiary; as Coke translated the Anglo-Norman, the suspect had to be attainted "provably," which meant by "direct and manifest proof," rather than attainted "probably," for which "*commune argumentum* [i.e., common proof or evidence] might have served."<sup>310</sup> But what, then, of acts of attainder used to secure the forfeiture of lands of the deceased? The attainder of Jack Cade, for example, had to be secured by act of Parliament; the Statute of Treasons would not have permitted his attainder in a common law court.<sup>311</sup> Or what of parliamentary attainders against those who had fled the realm and over which common law courts had no jurisdiction?

Coke comes close to reading the Statute of Treasons to imply that Parliament's authority to attaint for treason is circumscribed by the common law, but in the end acknowledges that authority but treats it as an exception. His disappointment is palpable in the discussion of Parliament in the Fourth *Institute*. Here Coke acknowledges that procedures in Parliament are governed not by the common law, but by the "law and course of parliament,"<sup>312</sup> and that Parliament's jurisdiction is "transcendent and absolute," as evidenced by its power to "attaint a man of treason after his

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source. See J.H. BAKER, *MANUAL OF LAW FRENCH* 53 (1979). In any case, by the time Coke wrote the Latin had already corrupted the Anglo-Norman and English terminology. See, e.g., St. German's First Dialogue, written in Latin in 1523. St. German, *supra* note 298, at 126-27 (using "*attinctus*").

307. Cf. CROMARTIE, *supra* note 30, at 210.

308. COKE, THIRD PART, *supra* note 190, at 12 (emphasis added).

309. *Id.*

310. *Id.* The Statutes of the Realm renders the term "probably." See 25 Edw. 3 c. 2, in 1 STATUTES OF THE REALM 320.

311. COKE, THIRD PART, *supra* note 190, at 12.

312. COKE, FOURTH PART, *supra* note 118, at 14-15.

death.”<sup>313</sup> Yet if Parliament’s power in this regard could not be disputed, Parliament itself might be faulted for proceeding in this way. Precedents existed of attainting

a subject of High Treason being committed to the Tower, and forth-comming to be heard, and yet never called to answer in any of the Houses of Parliament, . . . yet this I say of the manner of the proceeding, Let oblivion carry it away, if possible; if not, let it somehow be hidden in silence.<sup>314</sup>

Such a proceeding offended Magna Carta and its confirmatory statutes, which provided that no “man ought to be condemned without answer.”<sup>315</sup> An opportunity to appear and answer charges, and thus to challenge the prosecution to put forward a proof of its allegations, was central to Coke’s understanding of the common law, putting him, and those common lawyers who thought similarly, potentially at odds with Parliament.<sup>316</sup>

2. *After Coke.* Coke’s view on these matters was certainly influential, but there is some difficulty with separating cause from effect. We have already seen the leading role Coke played in the development of judicature in the Parliaments of the 1620s, and historian William Stacy has suggested that Coke’s legal contributions had a significant effect on the proceedings against Laud in 1645.<sup>317</sup> We also find views like Coke’s expressed after the restoration in the late seventeenth century. One example is the essay *On the Judicature in Parliaments*, published in 1681 under John Selden’s name, but which likely was written by a clerk of Parliament, Henry Elsyng.<sup>318</sup> Describing proceedings against Roger de Mortimer in 1330, the author observes that there was

no accusation by witnesses or otherwise to prove the said Articles objected against him. . . . [T]here was no other proof offered . . . then that the King believeth [the allegations], and that they are notorious and known for truth unto the Lords, and all the People of the Realm.<sup>319</sup>

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313. *Id.* at 36. Coke cites Jack Cade’s second attainder in 1453, 33 Hen. 6 c.1, and the case of Sir Robert Plesyngton, which was begun by information. See 3 Rot. Parl. 384a–85b, in 7 PROME, *supra* note 13, at 425–27.

314. COKE, FOURTH PART, *supra* note 118, at 37.

315. *Id.* at 38.

316. See CROMARTIE, *supra* note 30, at 215; Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1692 (1994).

317. See, e.g., Stacy, *supra* note 32, at 364 (“Laud’s trial illustrates . . . the enormous influence that the *Institutes* of Sir Edward Coke possessed in the 1640s.”).

318. See Elizabeth Read Foster, *The Painful Labour of Mr. Elsyng*, 62 TRANSACTIONS AM. PHIL. SOC’Y 5, 42–45 (1972).

319. JOHN SELDEN, OF THE JUDICATURE IN PARLIAMENTS 37–38 (n.d.). On *Roger de Mortimer’s Case*, which Chafee includes in his records of attainders, see 1 DOCUMENTS ON

This Elsyng thought a matter of concern. Parliamentary judicial powers required, he wrote, that a party “be brought to his Answer, otherwise the whole Judgment will be erroneous.”<sup>320</sup> The only exception was the case where “the Parliament hath used all means possible to have [the defendant’s] Answer.”<sup>321</sup>

As we move forward in time the matter becomes more complex. The literature available at the end of the *eighteenth* century spans a considerable range, and the question of Coke’s place in this inheritance is less clear. William Blackstone accepted Coke’s distinction between conviction, judgment, and attainder, as well as Coke’s fictitious etymology. For Blackstone, attainder is “the immediate inseparable consequence” of judgment on capital charges, and signifies “a note of infamy . . . [The defendant] is then called attaint, *attinctus*, stained or blackened.”<sup>322</sup> This legal status comprises a range of civil disabilities, including an inability to serve as a witness in court or as an attorney and agent, propositions for which Blackstone cites Coke’s Third *Institute*.<sup>323</sup> One sees nothing of Coke’s plea that Parliament refrain from attainting the absent by bill, but Blackstone does argue in Book I that laws are rules, which are by definition “permanent, uniform, and universal,” rather than particular, and “[t]herefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of municipal law.”<sup>324</sup> Coke’s influence on Blackstone is thus both readily detectable and acknowledged.

The treatment of attainder in John Reeves’s four-volume *History of the English Law*, published in 1784 partly in response to Blackstone, looks very different.<sup>325</sup> In volume 2, Reeves begins by showing that the distinction between conviction, judgment, and attainder central to Coke and Blackstone is, at best, a recent one; in fact, “no interval was left between the verdict and judgment,

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FUNDAMENTAL HUMAN RIGHTS, *supra* note 58, at 285–88. The author of *Of Judicature* also cites the case of John Matrevers and the de Spencers. SELDEN, *supra*, at 36–39.

320. SELDEN, *supra* note 319, at 89.

321. *Id.* Although I accept Elizabeth Foster’s argument that Elsyng wrote *Of Judicature*, it is interesting to note that the exception for those in flight is consistent with Selden’s limited defense of attainder in the Parliament of 1628. See *supra* notes 242–43 and accompanying text.

322. 4 WILLIAM BLACKSTONE, COMMENTARIES \*380.

323. *Id.* (citing COKE, THIRD PART, *supra* note 190, at 213).

324. 1 BLACKSTONE, *supra* note 322, at \*44. Whether this implies a kind of conceptual limit to the authority of Parliament is unclear, as a subsequent typology of statutes includes “[s]pecial or private acts,” which are “rather exceptions than rules.” *Id.* at \*86. Later, Blackstone describes acts of attainder as “new laws made *pro re nata*.” 4 BLACKSTONE, *supra* note 322, at \*59.

325. See MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE, 1760–1850, at 50 (1991).

but . . . it was usual to enter it immediately; and therefore, in all the old books, the *conviction* and *attainder* are spoken of without any distinction, as if they were the same thing.”<sup>326</sup> Volume 3 brings the reader forward in time, to the Wars of the Roses, where Reeves explains how the use of parliamentary attainders by the Lancastrians and Yorkists led to the adoption of uses to shelter property.<sup>327</sup> Attainder receives its fullest exposition in Reeves’s discussion of Henry VIII, where he distinguishes different forms of attainder in Parliament: “This extraordinary judgment was resorted to . . . either to confirm a sentence already passed in some court of law, or to ensure the destruction of such as might possibly escape the openness of a common-law trial.”<sup>328</sup> Reeves notes that the attainder of Bishop Fisher for misprison of treason “did not extend to life,” and that it was passed “without the examination of witnesses, or hearing [Fisher and others] in their defence.”<sup>329</sup> Reeves then turns to a discussion of Elizabeth Barton, whom he suggests was examined in Star Chamber, and whose attainder is described as “carried through with moderation and justice,” in comparison to the attainders of Cromwell and several others at the close of Henry’s reign.<sup>330</sup>

Reeves’s treatment of attainder, though it also bears evidence of the influence of Coke, is much closer to the historical record described here than is Blackstone’s. Nor was it the only such source available at the close of the eighteenth century. John Rushworth’s *Historical Collections of Private Passages of State*, comprising speeches and documents in the period surrounding the Civil War, including Strafford’s attainder, was printed in eight volumes in the latter half of the seventeenth century.<sup>331</sup> John Hatsell’s topically organized collection, *Precedents of Proceedings in the House of Commons* was published in 1781. Both collections rejected some elements of Coke and Blackstone’s accounts of attainder. Hatsell’s description of the meaning of the early precedents is worth quoting at length:

Although it is true, that this measure of passing Bills of Attainder . . . has been used as an engine of power . . . it is not therefore just to conclude, that no instances can occur, in which it ought to be put in practice.—Cases have arisen . . . and may again arise, where the public safety,

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326. 2 JOHN REEVES, HISTORY OF THE ENGLISH LAW 430 (1869).

327. 3 *id.* at 23.

328. *Id.* at 424.

329. *Id.*

330. *Id.* at 424–25.

331. See generally RUSHWORTH, *supra* note 250.

which is the first object of all government, has called for this extraordinary interference; and, in such instances, where can the exercise of an extraordinary power be vested with more security, than in the three branches of the legislature? It should, however, always be remembered, that this *deviation from the more ordinary forms of proceeding* by indictment or impeachment, ought never to be adopted, but in cases of absolute necessity; and in those instances only, where, from the magnitude of the crime, or the imminent danger to the state, it would be a greater public mischief to suffer the offence to pass unpunished, than even to over-step the common boundaries of law; and . . . by an exemplary though extraordinary proceeding, to mark with infamy and disgrace, perhaps to punish with death, even the highest and most powerful offenders.<sup>332</sup>

Extraordinary modes of proceeding, says Hatsell (discussing what he calls “bills of pains and penalties”) are applicable in cases where “the rules of admitting evidence, or other forms, to which the Judges in a court of law are bound to adhere, would preclude the execution of justice upon offenders.”<sup>333</sup>

By connecting summary “forms of proceeding” with “imminent danger to the state,” Hatsell’s account of attainder is suggestive of some of the earliest uses to which parliamentary attainder was put. It was suggestive, as well, of the tradition in European jurisprudence of employing summary justice to swiftly prosecute state crimes like treason.<sup>334</sup> Less evident in Hatsell’s account is the influence of Blackstone on attainder. Still, Hatsell’s terms of defense for attainder did resound with another institution described in Blackstone’s *Commentaries*, namely, “preventive justice.”<sup>335</sup> Preventive justice was a body of law obligating those “whom there is probable ground to suspect of future misbehavior” to give assurances to the public.<sup>336</sup> Included were individuals who threatened to breach the public peace towards the King, who go “armed with unusual attendance to the terror of the people,” or “speak[] words tending to sedition.”<sup>337</sup> These people, whom Blackstone called “suspicious,” had to pledge their good behavior before a justice of the peace, and were liable to preventive imprisonment if they did not.<sup>338</sup>

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332. 4 HATSELL, *supra* note 216, at 90 (emphasis added).

333. *Id.* at 94.

334. Pennington, *supra* note 18, at 32.

335. 4 BLACKSTONE, *supra* note 322, at \*248–49.

336. *Id.*

337. *Id.* at \*251–53.

338. See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 54 (2005).



Out on the edges of the British empire, American Englishmen would find it difficult, as they moved towards civil war, to untangle these doctrines of "preventive justice" from the use of summary legal procedures to prosecute notorious crimes, particularly where public safety was at risk. For the student of Hatsell, bills of attainder were simply one of the summary legal proceedings that might be employed to defend the state in a time of crisis.

### III. ATTAINDER IN BRITISH NORTH AMERICA

Once we understand bills of attainder as, in Hatsell's words, a "deviation from the more ordinary forms of proceeding by indictment or impeachment," we must shift the sources we use to frame our account to attainder in British North America. We are looking for a deviation from ordinary forms of proceeding, triggered by the failure of judicial process, brought about, in many cases, by rebellion, disorder, or war. So framed the record is rich. The colonies and the infant states employed many such proceedings. They took place in a variety of bodies, including colonial assemblies, provincial congresses, and the committees and associations of the Revolutionary War. They also took place in executive councils. Pennsylvania's executive, the Supreme Executive Council, attainted nearly 500 loyalists during the Revolutionary War, including individuals who were dead, pursuant to powers it was granted by the legislature.<sup>339</sup> The Pennsylvania case is an extreme one, but not so extreme as to be misleading. In addition to Pennsylvania, assemblies in New York, Massachusetts, New Hampshire, Delaware, North Carolina, and Virginia together attainted hundreds of loyalists.<sup>340</sup> New Jersey confiscated the land of loyalists by an act of assembly predicated on the basis of a breach of allegiance.<sup>341</sup>

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339. See An Act for the Attainder of Divers Traitors, ch. 784, § 1 (Mar. 6, 1778), in 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 201, 201-02 (James T. Mitchell & Henry Flanders eds., 1903) [hereinafter STATUTES AT LARGE OF PENNSYLVANIA]; Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, 90 PA. MAG. HIST. & BIOGRAPHY 287, 304, 306 (1966).

340. See Act of Oct. 22, 1779, ch. 25, in 1 LAWS OF THE STATE OF NEW YORK 26, 26 (1792); Act of Apr. 30, 1779, ch. 48, in 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 966, 966-67 (1886); Act of Nov. 28, 1778, ch. 19, in 4 LAWS OF NEW HAMPSHIRE 191, 191 (Henry Harrison Metcalf ed., 1916); Act of June 26, 1778, ch. 29, in 2 LAWS OF THE STATE OF DELAWARE 636, 636-43 (Samuel Adams & John Adams eds., 1797); Act of May 1778, ch. 12, in 9 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 463, 463-64 (William Waller Hening ed., 1821); Act of Dec. 28, 1777, ch. 17, in 24 THE STATE RECORDS OF NORTH CAROLINA 123, 123-24 (Walter Clark ed., 1905).

341. Act of Dec. 11, 1778, ch. 22, in 1 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 67, 67 (Peter Wilson ed., 1784).

As the New Jersey example suggests, to make sense of how and why American states employed summary proceedings, including bills of attainder, requires some familiarity with the American law of treason. On June 24, 1776, the Continental Congress recommended to the colonies that they enact legislation requiring allegiance of their residents and defining the crime of treason.<sup>342</sup> The first part of this resolution stipulated that “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony.”<sup>343</sup> This was the same rule as at common law,<sup>344</sup> but as we will see, it posed a number of difficulties for the revolutionary governments. It was unclear whether loyalists actively resisting revolutionary authority owed allegiance to any American state. The second part of the June 24th Continental resolution defined treason to include levying war “against any of the said colonies” or adhering to the King of Great Britain within colonial borders.<sup>345</sup> This was a vital development for a people who before had owed their allegiance to that King. As Bradley Chapin has described it, it was “a *de facto* declaration of independence.”<sup>346</sup> Most of the states enacted these resolutions into law.<sup>347</sup> We will examine the cases of New York and Pennsylvania in detail below.

Despite the key place of treason legislation in determining the political status of the colonies and their revolutionary congresses, the Revolutionary War did not see a great number of treason prosecutions at common law.<sup>348</sup> Americans’ understanding of

342. Resolution of June 24, 1776, in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1174–1789, at 475 (1906).

343. *Id.*

344. See, e.g., COKE, THIRD PART, *supra* note 190, at 4–5.

345. Resolution of June 24, 1776, in 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 342, at 475.

346. BRADLEY CHAPIN, THE AMERICAN LAW OF TREASON 37 (1964). Here, Chapin is following the work of Curtis Nettels, who also framed the June 24 resolution as an effectual declaration of independence. See Curtis P. Nettels, *A Link in the Chain of Events Leading to American Independence*, 3 WM. & MARY Q. 36, 39, 44–46 (1946).

347. CHAPIN, *supra* note 346, at 38–41; JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 84 (1971). Another source, which in my judgment overstates the role of continental authority in these developments, is Robert B. Morris, *The Forging of the Union. Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056, 1083–85 (1974). Treason was not, as Morris labels it, a “national offense;” it was first a state offense, even as it was defined by the resolution of the Continental Congress. On at least some occasions the Continental Congress stood between civil authority and the Continental army, which pushed for treason legislation and for measures to secure loyalists. See Thompson, *supra* note 17, at 85.

348. See CHAPIN, *supra* note 346, at 46, 63–64, 69–70; HURST, *supra* note 347, at 85 (noting that there are “few treason cases of the period”). The major exceptions are the treason trials by courts-martial in New York in 1777 and the prosecutions after the recovery of Philadelphia.

treason law derived largely from an acquaintance with English law and practice, and they applied English procedural law to their own proceedings.<sup>349</sup> Thus, even radical Whigs insisted on the procedural protections in the 1696 Treason Trials Act, which included two witnesses, an overt act, and a local jury.<sup>350</sup> Yet these procedures proved hard to mount during the war. Royal judges who had sworn to apply the law of England had no office to adjudge allegations of treason against independent states, and it took a number of American states months (sometimes years) to develop a working court system.<sup>351</sup> Some loyalists fled to the British and were beyond the reach of judicial process altogether. Instead of

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349. HURST, *supra* note 347, at 68–69, 83. As historian Thomas Slaughter reads Hurst, “there is little evidence that the drafters [of the Treason Clause in the federal Constitution] were familiar with the ancient English statute or case law, but they had a wide (if in most cases shallow) acquaintance with the major common law commentaries.” Thomas P. Slaughter, “*The King of Crimes*”: *Early American Treason Law, 1787–1860*, in *LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA* 54, 62–63 (Ronald Hoffman & Peter J. Alberts eds., 1996). Slaughter derives much from this premise, *see id.* at 70–71, 73–74, but the reading of Hurst is indefensible; on the very page Slaughter cites, Hurst writes, “Americans likewise had access to English statutory materials, which are thus relevant to our inquiry.” HURST, *supra* note 347, at 8. Hurst’s point was not that Americans were unfamiliar with ancient statutes and cases, but that they lacked access to the *State Trials*. Americans were familiar with cases, but in litigation they typically cited treatises, rather than reports. *See id.* at 85. This could be for many different reasons. Setting aside what Hurst did or did not mean, there is today (and was at the time Slaughter wrote) evidence that particular individuals were quite familiar with “ancient English statute or case law,” as well as major state trials, although some of these individuals did not participate in drafting the Treason Clause. Thomas Jefferson, for example, cited to Hatsell and Rushworth (which collected precedents and reported on state trials) as the source of his own views. *See* 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”). This is significant, since Jefferson’s influence on the law of treason during the Revolutionary War was immense. *See* HURST, *supra* note 347, at 84; Matthew Steilen, *The Josiah Philips Attainder and the Institutional Structure of the American Revolution* (forthcoming 3 *CRITICAL STUDIES OF LAW*). Jefferson was distinctively well read, but he was not the only American lawyer familiar with these sources. Inventories of leading private and university libraries can be found in PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK 171–96* (1939), and COLBOURN, *supra*, at 159; all include various reports, abridgements, and digests, and several include Rushworth. We know these books were used. *See*, for example, the essay on impeachment written by Josiah Quincy, Jr. in 1768, which cites Rushworth and the monograph attributed to Selden, “On the Judicature of Parliament,” described above. JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY* 580–84 (1865).

350. *See* CHAPIN, *supra* note 346, at 19–28; *e.g.*, An Act Declaring What Shall Be Treason, ch. 3 (Oct. 1776), in 9 *THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA*, *supra* note 340, at 168.

351. 1 JOHN JAY: *THE MAKING OF A REVOLUTIONARY* 278 (Richard B. Morris ed., 1975); Nettels, *supra* note 346, at 43 (quoting Resolution of June 17, 1776, in 6 *AMERICAN ARCHIVES: FOURTH SERIES* 1410 (Peter Force ed., 1846)).

treason trials, then, the revolutionaries turned to what James Willard Hurst has called “summary executive action,” carried out by wartime committees, associations, and assemblies.<sup>352</sup> I will explore the proceedings of a number of those committees below, including the well-known “committee for detecting conspiracies” in New York. That committee summoned, arrested, interrogated, deported, and jailed those it found to be “notoriously disaffected” with the American cause. Notice the terminology; the committee mixed summary legal proceedings not unlike those of parliamentary attainder with preventive forms of justice, predicating its action on evidence ranging from widely published statements to mere reputation.

Such proceedings posed obvious dangers of abuse, and students of the Revolution have long known of the evils that befell American loyalists—referred to, derisively, as “Tories”—during the war.<sup>353</sup> Recent loyalist studies have largely framed attainder in this light, as a tool of reprisal, vengeance, or coldly calculated wartime strategy. Thus, historian Maya Jasanoff describes attainder as part of the “persecution of loyalists” that accelerated after the Battle of Saratoga.<sup>354</sup> Another study observes the use of attainder and confiscation to “rebuild each colony’s faltering financial position.”<sup>355</sup> It was theft to finance war. After the war, the continued presence of defeated Tories was, in the words of Judith Van Buskirk, “too much to bear,” and extreme Whigs pushed for their expulsion and the confiscation of their lands to compensate for wartime injuries.<sup>356</sup> There is much to these judgments, of course, just as there is good evidence that efforts to attain loyalists were animated by a striking combination of passion and dehumanizing coldness. But so were efforts to *prosecute* loyalists in *courts of law*, as the treason trials after the liberation of Philadelphia demonstrate.<sup>357</sup> One cannot infer from the motives with which revolutionaries employed bills of attainder and other forms of summary proceeding that the proceedings themselves were understood to be illegitimate.

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352. HURST, *supra* note 347, at 83.

353. Here I refer to the early loyalist histories of VAN TYNE, *supra* note 17, and Thompson, *supra* note 17.

354. MAYA JASANOFF, *LIBERTY’S EXILES: AMERICAN LOYALISTS IN THE REVOLUTIONARY WORLD* 41, 68 (2011).

355. RUMA CHOPRA, *UNNATURAL REBELLION: LOYALISTS IN NEW YORK CITY DURING THE REVOLUTION* 160 (2011).

356. JUDITH L. VAN BUSKIRK, *GENEROUS ENEMIES: PATRIOTS AND LOYALISTS IN REVOLUTIONARY NEW YORK* 183–87 (2002).

357. See, e.g., C. Page Smith, *The Attack on Fort Wilson*, 78 PA. MAG. HIST. & BIOGRAPHY 177, 177–83 (1954) (describing the attack on the house of James Wilson, who defended the accused in the trials).

As our discussion of parliamentary practice shows, bills of attainder were part of an ancient legal tradition for punishing crimes against the state where judicial forms of process were impossible. This tradition is essentially ignored in recent loyalist histories, and even the major American commentaries on treason, which pause only to condemn it.<sup>358</sup> The tradition was not ignored, however, by leading lawyers in the American Revolution, even though it was quite old by the late eighteenth century and arguably moribund. Men like Patrick Henry and Thomas Jefferson in Virginia and Thomas McKean in Pennsylvania repeatedly defended bills of attainder and related forms of summary justice, drawing on some of the very events discussed above. In New York, even conservative Whigs like Gouverneur Morris and Egbert Benson, working alongside radicals like John Morin Scott, supported the use of bills of attainder to confiscate the land of loyalists.<sup>359</sup> Some Americans drew what they thought to be crucial distinctions among the different forms of attainder. Jefferson defended only the suspensive bill.<sup>360</sup> The great John Jay sat on New York's committee for detecting conspiracies, where he directed the use of summary procedures closely resembling parliamentary attainder—and yet, several years later, strongly condemned the state's confiscation of loyalist property by act of attainder.<sup>361</sup> Criticizing South Carolina's own confiscation act, lawyer Aedanus Burke singled out the practice of "attainting without a hearing," which he thought widely condemned in English history.<sup>362</sup> American lawyers, then, did not reject or accept bills of attainder *in toto*, but vigorously contested their proper scope and form. To understand why and what distinctions they drew requires close study.

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358. Only one short study of treason prosecution in the Revolutionary period frames attainder in this way. See Peter G. Yackel, *Criminal Justice and Loyalists in Maryland: Maryland v. Caspar Frietschie, 1781*, 73 MD. HIST. MAG. 46, 46–47 (1978). Hurst and Chapin address attainder and other forms of summary process only briefly. See CHAPIN, *supra* note 346, at 75–80; HURST, *supra* note 347, at 83, 100, 102–06. Slaughter passes over the matter entirely. Other recent studies of attainder by legal historians evidence basic misunderstandings. For example, in an effort to press the case that bills of attainder were not merely wartime devices, one writer identifies as "classic bill-of-attainder form" an act providing that those who engaged in certain proscribed actions would "be, on conviction thereof, adjudged guilty of misprision of treason." Far from being in classic bill-of-attainder form, the act is not an attainder at all. See Act of May 12, 1784, ch. 66, in 1 LAWS OF THE STATE OF NEW YORK 772, 772–73 (1886); Brett Palfreyman, *The Loyalists and the Federal Constitution: The Origins of the Bill of Attainder Clause*, 35 J. EARLY REP. 451, 460 (2015).

359. On Henry and Jefferson, see Steilen, *supra* note 349; on Morris, Benson, and Scott, see *infra* Part III.A; on McKean, see *infra* Part III.B.

360. MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 131–32 (1970).

361. See *infra* Part III.A.

362. Aedanus Burke, *On the Confiscation Act*, N.Y. GAZETTE & WKLY. MERCURY, May 26, 1783, at p. 1, col. 2; see also RODNEY L. MOTT, *DUE PROCESS OF LAW* 140–41, 140 n.64 (1926).

What follows is an account of the use of bills of attainder and related forms of proceeding in the revolutionary regimes of New York and Pennsylvania. The account shows, I think, that leading lawyers in both states participated in, and accepted, summary legal proceedings in so-called “extraconstitutional” committees and associations, as well as the assembly, the executive, and legislative and executive committees. It illustrates the close relationship, both formally and in practice, between the summary justice of the committee and the bill of attainder. It evidences the familiarity that defenders of these proceedings showed with English practice. And, finally, the account suggests that the bills of attainder were not limited to the assembly. As the case of Pennsylvania shows, members of the framing generation used the word “attainder” to describe actions by the executive as well as the legislature, at least where the executive was exercising delegated power. It was no less an act of attainder if the legislature left the executive to fill in some of the names.

#### A. *New York*

New York has a long history of bills of attainder and similar summary proceedings.<sup>363</sup> The practice goes back at least to the spread of English law in the colony at the end of the seventeenth century.<sup>364</sup> In 1691 a special commission of oyer and terminer tried and attainted Captain Jacob Leisler for seizing power in the period following the abdication of James II.<sup>365</sup> Leisler contested the court’s jurisdiction and refused to enter a plea. The issue was apparently referred to the governor, but there is no record of any process on the plea and the court entered judgment.<sup>366</sup> Leisler was executed, but others also attainted were not.<sup>367</sup> In 1702 Nicholas Bayard was tried for treason by another special commission, but proceedings largely followed the

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363. This has long been known; the comprehensive study is Alison Reppy, *The Spectre of Attainder in New York* (pts. 1 & 2), 23 ST. JOHN’S L. REV. 1, 243 (1948–1949).

364. On the state of English law in late seventeenth-century New York, see 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730*, at 46–47, 50–52 (2013).

365. Reppy, *supra* note 363, at 5.

366. The governor may have attempted to compel Leisler to enter a plea by putting him in “tie and iron,” but apparently Leisler was not pressed. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 83, 582–83 (1944). *Cf.* Act of Mar. 30, 1778, ch. 19, in 1 *LAWS OF THE STATE OF NEW YORK*, *supra* note 358, at 43 (banning pressing).

367. Reppy, *supra* note 363, at 5. Leisler’s attainder was later reversed. Act of May 16, 1699, ch. 64, in 1 *THE COLONIAL LAWS OF NEW YORK* 384, 384–85 (James B. Lyon ed., 1894); 6 & 7 W. & M. c. 30, in 6 *STATUTES OF THE REALM* 615. A number of Leisler’s associates were attainted but not executed. *See* Reppy, *supra* note 363, at 5.

common law, and Bayard obtained a reversal on appeal to the privy council.<sup>368</sup>

1. *The Attainder of Ethan Allen.* In 1773 and 1774 disputes over land titles in parts of Albany and Charlotte Counties, which would eventually become Vermont, led to a breakdown in civil authority. Ethan Allen and the Green Mountain Boys (his appellation), i.e., the ‘Bennington Mob’ (the government’s), attacked, beat, and whipped magistrates, burned their homes, and threatened those who held title under grant from New York.<sup>369</sup> The gang hoped to suspend process on decisions favoring New York grantees; magistrates (or justices of the peace) formed the base of the colony’s administrative power, and one of Allen’s preferred tactics of intimidation was to set up a para-court and sit in judgment on the magistrates themselves.<sup>370</sup> Magistrate Benjamin Hough did not appreciate the experience, and in early 1774 he petitioned Governor William Tryon for relief. The petition asserted that “the Civil authority . . . is altogether Silenced, neither Magistrates nor inferiour Officers being able to Officiate in their respective Stations.”<sup>371</sup> On February 2, 1774, the petition was read by the governor “in Council,” a group of twelve royal appointees fashioned in the likeness of the privy council, who could also sit with the governor as a court of chancery.<sup>372</sup> Rather than act on the petition themselves, the governor and council referred it with its supporting depositions to the general assembly.<sup>373</sup> The assembly

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368. HURST, *supra* note 347, at 74–75, 110 n.15; Reppy, *supra* note 363, at 10–11.

369. See CHARLES A. JELLISON, *ETHAN ALLEN: FRONTIER REBEL* 84–91 (1969).

370. SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787*, at 255 (2011); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 103 (2005).

371. Petition from Magistrate Benjamin Hough to Governor Tryon Requesting an Armed Force to Protect Durham Settlers from the Bennington Mob, in 4 *DOCUMENTARY HISTORY OF THE STATE OF NEW YORK* 518, 518–19 (E.B. O’Callaghan ed., 1851).

372. 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 38–39 (1906); see Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 46, 47 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

373. The petition might have been referred to chancery and treated as a bill of complaint, thus initiating a suit, see 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 173 (Julius Goebel, Jr. ed., 1964), but chancery would be an ineffective tool for dealing with a complete breakdown in government, as its process would depend on the very magistrates Allen’s Boys had targeted. Nor could Tryon, invoking his military authority, call out the British regulars, as the King had expressed disagreement with doing so. Letter from Lord Dartmouth to Governor Tryon (Oct. 14, 1773), in 4 *DOCUMENTARY HISTORY OF THE STATE OF NEW YORK*, *supra* note 371, at 518, 518. Tryon was called to London by the King in early 1774 and was asked by the general assembly to plead for his assistance. See John Cruger, Speaker, Gen. Assembly of the Colony of N.Y., *The Humble Address of the General Assembly of the Colony of New-York* (Jan. 18, 1774) (transcript available in the Public Record Office, London, copy 5/1106, f. 94).

referred the matter to its committee of grievances, which examined Hough's proofs and then recommended that the governor issue a proclamation for Allen's capture.<sup>374</sup>

The proclamation was issued on March 9th, but more important was the act passed the same day by governor and assembly, titled, "An Act for preventing tumultuous and riotous Assemblies."<sup>375</sup> As the title suggests, the first part of the law was a traditional "riot act," which required groups in Charlotte and Albany counties "tumultuously assembled . . . to the Disturbance of the Public Peace" to depart on the order of a magistrate.<sup>376</sup> If they failed to disperse, conviction "in due Form of Law" could result in a year imprisonment and corporal punishment.<sup>377</sup> Given the breakdown in civil authority, however, a riot act alone was unlikely to do the job, and for this reason the act also contained an attainder. Citing "Complaint and Proofs [made before] the Governor in Council [and] the General Assembly," the Act identified Allen's Boys by name as the cause of disorder in Charlotte and Albany.<sup>378</sup> It was "indispensably necessary for want of Process to Outlawry (which is not used in this Colony,) that special provision be made for bringing such Offenders in future to Trial and Punishment."<sup>379</sup> The law then authorized the governor to order "the abovenamed Persons or any other person [who] shall be indicted" for felony to surrender within seventy days.<sup>380</sup> If the suspect did not surrender, he would "be adjudged deemed and taken (if indicted for a Capital Offence hereafter to be perpetrated,) to be convicted and attainted of Felony, and shall suffer Death as in Cases of Persons convicted and attainted of Felony by Verdict and Judgment."<sup>381</sup>

374. Proclamation of Governor Tryon Offering a Reward for the Arrest of Ethan Allen and Other Rioters, in 4 DOCUMENTARY HISTORY OF THE STATE OF NEW YORK, *supra* note 371, at 526–27.

375. Act of Mar. 9, 1774, ch. 1660, in 5 THE COLONIAL LAWS OF NEW YORK, *supra* note 367, at 647.

376. *Id.* at 647–48.

377. *Id.* at 648.

378. *Id.* at 651.

379. *Id.* at 651–52. The assertion about outlawry is accurate. GOEBEL, JR. & NAUGHTON, *supra* note 366, at 445.

380. Act of Mar. 9, 1774, ch. 1660, in 5 THE COLONIAL LAWS OF NEW YORK, *supra* note 367, at 652. Goebel and Naughton suggest that such an order required the support of council, GOEBEL, JR. & NAUGHTON, *supra* note 366, at 446, but as I read the statute, the latter was required only when the order issued from the *acting* governor. See Act of Mar. 9, 1774, ch. 1660, in 5 THE COLONIAL LAWS OF NEW YORK, *supra* note 367, at 652 ("[H]is Excellency the Governor, or the Governor or Commander in Chief for the Time being by and with the Advice of the Council . . ." (emphasis added)).

381. Act of Mar. 9, 1774, ch. 1660, in 5 THE COLONIAL LAWS OF NEW YORK, *supra* note 367, at 652–53. Daniel Hulsebosch's remark in *Constituting Empire* that the act "bypassed grand jury indictments" does not describe the suspensive attainder portion of the law,



Allen dubbed the law “the Bloody Act,”<sup>382</sup> and promised, in a long and florid letter, that he and the Boys would “inflict *immediate death* on whomsoever” tried to capture them.<sup>383</sup> In fact, the act was never enforced,<sup>384</sup> but it still cost New York dearly in terms of public opinion.<sup>385</sup> Tryon and council were no Henry and Cromwell. Their defeat in the propaganda battle at the hands of an inflamed and loquacious Allen is probably not surprising, but the form of process they chose might have been more ably defended. It was, in effect, a suspensive attainder, a form that had been long employed in cases where process at common law was impossible, due to a breakdown in civil authority. Nor could this attainder be accused of being an *ex post facto* law: it attainted only those individuals who committed a known felony *after* the enactment of the law (“hereafter to be perpetrated”).<sup>386</sup> It did not eliminate a suspect’s right to be tried according to common law procedures, which he could claim by timely surrender. And the act was not limited to Allen, or even to his Green Mountain Boys, but extended generally to “any other person” who was indicted and refused to surrender. It was, in short, a means for the governor to extend the reach of justice where normal forms of process had failed. Ethan Allen played the role of New York’s Jack Cade. The Green Mountain Boys, of course, saw it differently; but others in Albany and the city of New York did not.

For all the heat it generated, then, the Allen attainder was relatively traditional. It was enacted in a forum controlled by allies of the government, and it served government ends. The General Assembly was then part of an “administrative machine” through which the Crown and ministry exercised influence in the province, acting through placemen.<sup>387</sup> In the Governor’s Council, where the

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whose application is expressly premised on indictment. HULSEBOSCH, *supra* note 370, at 103–04, 347 n.146.

382. JELLISON, *supra* note 369, at 92.

383. Spirited Remonstrance of Ethan Allen et al. (Apr. 26, 1774), in VERMONT STATE PAPERS 49, 52 (William Slade ed., 1823).

384. GOEBEL, JR. & NAUGHTON, *supra* note 366, at 447.

385. JELLISON, *supra* note 369, at 93, 96.

386. The act did authorize courts to enter judgment on *non-capital charges* for which the suspect had been indicted before passage of the act. See Act of Mar. 9, 1774, ch. 1660, in 5 THE COLONIAL LAWS OF NEW YORK, *supra* note 367, at 647, 652–53.

387. BERNARD MASON, THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773–1777, at 45–47 (1966). As a constitutional matter, both Lincoln and Chester describe the 1691 Charter of Liberties as conferring legislative authority on the governor, who enacted laws with the advice and consent of the council and a majority of the assembly. 1 LEGAL AND JUDICIAL HISTORY OF NEW YORK 222 (Alden Chester ed., 1911); 1 LINCOLN, *supra* note 372, at 437. The enacting language of the Allen attainder does not suggest this same relationship, however. See Act of Mar. 9, 1774, ch. 1660, in 5 THE COLONIAL LAWS OF NEW YORK, *supra* note 367, at 647, 652.

political faction based around the DeLancy family held sway, there was a special interest in land patents; the Crown used patents to exert influence in New York, and the DeLancys (along with much of the government 'in crowd') had gobbled them up.<sup>388</sup> From this perspective, Allen's attainder can be read as an effort by the government to vindicate royal interests in a forum it controlled.<sup>389</sup>

2. *Revolutionary New York.* This basic framework was to change in the next twenty-four months, as the Revolutionary War came to New York. At the end of that period, one could no longer describe the Assembly as a means for the Crown to deliver justice in the colony. Government would pass to New Yorkers themselves. The form of government would be republican; members assembled themselves into numerous committees and congresses, where legislative, executive, and judicial functions were mixed to meet the task at hand.<sup>390</sup> The variety is remarkable. Like other colonies, New York had committees of correspondence and committees of observation, as well as committees known by their size (the committees of fifty-one, sixty, and one hundred were important), membership (mechanics), and geography (county, district, and town).<sup>391</sup> Loyalists spoke derisively of being "enslaved" by "committee men"—an obvious exaggeration, but perhaps not entirely misleading.<sup>392</sup> In 1774 and early 1775, New York committees became the locus of pervasive mob action—tarring and feathering, rail-riding, and similar forms of rough persuasion—doled out particularly by the Sons of Liberty and certain groups of radical Whigs.<sup>393</sup> After the battle of Lexington in April 1775, local committees elected a Provincial Congress (an illegal alternative to the royally-sanctioned General Assembly), which delegated governing authority in its absence to a Committee of Safety.<sup>394</sup>

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388. MASON, *supra* note 387, at 47. The DeLancyite-turned-Livingstonian James Duane held 100,000 acres in the areas disputed with New Hampshire. RICHARD M. KETCHUM, *DIVIDED LOYALTIES: HOW THE AMERICAN REVOLUTION CAME TO NEW YORK* 281 (2002).

389. MASON, *supra* note 387, at 47–50.

390. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 27–35, 40–46 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers, Inc., expanded ed. 2001).

391. See, e.g., KETCHUM, *supra* note 388, at 267–70, 291–92, 301, 304, 327–28; 1 LINCOLN, *supra* note 372, at 475–78. A detailed account of the factional politics of New York's revolutionary committees can be found in MASON, *supra* note 387, at 62–99.

392. VAN TYNE, *supra* note 17, at 65.

393. See, e.g., *id.* at 61–62.

394. See CARL LOTUS BECKER, *THE HISTORY OF POLITICAL PARTIES IN THE PROVINCE OF NEW YORK, 1760–1776*, at 201–07, 211 (3d prtg. 1968); MASON, *supra* note 387, at 178–84. The Committee of One Hundred in the city and later the Provincial Congress took upon themselves important government functions, but Hulsebosch points out that in New York, unlike some other colonies, the local institutions of colonial government continued to function for some time. See HULSEBOSCH, *supra* note 370, at 150–53.

Although New York's committeemen had by then moved beyond merely mobbing, they became at the same time progressively less tolerant of political dissent. The Provincial Congresses that met in late 1775 and early 1776 addressed the dangers posed by the state's so-called Tories by having them arrested, interrogated, deported, seizing their property, and depriving them of basic civil rights.<sup>395</sup>

Most of these acts were not acts of attainder in the eyes of contemporaries. In June 1776, as concerns about loyalists began to mount in advance of a British invasion, John Hancock impatiently urged that New York should simply "attaint all traitors."<sup>396</sup> Apparently New York was doing something else, acting with too light a hand. Its preference was to address the threat of loyalists by using committees as special commissions of inquisition. Thus, in September 1775, the Provincial Congress instructed local committees to try individuals suspected of resisting its authority and to disarm those found guilty.<sup>397</sup> Then, in the spring of 1776, intelligence from General Washington about subversive activity led to the formation of several "secret committees."<sup>398</sup> A committee formed on June 5, 1776, which included John Jay and Gouverneur Morris, was charged with examining individuals whom the Provincial Congress had reason to believe were attempting to aid British forces.<sup>399</sup> The men were named in the resolution and described as "persons

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395. See BECKER, *supra* note 394, at 216; VAN TYNE, *supra* note 17, at 62–68, 120–27.

396. ALEXANDER CLARENCE FLICK, *LOYALISM IN NEW YORK DURING THE AMERICAN REVOLUTION* 71 (Univ. Press of the Pac. 2002) (1901). On the timing of the comment and the focus in the Third Provincial Congress on dealing with loyalists, see BECKER, *supra* note 394, at 261–62, 264.

397. Resolutions of Sept. 1, 1775, in 1 *JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK, 1775–1776–1777*, at 131–32 (1842) [hereinafter *JOURNALS OF THE PROVINCIAL CONGRESS*]; Resolution of Sept. 1, 1775, in 3 *AMERICAN ARCHIVES: FOURTH SERIES* 571, 572–74 (Peter Force ed., 1840). Flick dates these resolutions at August 3rd, but the date is incorrect. See FLICK, *supra* note 396, at 60; VAN TYNE, *supra* note 17, at 121 (following Flick). The resolutions were adopted in response to a letter from the committee of Brookhaven, which was dated August 3rd, see Resolutions of Aug. 11 and Aug. 23, 1775, in 1 *JOURNALS OF THE PROVINCIAL CONGRESS*, *supra*, at 105, 118, but the Journal and Force's Archives show that the resolutions themselves were made on September 1, 1775. See BECKER, *supra* note 394, at 223–24 (following *American Archives: Fourth Series*).

398. FLICK, *supra* note 396, at 66–69; MASON, *supra* note 387, at 199–202.

399. See Resolution of June 5, 1776, in 1 *JOURNALS OF THE PROVINCIAL CONGRESS*, *supra* note 397, at 475–76. Flick appears to conflate the Jay-Morris committee with a standing committee of five charged on May 27 with examining individuals arrested on the order of the Provincial Congress or Committee of Safety. See FLICK, *supra* note 396, at 66. The latter committee had a distinct membership, see Resolution of May 27, 1776, in 6 *AMERICAN ARCHIVES: FOURTH SERIES*, *supra* note 351, at 1337, and it seems likely that its purpose was to determine whether individuals then in custody had violated any of the September 1, 1775 resolutions of the Provincial Congress, see Resolutions of Sept. 1, 1775, *supra* note 397, at 131–32.

dangerous” or “enemies of America[.]”<sup>400</sup> The committee was to have them arrested and examined, and to jail, relocate, or release them on promises of good behavior.<sup>401</sup> New intelligence led to a second secret committee on June 17th.<sup>402</sup> Generally, these committees operated by examining individuals in person, on information supplied by witness deposition or else “notoriously” known, which might refer either to the report of a local committee or to military intelligence.<sup>403</sup> Neither the June 5th nor the June 17th committee was granted the authority to convict or attain the absent.<sup>404</sup>

Other proceedings, however, more overtly resembled the bill of attainder. Consider the committee formed on September 21, 1776, known as the committee for “inquiring into, detecting and defeating all conspiracies,” which was initially chaired by William

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400. Resolution of June 5, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 476.

401. *Id.*

402. This was the “Hickey Plot,” which involved Governor Tryon’s effort to recruit loyalists to assist the British upon their invasion of New York City. *See* Nettels, *supra* note 346, at 40–45. For the act creating the committee, see 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 497 (“Ordered, That Mr. Ph. Livingston, Mr. Jay and Mr. Morris, be a secret committee to confer with Genl. Washington, relative to certain secret intelligence communicated to this Congress, and take such examinations relative thereto as they shall think proper.”).

403. *See, e.g.,* BECKER, *supra* note 394, at 264; FLICK, *supra* note 396, at 69, 80; 6 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 351, at 1153–83 (calling suspects and taking witness depositions); Letter from General George Washington to John Jay (June 29, 1776), in 1 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1763–1781, at 65–66 (Henry P. Johnston ed., 1890) [hereinafter PAPERS OF JAY] (highlighting the examination of Gilbert Forbes in coordination with Washington). The “notoriously disaffected” language appears in 6 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 351, at 1175, as well as throughout the records of this and similar secret committees. Referring to these records, Flick writes that “[a] sub-committee was named to try loyalists at a distance,” FLICK, *supra* note 396, at 67, but the only sense in which this is true is that Gouverneur Morris and John Jay took depositions outside the presence of the full committee, whose content was relevant to charges against individuals not present at the deposition. *See, e.g.,* 6 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 351, at 1160–61.

404. Language in the June 5th act implies that the person in question is before the committee. *See* Resolution of June 5, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 476–77 (“And with respect to all such of the said persons as the committee shall find guilty of all or any of the said offences the said committee are hereby authorized and required to commit to safe custody [those that would be a danger] . . . and that they discharge the remainder . . . [I]f on the appearance and examination of the said persons, it shall appear to the satisfaction of the said committee . . .”). The June 17th commission assumes that Jay and Morris will conduct examinations, but it says nothing definite about their powers to make findings or enter judgment. *See* Resolution of June 17, 1776 at 497 (“take such examinations relative thereto”). On the actual investigation, see 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY: UNPUBLISHED PAPERS 1745–1780, at 278 (Richard B. Morris ed., 1975) [hereinafter UNPUBLISHED JAY PAPERS]. The committees unquestionably enjoyed extensive powers to summon, arrest, jail and to execute their process by military force. FLICK, *supra* note 396, at 81–82, 84.

Duer and included John Jay.<sup>405</sup> Its aim was to prevent the advancing British from mobilizing loyalists as a fifth column.<sup>406</sup> Like its predecessor of June 17th, the committee for detecting conspiracies was empowered not only “to send for persons and papers,” but “to call out such detachments of the militia, or troops . . . as they may, from time to time, deem necessary for suppressing insurrections; [and] to apprehend, secure or remove such persons whom they shall judge dangerous to the safety of the State.”<sup>407</sup> Committee minutes evidence various forms of proceeding.<sup>408</sup> In some cases, the committee ordered that an individual be arrested and brought before it for examination, proceedings like those employed by the June 5th committee. Whereas “Cadwallader Colden of Ulster,” son of the former governor, had been “represented” to be “notoriously disaffected to the American cause,” and the committee “have reason to believe” that he had “Countenanced and abetted measures prejudicial to the rights of America,” he was ordered “apprehended and brought before this committee.”<sup>409</sup> The arresting officer brought him, along

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405. See Resolution of Sept. 21, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 638; MASON, *supra* note 387, at 202. James Westfall Thompson describes Jay as chair, but it was a position that rotated between Duer, Jay, and others. See 1 MINUTES OF THE COMMITTEE AND OF THE FIRST COMMISSION FOR DETECTING AND DEFEATING CONSPIRACIES IN THE STATE OF NEW YORK, DECEMBER 11, 1776–SEPTEMBER 23, 1778, at 21, 51, 63 (1924) [hereinafter MINUTES OF THE COMMITTEE FOR DETECTING CONSPIRACIES]; Thompson, *supra* note 17, at 152. While the Provincial Congress usually referred to the committee as the committee for detecting conspiracies, today it is often called the “committee on conspiracies.” *E.g.*, MASON, *supra* note 387, at 202–03.

406. See 1 WILLIAM JAY, THE LIFE OF JOHN JAY 48–49 (reprt. 1972) [hereinafter LIFE OF JAY]; Resolution of Sept. 21, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 638. The Provincial Convention and its Committee of Safety had initially attempted to investigate loyalists themselves, beginning with the leading Anglican minister Samuel Seabury. WALTER STAHR, JOHN JAY: FOUNDING FATHER 67–68 (2005); see, e.g., 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 618–19, 620–21, 627, 628. The nineteenth-century editor of Jay’s papers, Henry Johnston, suggests that the resolution creating the committee for detecting conspiracies only passed “after much debate,” 1 PAPERS OF JAY, *supra* note 403, at 90 n.1, but Convention minutes do not reveal the content of that debate. See Minutes of the Provincial Congress (Sept. 21, 1776), in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 638–39 (describing the Convention’s reception of the proposed resolutions creating the committee).

407. Resolution of Sept. 21, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 638. For that grant of authority to the June 17th committee, see Resolution of June 20, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 500 (“Resolved, That the said committee . . . do cause such persons [i.e., ‘dangerous persons’] to be apprehended and secured in such manner as they may think most prudent; and that they have authority either to employ the militia or obtain detachments of Continental troops from the Commander-in-Chief for that purpose . . .”).

408. For a description of proceedings that rely on the minutes, see 1 LIFE OF JAY, *supra* note 406, at 50 (“[I]n short, a vigilant and vigorous system of police was exercised by this committee in every part of the State . . .”).

409. 1 MINUTES OF THE COMMITTEE FOR DETECTING CONSPIRACIES, *supra* note 405, at 14. Colden later petitioned to return but was refused. *Id.* at 82–83.

with a bundle of documents and a “piece of Poetry reflecting on the measures pursued by the Americans”; Colden was ordered removed to Boston.<sup>410</sup> This appears to have been the usual form of proceeding, but other cases show the use of summary procedures, particularly in the first months the committee sat.<sup>411</sup> Thus, informed by a county committee that Timothy Clossen was “either . . . aiding, assisting, or abetting the enemy, in subverting the liberties of America, or . . . notoriously disaffected to the measures pursued for the establishment of American liberty,” the committee ordered him “closely confined in jail till further orders from this Committee or the Legislature of this State, unless sooner discharged by due course of law.”<sup>412</sup> Clossen was thus jailed summarily, without a hearing, but might be freed subsequently by “due course of law,” a form of proceeding the committee left undefined.<sup>413</sup> Matters were initiated before the committee by report, letter, or petition.<sup>414</sup> Reputation was of signal importance,<sup>415</sup> as an accusation might be anonymous,<sup>416</sup> or based on the faceless report of a local committee.<sup>417</sup> The threshold for

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410. *Id.* at 15.

411. These proceedings would have been in the period before the new Constitution was drafted. *See, e.g., id.* at 5, 27, 29, 31, 34, 35, 40, 46, 49, 58, 65. Many other instances could be cited in material from the minutes before the adoption of the state constitution.

412. *Id.* at 8; *see also id.* at 76 (ordering the delivery of John Bloomer for proceedings before the Convention “inasmuch as the said John Bloomer is a Subject of this State and therefore hath as undoubted right to a Trial in it”).

413. Other men the committee ordered “immediately removed . . . till such times as proper courts shall be instituted in this State for the due trial and punishment of such treasonable practices . . .” *Id.* at 2. In June 1776, royal judges had refused to try two members of the Continental Army on the grounds that they derived their authority from the crown. 1 UNPUBLISHED JAY PAPERS, *supra* note 404, at 278. After New York signed the Declaration of Independence in early July, the Convention of the State of New York instructed “all magistrates and other officers of justice in this State . . . to exercise their respective offices . . . under the authority and in the name of the State of New-York.” Resolution of July 16, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 527; *see* 1 LINCOLN, *supra* note 372, at 488. Hulsebosch suggests in his study that “[s]everal of [the colonial] courts operated during the war. Those that did not probably could not.” HULSEBOSCH, *supra* note 370, at 180.

414. For two examples of proceedings by petition, which were informal, *see* 1 MINUTES OF THE COMMITTEE FOR DETECTING CONSPIRACIES, *supra* note 405, at 52, 76.

415. *See, e.g., id.* at 26, 29, 75.

416. *See id.* at 33.

417. *See, e.g., id.* at 28, 70, 86. Bradley Chapin’s statement that, under the procedures employed by the “commissions for detecting conspiracies, . . . [a] warrant would be issued in response to an accusation made by an individual citizen,” CHAPIN, *supra* note 346, at 65, does not best describe the nature of proceedings before the committee for detecting conspiracies in late 1776. On several occasions cited above, a local committee member simply appeared before the committee and read or delivered a letter reporting information the committee had gathered, without attributing that information to a particular source. As I interpret such a procedure, the *committee* made the accusation, rather than the individual reading the letter.

action was relatively low. The committee acted on accusations when it had "the highest reason to believe,"<sup>418</sup> when there was "reason to imagine,"<sup>419</sup> or when "it appears clearly"<sup>420</sup> that someone had engaged in "treasonable practices, or [was] notoriously disaffected."<sup>421</sup> The committee inclined towards distrust; since neutrals had previously gone over to the enemy, it stated, "it is reasonable to suppose that many persons who affect a similar neutrality of principal only wait [for] an opportunity [sic] of persuing [sic] a similar Conduct with those who have at length thrown off the mask."<sup>422</sup> Thus it was "[r]esolved that . . . all such persons ought forthwith to be removed to one of the neighbouring states."<sup>423</sup>

We should conclude, then, that committee procedures were summary in form.<sup>424</sup> The committee could (1) act on general allegations, (2) concerning treason or undefined threats to the state (e.g., 'disaffection'), (3) of whose truth its members were only reasonably satisfied, and (4) without permitting a suspect to first appear and respond—at least, that is, until "due course of law" was available.<sup>425</sup> It (5) mixed legislative and judicial functions; committee 'resolutions' (the same form of proceeding utilized by the Committee of Safety and Provincial Congress) might apply to named persons or classes of individuals described in general terms.<sup>426</sup> Yet while the committee could deport suspects or jail them indefinitely, it did not purport to dispose of matters by final judgment, ordinance, or resolution, and it did not order forfeiture or the execution of those it found engaged in traitorous

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418. 1 MINUTES OF THE COMMITTEE FOR DETECTING CONSPIRACIES, *supra* note 405, at 2.

419. *Id.* at 9.

420. *Id.* at 11.

421. *E.g., id.* at 6.

422. *Id.* at 13.

423. *Id.*

424. FLICK, *supra* note 396, at 121.

425. In March 1777, shortly before the enactment of the constitution of 1777, the Provincial Convention resolved that "an act of grace for all such persons as have been sent out of this State by the committee for detecting conspiracies, or confined within this State by their order . . . charged with notorious disaffection to the American cause, and not charged with treason" be prepared by committee. Resolution of Mar. 4, 1777, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 823. Gouverneur Morris was made a member of the committee and reported back on March 7; the proposed act, which was entered as a resolution in the minutes, extended to those who had not taken up arms against the Continental army or supplied the loyalists, and required them to take an oath of loyalty. See Resolution of Mar. 7, 1777, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 827.

426. See 1 MINUTES OF THE COMMITTEE FOR DETECTING CONSPIRACIES, *supra* note 405, at 3-4, 13.

activities.<sup>427</sup> Nonetheless, the overall picture is highly suggestive of the English bill of attainder.

Undoubtedly, the reason for proceeding summarily was the pressing nature of the committee's business: managing internal dissent during war. Thus the purpose, as well as the form of proceedings, is evocative of English attainders. The fragile state of New York had long been known. In January 1776, nine months before the committee was created, General Charles Lee had complained to Washington about loyalists in the state, and proposed that he be sent to expel or suppress "that dangerous banditti of Tories who have appeared in *Long-Island*."<sup>428</sup> Washington turned to John Adams, who advised the General that loyalists "who have arms in their hands, and are intrenching themselves, professedly to oppose the *American* system of defence; who are supplying our enemies, both of the Army and Navy" were enemies and thus came under his military jurisdiction.<sup>429</sup> Lee was consequently instructed to proceed,<sup>430</sup> but when John Jay learned Lee had imposed a loyalty oath on the residents of Long Island, he was furious. On March 1, 1776, Jay, James Duane, John Alsop, and Lewis Morris wrote the Provincial Congress, expressing their alarm at discovering that a loyalty oath, however "salutary" a measure it might be, "should owe its authority to any military officer, however distinguished."<sup>431</sup> Considering the matter "on general principles," they wrote, "[t]here can be no liberty where the military is not subordinate to the civil power in everything not

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427. The Provincial Convention defined treason and made it punishable by death only after independence, on July 16, 1776. See Resolution of July 16, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 527. The resolution included only parts of the definition of treason from the 1352 Statute of Treasons, namely, levying war against New York and adhering to the King of Great Britain.

428. Letter from General Charles Lee to General George Washington (Jan. 5, 1776), in 4 AMERICAN ARCHIVES: FOURTH SERIES 582, 582–83 (Peter Force ed., 1843).

429. Letter from John Adams to General George Washington (Jan. 8, 1776), in 4 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 428, at 604.

430. Letter from General George Washington to General Charles Lee (Jan. 8, 1776), in 4 THE WRITINGS OF GEORGE WASHINGTON 221–22 (John C. Fitzpatrick ed., U.S. George Washington Bicentennial Commission ed. 1931) (instructing Major General Charles Lee that he should, "[d]isarm[] all such persons upon long Island and elsewhere (and if necessary otherwise securing them), whose conduct, and declarations have rendered [sic] them justly suspected of Designs unfriendly to the Views of Congress"); see General Lee's Report to Congress (Jan. 22, 1776), in 4 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 428, at 805–07. Notably, Lee impugns Washington's instructions to disarm the loyalists: "The scheme of disarming, simply, the Tories, seems to me, totally ineffectual . . ." *Id.* at 806. He does suggest that disarmament is useful for supplying Continental troops with weapons, but his central recommendation is to appraise the value of loyalist estates and to administer a loyalty oath as Lee had done on his own initiative in December 1775 in Rhode Island. *Id.*

431. Letter from the Delegates of New York (Mar. 1, 1776), in 6 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 351, at 1392.



immediately connected with their operations.”<sup>432</sup> The Congress was unconvinced. On June 30th, shortly after the discovery of a massive loyalist plot, it granted Washington authority “to take such measures for apprehending and securing dangerous and disaffected persons as he shall think necessary for the security of this Colony.”<sup>433</sup> Jay regarded the arrangement with “Fear and Trembling.”<sup>434</sup> It was far better, Jay thought, to employ a form of civil summary proceeding to “remove such as are notoriously disaffected to Places where their arts and Influence will do us no Harm.”<sup>435</sup> About a month later, the Convention of the newly independent State of New York recalled Washington’s authority, which it would later delegate to Duer and Jay’s committee.<sup>436</sup>

The committee for detecting conspiracies exercised what we would call executive functions: It (1) issued orders to military officers on numerous occasions; (2) commanded its own ranger company and express riders; and (3) commissioned spies to infiltrate loyalist strongholds.<sup>437</sup> The key point is that in doing so, the committee subjected military forces to civil command, utilizing a summary form of proceeding like the English bill of attainder.<sup>438</sup> Whether Jay sharply distinguished the committee’s procedures

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432. *Id.*

433. Resolution of June 30, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 512. Previously the June 17th committee, on which Jay sat, had been granted the authority to call out the militia or Continental troops to secure “dangerous persons.” See Resolution of June 20, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 500.

434. Letter from John Jay to Robert R. Livingston (July 1, 1776), in 1 UNPUBLISHED JAY PAPERS, *supra* note 404, at 282.

435. Letter from John Jay to Alexander McDougall (Mar. 21, 1776), in 1 UNPUBLISHED JAY PAPERS, *supra* note 404, at 241. *Cf.* Letter from John Jay to Committee of Safety (Apr. 7, 1776), in 1 PAPERS OF JAY, *supra* note 403, at 51–52 (describing intelligence relating to a plot by Governor Tryon and then writing, “I must therefore request of you . . . to appoint proper persons to examine into this matter . . . by affidavits taken before the mayor or one of the judges of the supreme court” (emphasis added)).

436. See Resolutions of July 10 and July 16, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 518, 527; 1 LINCOLN, *supra* note 372, at 488.

437. *E.g.*, 1 MINUTES OF THE COMMITTEE FOR DETECTING CONSPIRACIES, *supra* note 405, at 47; see MASON, *supra* note 387, at 202. Overemphasizing this aspect of the business of the committee, Walter Stahr describes Jay as a “spymaster.” STAHR, *supra* note 406, at 70. Flick describes a similar committee formed on October 19, 1776, which served for a month on the northern front, in cooperation with General Schuyler. The committee “used troops to suppress insurrections at Helleberg” and in other places, but also “tried and sentenced loyalists.” FLICK, *supra* note 396, at 122.

438. *Cf.* MASON, *supra* note 387, at 201 (describing the recall of authority from Washington as a “precaution to safeguard civil authority”). The practice makes for a striking contrast with the British occupation of the city of New York, whose civilians (including loyalists) were subject to martial law. HULSEBOSCH, *supra* note 370, at 157–65; VAN TYNE, *supra* note 17, at 249. The British also imposed military government in Boston and Virginia, which was regarded as a violation of the colonists’ rights under the English constitution and their colonial charters. ADAMS, *supra* note 390, at 51, 57.

from the bill of attainder is impossible to know, as he never expressed himself on the matter. Jay certainly *could* have drawn a distinction, on the grounds that the committee did not confiscate land or take lives. As we will see, however, other New Yorkers grouped the proceedings together.

3. *The New York Constitution of 1777.* New York enacted its first constitution in April 1777.<sup>439</sup> The document is usually described as a victory for conservatives,<sup>440</sup> and grouped with the 'second wave' of state constitutions that compromised legislative supremacy to create a more energetic executive.<sup>441</sup> Jay, Morris, and Duer all served on the committee that prepared the draft, which historian Bernard Mason has argued was "the product of . . . joint labors."<sup>442</sup> The constitution that emerged did not contain a bill of rights, but article 41 did offer some protection against bills of attainder, which could not be "passed by the Legislature of this State[] *for crimes other than those committed before the termination of the present war.*"<sup>443</sup> Notably, the draft submitted to the Convention had barred acts of attainder outright, only to be amended.<sup>444</sup> On April 14th, days before enactment, Gouverneur Morris moved to permit attainders "for crimes hereafter to be committed"; Jay then moved to amend Morris's language to its final form.<sup>445</sup> Apparently the precise scope of the ban on attainder had come up once before, during the drafting process. An earlier draft of the constitution, which the full Convention never saw, contained a slightly different limitation, ordaining that "no Persons whatsoever within this State shall be

439. See 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 892–98.

440. *E.g.*, E. WILDER SPAULDING, *NEW YORK IN THE CRITICAL PERIOD, 1783–1789*, at 87–95 (Ira J. Friedman, Inc. 1963) (1932). Bernard Mason affirms this view, with some refinements. See MASON, *supra* note 387, at 230–31, 243–44.

441. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 103–04 (1988); see GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 430–33 (2d ed. 1998).

442. MASON, *supra* note 387, at 227; see also 1 LINCOLN, *supra* note 372, at 490–91. Mason argues that Jay, whose son, William Jay, credited him with drafting the constitution, "seems principally to have contributed clarity and economy of language." MASON, *supra* note 387, at 228.

443. 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 898 (emphasis added). The article also prohibited the corruption of blood.

444. See 1 LINCOLN, *supra* note 372, at 547.

445. 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 846, 881–82 ("Mr. Morris moved that the words, 'for crimes hereafter to be committed,' be added to that paragraph. Mr. Jay then moved, and was seconded by Mr. Robert Harper, for the following amendment to the amendment, . . . 'for crimes that may be committed after the termination of the present war.' . . . Mr. Jay then moved, and was seconded, for the following addition, viz: 'and that such acts shall not work a corruption of blood.'"). Both motions carried without a recorded division.

liable to any Loss or Punishment from any Act of Attainder or other sentence-of-Condemnation where the Party hath not an opportunity of being heard in his defence.”<sup>446</sup> The language suggests that acts of attainder are a kind of “sentence of Condemnation,” which might be imposed summarily without an opportunity for appearance and result in “any Loss or Punishment.” The language fairly describes Jay’s committee for detecting conspiracies, and it seems likely that someone on the drafting committee regarded its proceedings as akin to the bill of attainder.

Even if the constitution was a victory for conservatives, it did not end government by committee. A Council of Safety continued to operate even after the formation of the state’s first legislature, which was repeatedly forced to flee from the British Army.<sup>447</sup> Nor did the constitution or the new government end New York’s pursuit of its loyalists, which in fact accelerated under constitutional government.<sup>448</sup> In July 1776, the Provincial Convention declared that all residents deriving protection from the state owed it allegiance.<sup>449</sup> Soon, the committee for detecting conspiracies was replaced by a group of “commissioners” on conspiracies,<sup>450</sup> who were directed to administer loyalty oaths to persons previously removed from the state or released on parole by the committee for detecting conspiracies; those who refused were to be sent into British-held New York City.<sup>451</sup> At the end of March 1777, with conditions in the state continuing to deteriorate and the jails overfull, courts martial were established for trying cases of treason, with sentences of death made subject to legislative approval.<sup>452</sup> Removal of those who were

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446. See 1 LINCOLN, *supra* note 372, at 547 (strikethrough text) (emphasis added). It is difficult to say who proposed and who deleted the italicized language. Charles Lincoln concluded that the draft that contains the strikethrough was written in the hand of John McKesson, who was not on the committee that drafted the constitution, but was secretary of the Committee of Safety. *Id.* at 498. The McKesson version was a revision of a draft found in the papers of committee member Abraham Yates. MASON, *supra* note 387, at 227.

447. FLICK, *supra* note 396, at 117.

448. The first elections under the Constitution of 1777 placed the more radical Whigs in control. See SPAULDING, *supra* note 440, at 95, 100–01.

449. Resolution of July 16, 1776, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 527.

450. Resolution of Feb. 11, 1777, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 803. Jay was not among the commissioners; he began serving as the state’s Chief Justice in September 1777.

451. Act of June 30, 1778, ch. 47, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 87, 87–88; Resolution of Mar. 7, 1777, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 827.

452. Resolutions of Mar. 31, Apr. 1, and Apr. 21, 1777, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 856–57, 859, 898; CHAPIN, *supra* note 346, at 50–51, 64–65. In April the Convention had made the use of courts martial temporary on grounds that “a form of government will soon be established in this State, and proper courts organized for the trial

dangerous but had not committed treason continued, now with the aid of the governor. In April of its first session, the Legislature empowered “the person administering the government of the State . . . whenever he shall judge it necessary for the public safety, to cause . . . dangerous disaffected persons” residing near military posts and passes “to be removed to such other place or places within [the state] as he shall deem expedient.”<sup>453</sup> The governor was to “certify the names of persons so removed” to “commissioners of sequestration,” who would then place the removed in vacant properties.<sup>454</sup> The push against loyalists continued well past the turn of the war in late 1777.<sup>455</sup> Loyalists were successively barred from voting,<sup>456</sup> holding office,<sup>457</sup> practicing their professions,<sup>458</sup> suing in courts of the state,<sup>459</sup> trading with the British (such goods were made subject to seizure and condemnation)<sup>460</sup> and, finally, from holding property in New York.<sup>461</sup>

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of offenses therein.” Resolution of Mar. 31, 1777, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, *supra* note 397, at 856–57. A number of loyalist spies were tried by courts martial and executed. See CHAPIN, *supra* note 346, at 51–54; FLICK, *supra* note 396, at 126. An act passed in 1787 made treason triable only at common law. Act of Feb. 16, 1787, ch. 29, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 402, 402.

453. Act of Apr. 1, 1778, ch. 27, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 50, 50.

454. *Id.* Van Tyne records that the governor of South Carolina was also given “extraordinary powers” to arrest without bail or trial. See VAN TYNE, *supra* note 17, at 221. Virginia Governor Patrick Henry was as well. See Steilen, *supra* note 349.

455. New York was not unique in this regard. Summarizing his survey of the disabilities imposed on loyalists by the different colonies, Van Tyne writes,

The Tory could not vote or hold office. He had no legal redress for his wrongs, and, if he had, no Loyalist member of the bar could defend him; he was denied his vocation, and his liberty to speak or write his opinions; he could not travel or trade where he chose, and he must pray and fight for the cause he hated. . . . [A]ll of these restrictions were not to be found in any one place, nor at any one time. Nor were they rigorously enforced except where the cloud of war hung most threateningly.

VAN TYNE, *supra* note 17, at 210–11.

456. Act of Mar. 27, 1778, ch. 16, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 28, 35–36.

457. *Id.* Alison Reppy also identifies the oath of office prescribed in the first session as having this effect. See Reppy, *supra* note 363, at 19 & n.71 (1948).

458. Act of Oct. 9, 1779, ch. 12, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at, 155, 156.

459. Act of Apr. 11, 1782, ch. 36, § 15, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 465, 472.

460. Act of Apr. 13, 1782, ch. 39, § 1, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 479, 479.

461. For various acts confiscating loyalist property, see FLICK, *supra* note 396, at 136–41; VAN TYNE, *supra* note 17, at 337; Reppy, *supra* note 363, at 20–22. A period source is LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK, IN FORCE AGAINST THE LOYALISTS, AND AFFECTING THE TRADE OF GREAT BRITAIN, AND BRITISH MERCHANTS, AND OTHERS HAVING PROPERTY IN THAT STATE 9–94 (1786) [hereinafter LAWS OF THE LEGISLATURE].

4. *The Confiscation Act.* On October 22, 1779, the estates of leading loyalists were forfeit to New York by legislative attainder.<sup>462</sup> The act, known as the "Confiscation Act" or the "Act of Attainder," is well known to students of the Revolution and Confederation period.<sup>463</sup> The disgust it evoked is sometimes proffered as evidence of the view this generation took of bills of attainder. In May 1780, while serving as minister to Spain, Jay wrote to New York Governor George Clinton that he had seen "what they call, but I can hardly believe to be, your confiscation act."<sup>464</sup> Jay was beside himself:

If truly printed, New-York is disgraced by injustice too palpable to admit even of palliation. I feel for the honour of my country, and therefore beg the favour of you to send me a true copy of it; that if the other be false, I may, by publishing yours, remove the prejudices against you . . . .<sup>465</sup>

Unfortunately he had seen an accurate copy.<sup>466</sup> Back in New York, a young Alexander Hamilton took up the cudgels against it, suing on behalf of several individuals attainted by the act and later pressing the case against confiscation in his first *Letter from Phocion*.<sup>467</sup> Other notables had already done their best to prevent a confiscation policy from taking effect. New York's Council of Revision, a body then comprising Governor Clinton, Chancellor Robert R. Livingston, and Justice Robert Yates, had exercised its power under the Constitution of 1777 to veto an earlier version of the act, which they described as "repugnant to the plain and immutable laws of justice which no State can with honor throw off."<sup>468</sup> In a letter to Jay, Livingston lamented, "Never was there a greater compound of folly, avarice, and injustice."<sup>469</sup>

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462. Confiscation Act, ch. 25 (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173; see Reppy, *supra* note 457, at 22–27 (summary of each section).

463. See, e.g., DWIGHT HOLBROOK, THE WICKHAM CLAIM: BEING AN INQUIRY INTO THE ATTAINDER OF PARKER WICKHAM 88–98 (1986); 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 373, at 197–99.

464. Letter from John Jay to Governor George Clinton (May 6, 1780), in 1 LIFE OF JAY, *supra* note 406, at 112.

465. *Id.*

466. *Id.* at 113.

467. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 373, at 224–27; A Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27, 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON 483–97 (Harold C. Syrett ed., 1962); see HULSEBOSCH, *supra* note 370, at 193 (describing a group of "ambitious young attorneys" like Hamilton, Aaron Burr, and Robert Troup who defended loyalists).

468. ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 219–20 (1859).

469. Letter from Robert R. Livingston to John Jay (Apr. 21, 1779), in 1 UNPUBLISHED JAY PAPERS, *supra* note 404, at 583–84.

*Understanding the Act.* The Confiscation Act was clearly regarded with embarrassment by many New Yorkers, especially elite Whig lawyers like Jay, Livingston, and Hamilton, who were concerned with the infant state's standing in the Atlantic world.<sup>470</sup> We should accept at face value Jay's expression of alarm, as minister to Spain, at the content of the Confiscation Act. Yet Jay could not have been surprised at the passage of such a bill. As we have seen, in April 1777 he supported Gouverneur Morris's motion to amend the proposed state constitution to *permit* acts of attainder.<sup>471</sup> The primary attainder in the Confiscation Act fit within the state's emerging policy towards loyalist property, which was to regulate what were ongoing, informal, and in some cases, unlawful seizures.<sup>472</sup> A policy of confiscation was defended on the grounds that it deprived loyalists of protection from a state they were working to defeat and simultaneously prevented them from using their property to aid the British.<sup>473</sup> From this point of view, the key was to oversee confiscation and ensure that property wasn't stolen or wasted, but used for the benefit of the people.

In January 1778, in the first session of the state Legislature, John Morin Scott—a New York City lawyer and leading radical—introduced a forfeiture bill in the Senate.<sup>474</sup> The bill stalled and the session ended with no movement, but another bill was put in during the second session of the Legislature, this time supported by a petition signed by about five hundred inhabitants of Dutchess County.<sup>475</sup> It was introduced in the Assembly by Whig lawyer, Ezra L'Hommedieu; John Jay's brother, Sir James Jay, helped to

470. See Hulsebosch, *supra* note 19, at 828–29, 837; cf. LUTZ, *supra* note 441, at 107 (noting a decline in the number of lawyers sitting in state legislatures).

471. See *supra* notes 439–45 and accompanying text.

472. See Howard Pashman, *The People's Property Law: A Step Toward Building a New Legal Order in Revolutionary New York*, 31 L. & HIST. REV. 587, 593, 599–604 (2013); cf. HARRY B. YOSHPE, *THE DISPOSITION OF LOYALIST ESTATES IN THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK* 13, 113 (1939) (“Whether out of selfish motives or with a view to returning such property to the rightful owners after the cessation of hostilities, the Revolutionary government took steps to prevent the destruction, waste, and embezzlement of the estates of absconded Tories.”).

473. See FLICK, *supra* note 396, at 136–37, 139.

474. A convenient summary of the legislative proceedings leading up to the Confiscation Act, with citations to the journals of the assembly and senate, can be found in 2 THOMAS JONES, *HISTORY OF NEW YORK DURING THE REVOLUTIONARY WAR AND OF THE LEADING EVENTS IN THE OTHER COLONIES AT THAT PERIOD* 524–40 (1879). John Morin Scott was a graduate of Yale College and a member of the city legal debating society that included Gouverneur Morris, James Duane, and John Jay, among others. PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 136, 201–03 (De Capo Press 1970) (1939). Scott was the second choice for the state's chief justiceship after Jay, losing the vote 19 to 15. SPAULDING, *supra* note 440, at 95–96.

475. 2 JONES, *supra* note 474, at 526, 528–29.

push it along in the Senate from his position as chair of the committee of the whole.<sup>476</sup> The bill, titled an "Act of Forfeitures and Confiscation," passed out of the Legislature on March 11, 1779, but not before a "long and sharp" debate in the Senate, resulting in a statement of five "Dissentients" entered on the Senate Journal.<sup>477</sup> The Dissentients included Abraham Yates, formerly a member of the committee of the Provincial Convention that drafted the Constitution of 1777.<sup>478</sup> It was this bill that the Council of Revision vetoed on March 14th.<sup>479</sup> A veto override succeeded in the Assembly but failed in the senate, which voted 8 to 7 in favor of the bill, short of the required two-thirds.<sup>480</sup>

Immediately the Assembly appointed a committee to prepare a revised confiscation bill for the following session. Egbert Benson, who also served as the state's attorney general and would later represent New York as a Federalist in the House of Representatives, was named to the Assembly's committee.<sup>481</sup> In late June 1779, Benson wrote John Jay, who was then in Philadelphia as President of the Continental Congress:

Your Brother<sup>482</sup> has doubtless given You a History of the last Sessions of the Legislature. . . . The Confiscation Bill as it was the most important Matter occupied the most of our time, and after a safe passage through both Houses to the Council of Revision and on [its] return . . . suffered Ship-wreck in the Senate. The Bill was far from being unexceptionable, but, considering the Diversity of Sentiment in the Members upon the Subject, I am doubtful if We ever obtain any whether it will be more perfect, and therefore wish the Last had passed . . . .<sup>483</sup>

When the third session of the Legislature met in September 1779, it was Attorney General Benson who introduced the committee's bill.<sup>484</sup> The journals of the Assembly and Senate record relatively

476. *Id.* at 529–30.

477. *Id.* at 530, 532.

478. *Id.* at 530–31.

479. THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR SECOND SESSION 102–06 (1779).

480. 2 JONES, *supra* note 474, at 533.

481. *Id.* at 534. Spaulding describes Benson as a "wealthy lawyer and aristocrat, graduate of Columbia," and, indeed, Benson became a Federalist in the emerging party divide of the late 1780s. SPAULDING, *supra* note 440, at 227.

482. John Jay had two brothers serving in the second session of the legislature. Frederick Jay was a member of the assembly, and Sir James Jay was a member of the senate. 2 JONES, *supra* note 474, at 527–28.

483. Letter from Egbert Benson to John Jay (June 23, 1779), in 1 UNPUBLISHED JAY PAPERS, *supra* note 404, at 605.

484. 2 JONES, *supra* note 474, at 537.

little debate on this version.<sup>485</sup> The bill passed out of the Legislature on October 18th and was approved by the Council of Revision (where Clinton and Livingston still sat) without comment on October 22nd.<sup>486</sup>

Jay was too close to these developments to have been surprised by New York's use of an act of attainder to confiscate loyalist estates. On this point he may have differed from his good friend Livingston, who faulted "Benson[']s compromising genius" for progress on a confiscation bill.<sup>487</sup> Jay, on the other hand, was likely embarrassed by the *particulars* of the act, rather than simply its passage.<sup>488</sup> Here it is appropriate to pause and examine the Confiscation Act, to see if we can determine the source of Jay's objection. The relevant portion of the act describes two crimes.<sup>489</sup> The first of these crimes was adhering to the British King and his armed forces, with an "intent to subvert the government and liberties of this State and the said other United States."<sup>490</sup> The language approximates the 1352 Statute of Treasons, which covered those who "adhere[] to the king's enemies, giving to them aid and comfort in his realm or elsewhere, and of this shall be attainted and proved of open deed by men of their rank."<sup>491</sup> Unlike the Statute of Treasons, however, the Confiscation Act applied only to those "holding or claiming property within this State."<sup>492</sup> The offense was thus holding property in New York *and* adhering to the enemy. The statute then names "the most notorious offenders," beginning with former colonial Governors William Tryon and Lord

485. See *id.* at 537–38.

486. THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK; AT THEIR THIRD SESSION 80 (1779). Jones does not proffer an explanation for the relative ease with which the confiscation bill passed in the third session, remarking that "[a]fter the severe and successful struggle against [the bill] at the proceeding Session[,] . . . the result is very remarkable." 2 JONES, *supra* note 474, at 538.

487. See Letter from Robert R. Livingston to John Jay (Apr. 21, 1779), in 1 PAPERS OF JAY, *supra* note 403, at 584. Jay's correspondence with Benson suggests that the two were good friends as well. See, e.g., Letter from John Jay to Egbert Benson (June 1780), in 1 UNPUBLISHED JAY PAPERS, *supra* note 404, at 363–64.

488. If Jay believed, as he wrote to Clinton, that a "true copy" of the act might "remove the prejudices" against the state, he could not have expected an error on so basic a matter. See *supra* notes 464–65 and accompanying text.

489. See Confiscation Act, ch. 25, §§ 1–13 (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173–78.

490. *Id.* pmb., at 173.

491. 25 Edw. 3 c. 2, in 4 ENGLISH HISTORICAL DOCUMENTS, *supra* note 35, at 403; see also Statute of Treasons of 1352, 25 Edw. 3 c. 2, in 1 STATUTES OF THE REALM 319, 319–20 ("[B]e adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere, and thereof be probably attainted of open Deed by the People of their Condition . . .").

492. Confiscation Act, ch. 25, pmb. (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 173.



Dunmore, who are “immediately hereby convicted and attainted of the offence” and banished, their property forfeit to the state.<sup>493</sup> Others suspected of adhering to the King, but unnamed in the statute, are to be indicted and tried by jury according to a streamlined common law procedure.<sup>494</sup> The act then turns to a second crime: being found in New York after banishment for adhering to the King. This offense, unlike the first one, was capital. Those attainted and later discovered in the state were “hereby adjudged and declared guilty of felony, and shall suffer death as in cases of felony.”<sup>495</sup>

***Criticisms of the Confiscation Act.*** What, then, did Jay and other leading New York Whigs find so upsetting about the Confiscation Act? There were a variety of complaints. Some were concerned that those attainted by the law were innocent; others complained that the law provided insufficient process; and others, like Jay, believed that partisanship and greed had affected the act.

The best place to begin is with the Act’s predecessor, the March 11th bill, called the Act of Forfeitures and Confiscation (“Act of Forefitures” for short), which drew objections from the Senate “Dissentients” and was later vetoed by the Council of Revision.<sup>496</sup> While the text of the Act of Forfeitures has apparently not survived, we can reconstruct certain of its provisions, and the contrast they make with the Confiscation Act is revealing. First,

493. *Id.*

494. Several departures from common law procedure are described. Any person can be indicted, “whether in full life or deceased,” whom a single witness describes as committing the offense. *Id.* § 3, at 174. Notably, the witness need only swear that the individual is “generally reputed” to hold property in New York, not that he has personal knowledge of the fact. *Id.* Indeed, loyalists were in fact indicted on the testimony of a single witness, sometimes by individuals who had been injured at the hands of the person they later accused. See YOSHPE, *supra* note 472, at 18–19. One particularly well-informed or vengeful man, Henry Swartwout, testified in deposition that “at various times he saw thirty-eight named persons of Kings County who ‘were severally adherent to the King of Great Britain, his fleets and armies then at open war with the State of New York and the other United States of America.’” *Id.* (quoting Deposition of Henry Swartwout (June 7, 1781), in New York Public Library Miscellaneous Collections, American Loyalists Box 1, fol. 12 (on file with New York Public Library)). If after four weeks an individual fails to appear to traverse (i.e., contest) allegations in the indictment, he is convicted by default. Confiscation Act, ch. 25, §§ 4–5 (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 174–75. Yoshpe tells us that “[m]any failed to appear to plead or traverse the indictments; and the Supreme Court was kept busy ordering, on motion of the Attorney General [Benson] on behalf of the State, that judgments be entered against the defendants.” YOSHPE, *supra* note 472, at 19–20. For those who do go to trial, the act “declares” certain conduct to be “evidence” of the offense, such as remaining behind enemy lines. Confiscation Act, ch. 25, § 9 (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 176.

495. Confiscation Act, ch. 25, § 2 (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 174.

496. 2 JONES, *supra* note 474, at 530–31; STREET, *supra* note 468, at 219–26.

the Act of Forfeitures appears to have attainted individuals of *high treason*, both by name and general description, and then commuted the sentence to forfeiture of property, saving their lives.<sup>497</sup> In the Senate there was significant disagreement that the evidence established that those named and described had committed high treason. “[T]here is no Evidence,” wrote Abraham Yates and the other Dissentients, “to convict of High-Treason many of the Persons in the Bill named.”<sup>498</sup> In the Council of Revision, in contrast, Clinton, Livingston, and Robert Yates took the argument one step further. The bill “convicts and punishes the persons named . . . without affording them an opportunity of availing themselves of a trial by jury,” they wrote, which was a right “to which the Constitution [of 1777] impliedly entitles every subject, *how deep soever his guilt*, unless by his refusal to submit to such trial, after a day given, he may be presumed to have relinquished such a privilege.”<sup>499</sup> For Clinton, Livingston, and Robert Yates, then, the dearth of evidence was ancillary. The primary issue was the act’s failure to preserve the right to a trial. The Council’s view implied that the only form of attainder preserved by article 41 of the state constitution was a *suspensive* attainder—an attainder, like the one directed five years earlier at Ethan Allen, that applied *only if an individual refused to submit to judicial forms of process*.<sup>500</sup>

497. Letter from Governor George Clinton to John Jay (Mar. 17, 1779), in 4 PUBLIC PAPERS OF GEORGE CLINTON, FIRST GOVERNOR OF NEW YORK, 1777–1795, at 641–42 (“A Bill of Attainder also passed both Houses but was [lost] in the Senate on Objections made to it by the Council of Revision. It attainted upwards of 300 Persons ipso facto of High Treason, so far as to work a Forfeiture of their Estates.”); STREET, *supra* note 468, at 221 (“As some of the former clauses of the act absolutely convict and attain the persons therein named and described of high treason . . .”); see 2 JONES, *supra* note 474, at 531 (third objection). Richard Ketchum treats the Confiscation Act as identical to the March 11th bill, which I think is a mistake. See KETCHUM, *supra* note 388, at 366–67 (“[The March 11th bill] reached the Senate, where it passed by one vote, but was then reviewed and vetoed by a council headed by Robert R. Livingston, Jr. . . . All to no avail, as it turned out. Subsequently the bill was passed by both Houses, with no record of the votes . . . and then, even more curiously, approved by Livingston’s council with no comment.”). Surely one explanation of this curious result is that Egbert Benson made substantive changes to the vetoed bill and was able to convince Clinton and even Livingston that he had addressed their concerns.

498. 2 JONES, *supra* note 474, at 530. Richard Morris had moved during the final debate on the bill on March 9th “that the Names of such Persons in the Bill, as are not Known to have taken up arms against us, or been guilty of high Treason be expunged.” *Id.* (emphasis omitted). The motion failed to pass. *Id.* The senate did succeed in amending the list of those attainted of high treason by name; however, on the bill’s return to the assembly, delegates “refused to concur with . . . inserting the Names contained in the List Number One . . . [and] striking out the Names contained in the List Number Two.” *Id.* at 532.

499. STREET, *supra* note 468, at 220 (emphasis added).

500. See Letter from Governor George Clinton to John Jay (Mar. 17, 1779), *supra* note 497, at 642 (describing veto of forfeitures act, and continuing, “I have not Time to give you a particular description of this Bill. It was in my Opinion neither founded on Justice or warranted by sound Policy or the Spirit of the Constitution.” (emphasis added)).

Second, the Dissentients clearly saw a place for legal process in the legislature. The Dissentients' second objection singled out a clause that made "breaking a parole . . . one of the crimes for which the offender is *ipso Facto*, attainted of High Treason."<sup>501</sup> Breaking parole did not constitute treason under English law. The bill, wrote the Dissentients, thereby "creates the Crime, and adjudges the Offender at a breath," in effect "mixing the Legislative and Judicial powers of the Legislature, and exercising both at the same time."<sup>502</sup> The objection is revealing. The bill did not mix legislative and judicial power for being an attainder *alone*; the mixture of powers followed only from simultaneously creating a crime and convicting individuals of having committed it. In contrast, where the Legislature confined itself to exercising its "Judicial" powers, there was no problem. A properly formed attainder would do so.

Now turn from the Act of Forfeitures to its successor, the Confiscation Act itself. If we examine the text of the Confiscation Act, it suggests a greater concern with the objections of the Dissentients than with those of the Council of Revision. First, the central attainder in the Confiscation Act is *absolute*, not suspensive in form. The act does not provide named individuals with an opportunity to appear and claim a jury trial, despite the Council's insistence that the constitution require such an opportunity. Notably, the act only attaints by name those individuals it describes as "the most notorious offenders."<sup>503</sup> "Notorious," of course, is a familiar term from English parliamentary practice. As we saw, it was also used in revolutionary New York; the committee for detecting conspiracies deported men "notoriously disaffected" with the patriots' cause, a label that might rest merely on their local reputation. Here the

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501. 2 JONES, *supra* note 474, at 531.

502. *Id.*

503. Confiscation Act, ch. 25, pmb. (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 173. Presumably this list of individuals was smaller than those "named and described" in the March 11th bill, although there are some indications to the contrary. The assembly had previously refused to concur in the senate's amendment of the list of individuals attainted by name. See *supra* note 498. A letter written by Ezra L'Hommedieu, the sponsor of the March 11th bill in the assembly, suggests that those named and attainted in the March 11th bill were few. See Letter from Ezra L'Hommedieu to William Floyd (Feb. 9, 1779), in HOLBROOK, *supra* note 463, at 142 n.8 ("The Bill for confiscating the Estates of Persons inimical to these States, is now on the carpet, and I believe will at present, end in an Act of Attainder wherein a Number of Persons by Name being the Principal Tories in our Country, will be declared guilty of High Treason & their Estates confiscated. This is thought by Mr. Scot & others at present to be the most prudent & politick [sic]. They think the persons named will take in those that are objects, the others are open to the General Law of Treasons.").

legislature seems to have regarded itself as competent to determine, without the assistance of a trial, that men like Governor Tryon had adhered to the British King and Army. The view implies a different vision of article 41 of the state constitution than was expressed by the Council of Revision, which had read it to permit only suspensive attainders. Yet while Tryon's attainder is absolute, not suspensive, the Confiscation Act's preamble invokes a traditional justification for *suspensive* attainders! Those who held property in New York but adhered to the King had "forfeited all right to the protection of this State," just as men did when they fled justice and refused to submit to the process of courts of law.<sup>504</sup> Perhaps the language of the preamble was an effort to address the concerns of the Council, or to provide it with cover for reversing its position on the prior bill. Perhaps it was copied from a suspensive bill passed by another state.<sup>505</sup> Perhaps it was merely confusion.

The text of the Confiscation Act also shows an effort to rebut the Dissentients' criticisms that the Act of Forfeitures mixed legislative and judicial power. The Confiscation Act does not mention high treason, although that crime had been the centerpiece in its predecessor. The primary offense in the Confiscation Act is instead "adhering to the British king and army," which is never called "treason." This is a new crime, but its language is close enough to the Statute of Treasons that there could be no reasonable complaint of mixing legislative and judicial power. Similarly, breaking one's parole is no longer defined as treason, but is instead declared to be "evidence" of the crime of "adhering to the enemies of the people of this State," for use at indictment and trial.<sup>506</sup>

If the changes made to the text of the Act of Forfeitures satisfied the Council of Revision, they did not satisfy those who were subsequently attainted or convicted under the Confiscation Act. Here we must turn to a second set of criticisms, advanced by former colonial Judge Thomas Jones, who was himself attainted

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504. Confiscation Act, ch. 25, pmb1. (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 173.

505. Similar policies can be found in the confiscation acts of Rhode Island and New Jersey. See Act of Dec. 11, 1778, ch. 22, in 1 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY, *supra* note 341, at 67, 67; Act of Oct. 24, 1779, 1779 R.I. Acts & Resolves 24.

506. Confiscation Act, ch. 25, § 9 (1779), in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 173, 176. Hurst misreads this aspect of the statute in his commentary on the American law of treason. He describes the law as "a supplementary treason act," but then fails to note that the "Matters" declared to be evidence by the statute are not declared to be evidence of treason, but of adhering to the enemies of the state. See HURST, *supra* note 347, at 92-93.

in the act. Jones paints the state's legislators as unjust and crude for failing to observe the well-accepted requirements of notice and an opportunity to be heard. The Confiscation Act was passed, he wrote, "without any previous notice to appear, defend themselves, and oppose the passing of the Act, which in cases of this kind, in civilized nations, is always done."<sup>507</sup> Even when dealing with regicides and pretenders, the English parliament had observed such forms. Yet, sneered Jones, "[i]n how different a manner did the Legislature of New York act. Without the least notice, either written, or verbal, without a summons, a monition, or an advertisement, published in their papers to call in the objects of their resentment, to take their trials . . ."<sup>508</sup> Other rebel states had conformed to these rules. "The Governor of Pennsylvania issued a proclamation . . . ordering Benedict Arnold Esq., and nine others . . . to come in, surrender, and take their trials, . . . or in default of such appearance, and submission, they would be included in an act of attainder . . ."<sup>509</sup> Even more absurd and unjust was that the Legislature had attainted men who owed the rebellious 'state of New York' no allegiance whatsoever. The Act included "Sir Henry Clinton," the British Army General, "and General Tryon," who were "the subjects and natives of Britain."<sup>510</sup> Such men, wrote Jones, "ever looked upon themselves as the subjects of the King of England, to whom they had sworn allegiance[, and] never conceived themselves as subjects of the American States."<sup>511</sup>

But Jones's loudest complaint was that the Confiscation Act showed obvious "partiality."<sup>512</sup> It was a "political" exercise of "legislative power."<sup>513</sup> While some men, like Jones, were attainted for merely living at home under the conditions of their parole, many more in the same situation had not been.<sup>514</sup> Similarly, James DeLancy was attainted for actively opposing independence, despite leaving New York *before the Declaration of Independence*

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507. 2 JONES, *supra* note 474, at 272.

508. *Id.* at 275.

509. *Id.* at 274. Massachusetts, Rhode Island, Connecticut, New Hampshire, and New Jersey all followed the same course. *Id.* at 274-75; *cf.* VAN TYNE, *supra* note 17, at 278-79 (describing different mechanisms of confiscation employed by the states).

510. 2 JONES, *supra* note 474, at 270.

511. *Id.* at 272. According to Jones, some British subjects were attainted simply for "living upon their own estates, in their own houses with their wives and families, within the British lines." *Id.* at 288. This was a problem for colonial confiscation and treason statutes more generally. See CHAPIN, *supra* note 346, at 72-73, 76 ("The mere act of remaining in an area occupied by the enemy was not treason.").

512. 2 JONES, *supra* note 474, at 270.

513. See *id.* at 280, 306.

514. See *id.* at 290.

in July 1776; others who had done the same were again left out of the act.<sup>515</sup> Isaac Low had been attainted, according to one informant, for turning loyalist after serving on various Whig committees in the early stages of the conflict; but others who had acted similarly were not attainted.<sup>516</sup> What, then, was the reason for this partiality? The act, wrote Jones, “was undoubtedly founded upon the gratification of private revenge and political resentment.”<sup>517</sup> Legislators used it to settle scores. John Jay’s brother, Sir James Jay, had arranged for the attainder of fourteen former governors of King’s College, with whom he had disputed the treatment of college funds.<sup>518</sup> But the chief cause of resentment, and the chief aim of the act, was *land*. “What . . . political motive[] induced them to insert the name of John Watts[?] . . . [T]he reason given was, ‘he had a son in the British army.’ A better might have been given, ‘he had a large estate.’”<sup>519</sup> The Confiscation Act, concluded Jones, was a land grab by a state legislature resentful of New York’s great families and desperate for resources to finance its civil war.

***The Politics of Confiscation.*** If we step back for a moment, we can distinguish two kinds of objections to the Confiscation Act. First were objections to the attainder’s absolute form. Against these objections the legislature could mount a plausible defense. Its members simply disagreed with the proposition that the Constitution of 1777 permitted only suspensive attainders, which allowed defendants an opportunity to appear and claim a trial by jury.<sup>520</sup> Nor could those absolutely attainted have benefited from a trial. No British subjects were attainted of treason, as Judge Jones had mistakenly claimed. Alexander Hamilton noted this point, observing that the preamble used “the word *persons* not *subjects*,” and “the word *offence* only[,] not *treasons*.”<sup>521</sup> It therefore rightly applied to those who did not owe New York allegiance, such as Governor Tryon. And, in fact, several other states had already

515. *Id.* at 281–82.

516. *Id.* at 305–06.

517. *Id.* at 280, 282–83.

518. *Id.* at 225–26. Jones clearly despised Sir James; in a memorable passage, Jones describes him as “haughty, proud, overbearing, supercilious, pedantic, vain, and ambitious.” *Id.* at 223. Nevertheless, Richard Ketchum accepts Jones explanation of Sir James’s efforts on behalf of the Confiscation Act. See KETCHUM, *supra* note 388, at 366.

519. 2 JONES, *supra* note 474, at 283, 287, 290.

520. This is one of Jones’s principal complaints. *Id.* at 274. In another place, Jones advances the related, but distinct criticism that what was required was an opportunity to appear and contest “the passing of the Act.” *Id.* at 272.

521. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 373, at 233 (third and fourth emphasis added).

followed the same approach in their confiscation statutes.<sup>522</sup> Later, Chancellor James Kent would pick up on this point in litigation over Jones's own estate.<sup>523</sup> "The act of the 22d *October*, 1779, attainted, among others, *Thomas Jones*, of the offence of adhering to the enemies of this state," wrote Kent. "This was a specific offence, and was not declared, or understood, to amount to treason, because many of the persons attainted had never owed any allegiance to this state."<sup>524</sup>

A second category of objections was harder to answer. These objections maintained that the Confiscation Act was the product of petty politics and greed. As William Jay described the views of his father, John Jay, "many were attainted who had been perfectly inoffensive; and he believed motives of avarice had led to their proscription."<sup>525</sup> The distinction between treason and the newly invented offense of "adhering to the King" was too nice to be convincing, and ultimately contributed to the feeling that the act was essentially a land grab. The more reckless of the law's defenders were explicit about what was at stake. As "Brutus" reasoned in the *Independent Gazetteer* in May 1783, "should a repeal of the attainder or confiscation law take place . . . you will please to remember, that your taxes will be increased in proportion, and the principal burden of the war rest on the virtuous citizens and their posterity."<sup>526</sup> Indeed, New York did mortgage properties it obtained from the attainted to secure paper money printed to finance the war.<sup>527</sup> Concern about the state's

522. See, e.g., Act of June 26, 1778, ch. 29, § 2, in 2 LAWS OF THE STATE OF DELAWARE, *supra* note 340, at 636, 636 (general pardon applying to "any person or persons, inhabitants of this State," excepting listed persons, who had to take a loyalty oath or have their property confiscated); Act of 1777, ch. 17, in LAWS OF THE STATE OF NORTH CAROLINA 341 (James Iredell ed., 1791) (confiscation of the lands of "persons . . . inimical to the United States"); see also CHAPIN, *supra* note 346, at 76, 140 n.57; HURST, *supra* note 347, at 102–03.

523. *Jackson v. Catlin*, 2 Johns. 248, 260 (N.Y. 1807).

524. *Id.*; see also *Inglis v. Trustees of the Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 168 (1830) (Story, J., dissenting) ("[I]t is not an act which purports to be an attainder of citizens of the state only, on account of their treason in adhering to the public enemies; for it embraces persons who never were, nor were pretended to be citizens . . ."); HOLBROOK, *supra* note 463, at 90–93; HURST, *supra* note 347, at 123 n.69 (listing authorities in other states).

525. 1 LIFE OF JAY, *supra* note 406, at 113.

526. Brutus, *To the Friends of Freedom and Independence in the State of New-York*, INDEP. GAZETTEER (Phila.), May 10, 1783, at 1, col. 3.

527. See Act of June 15, 1780, ch. 64, in LAWS OF THE LEGISLATURE, *supra* note 461, at 28, 28–30; see also Act of Apr. 6, 1784, ch. 20, in LAWS OF THE LEGISLATURE, *supra* note 461, at 41, 41–42; Act of May 12, 1784, ch. 64, in LAWS OF THE LEGISLATURE, *supra* note 461, at 43; cf. FLICK, *supra* note 396, at 159 (estimating that New York acquired "property to the value of about \$3,600,000"); Pashman, *supra* note 472, at 589 (confiscation enable redistribution, which provided needed subsistence and "created a constituency with a stake in the revolutionary regime"). Other defenses of confiscation focused on the British removal and destruction of American property during the occupation. See Spaulding, *supra* note 440, at 116–19.

image had been present through much of the debate on confiscation. The Council of Revision had vetoed the Act of Forfeitures because, in part, it “injures the national character of the State.”<sup>528</sup> Jay, serving as foreign minister to Spain, would have keenly felt such an injury. As Hamilton explained several years later in the first *Letter from Phocion*,

[T]here is a certain evil which attends our intemperance, a loss of character in Europe. Our Ministers write that our conduct, hitherto, in this respect, has done us infinite injury, and has exhibited us in the light of a people, destitute of government, on whose engagements of course no dependence can be placed.<sup>529</sup>

Despite their pleas, New York would not repeal laws inconsistent with the treaty of peace, including those that confiscated loyalist property, until 1788.<sup>530</sup>

Even if bills of attainder were legally defensible, then, they were dangerous because they were exposed to the stark political forces of wartime government. In this respect, the lesson of the Confiscation Act looks much like that of the attainder of the earl of Strafford. And if the political forces that acted on bills of attainder could not be tempered, then those who were concerned about America’s standing in the Atlantic world would turn against them altogether. In Gouverneur Morris’s next major constitutional convention, the Convention of 1787, he would not only fail to ensure that some bills of attainder were permitted, as he had done in New York, but support the effort to ban them outright.<sup>531</sup>

### B. Pennsylvania

Pennsylvania, like New York, was divided by the Revolutionary War.<sup>532</sup> Pennsylvania politics in the decades leading

528. STREET, *supra* note 468, at 223.

529. A *Letter from Phocion to the Considerate Citizens of New York* (Jan. 1–27, 1784), *supra* note 467, at 492. Hamilton may have had in mind at least one letter from Jay. See VAN TYNE, *supra* note 17, at 296 (describing a letter to Hamilton in which Jay wrote that “violence and associations against the Tories pay an ill compliment to government, and impeach our good faith in the opinion of some, and our magnanimity in the opinion of many”). Despite Hamilton’s best efforts, confiscations in New York “actually *increased* after the treaty [of peace] was signed” in 1783, resulting in the dislocation of thousands of loyalists. HUSLEBOSCH, *supra* note 370, at 192; see also YOSHPE, *supra* note 472, at 23–24. Laws disabling loyalists from voting, holding office, and returning to their homes were also passed, buttressed by the persuasions of the mob. SPAULDING, *supra* note 440, at 23–26.

530. See Act of Feb. 22, 1788, ch. 41, in 2 LAWS OF THE STATE OF NEW YORK, *supra* note 358, at 679, 679.

531. See *infra* Part IV.

532. See VAN TYNE, *supra* note 17, at 85, 101–02.



up to hostilities were dominated by the Quaker party in the Provincial Assembly, led since the 1760s by Benjamin Franklin and Joseph Galloway.<sup>533</sup> Under Franklin's tutelage, much of the party had thrown its weight behind a rather fanciful plan to jettison the Penn family and "royalize" provincial government.<sup>534</sup> The movement put an odd face on Pennsylvania politics during the ensuing troubles, starting with the Stamp Act of 1765. The Quaker-dominated Assembly, anxious to showcase the colony's good behavior for its suitor, the Crown, sought to suppress dissent and nearly prevented the colony from sending delegates to the Stamp Act Congress.<sup>535</sup> It was Presbyterian elements of the proprietary party—the party associated with the *Governor*—that resisted the Crown, while the Quakers of the Provincial Assembly became "detached from the Revolutionary movement" and were set adrift.<sup>536</sup> When the Pennsylvania revolutionary movement began in earnest in April 1775, after the Battle of Lexington, new men stepped in to direct it, joining together outside the Assembly in associations and committees.<sup>537</sup> To many Quakers, these groups were no better than mobs, and the summary justice the groups employed was evidence. Indeed, sometime later, the Assembly, dominated by new men, passed a bill of attainder to confiscate the property of the state's loyalists, including former leaders of the Quaker party who had fled behind enemy lines, such as Joseph Galloway and Andrew Allen.<sup>538</sup>

Contrary to the dominant picture, however, the new men who administered these summary proceedings and wrote the bill of attainder were not just hayseeds and zealots. They were led by at least one moderate of national reputation, Thomas McKean, who later became President of the Confederation Congress, and they included leading Pennsylvania lawyers and judges like George

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533. See, e.g., James H. Hutson, *An Investigation of the Inarticulate: Philadelphia's White Oaks*, 28 WM. & MARY Q. 3, 13–14 (1971).

534. See *id.* at 13–14, 17; THEODORE THAYER, *PENNSYLVANIA POLITICS AND THE GROWTH OF DEMOCRACY, 1740–1776*, at 89–90 (1953).

535. Hutson, *supra* note 533, at 18–20 (revealing how Franklin wrote under a pseudonym in defense of the act).

536. WOOD, *supra* note 441, at 84; see also RICHARD ALAN RYERSON, *THE REVOLUTION IS NOW BEGUN: THE RADICAL COMMITTEES OF PHILADELPHIA, 1765–1776*, at 19 (1978) ("[T]he Assembly's misguided attempt to win royal favor did make an impact: it rapidly changed the Quaker 'country' party into a 'court' party.").

537. WOOD, *supra* note 441, at 84; RYERSON, *supra* note 536, at 18, 24. For an account of these developments from Progressive historians, see THAYER, *supra* note 534, at 154–55, 157–59; J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* 66–69 (Octagon Books 1971) (1936). Thayer and Selsam see a different set of factional alliances than Ryerson does, who largely follows James Hutson.

538. See *An Act for the Attainder of Divers Traitors*, ch. 784 (Mar. 6, 1778), in 9 *STATUTES AT LARGE OF PENNSYLVANIA*, *supra* note 339, at 201, 201.

Bryan and Joseph Reed.<sup>539</sup> Nor were these new men engaged, simply, in mobbing, but employed recognized (if controversial) forms of summary justice where process at law was impracticable or impossible. If they failed, then, it was not for employing these forms, but for proving unable, under the pressures of invasion, to perceive the difference between political dispute and genuine danger to public safety; and because they were unclear about whether the summary modes of proceeding they set in motion were meant to prosecute *crimes* (treason or “traitorous practices”) or to *prevent* the disaffected from aiding the enemy in the theater of war.

1. *Revolutionary Pennsylvania.* We can begin in Pennsylvania with the rise of military associations in the months following the Battle of Lexington. On April 24, 1775, news of the battle arrived in Philadelphia by express from New York, and the next day thousands gathered at the Statehouse and formed themselves into militia units.<sup>540</sup> In the weeks that followed, units began to parade through the city.<sup>541</sup> The City of Philadelphia’s Committee of Inspection and Observation, which had been formed to enforce the nonimportation agreement from the first Continental Congress, now adapted itself to military purposes.<sup>542</sup> It petitioned the Assembly for assistance. If the province wanted more than “mere Parade and useless Shew [sic],” it wrote, the Assembly would need to vote “suitable Pay and Subsistence to such Officers and Soldiers as shall solemnly engage to go into actual Service.”<sup>543</sup> Fifty thousand pounds were imminently needed, pleaded “a considerable Number of the Inhabitants of the

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539. See Richard Alan Ryerson, *Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalist Party*, in *SOVEREIGN STATES IN AN AGE OF UNCERTAINTY* 95, 101–02 (Ronald Hoffman & Peter J. Albert eds., 1981).

540. ANNE M. OUSTERHOUT, *A STATE DIVIDED: OPPOSITION IN PENNSYLVANIA TO THE AMERICAN REVOLUTION* 103–04 (1987). Ousterhout puts the number attending at “nearly” 8,000, and reports that according to one newspaper, the vote in favor of military association was unanimous.

541. See, e.g., *EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL* 22 (William Duane ed., 1877).

542. See JEFFREY M. DORWART, *INVASION AND INSURRECTION: SECURITY, DEFENSE, AND WAR IN THE DELAWARE VALLEY, 1621–1815*, at 109–10 (2008).

543. Petition and Memorial from the Committee of the City and Liberties of Philadelphia to the State Assembly (June 23, 1775), *discussed in* 8 *PENNSYLVANIA ARCHIVES, EIGHTH SERIES*, at 7237–38 (Charles F. Hoban ed., 1935); see also Petition from the Committee of the City and Liberties of Philadelphia to the State Assembly (May 9, 1775), *discussed in* 8 *PENNSYLVANIA ARCHIVES, EIGHTH SERIES, supra*, at 7232, 7232 (describing the petition as stating that the committee had acquired “a considerable Debt” from military preparations, “which cannot be discharged without the Aid of the Legislature”).

City,” to put “this Province into a State of Defence.”<sup>544</sup> The Quaker-dominated Assembly debated these requests for several days and then tasked an ad hoc committee of its own members with fortifying the city’s stores at a cost of no more than five thousand pounds.<sup>545</sup> The tepid response is surely understandable. How was the Assembly *supposed* to treat “an extraconstitutional army . . . springing up all around it and demanding to be legitimized and funded”?<sup>546</sup> The matter gives one pause. But, of course, there were older, religious fractures at work as well, as most Quakers disliked the new committees and militias.<sup>547</sup> Nevertheless, on June 30th the Assembly finally approved the city military association and provided for officer pay.<sup>548</sup>

Para-government in Pennsylvania (if one can call it that) was not limited to military associations in the weeks following Lexington. In fact, it became more pronounced after June 1775, and on several different levels. The resolution passed on June 30th also created a provincial Committee of Safety, comprising both members of the Assembly and others, inside and outside government, and vested the Committee with the power to call forth the militia in cases of invasion and insurrection.<sup>549</sup> This effectively split the province’s executive in two, as the Proprietary Governor, John Penn, still held office, although the Committee of Safety did not consult him on matters before it.<sup>550</sup> Historian Richard Alan Ryerson has shown that the Committee was largely split between Philadelphians and provincials; it included well-known moderate leaders like lawyer John Dickinson, merchant Robert Morris, and Andrew Allen, provincial Attorney General and member of the Governor’s Council.<sup>551</sup> Franklin—by now hotly *anti*-British—was

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544. Petition from a Considerable Number of the Inhabitants of the City and Liberties of Philadelphia to the State Assembly (May 4, 1775), *discussed in* 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7230, 7230.

545. See Resolution of May 12, 1775, *in* 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7234.

546. RYERSON, *supra* note 536, at 118.

547. See OUSTERHOUT, *supra* note 540, at 104. (“[Quakers] still disliked the committee activities and blamed Whigs for the deterioration of the crisis.”). Thayer takes a somewhat different view, emphasizing that “[a]ll this was done . . . with only three dissenting voices in an Assembly of which more than half still professed to be Quakers.” THAYER, *supra* note 534, at 166.

548. Resolution of June 30, 1775, *in* 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7246–47.

549. *Id.*

550. See OUSTERHOUT, *supra* note 540, at 106–07; *see also* DORWART, *supra* note 542, at 112. Of course, after independence, Governor Penn would lose his office entirely, and for this reason Ryerson writes of the Committee of Safety, “This body would be Pennsylvania’s real executive branch for the next eighteen months.” RYERSON, *supra* note 536, at 122.

551. RYERSON, *supra* note 536, at 122–24 (describing the Committee as an “eminently respectable body”). Military historian Jeffrey Dorwart seems to concur, noting that leading

made president.<sup>552</sup> Under his leadership, the Committee of Safety focused primarily on preparing defenses, financing the war, approving war expenditures, and adopting articles of association for the militia, but it also handled threats to internal security and the arrest and parole of dangerous persons.<sup>553</sup>

In addition to the Committee of Safety and the City Committee of Inspection, county committees and informal military associations also “sprang up among the militiamen,” and these bodies took it upon themselves “to investigate and castigate disaffected persons.”<sup>554</sup> Minutes of the Committee of the Safety of Bucks County, just north of Philadelphia, show that in July 1775 the committee heard testimony that one Thomas Meredith and one Thomas Smith had “uttered expressions inimicable to the Cause and Libertys of America,” for which a subcommittee was appointed “to examine into the said complaints.”<sup>555</sup> Meredith appeared before the subcommittee, which heard his testimony and then obtained a written apology and “promise for the future to . . . strictly adher[e] to the measures of the Congress.”<sup>556</sup> His compatriot Smith fared decidedly less well. Smith denied the charges against him and was called before the full committee, which, after hearing testimony, published their finding that Smith was “an Enemy to the Rights of British America” and asked that “all persons break off every kind of dealing with him.”<sup>557</sup> Two weeks later, a more penitent Smith managed to apologize.<sup>558</sup> Other county committees

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merchants and military associators “played important roles” on the committee. DORWART, *supra* note 542, at 111.

552. See Minutes of the Council of Safety of the Province of Pennsylvania (July 3, 1775), in 10 COLONIAL RECORDS OF PENNSYLVANIA 282 (1852).

553. See, e.g., Minutes of the Council of Safety of the Province of Pennsylvania, in 10 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 302–03, 332–33, 342–43, 357–59, 367, 374, 757; DORWART, *supra* note 542, at 112, 122. Dorwart notes Franklin’s appeal to patriot Quakers to “gather intelligence about and inform on their disaffected neighbors.” *Id.* at 113.

554. OUSTERHOUT, *supra* note 540, at 107.

555. *Minutes of the Committee of Safety of Bucks County, Pennsylvania, 1774–1776*, reprinted in 15 PA. MAG. HIST. & BIOGRAPHY 257, 263–64 (1891). For other examples, see *id.* at 268 (examination of Edward Updegrave); *id.* at 269 (testimony on statements by John Rodgers); *id.* at 270, 273 (William Walton, who allegedly “drank damnation to the Congress”); *id.* at 275 (inquiry into statements by John Burrows, Jr., followed by apology); *id.* at 277 (inquiry into statements by Thomas Blacklidge, which were apparently misunderstood); *id.* 280 (examination of James Scout, “charged before this Committee” with cursing Congress; Scout “begged pardon” and was dismissed); *id.* at 283, 285–86 (examination of “Stoffel Suckafuss” for assault and breaking the gun of a militia captain; the committee found him “dangerous to the safety of the State of Pennsylvania” and ordered him conveyed to the provincial Committee of Safety); *id.* at 289 (inquiry into the conduct of Ebenezer Owen, who refused to deliver his gun to an arms-collector and “uttered expressions discovering a violent enmity to the Libertys of America”).

556. *Id.* at 265.

557. *Id.* at 266.

558. *Id.* at 267.

conducted similar investigations, even trying cases on matters related to provincial defense and internal security, and publishing testimony, admissions, committee findings, apologies, and names of those found to be "Enemies to their Country."<sup>559</sup>

While similar committees existed in New York and other colonies as well, Pennsylvania also saw considerable interference from a certain *national* committee, the Continental Congress, which sat largely in Philadelphia until the British took the city in August 1777. National interference in Pennsylvania affairs was a result both of the natural interest that Congress took in Pennsylvania's defense and of efforts by Pennsylvania leaders to pivot between local, provincial, and national bodies to their advantage.<sup>560</sup> Thus, on July 18, 1775, Congress resolved that "all able bodied effective men, between sixteen and fifty years of age in each colony, immediately form themselves into regular companies of Militia."<sup>561</sup> Though it was allowed that "there are some people, who, from religious principles, cannot bear arms," such persons were asked "to contribute liberally in this time of universal calamity."<sup>562</sup> Of course, it was obvious who was meant (the Quakers). Prompted by the Continental resolution, the Philadelphia City Committee of Inspection petitioned the provincial Assembly to force men to join a militia or contribute monetarily.<sup>563</sup> A new, more radical Philadelphia association, the Committee of Privates, drafted a similar petition.<sup>564</sup> As radicals asked these bodies to force the issue with provincial Quakers, the

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559. The quoted language is from Minutes of the Northampton County Committee (June 15, 1776), in 14 PENNSYLVANIA ARCHIVES, SECOND SERIES 591, 604 (William H. Egle ed., 1888). For records of similar proceedings in other county committees of safety, see Memoranda of Proceedings of the Chester County Committee, in 14 PENNSYLVANIA ARCHIVES, SECOND SERIES, *supra*, at 127, 131, 137; Minutes of the Northampton County Committee, in 14 PENNSYLVANIA ARCHIVES, SECOND SERIES, *supra*, at 591, 600-07; Proceedings of the Berks County Committee, in 14 PENNSYLVANIA ARCHIVES, SECOND SERIES, *supra*, at 306, 306-07, 310; Proceedings of the Cumberland County Committee (June 28, 1776), in 14 PENNSYLVANIA ARCHIVES, SECOND SERIES, *supra*, at 469, 470; Proceedings of the Northumberland County Committee, in 14 PENNSYLVANIA ARCHIVES, SECOND SERIES, *supra*, at 337, 342, 347-48.

560. Cf. RYERSON, *supra* note 536, at 126 ("The arming of the province created or strengthened a host of institutions that had both overlapping memberships and distinct political, economic, and social characteristics. By mid-summer [of 1775], the Assembly, the Committee of Safety, local committees of observation, committees of militia officers, and committees of militia privates all competed for the loyalties of patriotic Pennsylvanians.").

561. Resolution of July 18, 1775, in 2 JOURNALS OF THE CONTINENTAL CONGRESS 187, 187-90. (Worthington Chauncey Ford ed., 1905).

562. *Id.* at 189.

563. See Petition from the Committee of the City and Liberties of Philadelphia (Oct. 20, 1775), in 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7311, 7311-12.

564. Petition from the Committee of the Privates of the Association of the City of Philadelphia (Oct. 21, 1775), in 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7312, 7312-13.

atmosphere in Philadelphia became charged.<sup>565</sup> Quaker leaders published an address defending their members, only to be publicly rebutted by Thomas McKean and several other members of the Committee of Inspection, who presented a "Petition and Remonstrance" to the Assembly.<sup>566</sup> McKean's petition began by averting to "the virtuous and wise Measures planned by the Congress"—where McKean *also* sat as a delegate from Delaware—and reasoned that Quakers were bound by the social compact to contribute to provincial and national defense.<sup>567</sup>

In at least one case, Congress directly intervened in local committee proceedings, probably to ensure that they were authorized by law. In late August 1775, the Committee of Inspection heard a case involving Isaac Hunt, a lawyer who had sued out a complaint against a member of the committee for seizing linen imported by his client, a dry goods merchant.<sup>568</sup> Unwisely, Hunt attempted to frustrate the committee's proceedings, and on September 20th he was made to ride in a cart around the city, flanked by militia, while fife and drum played "The Rogue's March."<sup>569</sup> When the parade passed the house of John Kearsley, a well-known loyalist, Kearsley "threw open his window and threatened the crowd with a pistol."<sup>570</sup> The decision was a poor one. The militia pulled Kearsley from his window and forced him into the cart (Hunt, apparently, was released, much to his own good fortune), continuing through the city with its new passenger.<sup>571</sup>

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565. See, e.g., *Diary of James Allen, Esq., of Philadelphia, Counsellor-at-Law, 1770-1778*, 9 PA. MAG. HIST. & BIOGRAPHY 176, 185-86 (1885) [hereinafter *Diary of James Allen*] ("Oct. 14, 1775.— . . . Last Thursday & the preceding Tuesday I appeared in Battalion in my uniform, as a private man in Capt Shees company. I have no opinion that this association, will be very useful in defending the City: as they have refused to be bound by any Articles & have no subordination. My Inducement principally to join them is; that a man is suspected who does not; & I chuse to have a Musket on my shoulders, to be on a par with them; & I believe discreet people mixing with them, may keep them in Order." (emphasis added) (citation omitted)).

566. EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 49-50; Address of the People Called Quakers, in 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7326, 7326-30; Petition and Remonstrance of the Committee of the City and Liberties of Philadelphia, in 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7334, 7334-37.

567. Petition and Remonstrance of the Committee of the City and Liberties of Philadelphia, in 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7334, 7334; see G.S. ROWE, THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 69-70 (1978).

568. See Minutes of the Committee of Inspection (Aug. 19, 1775), in PA. GAZETTE, No. 2437, Sept. 6, 1775, at 93; EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 38-39 (entry for Aug. 19, 1775).

569. OUSTERHOUT, *supra* note 540, at 117.

570. *Id.*; see also THAYER, *supra* note 534, at 171. Ryerson has Kearsley firing into the crowd. RYERSON, *supra* note 536, at 131-32.

571. OUSTERHOUT, *supra* note 540, at 117.

Kearsley avoided tarring and feathering, but his treatment was nonetheless clearly at odds with promises the Committee of Inspection had made only one day before. On September 19th the Committee had denied “publicly [sic] exposing and punishing, before conviction, certain persons supposed to be unfriendly to the cause of liberty,” as rumors suggested was its practice.<sup>572</sup> It resolved, further, that “no person or persons ought to . . . inflict punishment on any one” before a matter was “heard and determined by this Committee.”<sup>573</sup> Of course, Kearsley knew better. In the weeks following his release, he undertook to enlighten the English about events in Philadelphia, writing a series of letters that included his “Plan for subduing America” and a description of area naval defenses.<sup>574</sup> The Committee of Inspection was tipped off and intercepted the letters, arrested Kearsley, and ordered him confined to the Statehouse under guard.<sup>575</sup> On the same day, however, the Continental Congress issued its own resolution, recommending to “the several provincial Assemblies or Conventions, and councils or committees of safety” that *they* “arrest and secure every person in their respective colonies, whose going at large may, in their opinion, endanger the safety of the colony, or the liberties of America.”<sup>576</sup> In effect, Congress was asking that Kearsley be transferred from the City Committee of Inspection to the custody of the provincial Committee of Safety. The Committee of Safety took it this way, and immediately requested that Kearsley “be delivered over for trial,” since only *it* had been “invested with that power.”<sup>577</sup> The request “produced a warm debate for some time” in the Committee of Inspection, but ultimately members voted to comply, and the

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572. 3 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 397, at 731.

573. *Id.*

574. On the intelligence in Kearsley's letters, see DORWART, *supra* note 542, at 113. Historian Henry Young describes Kearsley as responding to the August 23rd proclamation by King George, which declared that “all our subjects of this realm and the dominions thereunto belonging are bound by law to be aiding and assisting in the suppression of such rebellion, and to disclose and make known all traitorous conspiracies and attempts against us, our Crown, and dignity.” The King's Proclamation for Suppressing Rebellion and Sedition (Aug. 23, 1775), in 9 ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 850 (Merrill Jensen ed., 1955); see Young, *supra* note 339, at 288.

575. EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 45 (entry for Oct. 6, 1775).

576. Resolution of Oct. 6, 1775, in 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 561, at 279, 280.

577. EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 45–46 (entry for Oct. 7, 1775); see Minutes of the Council of Safety of the Province of Pennsylvania (Oct. 7, 1775), in 10 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 358–59.

selection of fifteen delegates to assist in Kearsley's trial suggests that some compromise was reached.<sup>578</sup>

Kearsley's proceedings before the Committee of Safety ended with a jail sentence, but I am aware of no records of the trial itself, and it is worth asking what the crime might have been.<sup>579</sup> Kearsley had not broken the continental embargo on importing English goods. Nor was there, as of yet, any *state* of Pennsylvania or any law of treason, provincial or national, that criminalized Kearsley's conduct, which could be cast, in fact, as a dutiful response to the King's Proclamation of August 23rd requiring subjects to assist in suppressing rebellion, or even as a petition to his government to deal with local mobs.<sup>580</sup> Perhaps Kearsley's conduct placed him under the authority granted the Committee of Safety to "provid[e] for the Defence of this Province against insurrection and Invasion."<sup>581</sup> One could read the October 6th resolution of the Continental Congress—the recommendation that provincial assemblies or their committees of safety arrest dangerous persons—as an effort to clarify this connection.<sup>582</sup> From the perspective of Congress, the revolutionary bodies of the provincial governments possessed the legal authority to arrest and hold men like Kearsley, and these bodies might hold hearings or trials to determine the factual basis of confinement. Interestingly, there is no record of a discussion of what procedures the Committee of Safety was bound to observe in the Kearsley proceedings. The issue does not seem to have been one

578. See EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 45–46 (entry for Oct. 7, 1775).

579. On Kearsley's punishment, see Minutes of the Council of Safety of the Province of Pennsylvania (Oct. 24, 1775), in 10 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 380, 380–81; EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 48–49. He was sentenced to jail in York, PA, probably because the jails in Philadelphia were already full with "[h]undreds of British prisoners of war, Loyalist fighters, common criminals, and political prisoners." DORWART, *supra* note 542, at 120–21.

580. Compare Kearsley's letter to the petitions to Governor Tryon and council to send military forces to deal with Ethan Allen and the "Bennington mob." See *supra* Part III.A.1. On the absence of a law of treason during this period, see CHAPIN, *supra* note 346, at 33; OUSTERHOUT, *supra* note 540, at 118. ("Since treason was considered 'a criminal attempt to destroy the existence of the government,' until Congress was the legal government, it could not logically punish a failure of allegiance to itself."). Benjamin Church was the first person prosecuted for treason during the Revolutionary war. Church was a military physician and passed coded letters to the English. He was court-martialed on October 4, 1775, for "carr[ying] on a criminal Correspondence with the Enemy" in violation of the Articles of War. See CHAPIN, *supra* note 346, at 30–32. This was two days before the October 6th resolution of the Continental Congress that provincial Assemblies or Committees of Safety should arrest and secure dangerous persons.

581. Minutes of the Council of Safety of the Province of Pennsylvania (June 30, 1775), in 10 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 280.

582. Cf. Young, *supra* note 339, at 288–89 ("In effect, the resolution of Congress vested in the extralegal Whig committees the power of imprisoning citizens at will.")



of proper procedure. After all, the Philadelphia Committee of Inspection had resolved, on September 19th, to provide hearings for those suspected of disaffection; this apparently did not satisfy the Continental Congress, which requested anyway that such matters be handled by provincial authorities. What mattered, apparently, was not whether proceedings were summary in nature or full dress, but whether the local committee had remained within its legal authority.<sup>583</sup>

2. *The Pennsylvania Constitution of 1776.* The legal apparatus for dealing with conduct like Kearsley's did not emerge until after Pennsylvania wrote a new constitution in the summer of 1776. This delay was due largely to the efforts of the state's great men, who were, excepting Franklin, McKean, and a few others, largely loyalists and moderate Whigs, and who used their control of the provincial Assembly and Pennsylvania's delegation to the Continental Congress to impede radical change.<sup>584</sup> As late as February 1776, John Dickinson and Andrew Allen, accompanied by John Jay and William Duane of New York, met with one of the largest landholders in New Jersey, Lord Drummond, in an effort to draft terms of peace between the colonies and the Crown.<sup>585</sup> The meeting was promising, and it encouraged Dickinson to continue the campaign against independence from his seats in the provincial Assembly and the Continental Congress.<sup>586</sup> Yet the campaign was not to last long. The traditional story of Pennsylvania in this period is, at least in part, a story of how Dickinson, Allen, and their allies were outflanked and then defeated by radical Whigs, who controlled neither the Assembly nor the Congressional delegation.<sup>587</sup>

The key events in the story are well known. In January 1776 Thomas Paine published *Common Sense*, whose case for

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583. Indeed, problems with local mobbing and violence continued, and in June 1776 the Continental Congress issued a resolution forbidding that someone

charged with being a tory, or unfriendly to the cause of American liberty, be injured in his person or property, or in any manner whatever disturbed, unless the proceeding against him be founded on an order of this Congress, or the Assembly, convention, council or committee of safety of the colony, or committee of inspection and observation, of the district wherein he resides.

Resolution of June 18, 1776, in 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 342, at 459, 464.

584. See SELSAM, *supra* note 537, at 94-116; THAYER, *supra* note 534, at 177-80. To McKean and Franklin, one might also add Charles Thomson and Thomas Mifflin, both of whom were engaged in national service.

585. See Lord Drummond's Notes (Jan. 9, 1776); John Dickinson's Proposed Resolutions for Negotiating with Great Britain (Jan. 9-24, 1776); Lord Drummond's Minutes (Feb. 5, 1776), in 3 LETTERS OF DELEGATES TO CONGRESS: JANUARY 1-MAY 15, 1776, at 21-26, 64-71, 198-200 (Paul H. Smith ed., 1978).

586. DORWART, *supra* note 542, at 116.

587. See WOOD, *supra* note 441, at 84-85 (who captures this nicely in two pages).

independence found an eager audience in Pennsylvania.<sup>588</sup> Others became heatedly opposed, and March 1776 saw a “wordy war” in the Philadelphia press between advocates of peace and advocates of independence.<sup>589</sup> At the same time, the real war pushed closer. In April 1776 the giant British man-of-war, *Roebuck*, sailed up the Delaware River, and in early May cannon fire from an attack on the ship could be heard in the city, leading many to leave town.<sup>590</sup> If Pennsylvania’s great men remained opposed to independence, still the tide was shifting. Some of the great men saw this; as Andrew Allen’s brother, James, put it in his diary on March 6, “peace is scarcely thought of—Independancy predominant.”<sup>591</sup> Frustrated by provincial leaders, nervous about the security of Philadelphia, city radicals were galvanized by the May 15 resolution of the Continental Congress calling for colonies to establish new forms of government.<sup>592</sup> Three months later radicals had succeeded in calling a convention to frame a new constitution, while the provincial Assembly, still meeting, struggled to muster a quorum.<sup>593</sup>

With the great men sidelined or withdrawn, new men emerged to direct Pennsylvania’s Constitutional Convention and write “the most radical constitution of the Revolution.”<sup>594</sup> The new men were new to power, but they were not simpletons. According to Theodore Thayer’s history, the chief authors of the Constitution of 1776 were “James Cannon, Owen Biddle, Timothy Matlack, David Rittenhouse, George Bryan, and John Jacobs, [men who] were well within the brackets of upper-class respectability and

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588. THAYER, *supra* note 534, at 176.

589. See, e.g., SELSAM, *supra* note 537, at 104.

590. EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 69 (“[May] 8[:] [T]he City alarmed with hearing a great number of heavy cannons firing down the river. . . . [May] 9[:] [W]e heard the fight was renewed by the constant discharge of heavy cannon.”); Dorwart describes the feeling as “widespread panic.” DORWART, *supra* note 542, at 123.

591. *Diary of James Allen*, *supra* note 565, at 186; see also *Extracts from the Diary of Dr. James Clitherall, 1776*, 22 PA. MAG. HIST. & BIOGRAPHY 468, 469 (1898) (“I soon perceived in this city that parties ran high—the body of the people were for Independency.”).

592. *Extracts from the Diary of Dr. James Clitherall*, *supra* note 591, at 469–70 (“[O]n a recommendation of Congress that those Colonies that did not find their present form of government sufficient for the exigency of the times, would settle a form of government for themselves, the rage of the people burst out in a protest against their present Assembly, who had instructed their Delegates not to vote for Independency.”); see also ADAMS, *supra* note 390, at 71–77.

593. THAYER, *supra* note 534, at 180–83.

594. WOOD, *supra* note 441, at 85. Contrast Wood’s account with the revisionary view in ADAMS, *supra* note 390, at 259–60, 266. Adams does not see the 1776 Constitution as an example of “simple government” or direct democracy, and points to the independent election of the council and the long terms of judges.

possessed the education and culture of their kind.”<sup>595</sup> Paul Selsam, more doubtful of the Convention’s credentials, gave the lead role to George Bryan, who may have influenced its proceedings from the outside.<sup>596</sup> Bryan was a well-respected Philadelphia judge and merchant, and hardly unsophisticated.<sup>597</sup> Whoever took the lead, the constitution they framed did ignore elements of Whiggish political thought that had particular salience for moderates. In particular, its “Plan or Frame of Government” created a unicameral legislature, a conciliar executive, and something called a “Council of Censors,” a periodic body that was to determine if the government had violated the constitution and recommend amendments.<sup>598</sup> These institutions were roundly criticized from the beginning.<sup>599</sup> As later commentators have shown, however, they were adopted for reasons firmly rooted in English oppositional political thought,<sup>600</sup> namely, a desire to ensure that government remained responsive to its electors, that the people retained what sovereign powers they reasonably could, and that groundwork was not laid for the creation of a class of political elites—men like those who had controlled Pennsylvania politics throughout the eighteenth century, and who now mocked the constitution and its framers.

The other major section of the constitution, the “Declaration of Rights,” seemed less innovative than the Frame of Government, and was in fact largely copied from the Virginia Declaration of Rights.<sup>601</sup> Yet the Declaration interlocked with the Frame in ways

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595. THAYER, *supra* note 534, at 186. Ryerson has concluded that the Constitutionalists of 1776 (i.e., supporters of the state constitution) were political outsiders, with less average wealth than conservatives, and predominantly German Reformed or Scots-Irish Presbyterians. Ryerson, *supra* note 539, at 99–101, 109; see OUSTERHOUT, *supra* note 540, at 126 (“Their places were taken by persons from groups not previously involved in Pennsylvania politics, lower on the economic and social ladders than their predecessors had been, although not impoverished, unsuccessful men as some Tory writers claimed.”).

596. See SELSAM, *supra* note 537, at 150–51; cf. Ryerson, *supra* note 539, at 109 (crediting Cannon and Rittenhouse, “perhaps with some assistance from the political veteran and nondelegate George Bryan”). The attribution is contested. Bryan’s own biographer asserts that he did not “significantly influence” those who wrote the Constitution, but the author does not cite any textual support for this proposition. JOSEPH S. FOSTER, IN PURSUIT OF EQUAL LIBERTY: GEORGE BRYAN AND THE REVOLUTION IN PENNSYLVANIA 80 (1994). The whole matter is difficult to judge, as the Convention left no records of its deliberations.

597. See FOSTER, *supra* note 596, at 11, 64.

598. PA. CONST. of 1776, Frame of Government, §§ 1–3, 47.

599. See, e.g., ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776–1790, at 16 (1942).

600. See FOSTER, *supra* note 596, at 78–79, 81, 84; RYERSON, *supra* note 536, at 111; WOOD, *supra* note 441, at 86–89; Douglas McNeil Arnold, Political Ideology and the Internal Revolution in Pennsylvania, 1776–1790, at 28, 39, 48 (Mar. 1976) (unpublished Ph.D. dissertation, Princeton University).

601. ADAMS, *supra* note 390, at 77.

that are not often appreciated. We can see this by examining where the Pennsylvania Declaration departed from its Virginia model. Thus, for example, the celebrated section 5 of the Virginia Declaration, which mandated that “the legislative, executive and judicial powers [of the state] should be separate and distinct,” was missing from the Pennsylvania Constitution.<sup>602</sup> In contrast, the Pennsylvania Declaration guaranteed the right of the people to assemble and “apply to the legislature for redress of grievances, by [way of] address, petition or remonstrance”—a right unmentioned in the Virginia Declaration.<sup>603</sup> Both documents included criminal procedural rights, such as the right to counsel, confrontation, and a speedy trial, as well as a guarantee, that “[no man shall] be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.”<sup>604</sup> This was a Law of the Land Clause, included in a number of early state constitutions, whose meaning coincided roughly with the federal Constitution’s guarantee of due process.<sup>605</sup> In some states, the Law of the Land Clause was held to prohibit the legislature to alter fundamental aspects of common law procedure, but Pennsylvania’s Constitution contained language that arguably ruled out this view.<sup>606</sup> It included “law of the land” a *second* time, where the expression was equated with “the voice of a majority of the people” in the Assembly.<sup>607</sup> The implication then, was that the Assembly might deprive a person of

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602. VA. CONST. of 1776, Declaration of Rights, § 5. The only separation of powers provisions in the Pennsylvania Constitution are the vesting clauses in the Frame of Government. See PA. CONST. of 1776, Frame of Government, §§ 2, 3. In 1784, the Council of Censors observed that these vesting clauses served to separate powers in the Pennsylvania government, but views on this issue had clearly evolved over eight years, as the criticism of the ‘tyrannical’ assembly gained a foothold. See THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 84 (1825) (“The legislative, executive and judicial powers of the people being thus severally delegated to different bodies, the convention has carefully guarded against any encroachment of one on the proper authority of either of the other bodies . . .”).

603. PA. CONST. of 1776, Declaration of Rights, art. XVI.

604. *Id.* art. IX. The Virginia Constitution of 1776, Declaration of Rights, § 8 has “law of the land” (i.e., singular, not plural), but is otherwise the same.

605. See RODNEY L. MOTT, DUE PROCESS OF LAW 14–15 (1926). Both declarations also guaranteed the right of trial by jury in suits relating to property. PA. CONST. of 1776, Declaration of Rights, art. XI; VA. CONST. of 1776, Declaration of Rights, § 11.

606. See Matthew Steilen, *Due Process as Choice of Law: A Study in the History of a Judicial Doctrine*, 24 WM. & MARY BILL RTS. J. (forthcoming Apr. 2016).

607. See PA. CONST. of 1776, Frame of Government, § 17 (“But as representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and *make the voice of a majority of the people the law of the land*; therefore the general assembly shall cause complete lists of the taxable inhabitants in the city and each county in the commonwealth respectively, to be taken and returned to them, on or before the last meeting of the assembly elected in the year one thousand seven hundred and seventy-eight, who shall appoint a representative to each, in proportion to the number of taxables in such returns . . .” (emphasis added)).

his liberty *through a majority vote*, since that *was* law of the land. In this context, the failure of the Pennsylvania Declaration to prohibit bills of attainder was significant.<sup>608</sup> Such proceedings may have been expected, perhaps as a response to popular petitions seeking redress for the grievances caused by profiteering loyalists.<sup>609</sup>

In addition to framing the new constitution, the Constitutional Convention exercised a range of legislative and executive functions throughout the summer of 1776. In early September it passed an ordinance appointing its own members justices of the peace to ensure the continuance of basic government during the transition between regimes.<sup>610</sup> On September 5th, several weeks before approving the constitution, the Convention passed a temporary "Ordinance . . . Declaring What Shall Be Treason," which it made effective until the end of the new state Assembly's first session.<sup>611</sup> This treason ordinance largely followed the language of the earlier Congressional resolution, mentioned above.<sup>612</sup> It declared the same forms of treason, namely, levying war against the state and adhering to the King or to state enemies.<sup>613</sup> Unlike the Congressional resolution, however, the Pennsylvania ordinance was made applicable to all persons "inhabiting or residing within

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608. See SELSAM, *supra* note 537, at 182 & n.50.

609. Cf. Arnold, *supra* note 600, at 49–50 ("The allocation of extensive powers to the unicameral state Assembly by the radicals in the Pennsylvania Constitution and the corresponding curtailment of the authority of the executive represented an attempt to entrust the fundamental political powers in the state to a body which had traditionally been conceived as the major guardian of the public interest."). As with the separation of powers, the views of the Council of Censors in 1784 suggest a very different conception of legislative power. See THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, *supra* note 602, at 85–87 ("We are willing to leave . . . acts, *expost-facto*, to be justified by the necessity of the case. But law is well defined to be 'a rule prescribed or made before hand' . . . Innocence and guilt . . . ought, in all instances, to be judged by the known and usual course of proceedings; ever preserving, in case of doubts as to fact and law, the sacred right of trial by jury . . .").

610. An Ordinance for the Appointment of Justices of the Peace for the State of Pennsylvania, ch. 731, §§ 1, 3–4, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 13, 16–17. The justices of the peace were to apply provincial law but take an oath abjuring allegiance to the British King. A similar oath had been required for electors to the Constitutional Convention. See Minutes of the Conference of Committees of the Province of Pennsylvania (June 19, 1776), in 3 PENNSYLVANIA ARCHIVES, SECOND SERIES 561 (John B. Linn & Wm. H. Egle eds., 1896).

611. Act of Sept. 5, 1776, ch. 732, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 18, 18–19.

612. See Resolution of June 24, 1776, in 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 342, at 475.

613. Act of Sept. 5, 1776, ch. 732, § 2, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 18, 18–19; CHAPIN, *supra* note 346, at 39; HURST, *supra* note 347, at 83–84. Under the Pennsylvania ordinance, concealing treason or aiding a traitor was declared to be "misprison of treason," rather than a kind of constructive treason. See Act of Sept. 5, 1776, ch. 732, § 3, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 18, 19.

the limits of the state,” without the additional and typical requirement that an individual derive some protection from state law.<sup>614</sup> The intention may have been to reach those behind British lines or on the frontier. The Pennsylvania ordinance also required that conviction for treason occur in a “court of oyer and terminer hereafter to be erected according to law,” and set punishment at the forfeiture of land and imprisonment, but not death.<sup>615</sup> A week later, the Convention passed a similar ordinance criminalizing sedition, that is, obstruction of the war effort through speech or writing.<sup>616</sup> In contrast to treason, this offense could be prosecuted summarily, “on complaint and proof made on oath” before a local justice of the peace.<sup>617</sup>

On the last day of its existence, the provincial Assembly (the *colonial* body, still operating parallel to the revolutionary government) denounced the sedition ordinance as “a dangerous Attack on the Liberties of the good People of Pennsylvania” and a violation of their rights, which it resolved “ought not to be considered as obligatory.”<sup>618</sup> A freeman could “constitutionally” be deprived of liberty only “by the Judgment of his Peers, and a Trial had by a Jury of his Country.”<sup>619</sup> The provincial Assembly’s language differed from the language in the new state constitution, which required deprivations be by the “*laws of the land* or the judgment of [one’s] peers.” As we have seen, “*laws of the land*” arguably included deprivations of liberty by a summary form of proceeding, as long as that proceeding was supported by a majority vote in the state legislature.

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614. See Act of Sept. 5, 1776, ch. 732, § 1, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 18, 18.

615. Act of Sept. 5, 1776, ch. 732, § 2, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 18, 18.

616. Act of Sept. 12, 1776, ch. 733, § 1, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 19, 19–20; see CHAPIN, *supra* note 346, at 41.

617. Henry Young writes that under the sedition ordinance, “persons convicted were to be imprisoned, or bound over to keep the peace, at the justice’s discretion,” but this is not strictly speaking correct. The ordinance authorized a justice on complaint only to bail an offender; if he thought a defendant too dangerous to bail, the justice had to convene a panel to decide if the man should be committed to jail indefinitely. The amount of bail required was at the discretion of the justice, and those unable to make bail were to be committed to jail; thus, an individual justice might in effect jail an individual by setting his security too high to be paid; but under the letter of the law, being committed to jail required the judgment of three justices of the peace. See Young, *supra* note 339, at 291. The ordinance allowed for review of the decision of a justice or justices by way of appeal to the Council of safety, but as Anne Ousterhout points out, the Council had made its members all justices of the peace, which leads one to wonder what the efficacy of an appeal would be. OUSTERHOUT, *supra* note 540, at 148.

618. Resolution of Sept. 26, 1776, in 8 PENNSYLVANIA ARCHIVES, EIGHTH SERIES, *supra* note 543, at 7586 (emphasis omitted).

619. *Id.*

Few people were prosecuted under these ordinances.<sup>620</sup> In the case of treason, the difficulty was the absence of a functioning court system. Revolutionaries opposed to the state constitution, who formed a party known as the “Republicans,” boycotted the new government in an effort to force amendments or even a second convention.<sup>621</sup> Consequently, the courts of oyer and terminer required under the treason ordinance did not sit.<sup>622</sup> In Philadelphia in late November, a group of self-described “respectable citizens,” possibly the City Committee of Inspection, met at the Indian Queen Tavern to address complaints about local Tories emboldened by the imminent arrival of the British Army.<sup>623</sup> Thomas McKean chaired at least one of their meetings.<sup>624</sup> The group heard accusations that men sang “God Save the King” and were generally unfriendly to the American cause, and ordered some of the accused confined to jail.<sup>625</sup> The case of James Prescott was thought particularly serious; he was reported to have “rejoiced to hear news of the success of the British forces,” and the committee ordered him brought before the Council of Safety.<sup>626</sup> Another target of the committee, Joseph Stansbury, wrote to the Council of Safety that “some armed men” had come to his home, arrested him and then brought him before “a number of Persons, whose stile [sic] or authority I was entirely ignorant of” on allegations the Council had already dismissed.<sup>627</sup> He now sat in jail, despite showing the men who

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620. There was only one arrest and no convictions under the treason ordinance and no known prosecutions under the sedition ordinance. For the arrest under the treason ordinance, see Minutes of the Council of Safety (Nov. 22, 1776), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 12. The assertions about the absence of prosecutions under both ordinances derive from Henry Young’s study. Young, *supra* note 339, at 291.

621. BRUNHOUSE, *supra* note 599, at 21–22, 33.

622. OUSTERHOUT, *supra* note 540, at 148.

623. Minutes of the Meeting at the Indian Queen, 1776, in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, 73, 73–75 (Samuel Hazard ed., 1853); 1 JOHN THOMAS SCHARF & THOMPSON WESTCOTT, HISTORY OF PHILADELPHIA 326, col. 2 (1884); see OUSTERHOUT, *supra* note 540, at 156–57.

624. See JOHN M. COLEMAN, THOMAS MCKEAN: FORGOTTEN LEADER OF THE REVOLUTION 205–07, 284 n.75 (1975); see also Letter from Joseph Stansbury to Council of Safety (Dec. 6, 1776), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 94, 94–95. Coleman points to evidence that McKean’s earliest judicial opinions were given in his capacity as a member of the City Committee of Inspection and suggests that they may have concerned the disposition of prisoners. Interpreting McKean’s activity at the Indian Queen tavern in this light is surely preferable to the interpretation proffered by Young, who speculates that McKean was made chair of the proceeding against his will. Young, *supra* note 339, at 291–92.

625. Minutes of the Meeting at the Indian Queen (Nov. 25, 1776), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 73, 74–75.

626. *Id.* at 75.

627. See Letters from Joseph Stansbury to Council of Safety (Dec. 6, 10, 1776), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 94–95, 98–99. Stansbury was eventually released. Minutes of the Council of Safety (Dec. 10, 1776), in 11 COLONIAL RECORDS OF

arrested him records of the earlier proceeding. Surely the Council would want to “give a timely check to such arbitrary, unlawful[], & unprecedented Proceedings.”<sup>628</sup> Unfortunately for Stansbury, however, the Council of Safety had apparently ordered the proceedings.<sup>629</sup>

All of this took place in the shadow of the British Army, whose advance patrols were within twenty miles of the city by December 2nd.<sup>630</sup> While it was receiving appeals from Stansbury, the Council was ordering shops and schools closed on grounds that the city’s inhabitants should be “engaged solely in providing for the defense” of Philadelphia; anyone not so engaged “may justly be suspected of designs Inimical to the Freedom of America,” and, “[w]here . . . very apparent . . . confined.”<sup>631</sup> Finally, on December 8th, the city was put under the command of General Putnam.<sup>632</sup>

3. *The Quaker Banishment.* The British did not take Philadelphia in the winter of 1776, however, and the cycle of legislation, summary justice, and military authority repeated itself in the summer of 1777 when they threatened again. In January 1777 the Assembly passed an act reviving the laws of the province and establishing courts of general quarter sessions, common pleas, and oyer and terminer, among others.<sup>633</sup> On February 2, 1777, it replaced the temporary treason ordinance passed by the Convention with “An Act Declaring What Shall Be

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PENNSYLVANIA, *supra* note 552, at 43–44 (examination of Stansbury’s case by a board of six councilmembers); Resolution of Council of Safety (Dec. 13, 1776), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 106 (paroling Stansbury and several others on promises of good behavior).

628. Letter from Joseph Stansbury to Council of Safety (Dec. 6, 1776), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 98–99.

629. See Letter from Thomas Mifflin to General George Washington (Nov. 26, 1776), in 1 LIFE AND CORRESPONDENCE OF JOSEPH REED 266, 267 (William B. Reed ed., 1847) (“The Council of Safety, I am just informed, open the campaign this day by (imprisoning) the principal Tories in and near the city.”). Congress had apparently ordered General Mifflin to “remain in Philadelphia to rouse the men to arms, and incidentally to keep an eye on the assembly and the Council of Safety to see that they carried out the vital requisition.” BRUNHOUSE, *supra* note 599, at 23. Around the same time, news spread among conservative Philadelphians that “a list of 200 disaffected persons” had been composed, “who were to be seized, imprisoned & sent off to North Carolina.” *Diary of James Allen*, *supra* note 565, at 193. The news led a number of leading Philadelphians to flee the city for British-controlled New Jersey. Young, *supra* note 339, at 292; cf. OUSTERHOUT, *supra* note 540, at 157–58 (describing Galloway’s flight to the British army in the same period after learning that a warrant had been issued for his arrest for treason).

630. DORWART, *supra* note 542, at 131.

631. Minutes of the Council of Safety (Dec. 2, 1776), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 25–26; Minutes of the Council of Safety (Dec. 7, 1776), 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 36–38.

632. EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL, *supra* note 541, at 106.

633. Act of Jan. 28, 1777, ch. 737, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 29, 29–33.



Treason," which expanded the definition of treason to include enlisting in the British Army, furnishing it with supplies, carrying on a "traitorous correspondence," conspiring to betray the state or United States, and giving intelligence to the enemy.<sup>634</sup> Prosecution for treason was again confined to a court of oyer and terminer, but punishment was increased to death and forfeiture of land. The new law also punished sedition, called "misprison of treason," which was to be prosecuted in a court of quarter sessions and punished by imprisonment and partial forfeiture.<sup>635</sup> In March 1777 Pennsylvania's executive, the Supreme Executive Council, was finally able to assemble a quorum.<sup>636</sup> Still, because of resistance to the new constitution and the constant pressure of invasion, courts remained inoperative or dysfunctional for months.<sup>637</sup> Republican opponents of the constitution used the absence of a functioning court system to invite Congress to again interfere in the local governance of Pennsylvania.<sup>638</sup> In April Congress agreed, making Sam Adams, William Duer, and Richard Henry Lee a committee to confer with the President of the Supreme Executive Council on matters relating to the defense of the state.<sup>639</sup>

The uncertain and fluctuating character of civil authority in Pennsylvania played a crucial role in the banishment of leading Philadelphians in the late summer and early fall. July brought intelligence that General Howe and the British Army again intended to march on Philadelphia.<sup>640</sup> Later that month, Congress recommended to the Supreme Executive Council that it "make prisoners such of the late crown & proprietary officers," as well as others who were "disaffected or may be dangerous to the publick

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634. An Act Declaring What Shall Be Treason, ch. 740, §§ 1-3 (Feb. 11, 1777), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 45, 45-46. Young comments that the committee charged with drafting a treason bill comprised "extremists without legal training," but speculates that the bill they reported "was actually drawn for the committee by a trained lawyer." Young, *supra* note 339, at 293-94.

635. An Act Declaring What Shall Be Treason, ch. 740, §§ 2-4 (Feb. 11, 1777), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 45, 46-47.

636. Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Mar. 4, 1777), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 173.

637. BRUNHOUSE, *supra* note 599, at 37-38. Brunhouse argues that resistance to the new government was especially strong among lawyers and that radicals did not succeed in "re-establishing the judicial system under their own control" until May 1778. *Id.*

638. OUSTERHOUT, *supra* note 540, at 153-54, 156 ("But with courts not functioning and appointees refusing offices because of their dislike for the constitution, local government in many areas degenerated into a squabble between opposing political forces.")

639. Resolution of the Continental Congress (Apr. 14, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 310 ("Resolved, That it is the indispensable [sic] duty of Congress to watch over all matters . . . till such time as the Legislative and Executive Authorities of the Commonwealth of Pennsylvania, can resume the regular exercise of their different functions.")

640. FOSTER, *supra* note 596, at 88.

[sic] liberty,” and have them sent “back into the country” and confined or paroled.<sup>641</sup> The Council then named thirty-four men whose freedom could cause “great inconvenience and mischief” in light of the threatened invasion, including former Governor John Penn and Chief Justice Benjamin Chew.<sup>642</sup> Citing the congressional resolution in support, the Council ordered their imprisonment and removal, and instructed officers further “to imprison, remove, confine” and parole “as you see fit, all and persons whatsoever whom you may know or suspect to be disaffected.”<sup>643</sup> When Governor Penn and Chief Justice Chew refused to sign promises of good behavior, the Council requested that Congress remove them from the state.<sup>644</sup> Several days later, Chew changed his mind, explaining that he had refused parole “from a desire that the cause of his Arrest might have been inserted in the Warrant for arresting him, in order that he might be able to satisfy his friends upon what he is Arrested,” and thus to dispel the supposition “that he stands charged with having committed” a crime.<sup>645</sup> Chew had first treated his arrest as resting on an accusation of criminal activity, but now thought otherwise, and was happy to comply with a public safety measure. In the interim, however, the Council itself had apparently changed its view of the matter, and now wanted Chew simply removed; it withdrew the possibility of parole and asked Congress to send Chew to Virginia.<sup>646</sup>

Two weeks later, a similar profusion of recommendations and retractions led to the arrest and banishment of leading Philadelphian Quakers. Papers seized by General John Sullivan in late August implicated New Jersey Quakers in communicating intelligence to the British. Congress referred the matter to a committee of John Adams, Duer, and Lee.<sup>647</sup> The committee reported later the same day. Congress’s journals reveal nothing

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641. Resolution of Congress (July 31, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 469.

642. Warrant to Arrest Certain Persons, 1777 (Aug. 1–4, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 478, 484.

643. *Id.* at 478.

644. Minutes of the Supreme Executive Council (Aug. 12, 1777), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 264.

645. *Id.* at 267 (Aug. 18, 1777).

646. Congress at first refused, instructing the Council to take Penn and Chew’s parole, and then several weeks later, ordered their removal. *See* Minutes of the Supreme Executive Council (Aug. 12, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 513–14; Resolutions of Aug. 12, 1777 and Aug. 28, 1777, in 8 JOURNALS OF THE CONTINENTAL CONGRESS, at 633–36, 695 (Worthington Chauncey Ford ed., 1907).

647. Resolution of Aug. 28, 1777, in 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 646, at 688–89.

about the committee's views of the Sullivan papers, which contemporaries believed were forged, a judgment historians have long supported.<sup>648</sup> Instead, the committee reported much about earlier statements made by prominent Quakers, which Adams, Duer, and Lee thought "render it certain and *notorious*, that those persons are, with much rancour and bitterness, disaffected to the American cause."<sup>649</sup> There could be no doubt that "it will be their inclination" if possible, "to communicate Intelligence to the enemy."<sup>650</sup> Concern focused on what Quakers "*might do*," not on what the authors of the Sullivan papers had already done.<sup>651</sup> The committee concluded that it should be "earnestly recommended to the supreme executive council of the State of Pennsylvania, forthwith to apprehend and secure the persons of Joshua Fisher, Abel James, James Pemberton" along with eight other named Quakers and their papers "of a political nature."<sup>652</sup> Others who "in their general conduct and conversation, evidenced a disposition inimical to the cause of America" should also be arrested.<sup>653</sup> The Supreme Executive Council apparently thought the resolution "a direct order."<sup>654</sup> It immediately asked several leading members of the Constitutional party to assist "in forming out a List of persons dangerous to the State, & who ought to be arrested."<sup>655</sup> Warrants

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648. See 7 LETTERS OF DELEGATES TO CONGRESS: MAY 1–SEPTEMBER 18, 1777, at 573 n.1 (Paul H. Smith ed., 1981). For the view that the Sullivan papers were forged, see Remonstrance to Council by One Hundred and Two Citizens of Philadelphia (Sept. 7, 1777), in THOMAS GILPIN, EXILES IN VIRGINIA: WITH OBSERVATIONS ON THE CONDUCT OF THE SOCIETY OF FRIENDS DURING THE REVOLUTIONARY WAR 118–19 (1848); 2 PENNSYLVANIA, COLONIAL AND FEDERAL: A HISTORY, 1608–1904, at 44 (Howard M. Jenkins ed., 1906).

649. Resolution of Aug. 28, 1777, in 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 646, at 694 (emphasis added).

650. *Id.*

651. Robert F. Oaks, *Philadelphians in Exile: The Problem of Loyalty During the American Revolution*, 96 PA. MAG. HIST. & BIOGRAPHY 298, 303 (1972).

652. Resolution of Aug. 28, 1777, in 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 646, at 694. Most of the historians who had studied the Quaker banishment in detail find John Adams's public dislike of the Philadelphia Quakers significant. See, e.g., OUSTERHOUT, *supra* 540, at 165; James Donald Anderson, Thomas Wharton, 1730/31–1784: Merchant in Philadelphia 357–58, 362 (unpublished Ph.D. dissertation, University of Akron 1977). For a sense of Adams's views, see Letter from John Adams to Abigail Adams (Sept. 8, 1777), in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 487 (Edmund C. Burnett ed., 1923) ("You will see by the papers enclosed that we have been obliged to attempt to humble the pride of some Jesuits, who call themselves Quakers, but who love money and land better than liberty or religion. The hypocrites are endeavoring to raise the cry of persecution, and to give this matter a religious turn, but they can't succeed.").

653. Resolution of Aug. 28, 1777, in 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 646, at 695.

654. Anderson, *supra* note 652, at 359. When the arresting officers were challenged to produce a warrant, some of them read the resolution of Congress. See Oaks, *supra* note 651, at 304.

655. Resolutions of Congress, 1777 (Aug. 28, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 554–55; Minutes of the Supreme Executive Council (Aug. 31, 1777), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 283.

were issued and arrests were made on September 2nd, 3rd, and 4th.<sup>656</sup> Targets were asked not to leave their homes and to “refrain from doing anything injurious to the United States . . . by speaking, writing, or otherwise, and from giving intelligence” to the British.<sup>657</sup> Those who refused were confined to the local Mason’s lodge under guard.<sup>658</sup> In total twenty-six men were arrested.

The protests of the Quakers, their eventual banishment to Virginia, and their eventual return are well studied, and my concern here is largely confined to two aspects of the case. First, the petitions lodged by Israel Pemberton and several others protesting the circumstances of their arrest and requesting relief clearly assume that the Council or Congress suspected them of criminal activity. On requesting that the arresting officer produce a warrant, the men had been “astonished to find a General Warrant, specifying no manner of offence,” and “appointing no authority to hear and judge, whether we were guilty or innocent.”<sup>659</sup> All that those under arrest wanted was a hearing, and the refusal to provide merely a hearing was “evidence [of] the want of proof against us.”<sup>660</sup> But, of course, the disaffection of those confined to the lodge was, in the words of Congress, “notorious,” and the proof consisted in their published writings. The petitions largely failed to confront this point, and the men continued to object to the confinement as “unjust, as we have not attempted, nor are charged, with any act.”<sup>661</sup> We “have remained here un-accused and unheard,” in violation of “the Liberties and Privileges to which we are entitled by the fundamental rules of justice, . . . the laws of the land; and by the express provisions of the present Constitution.”<sup>662</sup> In the view of Henry Laurens, a delegate to Congress from South Carolina, the Quakers “have given the Strongest proofs which in these times can be expected of their avowed attachment to the cause of our Enemies.”<sup>663</sup> When

656. Exile of Friends from Philadelphia to Virginia (Sept. 9, 1777), in GILPIN, *supra* note 648, at 67; Anderson, *supra* note 652, at 360; Oaks, *supra* note 651, at, 304.

657. Exile of Friends from Philadelphia to Virginia (Sept. 9, 1777), in GILPIN, *supra* note 648, at 65.

658. *Id.* at 66.

659. AN ADDRESS TO THE INHABITANTS OF PENNSYLVANIA, BY THOSE FREEMEN, OF THE CITY OF PHILADELPHIA, WHO ARE NOW CONFINED IN THE MASON’S LODGE BY VIRTUE OF A GENERAL WARRANT 4 (1777) [hereinafter ADDRESS TO THE INHABITANTS OF PENNSYLVANIA].

660. *Id.* at 10.

661. *Id.* at 13.

662. *Id.* at 18. The reference to the Constitution of 1776 is to Article X of the Declaration of Rights, which forbade general warrants. PA. CONST. of 1776, Declaration of Rights, art. X.

663. Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra* note 652, at 476–77.

Congress finally recommended to the Supreme Executive Council that it hear the petitioners to allow them to remove suspicion against them, the Council balked.<sup>664</sup> A hearing could not do this, and thus, wrote the Council, “can answer no good purpose.”<sup>665</sup> “Besides, the restraint of suspicious persons, in like exigencies as the present, may be abundantly justified by the example of the first nations” and by civilian commentators.<sup>666</sup> One such commentator, Emer de Vattel, had observed that a nation at war had a right to demand good behavior of unarmed enemies, and that, if there was “any reason to mistrust them,” the sovereign might disarm them or even “take hostages,” not unlike the doctrine of preventive justice described by Blackstone.<sup>667</sup> Still, if that *was* the claim—that the Congress and the Supreme Executive Council were possessed of authority to arrest and confine dangerous persons without charge or hearing in an active warzone—neither Congress nor the Council unequivocally and publicly advocated this view, and both seemed, at times, simply confused.

Second, at least part of the difficulty consisted in the fact that the Quaker’s conduct fell conspicuously short of the standards set by the Treason Act passed by the state Assembly in early February 1777. As we have seen, that act defined treason to include both traitorous correspondence and giving intelligence to the enemy, as well as conspiring to betray the state or the United States. Had the Sullivan papers been authentic, they would have no doubt fallen within these categories. Yet prosecution under the act would have faced several challenges. There was the issue of the courts, which were still minimally functional.<sup>668</sup> Prosecution for treason could only be had in a duly commissioned court of oyer and terminer. There was also an issue of proof; as New Hampshire’s delegates noted in a letter to their governor, a prosecution for treason based solely on the Quakers’s published writings would

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664. See Resolution of Sept. 6, 1777, in 8 JOURNALS CONTINENTAL CONGRESS, *supra* note 646, at 718–19 (“Congress took into consideration the remonstrance from Israel Pemberton . . . who [was] taken into custody . . . praying to be heard; . . . Whereupon, Resolved, That it be recommended to the supreme executive council of the State of Pennsylvania, to hear what the said remonstrants can allege, to remove the suspicions of their being disaffected or dangerous.”).

665. Supreme Executive Council to Congress (Sept. 6, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 593.

666. *Id.*

667. EMER DE VATTEL, THE LAW OF NATIONS 551 (Bela Kapossy & Richard Whatmore eds., 2008) (1758).

668. When the Council finally requested the return of the Quakers from exile, President Wharton noted that the state had established courts where the men might be tried. Oaks, *supra* note 651, at 322.

likely “fail of that proof that is Expected.”<sup>669</sup> Finally, a prosecution might have foundered on the issue of Israel Pemberton’s allegiance, since he might have claimed to be a British subject. Extracting an affirmation of allegiance from Pemberton, then, was not simply an effort to humiliate the Quaker leader by forcing his about-face, but a means of setting up a later prosecution for treason in a court of law. A *refusal* to affirm allegiance would evidence the Quakers’s status as enemy aliens. A Resolution of the Supreme Executive Council entered on September 9th made the connection explicit; as the Quakers “declined giving any assurance of allegiance to this state, as of right they ought,” they “thereby renounce all the privileges of citizenship,” and appear to “consider themselves as subjects of the King of *Great-Britain*.”<sup>670</sup> Enemy aliens had long been “[a]rrested & [s]ecured upon suspicions arising from their general behaviour.”<sup>671</sup>

It was likely for this reason that Thomas McKean, recently appointed Chief Justice of the Pennsylvania Supreme Court, struck such an apologetic note in his explanation to John Adams of why he granted the Quakers’s petition for a writ of habeas corpus.<sup>672</sup> He had not, he said, heard the full news of their case. “My situation was such, that I had not received a letter, nor seen a news-paper from Philadelphia for a fortnight; nor could I learn any particulars respecting this affair from any one whom I met . . .”<sup>673</sup> McKean had even refused to read the pamphlet of petitions to the Council, confining his attention only to the petition. He granted that petition simply because it was “applied for in form,” and under the applicable statute a judge’s refusal to issue the writ on duly formed petitions was subject to a five hundred pound penalty.<sup>674</sup> This was the thrust of McKean’s case:

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669. Letter from New Hampshire Delegates to Meshech Weare (Sept. 2, 1777), in 7 LETTERS OF DELEGATES, *supra* note 648, at 596.

670. Resolution of Sept. 9, 1777, in ADDRESS TO THE INHABITANTS OF PHILADELPHIA, *supra* note 659, at 46–47.

671. *Cf.* Resolution of Sept. 9, 1777, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 296; FOSTER, *supra* note 596, at 89 (Vice President Bryan thought Penn and Chew to be “subjects of the state of Britain” and that they should be “liable to restraint as prisoners of the war”).

672. See Letter from Thomas McKean to John Adams (Sept. 19, 1777), in 5 PAPERS OF JOHN ADAMS 289–92 (Robert J. Taylor et al. eds., 1983). The first writs were delivered by messenger to the prisoners while they were en route to Virginia, but their military escort refused to honor them. Anderson, *supra* note 652, at 372. When the escort inquired with the Supreme Executive Council whether it should honor the writs, the Council instructed it to continue to Virginia, and the Assembly suspended the writ. COLEMAN, *supra* note 624, at 215–16; Anderson, *supra* note 652, at 373–74.

673. Letter from Thomas McKean to John Adams (Sept. 19, 1777), in 5 PAPERS OF JOHN ADAMS, *supra* note 672, at 289.

674. *Id.* at 289–90.

he did not go on to challenge the authority of Congress or the Council to arrest and confine dangerous persons, and he did not argue that their confinement without a hearing violated the Pennsylvania Constitution. Of course, such an argument would have been remarkable given McKean's involvement in the events at the Indian Queen Tavern the previous year. If the Council wanted to avoid the issuance of the writ, wrote McKean, the proper course was to suspend it.<sup>675</sup> Several days later, the Assembly temporarily suspended use of the writ "to obstruct the proceedings" of the Council "in this time of imminent danger to the state" and indemnified its officers from liability arising from seizure, detention, and other emergency actions.<sup>676</sup> And just to make the lawful basis of the Council's action clear, the Assembly expressly granted it the power to arrest and confine dangerous persons "upon the recommendation of Congress."<sup>677</sup> A McKean biographer later referred to the letter admiringly as "his debut"; but if it were a debut, it did not signal the arrival on stage of Pennsylvania's great champion of individual rights, but of a man seasoned in the demands of wartime security and with a regard for the summary forms of legality that applied in that setting.<sup>678</sup>

4. *The "Act for Attainder of Divers Traitors."* The duration of the war saw relatively few prosecutions under the Treason Act of 1777. Historian Henry Young identified 118 prosecutions for treason begun under the act, but only twenty-seven trials and four convictions.<sup>679</sup> One of these men was executed.<sup>680</sup> The war saw eighty-one charges of misprision of treason, fifteen convictions, but only three defendants who suffered the statutory penalty of imprisonment and partial forfeiture of land.<sup>681</sup> In many cases the government appears to have prosecuted loyalists for felony—

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675. See *id.* at 290–91. McKean was reported to have "made many professions of his disapprobation of" the Assembly's subsequent suspension of the writ in conversation with Robert Morton, stepson to one of the confined Quakers. *The Diary of Robert Morton*, 1 PA. MAG. HIST. & BIOGRAPHY 1, 6 (1877). McKean, wrote Morton, described the measure as "unprecedented," a label at odds with McKean's letter to Adams of three days prior.

676. An Act to Empower the Supreme Executive Council of the Commonwealth to Provide for the Security Thereof, ch. 762, § 2 (Sept. 6, 1777), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 138, 140.

677. *Id.* § 1, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 138, 139; see also An Act to Empower the Supreme Executive Council of This Commonwealth to Provide for the Security Thereof in Special Cases Where No Provision Is Already Made by Law, ch. 775 (Jan. 2, 1778), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 170, 170–71 (extending the first act).

678. See COLEMAN, *supra* note 624, at 215.

679. Young, *supra* note 339, at 295.

680. *Id.*

681. *Id.*

robbery or murder, say—rather than treason, even though the underlying conduct might have supported a charge of treason.<sup>682</sup> The tactic obviated the legal questions posed by allegiance. And where it was impossible for the government to surmount the evidentiary requirements necessary to obtain a treason conviction, prosecutors could, with leave of the court, charge the defendant with a treasonous “misdemeanor” instead, an offense that could be proved by the testimony of only one witness.<sup>683</sup> Similarly, the Supreme Executive Council proceeded against individuals on allegations that they were disaffected or dangerous, sometimes providing a hearing and sometimes not.<sup>684</sup> A (new) Council of Safety, created by the Assembly “more effectually to carry into execution the powers” granted to the Supreme Executive Council, was empowered “to proceed against, seize, detain, imprison, punish, either capitally or otherwise as the case may require, in a summary mode.”<sup>685</sup> If such proceedings were not judicial, still they might be, in the words of the Council, “according to Law.”<sup>686</sup>

This pattern of prosecutions supports one of Young’s basic contentions, namely, that “the general treason act could not cope with widespread, notorious, and successful treason.”<sup>687</sup> Young

682. See *id.* at 296.

683. An Act for the Amendment of the Law Relative to the Punishment of Treasons, ch. 889 (Mar. 8, 1780), in 10 STATUTES AT LARGE OF PENNSYLVANIA, at 110, 112 (James T. Mitchell & Henry Flanders eds., 1904). Young found records of “[m]any prosecutions” under this statute. Young, *supra* note 339, at 296.

684. See, e.g., Resolution of Sept. 15, 1777, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 307–08 (describing “[s]ome information by affidavit & verbally, being given to Council by George Stevenson, Esq’r . . . of divers treasonable & dangerous intentions and designs” and a petition of men committed to prison “declaring their innocence of any charge which may be alleged against them as disaffected persons”); Resolution of Oct. 20, 1777, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 357 (describing a complaint against Stephen Foulke for “having concealed divers Deserters”); Resolution of Oct. 24, 1777, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 360 (describing a petition for the parole of Jonathan and George Hunter, who were jailed on “Suspicion of their being unfriendly to this State,” but were in fact “illiterate Men . . . never known to be active in Public Affairs”); Resolution of Oct. 28, 1777, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 361–62 (jailing of John Temple); Resolution of Jan. 15, 1778, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 402 (ordering the arrest and production of Jacob Dingee, who refused to take the oath of allegiance).

685. Minutes of the Assembly (Oct. 9, 1777), in 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 155 (John Dunlap ed., 1782); An Act for Constituting a Council of Safety, ch. 766, § 1 (Oct. 13, 1777), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 149, 149–50; Minutes of the Council of Safety (Oct. 17, 1777), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 329.

686. Minutes of the Council of Safety (Nov. 20, 1777), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 344 (discussing Thomas Bulla, who, having “expressed the most violent enmity to the Cause of the United States,” was to be brought before the Council and “dealt with according to Law”).

687. Young, *supra* note 339, at 303.



thought this apparent to Pennsylvanians before the end of 1777. By then, defections to the enemy, who controlled Philadelphia, the City of New York, and parts of New Jersey, had become particularly problematic, since a defector who crossed enemy lines was no longer amenable to the process of the courts.<sup>688</sup> An advisory opinion written by McKean in late June, shortly before he was appointed Chief Justice of the Pennsylvania Supreme Court, addressed the concern.<sup>689</sup> McKean had been asked whether there was any process “that can issue by the laws of Pennsylvania, for outlawing a person, who will not appear, or by what means can such a person’s estate be forfeited?”<sup>690</sup> He affirmed that outlawry was part of Pennsylvania law and described its operation. Such a process could be used even against friendly aliens, who, said McKean, owed the state “local allegiance” in return for the protection of its laws.<sup>691</sup> In September of 1777, around the time of the Quaker banishment, the decision was made to enlist the help of the Assembly, and a committee of four, including Robert Whitehill, a leading western Constitutionalist, was appointed to prepare a bill for “confiscating the estates of such of the late inhabitants of this state, as have, or may have joined or gone over to the enemy.”<sup>692</sup> The Assembly’s flight from Philadelphia likely delayed the committee’s proceedings, and a bill was not printed for public consideration until late December.<sup>693</sup> The bill was titled “An act for the attainder of divers traitors, if they render not themselves by a certain day.”<sup>694</sup>

We know relatively little about the enactment of Pennsylvania’s bill of attainder. It seems probable that McKean wrote the bill, or at least contributed to its language. He was with the Assembly in early March, when the attainder bill passed; Speaker John Bayard had written in February, concerned with the failure to hold courts of oyer and terminer and requesting McKean’s “Advice & Assistance” with the Assembly’s effort to

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688. OUSTERHOUT, *supra* note 540, at 170.

689. Opinion of Thomas McKean (June 23, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 400. Ousterhout writes that the opinion was prepared for the Supreme Executive Council, but I have been unable to substantiate the assertion. See COLEMAN, *supra* note 624, at 212; OUSTERHOUT, *supra* note 540, at 171.

690. Opinion of Thomas McKean (June 23, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 400.

691. *Id.*

692. Minutes of the Assembly (Sept. 17, 1777), in 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 685, at 152.

693. In November Whitehill was made a member of another committee, also tasked with preparing a confiscation bill, and it was apparently this committee that returned the bill of attainder. See Minutes of the Assembly (Nov. 27, 1777), in 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 685, at 164; *id.* at 171, 176 (entry for Dec. 23, 1777).

694. *Id.* at 176 (entry for Dec. 23, 1777).

define treasonous activities.<sup>695</sup> Consulting McKean on such matters would have been familiar, given McKean's earlier practice of providing advisory opinions; and it would have been sensible, given that an attainder might deliver scores of defendants into Justice McKean's Supreme Court.<sup>696</sup> But I know of no records of deliberation on the bill, either in Assembly or in the public press or letters. There were calls in the press in February for punishing Tories and confiscating their lands, and a leading Constitutionalist expressed the desire to make "a few Examples" of the worst offenders.<sup>697</sup> There was considerable popular anger over the perception that Tories in Philadelphia had profited during the winter of the occupation, while the Continental Army starved at Valley Forge and good patriots suffered throughout the state. Strangely, however, we have no vocal complaints from the bill's targets, and James Allen's rather politic remarks upon being attainted several months later make for a marked contrast with the lengthy screed of Judge Thomas Jones on the subject of the New York Confiscation Act.<sup>698</sup> What did arouse significant public controversy was the subsequent prosecution for treason of Abraham Carlisle and John Roberts, two men who remained in Philadelphia during the occupation and assisted the British.<sup>699</sup> These men seem to have been made into examples of the need to vigorously enforce the law against internal enemies to ensure the safety of the state.<sup>700</sup> Carlisle and Roberts, however, were not

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695. Letter from John Bayard to Thomas McKean (Feb. 27, 1778), *quoted in* ROWE, *supra* note 567, at 109; *see also* COLEMAN, *supra* note 624, at 224 (McKean assisted Assembly with drafting bills). McKean is regularly attributed with authorship of the act, although not by either of his biographers. *See, e.g.*, OUSTERHOUT, *supra* note 540, at 173 (observing that the "[C]hief [J]ustice had been consulted" in drafting the bill); Young, *supra* note 339, at 304 ("[T]he trained mind of Thomas McKean worded the bill").

696. *See* COLEMAN, *supra* note 624, at 211 (members of Supreme Executive Council were familiar with McKean's legal views from his advisory opinions). McKean had dealt with the management of prisoners for Congress as well, as a member of the Committee on Prisoners. *See id.* at 221.

697. BRUNHOUSE, *supra* note 599, at 50 (quoting Letter from John Armstrong to George Bryan (July 29, 1778)).

698. *Diary of James Allen*, *supra* note 565, at 440 (describing his prosecution under the act as "one of those instances of private malice which influences our publick [sic] councils"). For the complaints of other attainted individuals about the process, *see* Steven R. Boyd, *Political Choice—Political Justice: The Case of the Pennsylvania Loyalists*, in *AMERICAN POLITICAL TRIALS* 49–50 (Michael R. Belknap ed., rev. ed. 1994).

699. *Respublica v. Abraham Carlisle*, 1 Dall. 35 (1778); *Respublica v. John Roberts*, 1 Dall. 39 (1778). On the public controversy the trial caused, *see* Letter from Judge Yeates to Col. Paxton Burd (Oct. 10, 1778), in *LETTERS AND PAPERS RELATING CHIEFLY TO THE PROVINCIAL HISTORY OF PENNSYLVANIA WITH SOME NOTICES OF THE WRITERS* 267–68 (Thomas Balch ed., 1855) ("The city is in the greatest ferment.").

700. *See* Peter C. Messer, "A Species of Treason & Not the Least Dangerous Kind": *The Treason Trials of Abraham Carlisle and John Roberts*, 73 *PA. MAG. HIST. & BIOGRAPHY* 303, 317 (1999).

named in the original act, but added by proclamation of the Supreme Executive Council.<sup>701</sup>

It is perhaps also suggestive of McKean's authorship that the language of the Act for Attainder shows a familiarity with and understanding of earlier practice. The author likely had models to work from. The act began with a preamble naming its targets and justifying their treatment. First were Joseph Galloway and Andrew Allen, both leaders of colonial Pennsylvania and opponents of independence who had fled for British lines; Samuel Shoemaker, a prominent Philadelphia merchant confined with the Quakers at the Mason's Lodge, but who had been released after giving promises of good behavior; and the Congressional Chaplain Jacob Duche, who had made the mistake of writing George Washington from occupied Philadelphia to propose that the General lay down his arms.<sup>702</sup> But there were lesser men included as well, men who were unknown to colonial government but who had taken positions of authority in British Philadelphia, as magistrates or inspectors.<sup>703</sup> As the act put it, somewhat less charitably, the men had joined or aided the army of the enemy, "traitorously and wickedly, and contrary to the allegiance they owe."<sup>704</sup> Now they assisted that army in occupying an American city, "where they daily commit divers treasonable acts without any sense of honor, virtue, liberty or fidelity to this state."<sup>705</sup> The act thus targeted not the great land-owning Tories of the state, but men, both great and ordinary, who had fled to the other side and were working to support it. The list suggests that the act was not intended exclusively to raise money for the war, despite Congress's request in November that states confiscate and sell all forfeited land.<sup>706</sup>

Section I of the act then described a suspensive attainder. "[I]f the said Joseph Galloway, John Allen, Andrew Allen," and others "shall not render themselves" to "justices of the supreme court or of the justices of the peace" by April 20th, to "abide their legal trial for such their treasons," then they would be after that day

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701. Minutes of the Supreme Executive Council (May 8, 1778), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 482-83.

702. An Act for the Attainder of Divers Traitors, ch. 784, pmb. (Mar. 6, 1778), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 201, 201. On the identity of the men named in the original act of attainder, see JOHN W. JORDAN, COLONIAL AND REVOLUTIONARY FAMILIES OF PENNSYLVANIA 453-55, 1203 (1911).

703. OUSTERHOUT, *supra* note 540, at 174.

704. An Act for the Attainder of Divers Traitors, ch. 784, pmb. (Mar. 6, 1778), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 201, 201.

705. *Id.*

706. Resolution of Nov. 27, 1777, in 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 646, at 971.

“convicted and attainted of high treason,” and “suffer and forfeit” accordingly.<sup>707</sup> Sections II and III then extended the attainder beyond the list of thirteen. Under section II, *any* subjects or inhabitants of the state who joined the British Army or knowingly aided it, “whom the supreme executive council of this state . . . shall name,” would be subjected to the same suspensive attainder, to be attainted and convicted if they failed to surrender within forty days of their naming.<sup>708</sup> Finally, section III extended the statute to a further class, declaring that those who joined or aided the British Army *in the future*—“from and after the publication of this act”—were “hereby attainted of high treason.”<sup>709</sup> Whether section III was an act of attainder or simply an amendment to the state’s law of treason is perhaps a close question; but McKean or the authors of the act thought it natural enough to use the term “hereby attainted.” If it was an act of attainder, however, it was not suspensive in form, as sections I and II were, but absolute.<sup>710</sup> Those who joined the British Army were attainted of treason *by force of the act*, after being identified by state agents appointed to process confiscated estates.<sup>711</sup>

The delegation of authority to the Supreme Executive Council to attain individuals by proclamation raises questions about how the authors of the Act of Attainder thought of that process. One could reasonably begin from the premise that a proclamation was properly distinguished from an act, and conclude the attainders of the Supreme Executive Council were not acts of attainder, but proclamations of attainder. According to the language of section I, those named in the act who failed to surrender were convicted and attainted “by the authority of this present act.” Section III was also made to rest on the act, attainting “hereby” anyone who joined or aided the British Army. But section II, in contrast, did not contain this language, or anything equivalent to it, stating instead that those who ignored their proclamation would “stand and be attainted of high treason.” Perhaps the contrast signaled that an attainder under section III was not by bill. Yet it would probably be a mistake to lean too heavily on this language. When the Supreme Executive

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707. An Act for the Attainder of Divers Traitors, ch. 784, § 1 (Mar. 6, 1778), in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 339, at 201, 202.

708. *Id.* § 2, at 202–03.

709. *Id.* § 3, at 203.

710. Most of those who have studied the Act of Attainder overlook this feature. See, e.g., Young, *supra* note 339, at 304–05 (contrasting “[a]bsolute acts of attainder, such as those passed in New York,” with the suspensive attainder passed in Pennsylvania).

711. *Id.* at 305. For instructions to the agents, see Minutes of the Supreme Executive Council (May 1778), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 479–80, 504–06. The Council’s first proclamation indicates that it relied on “the general report, & other evidence before the Council, relating to divers persons who have, as it is said, joined the Enemy.” *Id.* at 482.

Council issued the proclamations in question, it rested them on the authority of the act, not an inherent 'executive' authority.<sup>712</sup> The fact that the Supreme Executive Council acted by proclamation does not of itself imply that there was a significant *functional* distinction between proclamations and acts of the Assembly. Around the same time Whitehill's committee was tasked with bringing in a confiscation bill, in early October 1777, the Assembly had considered whether "the executive council shall be empowered [sic] to exercise *all the powers of government*, . . . except such as shall be reserved by this [H]ouse."<sup>713</sup> The House voted no, but the very question implies that some on the Assembly floor thought the council might do what the Assembly did, or at least as much of it as was not reserved. Power sharing went the other way as well. When the Assembly adjourned during the British invasion, it re-created the Council of Safety, staffed it with some of its own members, and then tasked it with exercising powers granted to the Supreme Executive Council, including the use of summary modes of proceeding against dangerous persons.<sup>714</sup> A legislative council could do such a thing, at least in Pennsylvania. As Paul Selsam aptly put it, "[t]he doctrine of the separation of powers found little favor" in Pennsylvania among the new men who had framed the constitution and who now controlled its politics.<sup>715</sup> The better view seems to be that the Assembly delegated its power to attain individuals for treason without judicial process to the Supreme Executive Council; that to exercise this delegated power, the Council had to name individuals; and that to name individuals, it used proclamations.<sup>716</sup>

If one counts the number of individuals named by the Supreme Executive Council in its various proclamations under the Act of Attainder, the total is around five hundred.<sup>717</sup> The stations

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712. See, e.g., Minutes of the Supreme Executive Council (May 8, 1778), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 483-84 (issuing a proclamation "by virtue of certain powers & authorities to us given by an Act of General Assembly").

713. Minutes of the Assembly (Oct. 8, 1777), in 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 685, at 155 (emphasis added).

714. *Id.* (entry for Oct. 9, 1777); An Act for Constituting a Council of Safety, ch. 766, § 1 (Oct. 13, 1777), in 9 STATUTES AT LARGE OF PENNSYLVANIA *supra* note 339, at 149, 149-50; Minutes of the Council of Safety (Oct. 17, 1777), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 326.

715. SELSAM, *supra* note 537, at 201.

716. See Young, *supra* note 339, at 288 ("[T]he Whigs used, in the first place, prosecution in the courts; and whenever this procedure seemed inadequate, they resorted to bills of attainder, *that is, procedures which led to an official judgment without trial.*" (emphasis added)).

717. See Minutes of the Supreme Executive Council, in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 482-85, 493-95, 512-15, 610-11, 768; Minutes of the Supreme Executive Council, in 12 COLONIAL RECORDS OF PENNSYLVANIA 27-28, 496, 665,

of those attainted by the Council, like those named in the act, were mixed.<sup>718</sup> Chief Justice Thomas McKean examined perhaps most of the attainted men who decided to surrender. In July 1778, he wrote to Pennsylvania Supreme Court Justice William Atlee that “[m]y time has been taken up principally in taking the surrender of the persons proclaimed.”<sup>719</sup> McKean also bailed many of these men, and complained at least once to the Supreme Executive Council for want of any evidence to substantiate the defendant’s “notorious disaffection.” On May 27, 1778, he wrote to Council Vice President, George Bryan, concerning James Bracken, who had been attainted in the first proclamation earlier that month.<sup>720</sup> Bracken, wrote McKean, “was brought before me yesterday without any testimony or evidence whatsoever against him.”<sup>721</sup> When McKean asked Bracken why he had gone to Philadelphia, Bracken said he had become sick (“he was in a consumption”) and needed “skillful Physicians and good medicines,” which were lacking in York County.<sup>722</sup> He had not joined the enemy, aided them, or given them any intelligence. McKean was troubled. To confine Bracken seemed inappropriate, since the man had taken an oath of allegiance and “at his trial perhaps little may be proved against him.”<sup>723</sup> Still, the judge had been “told he has been

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710 (1853); Proclamation of Attainder of Certain Persons Adjudged Guilty of High Treason (July 27, 1780), in 3 PENNSYLVANIA ARCHIVES, FOURTH SERIES, *supra* note 610, at 774–75; BLACK LIST: A LIST OF THOSE TORIES WHO TOOK PART WITH GREAT-BRITAIN IN THE REVOLUTIONARY WAR, AND WERE ATTAINTED OF HIGH TREASON 9–16 (1802); *see* Thompson, *supra* note 17, at 157; Young, *supra* note 339, at 306.

718. *But see* BOYD, *supra* note 698, at 48 (arguing that most of the attainted came from Philadelphia or a nearby county and were “singled out for prosecution because they had held prominent places in the political and social structure of colonial Pennsylvania”); Anne M. Ousterhout, *Pennsylvania Land Confiscations During the Revolution*, 102 PA. MAG. HIST. & BIOGRAPHY 328, 328, 339 (1978). Contra Boyd and Ousterhout, the records identifying the individuals attainted by proclamation do not support the view that the aim of the act was to strike at colonial leadership. There were simply too many men of modest position whose inclusion this view makes inexplicable. See historian James Westfall Thompson’s list of the occupations of about a dozen of those attainted, which is representative: “1 Custom House clerk, 1 baker, 1 distiller, 1 clerk, 1 merchant, 1 gentleman, 1 silk weaver, 1 trader, 1 lumber merchant, 1 carpenter, 1 mariner, 1 cord-wainer, 1 justice of the peace, 2 yeomen, 1 ironmonger, 1 sailmaker.” Thompson, *supra* note 17, at 157.

719. Letter from Thomas McKean to William Augustus Atlee (July 7, 1778), *quoted in* COLEMAN, *supra* note 624, at 229.

720. Letter from Thomas McKean to George Bryan (May 27, 1778), in 6 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 555 (1853) (the letter is misdated); Minutes of the Supreme Executive Council (May 8, 1778), in 11 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 552, at 483 (attainting James Bracken).

721. Letter from Thomas McKean to George Bryan (May 27, 1778), in 6 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 555.

722. *Id.*

723. *Id.*

uniformly inimical.”<sup>724</sup> Did the Council “have some Evidence against this man”?<sup>725</sup> If not, McKean would bail him. The Bracken case was likely exemplary, and it supports the charge that the Council’s agents were habitually “careless,” or perhaps self-interested, in assembling lists of those who had joined or aided the enemy army.<sup>726</sup> Of the 500 attainted, Young counts 113 who surrendered, “less than a score” who came to trial, three convictions, and two executions; of those who failed to surrender, six were captured and one was executed.<sup>727</sup> In another case, the jury acquitted a man who had duly surrendered for trial, only to flee when he was attacked by a mob.<sup>728</sup>

It is admirable, and of course appropriate, that McKean insisted on evidence to substantiate the Council’s accusations of treason against those attainted, dismissing many of the charges. Yet it would be a mistake to reconstruct McKean’s views on this basis alone. A longer view of McKean’s career makes it difficult to deny that he saw a vital place for legislative attainder. That he supported suspensive attainders can be deduced, of course, from the Act for Attainder (*his* act, remember), a view it seems likely he retained as late as the Aaron Doan case in 1784. Doan was a loyalist guerilla outlawed for failing to surrender to the government, and later captured and ordered executed.<sup>729</sup> President John Dickinson balked at carrying out the execution, but McKean argued that Doan had not been denied of his constitutional right to a jury trial, “for, that the party had not that trial, was owing to himself” by refusing to surrender.<sup>730</sup> Suspensive attainder rested on the same ground. Of course, it differed from outlawry in that it was based not on a common law writ, but an *ex parte* proceeding in a representative Assembly. Yet, here, too, McKean’s participation in the actions taken against disaffected loyalists at the Indian Queen Tavern under the auspices of Philadelphia’s Committee of Inspection suggest that he saw a place for summary modes of proceeding in representative bodies, at least in the context of an armed civil conflict. Just as an assembly might suspend the power of a court of law to issue a writ of habeas corpus in the context of an invasion or insurrection, it

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724. *Id.*

725. *Id.*

726. Young, *supra* note 339, at 305.

727. *Id.* at 306–07.

728. CHAPIN, *supra* note 346, at 56.

729. *Respublica v. Doan*, 1 Dall. 86 (1784).

730. *Id.* at 90; *see also* Opinion of Thomas McKean (June 23, 1777), in 5 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 400 (concluding that Pennsylvania law recognized outlawry).

might bring charges, hear testimony (or not), and demand the surrender of an individual in rebellion where judicial process could not run.

Summary proceedings in these bodies were necessary to give force to the requirement of allegiance, a matter than McKean, like the rest of the Constitutionalist party, took very seriously. To permit those who derived protection from the state to levy war against it, or to aid those who did, was to undermine the authority of the people to establish a government.<sup>731</sup> This attitude explains why McKean, in his celebrated charge to the grand jury at Lancaster in April 1778, defined treason broadly enough to include so-called constructive treasons, like making an insurrection to address a public grievance.<sup>732</sup> Where an individual did not derive protection from the laws of the state and did not owe its government allegiance, however, he could not be punished for levying war against it. He could be treated only as an enemy alien and made a prisoner of war, to be confined rather than prosecuted.<sup>733</sup>

#### IV. UNDERSTANDING THE BILL OF ATTAINDER CLAUSES

What does this history mean for the Bill of Attainder Clauses? Does the clause in Article I, Section 9, apply to the executive branch of the federal government?

Stepping back, three major themes emerge from the material above. First, over the many periods examined here, the dominant conception of the bill of attainder was that of a summary form of legal process. This view persisted into modernity; the speeches of Lord Digby and Oliver St. John show parliamentarians resorted to the view even during the Strafford attainder in the mid-seventeenth century.<sup>734</sup> Such a proceeding was appropriate where an offense was said to be “notorious.” This usage was common in England well past the Civil War; for example, the offenses of the Dutch filibusters attainted by Parliament in 1665 were said to be “notoriously known.”<sup>735</sup> In New York, the committee for detecting conspiracies summarily deported those “notoriously disaffected with the American cause,” and John Jay

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731. See Messer, *supra* note 700, at 316.

732. See THOMAS MCKEAN, A CHARGE DELIVERED TO THE GRAND JURY 14–15 (1778); see also CHAPIN, *supra* note 346, at 40.

733. *Respublica v. Chapman*, 1 Dall. 53, 58–59 (1781); Letter or Opinion of Chief Justice McKean to President Reed (Aug. 13, 1779), in 7 PENNSYLVANIA ARCHIVES, FIRST SERIES, *supra* note 623, at 645.

734. See *supra* notes 262–76.

735. See *supra* note 290.



used the expression to describe similar proceedings.<sup>736</sup> Later, the New York Confiscation Act attainted those whose adherence to the British King was “notorious,” while other offenders were offered a jury trial.<sup>737</sup> In Pennsylvania, the Quakers were banished for what John Adams regarded as their notorious disaffection.<sup>738</sup> “Notoriety” was thus a signal word. Over the run of cases, it seems to have indicated that there would be little value to summoning a suspect and hearing his defense. To proceed against him in his absence was therefore not unjust—at least, that may have been the idea.

Second, although bills of attainder were largely passed by legislatures, this is not true of all. The legislature might proceed summarily against notorious offenders because its members already knew of their offenses. The legislature was, in this respect, a self-informing body, somewhat like the early English jury of presentment. But officers of government could also be expected to know of notorious offenses, or they might *learn* of such offenses by gathering intelligence, a practice that occurred outside legal proceedings entirely. This is how the secret wartime committees of New York functioned.<sup>739</sup> New York and Pennsylvania authorized their executives to summarily remove “dangerous” persons.<sup>740</sup> The legislature might identify dangerous loyalists, but in both New York and Pennsylvania executives would be expected to add to the list. And in Pennsylvania, the legislature appears to have simply delegated its power to attain to the Supreme Executive Council, which acted by proclamation.<sup>741</sup> For such arrangements there were English precedents. For example, the act of 1665 authorized Charles II to order by royal proclamation the return of British subjects abroad if the government discovered them to be serving English enemies.<sup>742</sup>

Third, the primary purpose of bills of attainder was to provide legal process where judicial forms of process failed to run because of insurrection, rebellion, civil war, or a breakdown in civil authority. Early attainders were largely directed at overpowerful men rebelling against the authority of the King, but they also targeted rioters, fugitives, and lesser rebels like Jack Cade, whose activities had a destabilizing effect.<sup>743</sup> Henry VIII and Cromwell

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736. See *supra* notes 409–22.

737. See *supra* note 493.

738. See *supra* note 652.

739. See *supra* Part III.A.2.

740. See *supra* notes 453–54, 677.

741. See *supra* notes 709, 717.

742. See *supra* note 290.

743. See *supra* notes 78–82.

employed attainder against Elizabeth Barton because they regarded her as posing a serious threat to the stability of the kingdom.<sup>744</sup> The American attainder of Ethan Allen fits here as well, as Allen resided in a region effectively uncontrolled by government, and was able to effectively resist judicial process.<sup>745</sup> The bill of attainder thus served a law-enforcement function in areas where authority had broken down and the state could not project force. This function was primarily *executive* in nature. Those familiar with attainder could only expect that the agencies of government to which executive functions were delegated would employ such summary forms of procedure.

Taken together, these points suggest that the primary purpose of the Bill of Attainder Clauses was to prohibit a summary form of *proceeding*, rather than a proceeding in a certain *body*. If we turn now to the Constitution itself, we find that the text of the clauses also suggests a concern with process, along with an assumption that the process in question would normally occur in a legislature. Consider the clause in Section 9. The text provides that “[n]o Bill of Attainder or *ex post facto* Law shall be passed.”<sup>746</sup> The language suggests a contrast between bills and laws. Why *bills* of attainder but *ex post facto laws*? In the late eighteenth century, “bill” did not describe an act of one or both houses of the legislature, without the president’s approval, which would have been called an “ordinance” or “resolution.”<sup>747</sup> Nor was “bill” a natural way to single out legislative activity; “act of attainder” and “attainder by law” were the phrases employed in earlier state constitutions that expressly banned such legislative acts.<sup>748</sup> Instead, what “bills of attainder” called to mind were *private* bills, which were common in colonial assemblies in the eighteenth century.<sup>749</sup> The first federal Congress passed many such bills as well.<sup>750</sup> Private bills concerned the interests of one person, or a

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744. See *supra* notes 146–84.

745. See *supra* notes 369–71.

746. U.S. CONST. art. I, § 9, cl. 3.

747. COKE, FOURTH PART, *supra* note 118, at 25.

748. N.Y. CONST. of 1777, art. XLI; see MD. CONST. of 1776, Declaration of Rights, § XVI; see also MASS. CONST. of 1780, pt. 1, art. XXV (“No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.”); VT. CONST. of 1786, ch. II, § XVII (similar).

749. See Alison Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 546–47 (1992). Thomas Jefferson described the bill of attainder as “a special act . . . passed by the legislature, adapted to the particular case.” Letter from Thomas Jefferson to Louis H. Girardin (Mar. 12, 1815), in 8 THE PAPERS OF THOMAS JEFFERSON 334 (J. Jefferson Looney ed., 2011).

750. For an overview of the congressional petitionary practice, see *Documentary History of the First Federal Congress*, in 8 PETITION HISTORIES AND NONLEGISLATIVE OFFICIAL DOCUMENTS, at xiii–xxv (Kenneth R. Bowling et al. eds., 1998).

small group, or a locality or region.<sup>751</sup> Their passage followed a petition, hearing, and in some cases, proof.<sup>752</sup> The private bill, like the bill of attainder, was essentially a form of *legal process*. Indeed, “bill of attainder” must have had something like this connotation, since one could use the expression even to describe proceedings in a court of law, although this usage was unusual.<sup>753</sup> Generally, “bill” must have been broad enough in meaning to include some forms of legal process, *in addition to* the passage of general legislation, while typically excluding full common-law process.<sup>754</sup>

Admittedly, the legislative history of the Bill of Attainder Clauses is not entirely consistent with this view. The records of the Philadelphia Convention show that the Section 9 clause originated in an amendment to Article VII of the draft constitution of August 6, 1787, proposed by Elbridge Gerry and James McHenry, who moved to add to the restrictions on national legislative power that “[t]he Legislature shall pass no bill of attainder.”<sup>755</sup> Gouverneur Morris supported the motion, describing “the precaution” as “essential.”<sup>756</sup> A month later, however, Morris *deleted* the clause’s reference to the legislature in the draft constitution he prepared for the Committee on Style.<sup>757</sup> If we consider Morris’s various roles in wartime New York—both his service on the June 5th secret committee and his amendment to article 41 of the state constitution, permitting attainders relating to the war—it is possible that the committee’s deletion of “The Legislature” was significant. The committee also rendered the Section 10 Bill of Attainder Clause (which applied to the states) without “legislature,” but the previous version of that clause had not included the term.<sup>758</sup> It placed both clauses in Article I, but as

751. *E.g.*, J.E. NEALE, *THE ELIZABETHAN HOUSE OF COMMONS* 335–36 (1949).

752. SHELIA LAMBERT, *BILLS AND ACTS: LEGISLATIVE PROCEDURE IN EIGHTEENTH-CENTURY ENGLAND* 85–86, 87–89 (1971); 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 81–82 (1795).

753. ROYAL AM. GAZETTE, July 3, 1783, at 3, col. 2 (“A Special Court for *criminal jurisdiction* was opened [in Poughkeepsie] the week before last, and a bill of Attainder found against a number of Loyalists, within these lines, for having adhered to the Royal Government *during the war*. Mr. Nicholas Hoffman is included in the Indictment . . .”). Mr. Hoffman was a client of Alexander Hamilton. 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON*, *supra* note 373, at 225.

754. The Constitution appears to allow the use of judicial process for attainder of treason. See U.S. CONST. art. III, § 3.

755. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 368, 375–76, 378 (Max Farrand ed., 1937) (emphasis added).

756. *Id.* at 376.

757. See *id.* at 596–97; William Michael Treanor, Gouverneur Morris’s Constitution 4–6 (Sept. 12, 2014) (unpublished manuscript) (on file with author).

758. The prohibition on state attainders that ended up in Article I, Section 10 was introduced by John Rutledge, and did not contain reference to the legislature. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 755, at 435, 440. For an effort

with the Suspension Clause, the placement should not be read to confine bills of attainder to the legislature.<sup>759</sup> Unfortunately, ratification sources shed little light on the scope of the final language in either clause.<sup>760</sup>

Today, the dominant view of the clauses is that they serve separation-of-powers purposes. The clauses function to restrict legislatures to forward-looking, general laws.<sup>761</sup> This view took root in the decades *after* ratification. Courts of law cited the bill of attainder in cases where they sought to check the legislative confiscation and transfer of real property. The leading cases in this line are well known. Thus, *Vanhorne's Lessee v. Dorrance* concerned the validity of a Pennsylvania law that purported to quiet title in certain lands.<sup>762</sup> Justice Patterson began his charge to the jury by describing the “natural” origin of property rights, and then paused to consider whether the legislature “had authority to make an act, divesting one citizen of his freehold and vesting it in another.”<sup>763</sup> Counsel had urged that such a power existed “on certain emergencies,” but Patterson resisted the reasoning.<sup>764</sup> To his eye, the dispositive issue was that the “proofs and allegations” presented to a jury in title proceedings in a “court of law” were protective of rights, while in the legislature the “[t]he proprietor stands afar off, a solitary and unprotected member of the community, and is [stripped] of his property, without his

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to place the Section 10 clause in context, see Robert C. Palmer, *Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. L. REV. 631, 641–45 (1987).

759. See Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 92 (1993).

760. Setting aside the Josiah Philips case, which I have discussed elsewhere at length, there are relatively few mentions of bills of attainder in ratification sources. Bills of attainder receive brief mention in Federalist 43 and 44, as well as several other Federalist essays. See THE FEDERALIST NO. 43, at 310, 319, 491, 532 (James Madison) (Benjamin Fletcher Wright ed., 1961). For a sample of mentions in state ratifying conventions and commentary, see 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 417, 438, 500 (Merrill Jensen ed., 1976) (Pennsylvania); 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 158, 235 (John P. Kaminski et al. eds., 2003) (New York); 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 618, 1163 (John P. Kaminski et al. eds., 2004) (New York); 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2221 (John P. Kaminski et al. eds., 2009) (New York). One gets the distinct impression that anti-federalists thought they had little to gain by attacking the prohibition of bills of attainder, despite their use in both Pennsylvania and New York—and despite Melancton Smith's belief that the Section 10 prohibition might be used to strike down New York's confiscations of loyalist property. See 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 638–39.

761. See *United States v. Brown*, 381 U.S. 437, 443–46 (1965); Comment, *supra* note 20, at 343–48.

762. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

763. *Id.* at 310.

764. *Id.*

consent, without a hearing, [and] without notice.”<sup>765</sup> Patterson’s concern for providing due process in transfers of property submerged the question of summary proceedings in emergency conditions—the classic justification for bills of attainder.

Three years later in *Calder v. Bull*, the Court held that it did not clearly violate the article 10 Ex Post Facto Clause for the Connecticut legislature to set aside the decree of a state probate court.<sup>766</sup> In a memorable performance, Justice Chase professed to set aside the lead question posed by the case—“Whether the Legislature of any of the States can revise and correct by law, a decision of any of its Courts of Justice”—because he had no need to reach it.<sup>767</sup> The dodge was an artifice, as Chase went on to pronounce on the various limits of state legislative authority, listing “acts which the Federal, or State, Legislature cannot do,” among which was passing a “law that takes property from A. and gives it to B.”<sup>768</sup> The A-to-B formula fairly describes a bill of attainder, but of course the case had nothing to do with summary wartime process.<sup>769</sup> Attainder was simply one example of the legislative interference with property rights to which the Court would eventually apply the Due Process Clause. By 1810 this understanding of attainder was clear, when Justice Marshall gave the article 10 clause its first reading in *Fletcher v. Peck*.<sup>770</sup> The case again concerned whether the legislature could transfer property, in this case by rescinding the earlier fraudulent “Yazoo” land grant. Such transfers, said Marshall, had been the business of bills of attainder.<sup>771</sup> “The rescinding act . . . forfeits the estate of Fletcher for a crime not committed by himself,” Marshall observed. “This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why then is it allowable in the form of a law annulling the original grant?”<sup>772</sup> Bills of attainder functioned to transfer property from A to B, and the Bill of Attainder Clauses blocked such transfers. In this regard, they essentially duplicated the Fifth Amendment Due Process Clause.<sup>773</sup>

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765. *Id.* at 315–16.

766. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–92 (1798).

767. *Id.* at 387.

768. *Id.* at 388 (emphasis omitted).

769. *See Mendelson, supra* note 21, at 127.

770. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

771. *Id.* at 138 (“A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.”).

772. *Id.* at 138–39.

773. *See, for example, the argument of Daniel Webster before the Supreme Court in the Dartmouth College Case, described in Mendelson, supra* note 21, at 128 (“Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation,

The same progression can be illustrated in state courts, where a line of decisions brought state due process guarantees to bear on legislative transfers of property. Here the submergence of a distinctive bill of attainder jurisprudence, the development of the separation-of-powers strand of due process, and the emergence of the power of judicial review all proceeded hand-in-hand. Thus, in *Bayard v. Singleton*, the North Carolina Superior Court refused to enforce an act creating a summary procedure for quieting title on lands confiscated from loyalists.<sup>774</sup> The procedure eliminated the right to a jury trial, but “by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury.”<sup>775</sup> No mention was made of exceptions to such a right, as Alexander Hamilton had begrudgingly described bills of attainder several years earlier, in his first *Letter from Phocion*.<sup>776</sup> According to Judge Ashe, summary proceedings posed a threat to due process, for

if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all.<sup>777</sup>

Bayard was perhaps the earliest of these cases. In the next decades, legislative transfers of land became a favorite target for a judiciary emerging as co-equal in status with the legislature, unafraid to expound constitutional meaning.<sup>778</sup>

Where does this leave the meaning of the Bill of Attainder Clauses? The development of separation-of-powers construction of the clauses is not wholly inconsistent with the history discussed above. If we think of judicial power as a power to resolve *cases*, then bills of attainder are a form of judicial power.<sup>779</sup> Prohibiting their passage in the legislature is denying

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acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land.”)

774. *Bayard v. Singleton*, 1 N.C. 5, 7–8 (1 Mart. 48) (1787).

775. *Id.*

776. See Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27, 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 467, at 483, 485 (describing the guarantee of due process in the New York Constitution of 1777, but then immediately conceding and criticizing the exception for bills of attainder).

777. *Bayard*, 1 N.C. at 7.

778. See Edward J. Eberle, *Procedural Due Process: The Original Understanding*, in 4 CONST. COMMENT. 339, 347–50 (1987); Steilen, *supra* note 606.

779. See Comment, *supra* note 20, at 343–47. On the meaning of “case,” see Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, 535–40 (2014). Raoul Berger’s argument that attainder was a *legislative* power rests on a favorable selection of founding-era and early-republic texts; but as the concept was

judicial power to the legislature. Yet this cannot be the whole meaning of the clauses. First, the Constitution does not fully separate legislative and judicial power, and Congress possesses several forms of quasi-judicial authority, including the power to pass private bills.<sup>780</sup> The Article 9 *Bill of Attainder Clause* is naturally read as an exception to the power to pass private *bills*—a qualification of congressional judicial power, and thus an *affirmation* of it. Instead of separating powers, then, the clauses are evidence of the partial mixture of legislative and judicial power. Second, to treat the Bill of Attainder Clauses solely as separation-of-powers provisions obscures the historical use and function of the bill of attainder. It seems unlikely that separation of powers was the entire connotation of the clauses for men like Gouverneur Morris, John Jay, Thomas McKean, or Thomas Jefferson, who in 1787 were only a few years removed from having employed attainders in the context of an imperial civil war. To them, attainder was about maintaining order, addressing the dangers of disloyalty, and punishing treason. It is thus far more satisfactory to regard the Bill of Attainder Clauses, at least in part, as a deliberate policy choice to reject summary forms of proceeding even outside the normal range of judicial cases, such as insurrection, rebellion, or breakdown in civil government. The clause is better read, in other words, as a kind of Civil War Process Clause, describing a procedural floor for dealing with those of us who join our enemies.

## V. CONCLUSION

What is a bill of attainder? By the late eighteenth century the concept was contested, but one view understood attainder as a summary form of legal process that did not require the production of evidence or even the appearance of the accused. Attainder was not simply a legislative punishment, if by that expression one means *punishment in the legislature*. It is consistent with historical usage to describe any governmental body that proceeds against the absent, without requiring the introduction of evidence according to the forms and rules of the common law, as “attainting.” Indeed, we must say this to make sense of the majority of attainders in Pennsylvania during the Revolutionary War, and much of the activity of New York’s secret wartime committees. This is unsurprising when one reflects that bills of

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essentially contested, *see supra* Part III, one can readily marshal both legislative and judicial descriptions of the bill of attainder. *See Berger, supra* note 20, at 386–87.

780. This point is nicely made in Dick, *supra* note 3, at 1178–79 (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 472 (1977)).

attainder served an executive function: they were a device for enforcing the law where judicial process could not run because of insurrection, rebellion, or war. Today we have the same needs for such a device as the framers had. The compilation of blacklists and kill lists by contemporary executive agencies has the same basic form and serves the same purposes, and it falls within the policy of the Section 9 Bill of Attainder Clause.



APPENDIX: ENGLISH ACTS OF ATTAINDER AND SIMILAR  
PROCEEDINGS CITED IN THIS WORK

Note: "Type of Proceeding" refers to the kind of attainder, or other form of summary proceeding, as described in the cited sources. "Def. Present?" describes whether the defendant was present in parliament, and "Death Sentence" describes whether or not the act of parliament included a sentence of death. Where a cell is empty, I have been unable to determine the appropriate value.

| Year | Name  | Crime   | Type of Proceeding           | Def. Present? | Death Sentence?   | Source                                    |
|------|---|---------|------------------------------|---------------|---|---|
| 1388 | Robert De Vere, Duke of Ireland, Earl of Oxford | Treason | Appeal of treason            | No            | Yes; hanged, drawn, & quartered (not carried out; died in 1392 of natural causes) | 3 Rot. Parl. 229a-37b, in 7 PROME 83-102. |
| 1388 | Michael De la Pole, 1st Earl of Suffolk         | Treason | Appeal of treason            | No            | Yes; hanged, drawn, & quartered (not carried out; died in 1389 of natural causes) | 3 Rot. Parl. 229a-37b, in 7 PROME 83-102. |
| 1388 | Alexander Neville, Archbishop of York           | Treason | Appeal of treason            | No            | No  | 3 Rot. Parl. 229a-37b, in 7 PROME 83-102. |
| 1394 | Thomas Talbot                                   | Treason | Suspensive appeal of treason | No            | No  | Cal. Close Rolls, 1392-1396, at 294-95.   |
| 1397 | Sir Thomas Mortimer                             | Treason | Impeachment                  | No            | No  | 3 Rot. Parl. 374a-81b, in 7 PROME 531     |

| Year | Name   | Crime   | Type of Proceeding                                     | Def. Present? | Death Sentence?                | Source  |
|------|--|---------|--|---------------|--------------------------------|---|
| 1397 | Thomas of Woodstock, Duke of Gloucester  | Treason | Appeal of treason                                      | No            | No (murdered while imprisoned) | 3 Rot. Parl. 374a-81b, in 7 PROME 404-14 (see especially 411-14).   |
| 1397 | Sir Robert Plesyngton  | Treason | King lodged information and "awarded" sentence himself | No            | No (already dead)              | 3 Rot. Parl. 384b-85a, in 7 PROME 425-26.   |
| 1401 | Thomas Holland, Earl of Kent; John Holland, Earl of Huntington; John Montague, Earl of Salisbury; Thomas, Lord Despencer, Sir Ralph Lumley | Treason | Declaration and judgment of king and lords             | No            | No                             | 3 Rot. Parl. 459a-b, in 8 PROME 109-10.   |
| 1404 | Sir Henry Percy  | Treason | Judgment before king and lords                         |               | No (already dead)              | 3 Rot. Parl. 524a-25b, in 8 PROME 231-34.   |
| 1406 | Henry Percy, Earl of Northumberland  | Treason | Suspensive appeal from court of chivalry               | No            | No                             | 3 Rot. Parl. 593b-94a, 604a-07b, in 8 PROME 384-85; <i>see also</i> 9 PROME 72-74 (Grandson seeking reversal and enfeeoffment). |

| Year | Name                                  | Crime                       | Type of Proceeding                                  | Def. Present? | Death Sentence?                  | Source   |
|------|---------------------------------------|-----------------------------|---|---------------|----------------------------------|--|
| 1406 | Lord Thomas Bardolf                   | Treason                     | Suspensive appeal from court of chivalry            | No            | No                               | 3 Rot. Parl. 593b-94a, 604a-07b, <i>in</i> 8 PROME 384-85. |
| 1410 | Hugh de Erdswick                      | Felony and Trespass         | Suspensive attainder                                | No            | No                               | 3 Rot. Parl. 630a-32a, <i>in</i> 8 PROME 471-76.           |
| 1414 | Statute Concerning Murders            | Felony                      | General statute with conditional attainder          |               |                                  | 4 Rot. Parl. 26a-b, <i>in</i> 9 PROME 59-61.               |
| 1415 | Richard Cosinburgh, Earl of Cambridge | Treason                     | Confirming conviction                               |               | Yes (beheaded)                   | 4 Rot. Parl. 64b-65a, <i>in</i> 9 PROME 119-24.            |
| 1415 | Lord Lescrope of Masham               | Treason                     | Confirming conviction                               |               | Yes (drawn and beheaded)         | 4 Rot. Parl. 64b-65a; 9 PROME 119-24                       |
| 1415 | Sir Thomas Grey                       | Treason                     | Confirming conviction                               |               | Yes (drawn, hanged and beheaded) | 4 Rot. Parl. 64a-65b, <i>in</i> 9 PROME 119-24.            |
| 1417 | John Oldcastle                        | Treason, Heresy (Lollardry) | Supp. trial   | Yes           | Yes                              | 4 Rot. Parl. 107b-10a, <i>in</i> 9 PROME 210-15.           |
| 1423 | John Mortimer                         | Treasons and Felonies       | Confirming indictment                               | Yes           | Yes                              | 4 Rot. Parl. 202a-b, <i>in</i> 10 PROME 86-88.             |
| 1431 | Owen Glendower (Glendouer)            | Treasons and Felonies       | Confirming outlawry                                 | No            | No (already dead)                | 4 Rot. Parl. 377b-78a, <i>in</i> 10 PROME 466-67.          |
| 1433 | John Carpenter of Birdham             | Treason (Murder)            | Absolute attainder, king did not assent to petition |               | No                               | 4 Rot. Parl. 447b, <i>in</i> 11 PROME 130-31.              |

| Year | Name                         | Crime                                       | Type of Proceeding   | Def. Present?           | Death Sentence?                                   | Source  |
|------|------------------------------|---|----------------------|-------------------------|---|---|
| 1437 | William Pulle of Wirral      | Treason (Rape)                              | Suspensive attainder | No                      | No  | 4 Rot. Parl. 497b-98a, <i>in</i> 11 PROME 206-07.                           |
| 1439 | Philip Eggerton              | Treason                                     | Suspensive attainder | No                      | No  | 5 Rot. Parl. 17b-18a, <i>in</i> 11 PROME 276-78.                            |
| 1439 | Lewis Leyson (Leyfon)        | Treason (Rape)                              | Suspensive attainder | No                      |   | 5 Rot. Parl. 14b-16a, <i>in</i> 11 PROME 271-73.                            |
| 1439 | Peter (Piers) Venables       | Felony                                      | Suspensive attainder | No                      | No  | 5 Rot. Parl. 16a-17a, <i>in</i> 11 PROME 274-76.                            |
| 1450 | Jack Cade                    | Treason (Rebellion)                         | Absolute attainder   | No                      | No (already dead; mortally wounded when captured) | 5 Rot. Parl. 224b; 4 Rot. Parl. 503b, <i>in</i> 12 PROME 202-03.            |
| 1453 | William Oldhall              | Treason (Rebellion)                         |                      | Yes                     | No  | 5 Rot. Parl. 265b-66a, <i>in</i> 12 PROME 307-09.                           |
| 1453 | Jack Cade (second attainder) | Treason (Rebellion)                         | Absolute attainder   | No (deceased from 1450) | No  | 5 Rot. Parl. 265a, <i>in</i> 12 PROME 306-07.                               |
| 1453 | Edward Lancaster             | Treason (Rape, murder, general lawlessness) | Absolute attainder   |                         | No  | 5 Rot. Parl. 261b-71b, <i>in</i> 12 PROME 316-20.                           |
| 1459 | Richard, Duke of York        | Treason (Rebellion)                         | Absolute attainder   | No                      | No  | 5 Rot. Parl. 346a-52a, <i>in</i> 12 PROME 453-64 (see 459-61 specifically). |

| Year | Name  | Crime                  | Type of Proceeding | Def. Present? | Death Sentence? | Source   |
|------|---|------------------------|--------------------|---------------|-----------------|--|
| 1459 | Edward, Earl of March<br>(future Edward IV)         | Treason<br>(Rebellion) | Absolute attainder | No            | No              | 5 Rot. Parl. 346a-52a, in 12 PROME 453-64 (see 459-61 specifically).                             |
| 1459 | Edmund, Earl of Rutland                             | Treason<br>(Rebellion) | Absolute attainder | No            | No              | 5 Rot. Parl. 346a-52a, in 12 PROME 453-64 (see 459-61 specifically).                             |
| 1461 | Henry VI<br>(having been deposed by Edward of York) | Treason                | Absolute attainder | No            | No              | 5 Rot. Parl. 476b-83a (specifically 478b for attainder), in 13 PROME 46.                         |
| 1461 | Margaret of Anjou<br>(Queen/consort of Henry VI)    | Treason                | Absolute attainder | No            | No              | 5 Rot. Parl. 476b-83a (specifically 479a for attainder), in 13 PROME 42-54 (specifically 47-49). |
| 1461 | Edward, Prince of Wales                             | Treason                | Absolute attainder | No            | No              | 5 Rot. Parl. 476b-83a (specifically 479a for attainder); 13 PROME 42-54 (specifically 47-49)     |
| 1461 | Dafydd ap Ieuan ap Einion                           | Treason<br>(rebellion) |                    | No            | No              | 5 Rot. Parl. 486a-b, in 13 PROME 61.   |

| Year | Name                                       | Crime             | Type of Proceeding | Def. Present?  | Death Sentence? | Source   |
|------|--|-------------------|--------------------|--|-----------------|--|
| 1461 | John Scudamore                             | Treason           |                    | No   | No              | 5 Rot. Parl. 483a, <i>in</i> 13 PROME 55–56, Rev'd 14 PROME 66–68.             |
| 1465 | Henry Beaufort, Duke of Somerset           | Treason           | Absolute attainder | No (already deceased; beheaded after Battle of Hexham, 1464) | No              | 5 Rot. Parl. 511a–14b, <i>in</i> 13 PROME 122–29.                              |
| 1472 | John de Vere, Earl of Oxford               | Treason           |                    | No   | No              | 6 Rot. Parl. 144b–48a, <i>in</i> 14 PROME 298–300.                             |
| 1478 | George, Duke of Clarence                   | Treason           |                    | Yes  | Yes             | See appendix and introduction to the 1478 Rolls <i>in</i> PROME; 14 PROME 345. |
| 1478 | Roger Lever and Associates                 | Riot and Trespass |                    | No   | No              | 6 Rot. Parl. 181a–82b, <i>in</i> 14 PROME 378–82.                              |
| 1484 | Henry, Earl of Richmond (future Henry VII) | Treason           | Absolute attainder | No   | No              | 6 Rot. Parl. 244b–50a, <i>in</i> 15 PROME 24–35.                               |
| 1484 | Margaret, Countess of Richmond             | Treason           | Absolute attainder | No   | No              | 6 Rot. Parl. 250b–51a, <i>in</i> 15 PROME 35–37.                               |
| 1484 | Walter Roberd                              | Treason           |                    | No   | No              | 6 Rot. Parl. 251, <i>in</i> 15 PROME 36–38.                                    |

| Year | Name                                      | Crime   | Type of Proceeding | Def. Present? | Death Sentence?               | Source   |
|------|---|---|--------------------|---------------|-------------------------------|--|
| 1485 | Richard, Duke of Gloucester (Richard III) | Treason (Usurp.)  | Absolute attainder | No            | No                            | 6 Rot. Parl. 275b-78a, in 15 PROME 106-12.                       |
| 1487 | John Spynell                              | Felony  |                    | No            | No                            | 6 Rot. Parl. 402b (cited in COKE, THIRD PART); 15 PROME 379-80   |
| 1491 | John Hayes                                | Misprision of Treason   | Absolute attainder | No            | No                            | 7 Henry 7 c. 22, in 2 STATUTES OF THE REALM (SR) 566.            |
| 1495 | Sir William Stanley                       | Treason   |                    | No            | No (perhaps already dead)     | 11 Henry 7, No. 39; Rot. Parl. vi. 503b-06b, in 16 PROME 229-35. |
| 1497 | James Grame                               | Petty Treason (murder of a master)                                  |                    | No            | Yes                           | 12 Henry 7 c. 7, in 2 SR 639.                                    |
| 1504 | Edward, Earl of Warwick (Warwyk)          | Treason (rebellion)   | Absolute attainder | No            | No (already beheaded in 1499) | 19 Henry 7 c.34, in 2 SR 684-88.                                 |
| 1523 | Edward, Duke of Buckingham                | Treason (rebellion)   |                    | No            | No (already beheaded in 1521) | 14 & 15 Henry 8 c.20, in 3 SR 246-58.                            |
| 1531 | Richard Roose                             | Treason (murder by poison, declared treasonous in the same session) | Absolute attainder | No            | Yes (boiled to death)         | 22 Henry 8 c.9, in 3 SR 326.                                     |
| 1532 | Rhys ap Griffith                          | Treason (rebellion)   |                    | No            | No (already executed in 1531) | 23 Henry 8 c.34, in 3 SR 415-16.                                 |

| Year | Name                               | Crime   | Type of Proceeding   | Def. Present?            | Death Sentence?   | Source  |
|------|------------------------------------|---|----------------------|--------------------------|---|---|
| 1534 | Elizabeth Barton                   | Treason (heresy & lese majeste; propecyng against the king's marriage to Anne Boleyn) | Absolute attainder   | No                       | Yes; hanged, drawn, & quartered ("[she] shall suffer suche execucion and paynes of deth as in cases of high treason") | 25 Henry 8 c.12, in 3 SR 446-51.                            |
| 1534 | John Wolfe                         | Felony  | Suspensive attainder | No                       | Yes (but others dead)   | 25 Henry 8 c.34, in 3 SR 490-91.                            |
| 1534 | Bishop John Fisher                 | Misprision of Treason   | Absolute attainder   | No                       | No  | 26 Henry 8 c.22, in 3 SR 527-28.                            |
| 1536 | John Lewes                         | Treason (rebellion)   | Absolute attainder   | No                       | Yes (arms severed, hanged, drawn, & quartered)  | 27 Henry 8 c.59, in 3 SR 629-30.                            |
| 1536 | Sir Thomas More                    | Misprision of Treason   | Absolute attainder   | No                       | No (already beheaded for treason in 1535)   | 26 Henry 8 c.23, in 27 Henry 8 c.58, in 3 SR 528, 3 SR 629. |
| 1536 | Thomas Fitzgerald, Earl of Kildare | Treason (rebellion)   | Absolute attainder   | No (imprisoned in Tower) | Yes   | 28 Henry 8 c.18, in 3 SR 674-75.                            |
| 1536 | John Howard (Lord Thomas Howard)   | Treason   | Absolute attainder   | No                       | Yes, but not carried out; later died of disease in the Tower the following year                                       | 28 Henry 8 c.24, in 3 SR 680-81.                            |



| Year | Name  | Crime               | Type of Proceeding                          | Def. Present? | Death Sentence?                 | Source   |
|------|---|---------------------|---|---------------|---------------------------------|--|
| 1540 | William Bird  | Treason, misprision | Absolute attainder                          | No            | Yes                             | 32 Henry 8 c.61 (Not Printed in <i>Statutes of the Realm</i> ) |
| 1542 | Catherine Howard  | Treason, Misprison  | Absolute attainder                          | No            | Yes (beheaded)                  | 33 Henry 8 c.21, in 3 SR 857-60.                               |
| 1553 | John, Duke of Northumberland, et al.  | Treason             | Confirming conviction                       | No            | No (already executed)           | 1 Mary st. 2, c.14, in 4 SR 217.                               |
| 1571 | Charles, Earl of Westmoreland, et al.   | Treason             | Confirming indictment, outlawry, conviction | No            | Yes (but some already executed) | 13 Eliz. 1 c.16, in 4 SR 549-50.                               |
| 1586 | Thomas Paget et al.   | Treason             | Confirming indictment, outlawry, conviction | No            | Yes (but some already executed) | 29 Eliz. 1 c.1, in 4 SR 766-67.                                |
| 1606 | Robert "Winter," Thomas "Winter," Guy Fawkes, Robert Keyes, Ambrose "Rookewood," John Graunt, Thomas Bates, Sir Everard Digby | Treason             | Confirming conviction                       | No            | No (already executed)           | 3 Jac. 1 c.2, in 4 SR 1068-70.                                 |
| 1606 | Robert Catesby, Thomas "Percy," John Wright, Christopher Wright   | Treason             | Absolute attainder                          | No            | No (killed evading capture)     | 3 Jac. 1 c.2, in 4 SR 1068-70.                                 |
| 1606 | Francis Tresham   | Treason             | Absolute attainder                          | No            | No (died in custody)            | 3 Jac. 1 c.2, in 4 SR 1068-70.                                 |
| 1606 | Hugh Owen   | Treason             | Absolute attainder                          | No            | No                              | 3 Jac. 1 c.2, in 4 SR 1068-70.                                 |

| Year | Name   | Crime    | Type of Proceeding               | Def. Present? | Death Sentence? | Source   |
|------|--|----------|----------------------------------|---------------|-----------------|--|
| 1621 | Sir Giles Mompesson                            | Monopoly | Impeachment                      | Yes           | No              | 4 COMMONS DEBATES, 1621, at 115-17.                |
| 1626 | Edmund Nicholson                               | Monopoly | Attainder                        | Yes           |                 | 1 HC Jour. (1625) 822, 826; 3 HL Jour. (1626) 569. |
| 1628 | Roger Manwaring                                | Treason  | Impeachment & Attainder          | Yes           | No              | 3 Cobbett's State Trials 338-56                    |
| 1641 | Thomas Wentworth, Earl of Strafford            | Treason  | Impeachment & absolute attainder | Yes           | Yes             | 1 Documents on Fundamental Human Rights 291-92     |
| 1644 | William Laud, Archbishop of Canterbury         | Treason  | Impeachment & absolute attainder | Yes           | Yes             | Acts & Ordinances 608-09                           |
| 1657 | Irish rebels                                   | Treason  | Absolute attainder               | No            | No              | Acts & Ordinances 1250-62                          |
| 1665 | Thomas Dolman, Joseph Bampffield, Thomas Scott | Treason  | Suspensive attainder             | No            |                 | 17 Car. 2 c.5, in 5 SR 578.                        |
| 1696 | Sir John Fenwick                               | Treason  | Absolute attainder               | Yes           | Yes             | 8 & 9 Will. 3 c.4, in 7 SR 165.                    |

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