THE RULE OF LAW AND THE ORIGINS OF THE BILL OF ATTAINDER CLAUSE

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I. INTRODUCTION

Until recently, modern bill of attainder analysis has been fairly simple for courts and litigators alike — in order to be considered a bill of attainder, a law must "(1) specify the affected persons; (2) impose punishment; and (3) lack a judicial trial."[1] Furthermore, the case law defining the appropriate analysis in bill of attainder cases is minimal and simple to understand: as one recent appointee to the D.C. Circuit has aptly noted, "[t]he Supreme Court's approach to the bill of attainder clause has been developed in only a handful of decisions."[2] It is surprising that such a historically non-controversial clause of the Constitution has become such a potent "weapon"[3] in the hands of contemporary litigators.[4] However, within just the last couple of years, litigants have more aggressively utilized the Constitution's Bill of Attainder Clause in an increasing variety of cases involving the following issues: petitions of habeas corpus,[5] the invalidation of regulatory schemes,[6] housing ordinances,[7] the

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1. Palmer v. Clarke, 408 F.3d 423, 433 (8th Cir. 2005); *see also* United States v. Lovett, 328 U.S. 303, 315 (1946).

2. T.B.G., Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 476 (1984); *see also id*. at n.7 (showing that only six cases combined to create the exhaustive list of reliable bill of attainder jurisprudence as of twenty years ago). Since this note was written, the Supreme Court has only mentioned "bill of attainder" in its opinions a total of twenty times. Of these twenty cases, only the following four discuss bills of attainder with more than a mere mention of the phrase: Carmell v. Texas, 529 U.S. 513 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Landgraf v. USI Film Products, 511 U.S. 244, 267 n.20 (1994); Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 851 (1984). Of course, fewer discuss bills of attainder specifically with any significant focus. *See generally id*; *Carmell*, 529 U.S. 513.

3. Alison C. Carrigan, *The Bill of Attainder Clause: A New Weapon to Challenge the Oil Pollution Act of 1990*, 28 B.C. ENVTL. AFF. L. REV. 119 (2000).

4. The assertion here is that the amount of bill of attainder clause claims are dwarfed by other actions such as second amendment, commerce clause, establishment clause, and ex post facto actions.

5. *See* Palmer v. Clarke, 408 F.3d 423 (8th Cir. 2005); Bledsoe v. United States, 384 F.3d 1232 (10th Cir. 2004).

6. Elliott v. Simmons, No. 03-3280, 2004 U.S. App. LEXIS 11168, at **3 n.3 (10th Cir. June 7, 2004).

7. Shenandoah v. Halbritter, 366 F.3d 89, 90 (2d. Cir. 2004).

constitutionality of a DNA database,[8] and the Elizabeth Morgan Act.[9] Perhaps the most controversial case involving bill of attainder analysis in our country's history was decided just this year in the U.S. District Court for the District of Nebraska.[10] In that case, the district court decided to invalidate a state constitutional amendment[11] on the basis that it was "an unconstitutional bill of attainder" because it singled out gays, lesbians, bisexuals, and transsexuals for legislative punishment.[12] With so many cases revolving around bill of attainder analysis, and given the nature of some of the claims, it is almost certain that the Supreme Court will revisit its bill of attainder analysis in coming years.

Given the varied and many attempts to utilize what has been termed a Constitutional "weapon,"[13] this paper is meant to be a guide to those interested in the actual origins of the bill of attainder clauses in the Constitution. There are a growing number of judges who seek "to unearth the statutes' original meanings rather than enforcing whatever modern readers might take the statutes' language to mean."[14] However, there is as great a paucity of discussion concerning the origins of the bill of attainder clause in academia as there is in Supreme Court case law.[15] Therefore, this

8. Hunt v. Johnson, No. 03-20555, 2004 U.S. App. LEXIS 606, at **2 (5th Cir. 2004).

9. Foretich v. United States, 351 F.3d 1198, 1203 (D.C. Cir. 2003).

10. *See* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005). This case has caused a great deal of controversy. *See, e.g.*, Robynn Tysver, *Same-sex union fight is not over [-] Nebraska will appeal a ruling overturning its ban on gay marriage, which the judge said was motivated by "irrational fear,"* OMAHA WORLD-HERALD, May 13, 2005, at 1A; Michael Foust, *A first: Federal judge strikes down Neb. marriage amendment*, BAPTIST PRESS, May 13, 2005, *available at* http://www.bpnews.net/bpnews.asp?ID=20784 (last visited Nov. 3, 2005); Bruce Hausknecht, *Federal Court Strikes Down Nebraska Marriage Amendment*, FAMILY.ORG, May 13, 2005, *available at* http://www.family.org/cforum/fosi/government/facts/a0036204.cfm (last visited Nov. 3, 2005).

11. NEB. CONST. art. I, § 29.

12. *Bruning*, 368 F. Supp. 2d at 1005. "The court finds that Section 29 is directed at gay, lesbian, bisexual and transsexual people and is intended to prohibit their political ability to effectuate changes opposed by the majority." *Id.* at 1007.

13. *See* Carrigan, *supra* note 3.

14. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 367-68 (2005). Justices Scalia and Thomas, and Judge Easterbrook, are "champions" of the textualist method. *See generally*, *id.* Moreover, textualism has recently become one of the leading methods of statutory interpretation. *See id.* at 347-48. *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 37 (Princeton University Press 1997) (explicitly stating that when interpreting the Constitution Justice Scalia will read documents from the founding period to find "the original meaning of the text").

15. The paucity in Supreme Court case law is discussed above. *See* authority and discussion *supra* note 2. As to the paucity in academia, thorough research will reveal very few articles that dedicate any substantial space to the history of the attainder clause. Most of the papers found during the research for this paper simply mentioned the clause, had more to do with the ex post facto clause, or were concerned with the modern use of Bill of Attainder analysis. The following are a few examples of articles that actually dedicate some time to the history of the bill of attainder clause: Carrigan, *supra* note 3 at 136-39; Jane Welsh, *The Bill of Attainder Clause: An*

paper is dedicated to a discussion of the origins of the bill of attainder clause, and thus fills some of the academic void by presenting a theory as to how the clause was understood at the time of its incorporation into the Constitution. The purpose of this paper is twofold: first, this paper examines the history of bill of attainder usage that would have been familiar to the founders; and second, this paper theorizes that the founders' dedication to the Rule of Law is what led them to adopt what we know now as the Bill of Attainder clause in the Constitution. Ultimately, the hope is that this paper will be an aid to those interested in the original understanding of the Constitution during this time of increased interest in the Bill of Attainder clause.

II. WHAT IS THE RULE OF LAW? WHAT IS THE BILL OF ATTAINDER CLAUSE?

The Rule of Law is an ideal concerned with the proper powers to be delegated to the government. The regulation of government officials by law is an additional concern. Specifically, the Rule of Law deals with the governing of people with laws and not with the potentially arbitrary whims of a supreme sovereign such as a King, Parliament, or Judge.

One of the great philosophers whose writings influenced the Constitution was John Locke. Concerning the Rule of Law, Locke said:

> Freedom of men under government *is to have a standing rule to live by*, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man.[16]

A government striving towards the Rule of Law will protect the law, and the law in turn will protect both the government and the governed.

At first glance, the bill of attainder clause seems like a fairly simple piece of the United States Constitution.[17] Furthermore, if someone blinked while reading James Madison's notes from the convention, he or she might miss any discussion of the matter.[18] However, one does not need to do too

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Unqualified Guarantee of Process, 50 BROOKLYN L. REV. 77, 82-90 (1983); Robert C. Palmer, *Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. 631, 639-46 (1987).

16. F. A. HAYEK, THE CONSTITUTION OF LIBERTY 170 (The University of Chicago Press 1960) (emphasis added).

17. U.S. CONST. art. I, § 9, cl. 3 (No Bill of Attainder or ex post facto Law shall be passed.) *Id*.

18. The only discussion that Madison records regarding the Bill of Attainder clause's inclusion in the Constitution is the debate on whether to add "or ex post facto law" to the clause. Literally the only discussion mentioned on whether to include the "bill of attainder" portion of the clause takes one to two lines of text, and that is only a transcript of a vote, which passed "*nem. contradicente*" [abbreviation of *nemine contradicente*, meaning "of one mind," or "without

much research before realizing that the bill of attainder clause carries more weight than the one-sentence clause reflects on its face. For instance, even though Article I, section nine clearly and unambiguously states that "no Bill of Attainder . . . shall be passed,"[19] the very next section of the document states that no State will be able to pass a bill of attainder either.[20] So there is not *a* bill of attainder clause, but there are multiple attainder clauses. This is amazing when remembering that the Constitution in its original form did not have a Bill of Rights, and thus explicitly protected few rights specifically,[21] and even fewer were specifically enforced on the states in such a manner.[22]

The third and final attainder clause can be found in Article III of the Constitution, and provides: "[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[23] A question necessarily arises from this seemingly obvious contradiction: if Congress is not allowed to pass a bill of attainder, why is the attainder of treason still on the table for discussion in Article III?

There are other interesting questions that can be asked about the Bill of Attainder clause after a quick review of history. One such question is why there was no discussion on the issue during the Constitutional

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dissent"], after which the delegates moved on to debate the ex post facto portion of the clause. The Avalon Project at Yale Law School, The Debates in the Federal Convention of 1787 reported by James Madison: August 22, *available at* http://www.yale.edu/lawweb/avalon/debates/822.htm (last visited Oct. 22, 2005) [hereinafter Madison, August 22].

19. U.S. CONST. art. I, § 9, cl. 3.

20. U.S. CONST. art. I, § 10, cl. 1. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." *Id.*

21. One of the "most considerable" of the objections to the Constitution in its original form was the lack of a bill of rights. THE FEDERALIST No. 84 (Alexander Hamilton). Hamilton tried to defend the lack of a bill of rights by pointing to some of the rights that were protected in the body of the Constitution. *Id.* Some examples are: U.S. CONST. art. I, §3, cl. 7 (limiting the punishment in impeachment cases); U.S. CONST. art. I, § 9, cl. 2 (the protection of the *habeas corpus* privilege from suspension); U.S. CONST. art. III, § 3, cl. 1 (requiring two witnesses for a conviction of treason). With so few rights protected explicitly it is interesting that so much consideration was given to bills of attainder and the affects of attainder.

22. The relationship between the federal constitution and the states' powers was dramatically different at the Founding from how we conceive it today. For example, even when the Bill of Rights *was* passed the rights were not necessarily enforceable upon the states. *See* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1231 (2004) (explaining that the rights included in the Bill of Rights only applied originally to the federal government and it was not until the passage of the Fourteenth Amendment that the rights in the Constitution were enforceable against the states, "that is, found by the Supreme Court to apply to the actions of state governments as well as the federal government").

23. U.S. CONST. art. III, § 3, cl. 2.

Convention,[24] even though the usage of bills of attainder had been prevalent in at least one state, used in others, and had been accredited in the convention itself with having saved the Constitution of England?[25]

The historical significance of bills of attainder, in the English empire and the American colonies, is illuminated by an understanding of the founders' conceptualization of the Rule of Law. Bills of attainder were thought historically, until the time of the Constitutional Convention, to be a necessity for the survival of the English Constitution.[26] If this is true, then the obvious question is: why did the delegates at the convention pass the prohibitive measure "nem. contradicente?"[27]

This article will discuss the significance of the bill of attainder clauses as they evidence the founders' dedication to the Rule of Law. To accomplish this, the article will begin by explaining what a bill of attainder is, and also what is meant by the phrase, "Rule of Law." The article will then describe the English history concerning the purpose and role for bills of attainder, with a particular focus on the trial of the Earl of Strafford. Next, the article will analyze the usage of bills of attainder in the American colonies, with a focus on the trial of Josiah Philips. The comparison of these two examples, along with the history of the bills in general, will be used as a reference point to show three things: (1) bills of attainder violate the Rule of Law, (2) the founders cherished the ideal of the Rule of Law, and (3) the bill of attainder clauses were included in the Constitution as instruments to protect the Rule of Law.

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24. See discussion *supra* note 15.

25. *See* Madison, August 22, *supra* note 18. *See also* The Debates in the Federal Convention of 1787 reported by James Madison: September 8, *available at* http://www.yale.edu/lawweb/avalon/debates/908.htm (Sept. 20, 2005) [hereinafter Madison, September 8]; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS, 70-72 (Yale University Press 1999).

26. Madison, September 8, *supra* note 25.

The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up. Col. MASON. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined. As bills of attainder *which have saved the British Constitution* are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after "bribery" "or maladministration."

Id. (emphasis added).

27. Madison, August 22, *supra* note 18. "[T]he motion relating to bills of attainder was agreed upon *nem. contradicente*." *Id*. (Emphasis added).

III. DEFINITIONS

A. BILL OF ATTAINDER

An adequate definition of bills of attainder requires first an understanding of attainder itself.

1. Attainder

Attainder, at the time of the Constitutional Convention, could most easily be described as "the extinction of a person's civil rights after he has been sentenced to death or to outlawry, as an additional penalty."[28] Because a person's civil rights had become extinct, that person could no longer own property; therefore, his children could not inherit that property, which in essence caused the property to be forfeited to the crown.[29] Reversals of attainder were permissible, but did not always result in a full return of the property.[30]

Blackstone's commentaries state that "[w]hen sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is *attainder*."[31] Furthermore, Blackstone states "[t]he consequences of attainder are forfeiture, and corruption of blood."[32]

2. Bill of Attainder

A bill of attainder was an act of the legislature, proposed and passed as any other bill, but for the specific purpose of *attainting* individuals of "treason, or felony, or to inflict pains and penalties beyond, or contrary to the common law."[33] In his work on the Blackstone Commentaries, St. George Tucker, in 1803, defined "Bills of Attainder" as follows:

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28. *Factbug Online Encyclopedia,* http://www.explore-law.com/law/A/Attainder.html (last visited Sept. 15, 2005).

29. *Id.* In all likelihood the attainting of many individuals was malicious. *See* Laurence Claus, *The Antidiscrimination Eighth Amendment,* 28 HARV. J. L. & PUB. POL'Y 119, 150 (2004) (referencing the "acts of attainder" that were "no doubt" abused in England "as instruments of vengeance by successful over a defeated party") (quoting letter from Thomas Jefferson to L.H. Girardin (March 12, 1815), *in* 14 THE WRITINGS OF THOMAS JEFFERSON 272 (Andrew A. Lipscomb & Albert Ellery Burgh eds. 1905)).

30. *Id.*

31. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-69 (University of Chicago Press 1979), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_3s2.html (last visited Nov. 4, 2005).

32. *Id.*

33. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF

> They are state-engines of oppression in the last resort, and of the most powerful and extensive operation, reaching to the absent and the dead, as well as to the present and the living. They supply the want of legal forms, legal evidence, and of every other barrier which the laws provide against tyranny and injustice in ordinary cases: being a legislative declaration of the guilt of the party, without trial, without a hearing, and often without the examination of witnesses, and subjecting his person to condign punishment, and his estate to confiscation and forfeiture.[34]

As shown here, bills of attainder circumvent the legal requirements for prosecuting the crimes of tyranny and injustice.

3. Summary of Bill of Attainder vs. Attainder

As shown above, the bill of attainder was a legislative act, meaning that it required the signature of the King as well as approval of both the House of Lords and the House of Commons.[35] However, the attainting of someone was possible wholly within the judicial context as well.[36] Because attainder was possible by both judges and legislatures the founders had to address the problem in both Article I and Article III of the U.S. Constitution.[37] The attainder associated with Article III, § 3 also reflects a protection of the Rule of Law; however, the analysis in this paper will focus solely on the bill of attainder clauses in Article I.[38]

THE COMMONWEALTH OF VIRGINIA, *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_3s12.html (last visited Nov. 4, 2005).

34. *Id.*

35. Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2093 (2002) (stating that after the Bill of Attainder for the Earl of Strafford had been passed by both the House of Commons and the House of Lords "[t]he bill still required the King's assent"). *See* Stanford E. Lehmberg, *Parliamentary Attainder in the Reign of Henry VIII*, 18 THE HISTORICAL J. 675, 701 (1975) (showing that bills of attainder were actually influential in bringing about "the new manner of giving royal assent to legislation").

36. As stated above, a sentence of death could be pronounced upon a person, which would have the affect of attainting that person. *See* BLACKSTONE, *supra* note 31.

37. *See* U.S. CONST. art. I, §§ 9-10, art. III, § 3.

38. In answer to the question presented in the introduction, it would appear that since the natural consequence of a sentence of death was attainder on the person sentenced, the U.S. Constitution is simply regulating those judgments from courts to affect the person attainted in life and not his heirs. Therefore, under the Constitution, it was still possible to be attainted, but the attainting had to be accomplished after being proven guilty of treason. The "bill of attainder" clauses were clearly and specifically focused on a given operation of legislatures that the convention delegates wanted to prohibit future generations from exercising.

B. THE FOUNDER'S CONCEPTION OF THE RULE OF LAW[39]

A distinction should be drawn between the "Rule of Law" and the protection thereof. Procedural rules, such as requiring a two-thirds vote, and laws, such as the bill of attainder clause, are protections of the Rule of Law.[40] The Rule of Law itself runs much deeper than mechanics and actions; it is an ideal, a philosophy of governance that reciprocally protects the individual liberties of the people who strive to protect the Rule of Law.[41] The Rule of Law propagates the idea that the law is supreme to the man by which it was created.[42]

1. History

England's resistance to the monarchical absolutism that swept through Europe may have preserved the common medieval ideal of the supremacy of law.[43] As the English system of Parliament became more prominent, so too did the focus on individual liberties and the ways in which laws should be designed to protect those liberties – literally to

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39. HAYEK, *supra* note 16. This paper will use F.A. Hayek's historical studies to articulate the founders' understanding of the Rule of Law.

40. *Id.* at 206. "The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal." *Id.*

41. One of the more elegant articulations of this ideal is in Robert Bolt's play, "A Man for all Seasons." In the play, Thomas More's family wants him to have Richard Rich arrested, but instead Thomas More lets him go, which begins the following conversation:

> While you talk, he's gone!" Thomas responds, "And go he should, if he was the Devil himself, until he broke the law!" William Roper, More's daughter's boyfriend, then says, "So now you'd give the Devil the benefit of law," to which Thomas responds, "Yes. What would you do? Cut a great road through the law to get after the Devil?" Roper replies, "I'd cut down every law in England to do that!" Outraged and incredulous, Thomas says, "Oh? . . . And when the last law was down, and the Devil turned round on you—where would you hide . . . , the laws all being flat? . . . This country's planted thick with laws from coast to coast . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

Peter D. Webster, *Who Needs an Independent Judiciary?*, 78 FLA. BAR J. 24, 27 (2004). The laws protect people, but the laws are only able to do such as long as the laws themselves are protected by the people.

42. The main assertion here will be shown throughout the paper. For now, it is sufficient to say that the rule of law does not prevent the changing of laws. Part of the genius of the Constitution is that it can be amended. *See* U.S. CONST. art. V. The Constitution can be changed, but not solely at the whim of those who would benefit from such a change. Article V prescribes the manner in which the Constitution can be changed, if necessary. Thus the Constitution is protected from political actors running over it roughshod for self-indulgent purposes, but only as long as the law is respected.

43. HAYEK, *supra* note 16, at 163. In the Middle Ages it was believed that "the state cannot itself create or make law, and of course as little abolish or violate law, because this would mean to abolish justice itself, it would be absurd, a sin, a rebellion against God who alone creates law." *Id.* (citations omitted). This is significant because it was England that allowed Parliament to thrive and evolve from a "law-finding body to a law-creating one." *Id.*

protect people from an intrusive government.[44] This all refers to the English legal system's restraint on absolute monarchs, which preserved the liberty of individuals by making their liberties subject to law and not to the arbitrary whims of unruly monarchs.

This ideal, though it was preserved in England, has roots stretching as far back as the classical period. Aristotle was an advocate for rulers to be ruled by laws, and declared, "it is more proper that the law should govern than any of the citizens."[45] The idea that even the rulers were subject to the law was rekindled in England after it had been stamped out by the Roman Empire.[46] However, it did not take long until the parliament in England, which had fought so dearly against an absolutist monarch, began its reverse evolution into an absolutist body of politicians: "Parliament began to act as arbitrarily as the king."[47]

In England, in 1641, there was an abolition of the prerogative courts, which led to twenty years of debate wherein the central issue was how to prevent the arbitrary actions of government.[48] The people of England realized that whether a governmental action was arbitrary had nothing to do with the source so much as "whether it was in conformity with pre-existing general principles of law."[49] The general points of discussion were: (1) "there must be no punishment without a previously existing law providing for it;" (2) "all statutes should have only prospective and not retrospective operation;" and (3) "the discretion of all magistrates should be strictly circumscribed by law."[50] These three points were the main thrust to make the law the king, or as one writer declared, "*Lex, Rex*."[51]

Two main proposals emerged from the twenty-year debate on how to protect the three aforementioned ideals: (1) a written constitution; and (2) the principle of the separation of powers.[52] The importance of these two concepts was evidenced in the 1660 "Declaration of Parliament Assembled

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44. *Id*.

45. *Id*. at 165. Hayek quotes Aristotle as saying "persons holding supreme power 'should be appointed only guardians and servants of the law.'" *Id*.

46. Un-ruled rulers were typified in the Roman governments. As one student put it: "[T]he absolute empire proclaimed together with the principle of equity the authority of the empirical will unfettered by the barrier of law." *Id*. at 167. Hayek also makes a point to note that "when the art of legislation was rediscovered, it was the code of Justinian with its conception of a prince who stood above the law that served as the model on the Continent." *Id*.

47. *Id.* at 169.

48. *Id*.

49. *Id*. (all branches of the government were capable of arbitrary action).

50. *Id*.

51. *Id*.

52. *Id*.

at Westminster," in which the Parliament attempted to articulate the essential principles of a constitution:

> There being *nothing more essential to the freedom of a state, than that the people should be governed by the laws*, and that justice be administered by such only as are accountable for mal-administration, it is hereby further declared that all proceedings touching the lives, liberties and estates of all the free people of this commonwealth, *shall be according to the laws of the land*, and that the Parliament will not meddle with ordinary administration, or the executive part of the law: it being the principle [sic] part of this, as it hath been of all former Parliaments, *to provide for the freedom of the people against arbitrariness in government*.[53]

This statement represents a good effort to articulate the Rule of Law and how the English government would strive to protect it. When it says the "people should be governed by the laws," it means the laws should be published and people will be held accountable for their obedience to them; but it also means the laws apply to everyone, including the sovereign.[54] The proceedings of the government "shall be according to the laws of the land" connects to the statement that the people should be protected "against arbitrariness in government."[55] In other words, the government should be set up in a way that there is a protection from the arbitrary whims of the sovereign.

2. The Rule of Law in the Colonies

As mentioned above and as will be shown below, the English Parliament not only acted in an arbitrary fashion, but in 1767, just one century after it had issued the "Declaration of Parliament Assembled at Westminster," Parliament "issued a declaration that a parliamentary majority could pass any law it saw fit."[56] Thus, Parliament had established itself as a sovereign that could, upon its whim, change the law for political convenience, and thus not bind itself realistically to any laws. As a result, American colonists objected to English rule not only because they were unrepresented in Parliament, "but even more that [Parliament] recognized

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53. *Id*. at 169-70 (emphasis added).

54. *Id*. at 164. The word that the Greeks used to describe the Rule of Law concept was "Isonomia," which meant "equality of laws to all manner of persons." *Id*. Hayek noted that "[w]hen it first appeared, it described a state which Solon had earlier established in Athens when he gave the people 'equal laws for the noble and the base.'" This is also reflected in the statement "that justice be administered by such only as are accountable for mal-administration," *id.* at 169-70, meaning that the government leaders will also be accountable under the law.

55. *Id*. at 169-70.

56. *Id.* at 176 (quoting E. MIMS, JR., THE MAJORITY OF THE PEOPLE 71 (Modern Age Books) (1941)).

no limits whatever to its powers."[57] Therefore, the colonies took it upon themselves to become independent from England, and to preserve the Rule of Law.

Though the Revolution was a miraculous success, the Articles of Confederation, that attempted to institute a new national government, were soon recognized to be inadequate to support and maintain the government needed in the colonies.[58] Therefore, when the Federal Convention convened in 1787, the delegates were immediately confronted with two problems: (1) the Articles of Confederation failed to give government sufficient power and needed to be strengthened (which would have proposed a threat to the strength of the states); and (2) as the strength of government was expanded the protection of individual rights was threatened.[59] Both of these problems reflected the colonists' concern that the power of government be limited. The colonists obviously did not want a king, nor did they want an English style Parliament that could act as a king – either scenario would lead the colonies back into the hole where people's individual rights were arbitrarily discounted and at the constant mercy of political tides.

The Constitutional Convention of 1787 eventually gave birth to what became the Constitution of the United States of America. There are certainly other aspects of the Constitution that were designed to protect the Rule of Law.[60] However, this paper's focus will be limited to the concept of prohibition against bills of attainder as a protection of the Rule of Law as the founders understood it.

IV. ENGLISH HISTORY CONCERNING BILLS OF ATTAINDER

Bills of attainder had been utilized in England for centuries before the ratification of the U.S. Constitution.[61] One of the earliest bills recorded in English history was issued against the Earl of Lancaster, who was thereby executed in 1322.[62] From that time, the face of English history continued

57. *Id.* at 177.

58. Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 436 (2003) (discussing the immediate dangers realized under the Articles of Confederation after the nation had achieved independence through the revolution); Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005) (showing the articles' inadequacy to protect the fledgling government's economy).

59. HAYEK, *supra* note 16 at 184-85.

60. Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J. L. & PUB. POL'Y 273 (2004) (summarizing the different ideas that the founders incorporated into the U.S. Constitution to protect the rule of law).

61. LEVY, *supra* note 25, at 68.

62. *Id*.

to be blemished by the bills, for politically malicious reasons.[63] As mentioned in the definition section above, a bill of attainder is "a legislative declaration of the guilt of the party, without trial, [and] without a hearing,"[64] but it still required the King's consent as a legislative act.[65] Therefore, Parliament found it more convenient to initiate acts of impeachment when dealing with undesired officers of the state, who may have been friends of the king, and reserved bills of attainder for those situations where the King was more likely to agree.[66] For instance, King Henry VIII used bills of attainder to rid himself of some of his wives.[67] However, in general, bills of attainder "fell into a state of desuetude" for a time until a monumental trial against Thomas Wentworth, the Earl of Strafford.[68]

A. THE TRIAL OF THE EARL OF STRAFFORD

The bill of attainder issued against the Earl of Strafford, Thomas Wentworth, was on the minds of the delegates when they passed the bill of attainder clauses.[69] The trial of the Earl of Strafford presented England with a real constitutional crisis.[70] As one author put it, "[a]t stake in Strafford's trial was nothing less than the future of English constitutionalism and limited monarchy."[71] Specifically, the concern

63. *Id*. Probably one of the more famous "political enemy" type bill of attainders is represented in the case of Jack Cade of Kent, who managed to seize London with four thousand men and caused the King to flee. Upon retaining his Kingdom however, the King granted amnesty to all his followers and put a price on Cade's head. Cade was captured and killed, but Parliament also passed a bill of attainder against him, after his death, which disinherited his posterity and gave all his property to the crown.

64. *See* TUCKER, *supra* note 33.

65. *Id*.

66. LEVY, *supra* note 25, at 69. Levy suggests that Parliament reserved attainders for "retaliating against strong ministers." *Id*.

67. *Id*.

68. *Id*. Levy does not go into any detail as to why the prominence of bills of attainder "fell into a state of desuetude." *Id.* Another author agrees that by the time King Henry VIII came to the throne "attainder by parliament was an established means of dealing with special offenders" and especially people that threatened the power of the King. Lehmberg, *supra* note 35, at 677. Part of the rapid decline is due simply to the fact that Henry VIII attainted so many people during his reign it would be difficult for the numbers not to drop off. *Id.* at 701 (one hundred and thirty persons were attainted under Henry VIII: "96 for treason, 26 for misprision, 5 for felony, and 3 for heresy"). Aside from the natural drop off one might expect, Lehmberg suggests that Parliament may have just become disgusted with the process for having engaged in it to tyrannically. *Id*. (citing to the example of Sir Thomas More's bill and also Sir Edward Coke's criticism of such acts).

69. Lerner, *supra* note 35, at 2060.

70. *Id*. at 2058.

71. *Id*.

surrounding the trial was whether the King would obtain more absolute power (such as the other European kings had retained in their governments), or whether the House of Lords and the House of Commons maintained a strict balance of powers between the monarchy and parliament.[72]

In the 1620s, Thomas Wentworth was a leading member of the House of Commons and had even been "rewarded" for his obstinacy towards the Crown by refusing one of the King's "forced loans."[73] As a Member of Parliament, Wentworth was a thorn in the side of King Charles I as he advocated for the Petition of Right, which was designed to limit the power of the King.[74] The power struggle between the King and the House was raging throughout the 1620s, and Wentworth advocated a more moderate petition than that of his associates in the House, Sir Edward Coke and Sir John Eliot, whose views eventually won out and cost Wentworth his influence.[75] In 1628, Wentworth abandoned his post in Parliament and sided with the King.[76] This immediately won him a baronetcy and a position in Yorkshire as Lord President of the North.[77] This switch probably saved his life as just the next year, the King, tired of the constant battle with the House of Commons, dismissed parliament and had its leaders thrown in jail – where at least one of them died years later.[78]

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72. *Id*. "Would the Stuart kings enlarge the powers of the monarchy along French lines or would Parliament preserve, and even expand, its own powers and privileges? And, on a more personal level, whose head would fall – Strafford's or that of his principal antagonist in the House of Commons, John Pym?" *Id*.

73. *Id*. at 2063-64. "The parliaments of the 1620s had battled with Charles over foreign policy, religion, and, most ominously, money, with the King demanding subsidies and a wary Parliament refusing him. Hence, his recourse to 'forced loans,' and hence Wentworth's first state-subsidized visit to the Tower of London." *Id*. at 2064.

74. *Id*. at 2064. *See also* Columbia University Press, *The Columbia Electronic Encyclopedia, Sixth Edition* (2003), Columbia University Press, *available at* http://www.answers.com/main/ntquery;jsessionid=90re081ajqi2g?method=4&dsid=2222&dekey=Petition+of+Right&gwp=8&curtab=2222_1&sbid=lc04a (last visited Nov. 11, 2005) (noting that the Petition of Right actually began by Sir Edward Coke in an effort to combat the power of the King. It focused on curbing the King's powers in four ways: "no taxes may be levied without consent of Parliament; no subject may be imprisoned without cause shown (reaffirmation of the right of habeas corpus); no soldiers may be quartered upon the citizenry; martial law may not be used in time of peace." The King agreed to the petition in return for subsidies.

75. Columbia University Press, *The Columbia Electronic Encyclopedia, Sixth Edition* (2003), *available at* http://www.answers.com/main/ntquery;jsessionid=90re081ajqi2g?method=4&dsid=2222&dekey=Petition+of+Right&gwp=8&curtab=2222_1&sbid=lc04a (last visited Sept. 11, 2005); *see also* Lerner, *supra* note 35, at 2064.

76. Lerner, *supra* note 35, at 2064.

77. *Id*.

78. *Id*. at 2065. John Eliot, whose "Petition of Right" had succeeded, was among those thrown into Prison, where he died three years later. *Id*.

Wentworth was very successful in his new post in the House of Lords. He was made Lord Deputy of Ireland where he successfully expanded his powers into the courts of common law between civil parties by "bullying Irish lawyers into submission."[79] Wentworth's impressive success in Ireland and open advocacy of an absolute monarch was likely the reason he became the King's most trusted advocate as well as the most feared enemy of the House of Commons.[80]

The political stage was set. The Scots were at war with England and required one thousand Sterling a day to keep peace; before the final treaty was signed King Charles would need subsidies, and the House of Commons knew it.[81] The House was hoping the pressure on King Charles would persuade him to agree to a new legislative agenda.[82] However, the King had in the meantime made Thomas Wentworth the new Earl of Strafford and brought him home as his closest advisor.[83] As a leader in the House, John Pym recognized that Wentworth would be the main obstacle to overcome in his quest for legislative reform; thus, Pym focused his efforts on bringing about the Earl of Strafford's impeachment trial for the cause of treason.[84]

Wentworth was confined during the duration of his impeachment trial in the Tower of London.[85] The impeachment charges alleged that Strafford had "traitorously sought to subvert the fundamental laws of England," and included articles to support "the charge of High Treason."[86] Though the list of allegations was long, Wentworth's lawyers, or Wentworth himself, debunked all the allegations soundly.[87] Throughout the trial, Strafford's basic defense was that none of the allegations were proven, and even if they were, they did not amount to the charge of treason.[88]

Strafford's strategy was based on the Rule of Law. He urged the House of Lords to define treason as it was defined in the law, in the 1352 statute, and to not go beyond the written definition.[89] Strafford contended

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79. *Id*.
80. *Id.* at 2066.
81. *Id*. at 2067-68.
82. *Id*. at 2068.
83. *Id*. at 2067-68.
84. *Id*.
85. *Id*. at 2072. Wentworth had thus come full circle within his life, having served time in the Tower of London for his role in opposing the King's forced loan, now he was in the Tower for supporting the King. *Id*. at 2064.
86. *Id*. at 2074.
87. *Id*. at 2074-75, 2091.
88. *Id*. at 2075-76. Professor Lerner provides an excellent summary of Wentworth's trial, and is commended to readers for a more exhaustive understanding of the experience.
89. *Id.* at 2078. This was Strafford's mainstay throughout the trial. He was depending on

that he was at most guilty of misdemeanors, and "a hundred misdemeanors [would] not make a felony, and therefore not a treason."[90] The managers[91] only responded with a natural law argument, which did not hold water with the court, nor with the spectators, throughout the trial.[92] The managers' prosecutor stated: "We shall charge him with nothing but what the Law in every man's breast condemns, the Light of Nature, the Light of common reason, the Rules of common Society."[93] It was a poor counterargument for the court: rhetorically powerful, legally empty.

This however was the tenor of the whole action against Strafford. Inevitably, "[t]he managers would unveil a charge with great fanfare only to go slinking irritably away at the end of the day, unable to prove the facts contained in the charge."[94] The action was never on solid ground to begin with – impeachments were supposed to be on behalf of the king, but Strafford always had the King's support for what he had done.[95] Furthermore, on the one allegation that may have been possibly treasonous, the prosecution only had one witness, even though the law indubitably required two witnesses for a judgment of treason.[96]

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the Rule of Law to save him. He stated that he was "free of all offenses declared [to be] treason." *Id.*

90. *Id.* at 2079.

91. "Managers" refers to the prosecutors of the Earl of Strafford. *Id.*

92. According to Lerner, the prosecutors, upon realizing their case was a lost cause on legal grounds stated: "We shall charge him with nothing but what the Law in every man's breast condemns, the Light of Nature, the Light of common reason, the Rules of common Society." *Id. See also* William R. Stacy, *Matter of Fact, Matter of Law, and the Attainder of the Earl of Strafford*, 29 AM. J. OF LEGAL HIST. 323, 324 (1985) (stating that the "Commons's [sic] case against Strafford was weak from the first to the last").

93. Lerner, *supra* note 35, at 2079.

94. *Id.* at 2077.

95. *Id.* at 2080-81 (citing RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 30 & n.107 (Harvard University Press 1973) ("Menacing as the acts of Strafford were, they did not amount to treason within the common understanding because they were not in the strict sense acts committed against the authority of the king: They had his tacit consent, if not encouragement.").

96. *Id.* at 2082-84. The only allegation that survived minimal cross-examination was whether Strafford had offered to "solve" the King's parliamentary battle with Irish soldiers. Knowing of the troubles that England was having with the Scots, and also knowing of the troubles the King was having with Parliament to raise an adequate army to fight them, Thomas Wentworth had stood in council with the King's advisors and stated: "You have an army in Ireland you may employ here to reduce this kingdom." The controversy surrounding this statement is what was meant by 'here.' Did it mean 'here' England or 'here' Scotland? There was one witness, Henry Vane, who had testified on three occasions before the trial. In the first two testimonies he claimed that he had no recollection of the Irish army suggestion, but upon his third testimony he recalled everything down to the exact words Strafford had used and their meaning. However, even this testimony was denied on cross-examination, and was attacked by numerous other witnesses that claimed that Strafford had said 'there'; specifically meaning Scotland. *Id*.

In concluding his case, Strafford urged the court to remember the Rule of Law.[97] He reminded the judges that what he had done was not treason under the law, and that if the judges would rule against him in this matter, it would be like a lion that if once let "loose it will tear us all."[98] Interestingly, Strafford compared the bogus treason claim to an *ex post facto* law problem – another Rule of Law argument.[99] Strafford's concluding remarks pointed to the fact that even if they found what he did to be wrong, it would be against the "fundamental laws" of England to charge someone for laws created after the commission of an act.[100] Strafford contended that what he did was not treason because treason had been defined in the 1352 statute.[101] Specifically, he argued that the statute had been created for a protection against *ex post facto* treason accusations manufactured by Parliament.[102] Strafford closed his argument with: "It were better to live under no law than under a law one cannot tell."[103]

It was obvious that the prosecution had failed, and Pym knew it. His prosecution was not based on law, but on an invented malicious theory.[104] The result of the prosecution caused one observer to write in his diary: "Without question they will acquit him, there being no law extant whereupon to condemn him of treason."[105]

Pym thus resorted to a bill of attainder action. It was passed in the House of Commons by a final vote of 204-59.[106] The bill then moved to the House of Lords where its passage was promoted by Oliver St. John,

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97. *Id.* at 2084.

98. *Id.*

99. This is interesting for the purposes of this paper because the main Bill of Attainder clause and the *ex post facto* clause are side-by-side in the U.S. Constitution. *See* U.S. CONST. art. I, § 9, cl. 3.

100. *Id.* at 2085. Pym used the phrase "fundamental laws" throughout the prosecution, because there were no written laws on which to base his claim. After the trial one of the House members, Edmund Waller, asked the managers, much to their chagrin, what "the fundamental laws of the kingdom" were exactly. *Id*.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id. See also* Stacy, *supra* note 92, at 325 (stating that Pym's case was "foundering in law and fact").

105. J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-89, 1695 (Cambridge 1962), *cited in* Lerner, *supra* note 35, at 2090.

106. Lerner, *supra* note 35, at 2091. The prosecution's publicity of the case contributed immensely to the bill of attainder action most likely. Because Strafford had been kept in the Tower of London for the duration of his trial, he had a restricted ability to win his case in the court of public opinion. Because the impeachment trial failed miserably the public outcry may have been too much for the House of Commons to bear. On the day of the vote for the Bill of Attainder, only 263 of the 500 members of the House of Commons were present. Lerner states that the rest were scared away by "dangerous looking crowds." *Id*.

who basically argued that the bill made all of Strafford's acts illegal and punishable under the law.[107] One of the members countered and asked whether Parliament should follow the example of the "Supreme Law-giver, who commonly warns before he strikes?"[108] To this, St. John responded that Strafford was something of a beast of prey, which did not merit the protection of law.[109] The bill of attainder passed in the House of Lords 26-19.[110] Because the King had to still sign the bill, and it seemed that the public would only settle for Strafford's condemnation, Strafford himself urged the King to sign the bill, which he did.[111] The Earl of Strafford was executed soon thereafter.[112]

The case and its aftermath were replete with examples of violations against the Rule of Law. Even though the Earl of Strafford had the benefit of a trial, he won that trial and was still sentenced to death. His actions did not fall within the definition of treason, but that was what he was convicted for in the bill of attainder.[113] The accusations that led to his bill of attainder were never proven. Instead of having two witnesses testify against him as mandated by the law, there was only one, and that witness contradicted himself upon cross-examination.[114] The House of Lords did not condemn Strafford as a court, by impeaching him, but rather purchased St. John's argument wholesale that "meer [*sic*] Legislative Power may be exercised" to punish Strafford.[115] Strafford's fate was not protected by the law but was decided by the whims of men who would see him die. One member of the House of Commons, who voted against Strafford, noted that it was as if "we had condemned him because we would condemn him."[116] The laws were forgotten and the government was of men.[117]

V. BILLS OF ATTAINDER IN THE AMERICAN COLONIES

The history of bills of attainder in the colonies also demonstrates their threat to the Rule of Law. Bills of attainder were rare in the colonies, save

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107. *Id*.

108. *Id.* at 2092 (The reasoning, of course, is that if God, the "Supreme Law-giver," commonly warns before striking, so should Parliament.).

109. *Id*.

110. *Id*. at 2093.

111. *Id*. (Lerner reports that the King later regretted his decision and that perhaps Strafford was surprised that the King had taken Strafford's advice.).

112. *Id*.

113. *Id*. at 2091-92.

114. *Id*. at 2066.

115. *Id.* at 2092.

116. *Id*. at 2091.

117. HAYEK, *supra* note 16, at 166.

for during the Revolution.[118] There were only four states that had bill of attainder clauses in their original constitutions – Maryland, New York, Massachusetts, and Vermont.[119] Maryland was the first,[120] but the New York constitution was probably the most interesting due to its explicit allowance of bills of attainder for those who had committed egregious crimes before the termination of the "current" Revolutionary War.[121]

Outside of the states that had the amendments, there were several states that used the bill of attainder to strip property from the Tories.[122] One author reports that in Pennsylvania alone, at least 490 individuals were attainted by name in 1776 for high treason.[123] New York apparently took advantage of that allowance and convicted more than 1,000 individuals through the use of bills of attainder or bills of pains and penalties.[124]

Bills of attainder were also used in the colonies before the ratification of the Constitution. Though Thomas Jefferson would waver on the point throughout his career, he was one of the greater proponents for allowing bills of attainder at the time the U.S. Constitution was being ratified.[125] Jefferson argued that "[n]o one doubted that society had a right to erase from the roll of its members any one who rendered his own existence inconsistent with theirs."[126] It is shocking to think that Jefferson, having been such a rights advocate, having written the Declaration of

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118. LEVY, *supra* note 25, at 70.

119. *Id.*

120. *Id.*

121. N.Y. CONST. art. XLI, *available at* http://www.nhinet.org/ccs/docs/ny-1777. htm (emphasis added) (last visited Nov. 10, 2005).

> And this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever. And that no acts of attainder shall be passed by the legislature of this State for crimes, *other than those committed before the termination of the present war*; and that such acts shall not work a corruption of blood. And further, that the legislature of this State shall, at no time hereafter, institute any new court or courts, but such as shall proceed according to the course of the common law.

Id.

122. LEVY, *supra* note 25, at 71. Tories are those who supported the King of England and were opposed to the American Revolution. *See* MERRIAM-WEBSTER ONLINE, *available at* http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=Tories&x=0&y=0 (last visited Nov. 10, 2005).

123. LEVY, *supra* note 25, at 71.

124. *Id. See also* Joseph Story, *Commentaries on the Constitution of the United States*, vol. 3, §§ 1338-39 (1833), *available at* http://presspubs.uchicago.edu/founders/documents/ a1_9_3s15.html (last visited Sept. 11, 2005) ("If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the constitution, it seems that bills of attainder include bills of pains and penalties.").

125. LEVY, *supra* note 25, at 77.

126. *Id*.

Independence, having himself been named in a bill of attainder during the times of revolution,[127] would in any way condone the ability of Congress to pass bills of attainder. Despite all this, Jefferson still put his hand to the task of writing a bill of attainder against Josiah Philips, who was "reputed to be a Tory cutthroat."[128]

In the early years of the revolution, Josiah Philips had already developed a reputation as a "noted [t]raitor."[129] In May, 1778, it came to the attention of the Governor of Virginia, Patrick Henry, that Philips was using a British commission as a shield for plundering Virginia's people.[130] In response, Governor Henry authorized the raising of one hundred militiamen and offered five hundred dollars for the capture of Philips.[131] However, the militia failed miserably, and the Governor placed the matter before the Virginia assembly to determine the best manner to capture the men.[132] Governor Henry consulted personally with Thomas Jefferson who was later recorded as saying: "[w]e both thought the best proceeding would be by a bill of attainder, unless he [Philips] delivered himself up for trial within a given time."[133] Thomas Jefferson wrote the bill of attainder, which was quickly ratified by the Virginia Assembly on May 30, 1778, not even one month after the notice came to Governor Henry of Josiah Philips' actions.[134]

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127. In his autobiography, Thomas Jefferson explains how his pamphlet entitled "A Summary view of the rights of British America" had made its way to the British Kingdom and had

> [P]rocured [him] the honor of having [his] name inserted in a long list of proscriptions enrolled in a bill of attainder commenced in one of the houses of parliament, but suppressed in embryo by the hasty step of events which warned them to be a little cautious. Montague, agent of the H. of Burgesses in England made extracts from the bill, copied the names, and sent them to Peyton Randolph. The names . . . were about 20 . . . but I recollect those only of Hancock, the two Adamses, Peyton Randolph himself, Patrick Henry, & myself.

Thomas Jefferson, *Autobiography*, (1790), *available at* http://www.yale.edu/law web /avalon/jeffauto.htm (last visited Sept. 11, 2005) (citing Girardin's History of Virginia, Appendix No. 12).

128. LEVY, *supra* note 25, at 72.

129. *Id*.

130. *Id.*

131. *Id.*; *see also* W. P. Trent, *The Case of Josiah Philips*, 1 THE AM. HIST. REV. 444, 445 (1896) *available at* http://links.jstor.org/sici?sici=0002-8762%28189604%29 1%3A3%3C444%3 ATCOJP%3E2.0.CO%3B2-4 (last visited Nov. 10, 2005) (Governor Henry had even issued a warrant on January 3, 1778 offering fifty-five pounds for the apprehension of Josiah Philips.).

132. LEVY, *supra* note 25, at 72.

133. *Id.*

134. *The Papers of Thomas Jefferson* (Julian P. Boyd et al., Princeton University Press) (1950) [hereinafter *The Papers*], *cited in* THE FOUNDERS' CONSTITUTION, Vol. 3, Art. 1, § 9, Cl. 3, Doc. 4, *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_3s4.html (last visited Nov. 10, 2005); *see also* Jack Lynch, *a Patriot, a Traitor, and a Bill of Attainder*, *available at* http://www.history.org/foundation/journal/Spring02/attainder.cfm (last visited Sept. 20, 2005) (the vote to pass the bill of attainder was unanimous).

The hand of Jefferson, perhaps still remembering the form and style of the Declaration of Independence, began the bill of attainder with a list of grievances concerned with Josiah Philips and his followers.[135] Then, the rationale for the bill of attainder was given: "the delays which would attend the proceeding to outlaw the said offenders *according to the usual forms and procedures of the courts of law* would leave the said good people for a long time exposed to murder and devastation."[136] Philips and his associates were given one month in the bill of attainder to turn themselves over to some type of municipal authority or they would be "convicted and attainted of high treason, . . . suffer the pains of death, and incur all forfeitures, penalties and disabilities prescribed by the law against those convicted and attainted of High-treason [sic]."[137] The bill also gave authority to all citizens "in the meantime" to lawfully "pursue and slay" Josiah Philips and any of his associates if they had not turned themselves over to the authorities provided that the alleged was armed and resisted capture.[138]

Even though Virginia had no explicit bill of attainder clause as Maryland, New York, Vermont, and Massachusetts did to prevent the action, it was nonetheless a violation of the Rule of Law.[139] Even so, Virginia did have its own Bill of Rights, which stated clearly:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.[140]

There was no trial. There was no jury. Hence, this was not a prosecution. Still, it was just two short years after the passing of the Virginia Bill of Rights that Thomas Jefferson and the assembly unanimously denied the "usual forms and procedures of the courts of law" to an alleged criminal.[141] Jefferson possibly tried to inject some credibility and fairness into the bill by including: "execution of this sentence of attainder shall be done by order of the General court."[142] However, all

135. *The Papers*, *supra* note 134.
136. *Id.* (emphasis added).
137. *Id.*; *see also* LEVY, *supra* note 25, at 72.
138. *The Papers*, *supra* note 134.
139. LEVY, *supra* note 25, at 70.
140. VA. CONST. § 8.
141. Lynch, *supra* note 134.
142. *The Papers*, *supra* note 134.

semblance of a fair trial was destroyed because the bill allowed anyone to kill an associate of Phillips if he or she tried to resist capture.[143]

It is possible that the bill of attainder worked. Within the month, Josiah Philips and several of his associates were captured after a deadly battle.[144] Because the bill of attainder had not gone into effect, they were given a trial as citizens.[145] Notably however, the attorney general of Virginia, the young Edmund Randolph, did not charge the men with the egregious crimes set forth in the bill of attainder (i.e. murder, arson, and wasting farms).[146] Instead, Randolph charged them with robbery.[147] The effect however, was the same since robbery in Virginia was a capital offense.[148]

Even though the bill of attainder had never gone into effect, it had still left its indelible black mark on Virginia. Years later, Jefferson was still trying to defend himself for the action.[149] During Virginia's U.S. Constitution ratification process Edmund Randolph, who had since become Governor, referred to the incident with shame.[150]

Once again the issuance of a bill of attainder had violated the Rule of Law. It has been theorized that Edmund Randolph chose to prosecute Philips for robbery, as opposed to murder and arson, due to the lack of evidence on either of those charges.[151] If this were true, that would fairly put Philips' bill of attainder in line with the bill of attainder issued against the Earl of Strafford. The bill of attainder was consistently used for the purpose of circumventing the court system. In the same Virginia Convention that was called to ratify the Constitution of the United States, John Marshall remembered the Philips attainder and asked:

> Can we pretend to the enjoyment of political freedom or security when we are told that a man has been, by an act of Assembly, struck out of

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143. *Id.*

144. LEVY, *supra* note 25, at 73.

145. *Id.*

146. *The Papers*, *supra* note 134.

147. LEVY, *supra* note 25, at 73 (charging the "theft of twenty-eight men's felt hats and five pounds of twine, valued at forty-five shillings").

148. *Id.*

149. In a letter of March 12, 1815, Thomas Jefferson wrote:

> When a person charged with a crime withdraws from justice, or resists it by force . . . a special act is passed by the legislature adapted to the particular case. This prescribes to him a sufficient time to appear and submit to a trial by his peers; declares that his refusal to appear shall be taken as a confession of guilt . . . and pronounces the sentence which would have been rendered on his confession or conviction in a court of law.

Lynch, *supra* note 134.

150. LEVY, *supra* note 25, at 74.

151. *Id*. at 73.

> existence without a trial by jury, without examination, without being confronted with his accusers and witnesses, without the benefits of the law of the land? Where is our safety, when we are told that this act was justifiable because the person was not a Socrates? What has become of the worthy member's maxims? Is this one of them? Shall it be a maxim that a man shall be deprived of life without the benefit of law? Shall such a deprivation of life be justified by answering that the man's life was not taken . . . because he was a bad man?[152]

John Marshall knew, as did everyone else at the Virginia convention, that they had violated the Rule of Law. They knew that if the bill of attainder clauses were not made part of the Constitution then there would be room for the future violation of the Rule of Law.

Obviously governments must be able to react to a situation akin to what happened with Josiah Philips. However, the way the emergency was handled here breached the Rule of Law, and as a result, it unnecessarily deprived the citizens of the protections of the government. The most egregious violation by the bill of attainder was that it authorized the killing of Josiah's accomplices for resisting capture, without naming them.[153]

It is not at all difficult to see how this could easily become problematic. For instance, consider a bounty hunter, who takes it upon himself to catch a Josiah associate. Upon apprehending a truthfully innocent man, who innocently resists arrest, the bounty hunter kills the alleged associate. The hypothetical becomes even scarier when the bounty hunter is not sincere in his desire to collect a bounty, but rather he wants to get revenge on someone in the next town. If the bounty hunter claims he sincerely thought the person he killed was an associate of Josiah Philips, the bill of attainder would put him beyond the reach of the law. In effect, the law would have opened the door to a vast spectrum of possible violations to every individual's liberty. These are the types of unintended consequences that the Rule of Law will protect against. Furthermore, once the "bill of attainder gate" has been opened, it is hard to ever shut it again.

The bill of attainder against Josiah Philips noted that the reason for the action was that "the delays *which would attend the proceeding to outlaw the said offenders according to the usual forms and procedures of the courts of law* would leave the said good people for a long time exposed to murder and devastation."[154] It is hard to criticize the Virginia Legislature's desire to take action. It is fair to remember that Josiah Philips

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152. John Marshall, Address at the Virginia Convention: On the Federal Convention: On the Federal Constitution (June 10, 1788), *available at* http://www.bartleby.com/268/8/21.html (last visited Nov. 15, 2005).

153. *The Papers*, *supra* note 134.

154. *Id.*

was soon apprehended after the bill of attainder was issued.[155] However, if Josiah Philips was caught because the bill of attainder had given him a certain amount of time to turn himself in under the threat of attainder for noncompliance, then an outlawry action could have begun and that would have had the same effect - without violating the Rule of Law.[156]

Being outlawed has the same legal effect as a bill of attainder, but it is a judicial, rather than a legislative, process.[157] Those who are adjudicated outlaws would under the law of the time have been deemed attainted:

> Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. *And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.*[158]

The idea is that upon not being able to capture the alleged associates, Thomas Jefferson could take the matter to the court, which would issue a warrant for their arrest. This would require Jefferson to at least name the specific people in his complaint, thus providing one more protection against an arbitrary action against innocent bystanders. Jefferson never said that the outlawry procedures could not be utilized, but merely that they would take too much time.[159] These actions could have been started at the time the judge issued the warrant; then, the judge would merely need to issue an order requiring that the government publish the name of those accused, and in turn that the accused appear before the court within 30 days (the same amount of time given in the Bill of Attainder).[160] If the person does not appear before the court then he would be deemed as "absconding or fleeing from justice," which according to Blackstone is sufficient to adjudge him an outlaw because he has "tacitly confess[ed] the guilt."[161] This in turn has the automatic effect of attainting the *named* individuals.[162]

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155. LEVY, *supra* note 25, at 73.

156. The law of outlawry was understood at the time of the Constitution's ratification to be within the jurisdiction of the courts. *See* Alexander Hamilton, Remarks to the New York Assembly on an Act for Regulating Elections (Feb. 6, 1787), available at http://press-pubs.uchicago.edu/founders/documents/amendV_due_processs13.html (last visited Nov. 15, 2005). *See also* Levy, *supra* note 25, at 77 (outlawry by legislature not used after 1710).

157. BLACKSTONE, *supra* note 31, at 293-97, 369-74.

158. *Id.* (emphasis added).

159. *See The Papers*, *supra* note 134, at 189-91.

160. *Id.* (the bill of attainder, written on 28 May 1778, required Josiah and his associates to present themselves "on or before the day of June," meaning before the month of June was out). *See also* Trent, *supra* note 131, at 447 (clarifying that Josiah was given until the last day of June).

161. BLACKSTONE, *supra* note 31, at 293-97, 369-74.

162. *Id.*

Thus, if the Virginia government had followed its prescribed rules and tried to declare Josiah Philips and his associates as outlaws, then the Rule of Law would not have been violated. Openly declaring hunting season on Philips' associates without naming them was a gross violation of the Rule of Law by conveniently circumventing the law at the cost of an individual's liberty interest in being secure.[163]

VI. THE RULE OF LAW AND THE CONSTITUTION

It is very interesting to note that the Constitution, as it stood originally, and as previously mentioned, had no Bill of Rights.[164] The convention delegates felt that the Constitution did not need a Bill of Rights because all the states already had one.[165] Since there was no Bill of Rights in the Constitution, it is interesting to note the rights that were actually included in the original Constitution.[166] As noted above, there were only four states at the time of the convention that actually prohibited the passing of bills of attainder in their constitutions.[167] One of the obvious rights guaranteed by the Constitution is the protection from bills of attainder.[168] Moreover, Article I, section 10 made this federal law binding on all the states. There was absolutely no debate as to the portion of the original attainder clause that dealt with bills of attainder.[169] The ex post facto laws portion of the clause received a good debate because of questions as to its necessity and an ex post facto law's validity.[170]

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163. It is truly surprising that Jefferson fails to note the specific names of the people that Governor Henry had already named previously – Livy Sykes, Josiah Philips, and John Ashley – but instead leaves the persons accused largely unspecified. Trent, *supra* note 131, at 445.

164. The National Archives Experience, *Constitution of the United States at* http://www.archives.gov/national_archives_experience/charters/constitution.html (last visited Sept. 20, 2005).

165. James Madison's notes from the Constitutional Convention, The Debates in the Federal Convention of 1787 reported by James Madison: September 12, *available at* http://www.yale.edu/lawweb/avalon/debates/912.htm [hereinafter Madison: September 12] (last visited Sept. 20, 2005). According to Madison's notes it was Col. Mason who suggested there should be a committee to determine the Bill of Rights for the Constitution. However, following the motion for creating a committee, Madison noted:

> Mr. SHERMAN, was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient. There are many cases where juries are proper which can not be discriminated. The Legislature may be safely trusted." The result of the motion was that absolutely none of the states voted for it.

Id.

166. THE FEDERALIST No. 84 (Alexander Hamilton). Specific rights are listed *supra* note 21.

167. LEVY, *supra* note 25, at 70.

168. U.S. CONST. art. I, § 9, cl. 3.

169. Madison, August 22, *supra* note 18 (stating "the motion relating to bills of attainder was agreed to *nem. contradicente*"). *Id*. (Emphasis added).

170. *Id.*

Ex post facto laws were believed to be "void of themselves" and to have violated common sense principles.[171] Others suggested that a clause preventing them would "bring reflexions on the Constitution - and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."[172] Ex post facto laws violated the Rule of Law by eliminating predictability. Changing the laws, to make someone's act illegal, after they have already committed an otherwise legal act does indeed seem to be something that is void in itself. The argument some of the founders made was that ex post facto laws were clearly illegitimate, and therefore, there was no need for the clause.[173] The Rule of Law clearly dictated that there should be no such practice. It seems natural that someone trying to protect the Rule of Law, and recalling the trial of the Earl of Strafford, would incorporate the clause together with the ex post facto Clause.[174]

The debate surrounding the need for the ex post facto portion of Article I, section 9, cl. 3 illustrates the founders' dedication and beliefs concerning the Rule of Law; when this is contrasted with the discussion on the bill of attainder portion of the clause, it illuminates additional things the founders believed about the bill of attainder portion of the clause. For instance, the debate about there being no need for an ex post facto clause stands in stark contrast to there being absolutely no debate on the issue of the bill of attainder portion.[175] Opposing the ex post facto clause as unnecessary would imply that the un-debated portion of the clause *was* necessary. It was not void in itself, as others had stated about the ex post

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171. Madison, August 22, *supra* note 18. *See also* the papers of James McHenry wherein he notes that on the motion to have a clause for no *ex post facto* laws or bills of attainder:

> G. Morris Willson Dr. Johnson etc thought the first an unnecessary guard as the principles of justice law et[c] were a perpetual bar to such. To say that the legis. shall not pass an ex post facto law *is the same as to declare they shall not do a thing contrary to common sense*-that they shall not cause that to be crime which is no crime.

Papers of James McHenry on the Federal Convention, May 14, 1787, *available at* http://www.yale.edu/lawweb/avalon/const/mchenry.htm (last visited Sept. 20, 2005) (emphasis added).

172. Madison, August 22, *supra* note 18.

173. *Id.* Mr. Elseworth claimed specifically that "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves. It can not [sic] then be necessary to prohibit them." *Id.* Mr. Wilson was "against inserting any thing [sic] in the Constitution as to ex post facto laws. It will bring reflexions [sic] on the Constitution and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so." *Id.* Dr. Johnson "thought the clause unnecessary, and implying an improper suspicion of the National Legislature." *Id.*

174. U.S. CONST. art. I, § 9, cl. 3.

175. Madison, August 22, *supra* note 18.

facto clause.[176] Furthermore, it would not bring a bad reflection on the government to have such a law, as was indicated might be the case with the ex post facto clause.[177] The convention delegates knew that just because something was allowed, and had been regularly practiced, did not mean it was good. The delegates had seen bills of attainder work in their own country, they knew the history of the practice in England, and they knew that the method could be employed in their own country again if the law did not specifically prohibit it.[178]

The trials of the Earl of Strafford and Josiah Philips were surely on the minds of the delegates at the convention. Clearly, Edmund Randolph, who was at the convention as the Governor of Virginia, would be thinking of his prosecution of Josiah Philips when the Article I, section 9 bill of attainder clause was proposed on the floor.[179] It is also apparent from the comments of George Mason that the trial of the Earl of Strafford was on the delegates' minds during the convention.[180] Apparently, it was a big

176. *Id.*

177. *Id.*

178. This is similar logic to what James Madison expressed in Federalist 44:

> Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. *Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted*. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights . . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community.

United States v. Brown, 381 U.S. 437, 444 n.18 (1965) (quoting THE FEDERALIST, No. 44, 351 (Hamilton ed. 1880).

179. Madison, August 22, *supra* note 18 (showing that Governor Randolph was present the day the bill of attainder clause was discussed). *See also* LEVY, *supra* note 25, at 74 (showing that during the ratification debates in Virginia, Governor Randolph spoke of the Josiah Philips bill of attainder with shame, thus it is safe to say he would probably have remembered it during the Constitutional Convention as well).

180. In James Madison's notes from the convention, Col. George Mason had taken the floor on the matter of impeachments. Because the trial of Thomas Wentworth began as an impeachment, it is understood that Col. Mason was referring to the trial of the Earl of Strafford in his statements. Madison records:

> The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up. Col. MASON. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined. As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after "bribery" "or maladministration.

enough concern in the minds of the delegates that history would not repeat itself because the Clause made it into the Constitution.[181] But, as mentioned earlier, more than just being passed into the Constitution, it was incorporated with unanimous approval.[182] Furthermore, it was such an important protection from government encroachment that it was included in the original Constitution, as opposed to waiting to introduce it in the Bill of Rights. The protection was found to be so vital that Congress placed the practice outside the reach of the state legislatures as well.[183]

VII. CONCLUSION

Bills of attainder enacted in English and early colonial societies were violations of the Rule of Law. Since the signing of the Magna Carta, free governments have wanted to preserve the right of an accused to never be deprived of liberty "except by the lawful judgment of his peers or by the law of the land."[184] The law that was imported to the colonies from England allowed for, and in some cases, promoted bills of attainder. Some of the colonies allowed for the use of these bills and consequently, some of the most egregious examples of the violation of the Rule of Law in our nation's history occurred.

Baron Montesquieu, with whom the delegates at the convention would have been familiar, once stated that: "in order to preserve it for the whole community . . . [t]here are cases in which a veil should be drawn for a while over liberty."[185] The delegates however did not agree with him on this aspect, at least as it pertained to bills of attainder.[186] The delegates knew of the propensity of men to act in the space provided them by the law, so they eliminated the space available for Congress to enact a bill of attainder.[187] However, they did not stop there, they also prohibited the state legislatures from enacting bills of attainder, thereby insuring that no citizen of the United States should fear such an action against them.[188] The bill of attainder clauses preserved and enshrined a valued right to citizens, which

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Madison, September 8, *supra* note 25.

181. U.S. CONST. art. I, § 9, cl. 3.

182. Madison, August 22, *supra* note 18 (revealing that the motion relating to bills of attainder passed *nem. contradicente*) (emphasis added).

183. U.S. CONST. art. I, § 10, cl. 1.

184. MAGNA CARTA, 1215 § 39, *available at* http://www.yale.edu/lawweb/avalon/medieval/magframe.htm (last visited Sept. 20, 2005).

185. Lynch, *supra* note 134, (quoting Baron Montesquieu).

186. *Id.* (having the vote on the matter pass *nem. con.* was evidence of the unanimous concern on the matter).

187. U.S. CONST. art. I, § 9, cl. 3.

188. U.S. CONST. art. I, § 10, cl. 1.

is even more significant when considered against the backdrop that no Bill of Rights accompanied the original Constitution.

The founders of the Constitution apparently knew the phrase that it might be a "government of laws and not of men."[189] However, this statement was derived from, and a reflection of, the Rule of Law ideal passed down from Aristotle.[190] The English preserved this ideal of the Rule of Law as they opposed an absolute monarch and sustained a legally bound sovereign.[191] As the English became more and more aware of the propensity for government officers to put themselves above the law, Parliament issued the "Declaration of Parliament Assembled at Westminster" in which Parliament declared that there was "nothing more essential to the freedom of a state than that the people should be governed by the laws."[192] The Declaration demonstrated an understanding of the people's desire to be protected by the Rule of Law. Nevertheless, England failed to revere the protections it had in place to guard the Rule of Law, "the idea of a written constitution and the principle of the separation of powers."[193] Therefore, it was the Americans that had to rise to the occasion in an effort to continue the struggle to preserve the Rule of Law.

The American founders were dedicated to the ideal of the Rule of Law. They sought to preserve it through a "fixed constitution" that would not suffer from the same weaknesses of its English counterpart.[194] The colonies would thus accomplish what the English government failed to do: (1) preserve the Rule of Law with a supreme constitutional law, whereas the English had continually drifted into creating sovereign bodies that assumed they were not bound by law; and (2) define a separation of powers, whereas the English had often blurred the line.

The founders were attempting to preserve the Rule of Law by eliminating the arbitrariness often associated with supreme sovereigns that believed they were above the law.[195] The founders protected against three distinct things in their framing of the Constitution: (1) "punishment without a previously existing law providing for it," (2) statutes with retrospective operation, and (3) magistrates that were unchecked by laws.[196] The

189. *See* MASS. CONST. pt. 1, art. XXX.

190. HAYEK, *supra* note 16, at 165-66.

191. *Id.* at 163 (declaring "the supremacy of law . . . was destroyed . . . by the rise of absolutism").

192. *Id.* at 169.

193. *Id.*

194. *Id*. at 177-78.

195. *Id*. at 169.

196. *Id*.

Constitution as a whole undoubtedly aims at accomplishing these goals and the Bill of Attainder Clause protects against all three.