

Imperial Impotence: Treason in 1774 Massachusetts

NEIL L. YORK

The Parliament was persuaded to come to some threatening resolves, and to give back the curious advice of sending for the subjects of *America*, suspected of treason and misprision of treason, to *England*, under the authority of an old act of *Henry VIII*, to be tried here. These threats never were, as it was known they never could be, carried into execution. They exposed the weakness of Parliament, and rendered its power abhorred, and reduced the dignity of government to contempt.

So contended Edmund Burke in the House of Commons, during a May 1770 speech that ridiculed the government's American policy.¹ It was

1. Edmund Burke in the House of Commons, May 9, 1770, as taken from R. C. Simmons and P. D. G. Thomas, eds., *Proceedings and Debates of the British Parliaments Respecting North America, 1754–1763*, (Millwood, NY: Kraus International Publications, 1982–1987), 3:324. His eight defeated motions are enumerated at *ibid.*, 297–98. He and Isaac Barré had both earlier ridiculed the notion in House of Commons debates on January 9. See William Cobbett, ed., *The Parliamentary History of England to 1803*, 36 vols. (London: T. C. Hansard, 1806–1820), 16:722 and 711, respectively. Burke all but repeated himself in the House of Commons on March 7, 1774, criticizing colleagues for assuming that

Neil L. York is a professor of history and Mary Lou Fulton Professor at Brigham Young University neil_york@byu.edu. He had two books published this past year: *The Boston Massacre: A History With Documents* and *Henry Hulton and the American Revolution: An Outsider's Inside View*. He is now putting the final touches on an essay where he compares the British decision to send troops to Boston in 1768 with the American invasion of Iraq in 2003. He thanks editor David Tanenhaus and the anonymous readers for their help with the essay printed here.

not the first time Burke raised the subject of this 1543 statute. He had asked—rhetorically—during debates two weeks before, “The Act of Henry VIII. Did you mean to execute that?” He then answered his own question, the scorn beneath it probably apparent to all. “You showed your ill will to America, at the same time you dared not execute it.”² Burke hoped that by shaming the ministry he might be able to push through a set of resolutions condemning its policies, which could open the way for a new approach to imperial management. He failed, but that did not mean he had been wrong about the futility of threatening to resurrect an old statute to intimidate protesting Americans.

Parliament’s threat about extending the 1543 statute had been intended to make colonists think twice before they resisted imperial authority. Deciding, perhaps, that desperate times required desperate measures, Parliament had acted in response to a plea the king made when he opened a new parliamentary session in November 1768. George III used strong language about American affairs in his speech, much stronger than anything he had said during the Stamp Act crisis a few years before. Developments in Massachusetts over the previous months had proved most disturbing and he had authorized the dispatch of troops to Boston to quell what he considered the rising lawlessness there. Without mentioning either Massachusetts or Boston by name, he expressed alarm that dissidents in one of his colonies had committed “Acts of Violence and of Resistance to the Execution of the Law.” Of greatest concern, “the capital Town” of that “Colony appears by late Advices to be in a state of Disobedience to all Law and Government, and has proceeded to Measures subversive of the Constitution, and attended with Circumstances that manifest a Disposition to throw off their Dependence on *Great Britain*.”³

The 1543 statute that Parliament turned to dealt with prosecuting inside the realm those accused of committing treason outside it. George III said nothing about treason in his address but there were those in Parliament who would not be so circumspect and at least one member of the

“treasons” had been committed without conducting a thorough investigation first (see *ibid.*, 43). “Although the Act of 35 Henry VIII contributed little substance to the constitutional debate leading to the American Revolution,” concluded John Phillip Reid, “it became a serious grievance helping to drive Americans to rebellion.” See Reid’s *Constitutional History of the American Revolution*, 4 vols. (Madison: University of Wisconsin Press, 1986–1993), 3:281–86; quotation from 284.

2. Burke in the Commons, April 26, 1770, in Simmons and Thomas, eds., *Proceedings*, 3:257–58.

3. George III, speech from the throne, November 8, 1768, in Simmons and Thomas, eds., *Proceedings*, 3:1.

Commons called dissident Americans “traitors.”⁴ Although the rhetoric could be florid in the House of Commons, action came first from the House of Lords, which passed a resolution in December 1768 that the Commons endorsed the following February—the resolution later belittled by Burke. It stipulated that any colonist who could be charged with treason be transferred to England for trial if “sufficient ground” could be established for such action.⁵

George III did not use the statute as Parliament recommended, either then or five years later, when again encouraged to do so. From 1768 on he had felt that something decisive needed to be done and he probably sympathized with those who believed that, even if no colonist was ever actually prosecuted under the statute, “it may awe, it may deter.” But there lingered an astute warning made by Constantine Phipps during debates in the Commons over any plan to try colonists in England for supposedly treasonous behavior on their side of the Atlantic: “These measures are more calculated to promote rather than to prevent rebellion.”⁶ Sure enough, once apprised of what had transpired in Parliament the lower house of the Massachusetts General Court fired off a resolution condemning the prospective removal of Bay colonists to England “suspected of any Crime whatsoever” committed in the province. Massachusetts had its own treason statute, patterned after current English law, and the legislators there

4. Hans Stanley, in the House of Commons on November 8, 1768, *ibid.*, 3:9.

5. The peers urged that the King “direct His Majesty’s Governor of *Massachusetts Bay* to take the most effectual Methods for procuring the fullest Information that can be obtained, touching all Treasons or Misprision of Treason, committed within His Government since the Thirtieth of *December* last, and to transmit the same, together with the Names of the persons who were most active in the Commission of such Offences, to One of His Majesty’s Principal Secretaries of State, in order that His Majesty may issue a Special Commission for enquiring of, hearing, and determining, the said Offences, within this Realm, pursuant to the Provisions of the Thirty-fifth year of the Reign of *Henry* the Eighth, if His Majesty shall, upon receiving the said Information, see sufficient ground for a Proceeding.” Their resolution, the eighth of eight dealing with American affairs, passed its third reading on December 21, 1768 and was endorsed by the Commons on February 8, 1769, after the Christmas recess. See Simmons and Thomas, eds., *Proceedings*, 3: 45–47, for the House of Lords resolutions. For the House of Commons’ debates and ultimate concurrence see *ibid.*, 34:64–87. The phrase “Misprision of Treason” was included to cover those who knew that treason was being committed but did nothing to stop or even report it, an unusual charge under common law, where inaction rather than action was the key to whether or not a crime had occurred. For Massachusetts Governor Francis Bernard’s disappointment that no sedition or treason charges resulted, see Colin Nicolson, *The “Infamous Governor”* (Boston: Northeastern University Press, 2001), 191–97.

6. “Awe,” by William de Grey, the attorney general, during debates in the House of Commons on January 26, 1769, in Simmons and Thomas, eds., *Proceedings*, 3:69; Phipps in the House of Commons on February 8, 1769, *ibid.*, 3:90.

insisted that their courts had jurisdiction and all Bay Colony residents had the right to be tried by a jury of their peers. Any departure from that legal custom would be “highly derogatory of the rights of British Subjects.”⁷

This was hardly the reaction of an intimidated group of men. They had grown accustomed to governing themselves with little interference from London. Despite the presence of a royally appointed governor, Massachusetts was virtually a self-contained political entity, with enough autonomy that what crown and parliament considered privileges, the people of the province considered rights. The basic question of sovereignty had not been answered, nor would it ever be, before Massachusetts ceased to be a colony in the empire and became a state in a new nation.⁸

Americans who resisted imperial authority in the years leading to the Revolution were sometimes denounced as traitors—in Massachusetts and in some other colonies as well. But none would ever be formally charged in court with treason or prosecuted for it, in either Britain or America. In Massachusetts rebels took over virtually every town except Boston without firing a shot before the end of 1774. Ironically, they even turned the tables on imperial authorities, alleging that defenders of empire were the real traitors whereas they stood as true defenders of the law. They could do this, in part, because the proper constitutional relationship between mother country and colonies had not been precisely defined. They could do it in part, too, because treason under law was almost as poorly defined. Most important, they could do it because imperial administrators never found a way to apply the law of treason and force a change in American political behavior without bringing on the very confrontation they hoped to avoid.

* * *

The Massachusetts legislators’ response in July 1769 to the parliamentary resolution passed five months before scratched the surface of much deeper issues. Throughout these years of imperial crisis, threats of formal charges

7. From the resolution of July 7, 1769, printed in *Journals of the House of Representatives of Massachusetts* [hereafter *Mass. House Journals*], 55 vols. (Boston: Massachusetts Historical Society, 1919–1990), 45:172. The 1696 statute, which replaced another passed in 1678, can be found in *The Charters and General laws of the Colony and Province of Massachusetts Bay* (Boston: T. B. Wait, 1814), 61–62 (1678) and 294 (1696). It too defined treason as an act against the king, as attested to by “two lawful and credible witnesses.” In Virginia, the House of Burgesses had condemned taking colonists accused of treason to England for trial as well.

8. The historiography on this subject would fill many shelves. Good starting points remain Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: The Belknap Press of Harvard University Press, 1967); and Jack P. Greene, *Peripheries and Center* (Athens, GA: University of Georgia Press, 1986); as well as Reid *Constitutional History*.

against dissident colonists would be juxtaposed uneasily with informal complaints about their behavior. The language of recrimination could be troublesome because using the word “treason” sloppily only served to confuse. Treason, after all, was in one sense a matter of law, an allegation that could lead to indictment, prosecution, and even execution in the event of conviction. But in another sense the cry of “treason” did not rise above the status of inflamed opinion, a street-corner accusation tossed about as an epithet. The informal political accusations of treason through 1774 did not carry over into formal legal charges—a tendency traceable for nearly a century, back to when Edward Randolph accused Bay colonists of being traitors, only to see the formal charges resulting from his investigations couched in more guarded language.⁹

There are various reasons why formal charges did not follow the informal allegations. First and foremost was Whitehall and Westminster’s reluctance to make threats, if threats—to be effective—eventually required action that they did not want to take. This tendency should not be dismissed as mere political cowardice. Rather, from the beginning of colonization the empire had been defended by its champions as reciprocal in nature, with all component parts benefiting by the association. Even more, it was talked of as a family, with a mother country at the center whose colonies on the periphery were her children. The king presided over all as a benevolent father.¹⁰ Disputes, most advocates of empire on both sides of the Atlantic wanted to believe, could be settled amicably, to the satisfaction of all the family members.

Reasonable people knew that to allege treason could escalate tension, triggering rather than defusing a crisis. Likewise, policy makers in

9. In his report to Charles II of April 6, 1681, Randolph complained that the “unparalleled misdemeanors & contempts even in their daily arbitrary actings” amounted to “no lesse than High Treason,” but the fifteen formal articles drawn up against the Bay Colony on June 4, 1683 did not stipulate treason as among the reasons for a *quo warranto* proceeding that could lead to the charter’s being rescinded. See Robert Noxon Toppan, ed., *Edward Randolph*, 5 vols. (Boston: The Prince Society, 1898–1899), 3:90 and 229–30, respectively. For Randolph and his investigations, culminating in the Dominion of New England, see Michael G. Hall, *Edward Randolph and the American Colonies, 1676–1703* (Chapel Hill: University of North Carolina Press, 1960); and Richard R. Johnson, *Adjustment to Empire: The New England Colonies, 1675–1715* (New Brunswick: Rutgers University Press, 1981).

10. For which see, variously, Greene, *Peripheries and Center*; Richard L. Bushman, *King and People in Provincial Massachusetts* (Chapel Hill: University of North Carolina Press, 1985); Melvin Yazawa, *From Colonies to Commonwealth* (Baltimore: Johns Hopkins University Press, 1985); Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992); David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); and Eliga Gould, *Persistence of Empire* (Chapel Hill: University of North Carolina Press, 2000).

London realized that accusing colonists of treasonous behavior could tear at the notion of empire as loving family or harmonious community of interests. And yet both crown and Parliament found it difficult to resist using this potentially dangerous word whenever they believed that colonists, through their disobedience, had forgotten their subordinate place in the imperial hierarchy. Members of the general public also tossed the word about, for whatever momentary satisfaction that it gave them. However satisfying on the visceral level, that sort of labeling did not make for clear thinking on the subject.

That treason under law could itself be vague further complicated matters. Colonists facing a formal accusation of treason by authorities in London had to concern themselves with two statutes in particular: the one that Parliament passed in 1543, the proposed use of which Burke condemned in 1770, and another dating from much earlier, to 1352 and the reign of Edward III. As noted, the former dealt with how those accused of treason outside the realm could be tried within it; the latter dealt with the nature of treason itself. Parliament enacted the 1543 law to placate an increasingly paranoid Henry VIII. Seeing enemies everywhere he turned, he wanted them to know that they could not escape retribution should they betray him; or, more to the point, he wanted them to fear that they might be seized whenever he chose if he became convinced they intended to turn on him. Although Parliament did the king's bidding by passing the statute it also showed its ties to the common law tradition by wording the text carefully to say, in effect, that it was finding or clarifying the law rather than making it. For those who might ask whether the king had the authority to bring subjects accused of treason into the realm for trial, even if the behavior in question occurred outside the realm or in the crown's more extensive dominions, Parliament had now responded with an emphatic yes.

Of course Henry VIII and Parliament had had no thought of America; rather, they put those who lived in France and Ireland, as well as in Wales and Scotland, on notice. Equally important, the statute provided for "treasons, misprisions of treason, or concealment of treasons" as they might be defined in the future as well those that were already included within it. Cases could be heard either before the Court of King's Bench "or else before such commissioners, and in such shire of the realm, as shall be assigned by the King majesty's commission," before a jury of "good and lawful men of the same shire."¹¹

Parliament intended that this 1543 statute clarify lingering issues, as had its statute in 1352. Parliament in that earlier instance attempted to bring

11. 35 Henry VIII c. 2 in Danby Pickering, ed., *The Statutes at Large*, 46 vols. (Cambridge: Joseph Bentham, 1762–1807), 5:199.

within one encompassing law various notions of treason that had evolved through prior court rulings and royal decrees. The new law distinguished between high treason and petty treason, enumerating examples of each. The list of treasonable offenses could be added to by crown and Parliament as they saw fit. A grim fate specified under other laws awaited those traitors sentenced to die: they would be hanged, cut down while still alive, disemboweled, then drawn and quartered, with their estates subsequently confiscated by the crown.¹² Treason by implication was a crime against the very kingdom and high treason meant the crown was threatened directly by that act, even if the king stood in no personal danger. Should the accused “compass or imagine the death of the King, or of our Lady his Queen, or their eldest son and heir,” the charge would be high treason, the penalty would be death, and only the king himself could grant a pardon. Likewise “if a man do violate the King’s companion, or the King’s eldest daughter unmarried, or the wife of the King’s eldest son and heir,” then high treason could be found to have occurred. Not surprisingly, “if a man do levy war against our lord the King in his realm” it was high treason; if he gave aid and comfort to the king’s enemies, in the realm or out, it was high treason; if he became involved in counterfeiting, whether making the coins himself or carrying them into the kingdom, that too was prosecutable as high treason.¹³

Numerous changes would be made during the coming years, adding offenses and then removing them again, depending upon what most concerned crown and Parliament at any given moment. There was, however, one constant. As William Blackstone would put it, the king on his throne, his ministers in Parliament, judges on the bench, and even, presumably, the public at large, all considered treason “the highest civil crime” that “any man can possibly commit.” Under law it would be far worse to make an attempt on the king’s life and fail than to succeed in killing anyone else.

Because there could be no greater crime, because nothing was more threatening to the social order, Blackstone added this essential caveat: of all felonies, treason “ought to be the most precisely ascertained” because

12. That was the fate awaiting a common man. A convicted woman would be burned alive. A peer of the realm, who could request to be tried in the House of Lords, could also hope for a simple beheading if convicted.

13. 25 Edward III c. 2, in Pickering, ed., *Statutes*, 2:50–53. For context see J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970), who also observed (p. 137) that “since the king’s lawyers were able if they wished to construe a great many crimes as compassing the death of the monarch it is obvious that it was not the scope of the law of treason which restricted any despotic tendencies in this field. It was in fact more by the legal procedure necessary to try a traitor that any tendency to override the law was limited.”

“if the crime of high treason be indeterminate, this alone . . . is sufficient to make any government degenerate into arbitrary power.”¹⁴ Therefore the modifications made over time so that rules of evidence in a treason trial would be stricter than in any other legal proceeding; therefore too a defendant in a treason trial being entitled to counsel—an anomaly even as late as the American Revolutionary Era. By then, to be convicted of waging war against the crown—the most obvious form of high treason—required the testimony of two reliable witnesses to an overt act.¹⁵ But an overt act could be construed broadly, including putting plans to paper, if those plans were published. The “bare words are not the treason,” Blackstone pointed out; rather, it was “the deliberate act of writing them” that could send their author to the gallows.¹⁶ Moreover, as William Hawkins, an earlier commentator on English law, noted, “not only those who directly rebel against the King, and take up Arms in order to dethrone him, but also in many other Cases, those who in a violent and forcible Manner withstand his lawful Authority, or endeavour to reform his Government, are said to levy War against him.”¹⁷ It would be this notion of treason that proved potentially problematical for the civilly disobedient in 1774 Massachusetts.

14. William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979; orig. ed., 1765–1769), 4:75, from “Of High Treason” (Book IV, Chapter 6). William Eden echoed Blackstone when he wrote that high treason “is the foulest crime that can be committed” and the “foulest instance” of it is when it “aims directly at the royal person.” In Eden’s anonymously authored *Principles of the Penal Law*, 3rd ed. (1775), 117. Henry Dagge, *Considerations on the Criminal Law* (London: T. Cadell, 1772) commented that 25 Edward III c. 2 “is to this day the ruling Statute” (p. 294), which “appears to be not only extremely severe, but strangely undistinguishing.” (that is to say, indiscriminate, p. 296). Dagge, who considered himself a legal reformer, regarded the punishment for high treason—a crime that could be much too broadly construed—with “horror” (p. 299).

15. The most important statute for these purposes, passed in 1696, is 7 William III c. 3, in Pickering, ed., *Statutes*, 9:389–92. For contrast, see 21 Richard II c. 3, a 1397 law stipulating “that every man, which compasseth or purposeth the death of the King, or to depose him, or to render up his homage or liege” could be attainted in Parliament and “shall be judged as a traitor of high treason against the crown” (*ibid.*, 2:372). Here, no overt act was required; indeed, it could have included just the expression of a desire rather than the formation of a plan to challenge the throne, under the rubric of what would become known as “constructive treason.”

16. Blackstone, *Commentaries*, 4:80 (Book IV, Chapter 6), “though of late even that has been questioned,” he added (4:81).

17. William Hawkins, *A Treatise of the Pleas of the Crown*, 2 vols. (London: Elizabeth Nutt, 1716, 1721), 1:37 (Book 1, Chapter 17). Hawkins, far more than Blackstone, qualified his conclusions with “however” and “seems” to underscore how many gaps there were (and still are, it should be admitted) in the reconstructed English legal past, and therefore how difficult it was to know how and when treason became a felony apart, and how the law pertaining to it had been applied over time.

Ultimately, despite the many additions to and revisions of the 1352 statute, the underlying theory—that to threaten the crown was to threaten the kingdom and that there could be no more dangerous crime than that—had not changed in four centuries. Those who had traitorous notions had been duly warned. The criminal law in general, not just the crime of high treason, was essential for social control. “The ideology of the law was crucial in sustaining the hegemony of the English ruling class,” argued Douglas Hay, and, in a society with a small army and no police force in the modern sense, artful persuasion had to be relied upon more than brute force.¹⁸ For the social order to be preserved, Britain’s leaders believed, fear had to be combined with respect; hence the legal system as it had evolved and its myriad capital offenses as they continued to structure it.

High treason was rarely invoked in the eighteenth century but it remained a tool in the astute jurist and politician’s legal kit. They wanted subjects of the crown, wherever they lived—close at hand in the realm or in far-off dominions—to understand that there could be nothing more serious than an attack on the king. They kept vague what constituted an attack. It did not require an attempt to literally assassinate the king. For some, an attack through the press that impugned his character, though technically only seditious libel, no longer a capital offense, was still somehow treasonous. Even if the law would not sustain a libel as an act of treason, a judge might still interpret talk of displacing monarchy as treasonous, or instigating a riot against royal authority as treasonous. That same judge might interpret any attempt to interfere with law enforcement as a form of treason, because all laws were passed in the king’s name and all Britons—and colonists—were the king’s subjects. Judicial discretion could allow for very broad interpretations, all the more likely if encouraged by crown and Parliament. Consequently, the noted jurist and chief justice of King’s Bench, Matthew Hale, warned against trying to win a case by

18. Douglas Hay, “Property, Authority and the Criminal Law” in *Albion’s Fatal Tree*, eds. Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow (London: Allen Lane, 1975), 56. Frank McLynn’s popular account, *Crime and Punishment in Eighteenth-Century England* (London: Routledge, 1989) follows a similar interpretive line, noting that Britain’s elite “was normally more concerned with the law’s bark than its bite.” (p. 348, n. 26). Also see Lisa Steffen, *Defining a British State: Treason and National Identity 1608–1820* (New York: Palgrave, 2001); and Bradley Chapin’s still very useful *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1964). Brian F. Carso, Jr., “Whom Can We Trust Now?” (Lanham, MD: Lexington Books, 2006) relies heavily on Chapin for his discussion of treason in the Revolutionary Era, but he does offer his own insights on larger issues that arose then.

turning to “constructive” treason—in essence, imputing treasonous intent to an act not yet committed, such as “compassing” the king’s death, or to an act deemed treasonous even though not covered by a specific statute. Sage advice, that, but crying “treason” was difficult to resist when crisis loomed and traitors were imagined behind every tree.¹⁹ Using high treason as a political bludgeon to induce loyalty and reduce civil disobedience could prove tempting. But threat of punishment had to be made judiciously to be effective; applying the full weight of the law in a capital offense such as high treason had to be even more selective.

* * *

Imperial authorities understood the need to proceed carefully with law-breaking colonists if they were to avoid making the bad even worse. That understanding is shown perfectly with the *Gaspee* affair. The HMS *Gaspee*, a schooner posted in Rhode Island waters to help enforce the Navigation Acts, had been attacked and sunk in the Providence River above Narragansett Bay. It ran aground at low tide the afternoon of June 9, 1772 and just after midnight the crew heard boats approaching in the darkness. Orders were shouted from the *Gaspee* for the barely visible boats to stand clear but they kept coming. Shots were exchanged and boarders with blackened faces subdued the sailors and their wounded commander, Lieutenant William Dudingston. The boarders loaded Dudingston and his crew into their boats, rowed them ashore, and departed before dawn. The dazed crew watched as the *Gaspee* burned to the waterline, destroyed completely.²⁰

The crew reported what had happened to Admiral John Montagu, Boston-based commander of His Majesty’s naval forces in North America. Montagu sent copies of what they wrote, along with his own report and a statement by Rhode Island’s Governor Joseph Wanton, to the admiralty and to the secretary of state for American affairs, the earl of Hillsborough. Hillsborough in turn passed those papers on to Attorney General Edward Thurlow and Solicitor General Alexander

19. Matthew Hale, *The History of the Pleas of the Crown*, 2 vols. (London: E. and R. Nutt, 1736), 1:76–87, part of a much larger discussion of treason (pp. 1:8–372). Hale had died over a half century before, but an admiring Sollom Emllyn edited the text for publication and it was widely respected and cited by English jurists, Blackstone included, for decades to come. Members of Parliament, such as John Dunning, who contended that the North ministry had erred in labeling as war against the king what was merely riot, may well have been following the distinction as laid out in Hale, *Pleas*, 1:130–58.

20. For this and what followed see Neil L. York, “The Uses of Law and the *Gaspee* Affair,” *Rhode Island History* 50 (1992):1–22.

Wedderburn, asking if they thought the incident an act of high treason. Thurlow and Wedderburn responded just a few days later that, yes, indeed, the attack on the *Gaspee* constituted high treason.²¹

If ever the time had come to use 35 Henry VIII c. 2, the 1543 statute, this was it. However Whitehall decided not to and Westminster did not complain about its choice. Instead, the king appointed a five-man commission to investigate the incident. The commissioners came from the colonies, not Britain, and included Governor Wanton. He was not a lawyer and he most likely did what he could behind the scenes to sabotage the proceedings. The commission held hearings in both January and June of 1773 but could do nothing unless a Rhode Island grand jury handed down indictments or the colony's attorney general acted on an information to provide the commission with a list of accused to stand trial. None of that happened. If it had, the commissioners could have recommended a trial venue in either England or the colonies. Some witnesses did come forward and named names but others provided alibis for those that they had identified. Blocked at seemingly every turn, the commission gave up; no one was ever indicted, much less prosecuted. To this day the identity of those who destroyed the *Gaspee* is a matter of few facts and much supposition.

A pattern had been established in London's reaction to the *Gaspee*'s sinking that did not change before the shooting war started in April 1775. It would be seen again at Whitehall and Westminster during the early months of 1774, in response to the Boston Tea Party, and yet again as the year drew to a close, in response to resistance to new parliamentary legislation. Imperial authorities hemmed and hawed, seeking some solution short of the use of force to solve their growing problems, around the American colonies in general but within Massachusetts in particular.

21. Their report of August 10, 1772 (in response to Hillsborough's request of August 7) is in The National Archives [hereafter TNA], Public Record Office, Colonial Office [hereafter PRO/CO] 5/159, fos.26–27; also in TNA, PRO/CO 5/247, fo. 43. They ruled that the Royal Dockyards Act, passed the previous session of Parliament, did not apply in this case, because the *Gaspee* was at sea rather than in dock facilities. "We are also of the opinion that the Attack made in the manner it was upon His Majesty's Commission [meaning Lieutenant Dudingston, on the king's business] was an Act of High Treason vizt of levying War against His Majesty & that the Offenders may be indicted of the High Treason either here or in Rhode Island taking that Assertion of the Gov.nr to be true that the Ship was stationed within the Body of some County in that Province." Those facing prosecution under the Dockyards Act for crimes committed outside the realm could be tried either at the local venue or back in England, a provision similar to that which was being read into 35 Henry VIII c. 2. Violators of the act were charged with a general felony, not high treason. See 22 George III c. 24, in Pickering, ed., *Statutes*, 19:62–63.

As in 1772, information would be gathered and sent to London. It would be submitted to Thurlow and Wedderburn, just as before. They would rule that high treason had been committed and that the king had the option of pursuing trials in the colonies or bringing the accused over to England. Drawing on testimony provided by people on the scene, they would identify individuals who could be charged with treason and leave open the possibility of adding more names to that list. But the king declined to pursue individual lawbreakers through proceedings in English courts and chose, instead, to work primarily through Parliament and the legislative process. That he did is a reminder that the old approach of avoiding confrontation or seeking resolution through half-measures did not change—that what is usually depicted as a new hardline policy in 1774 was not really new or especially hard line.²² Fear of pressing too vigorously, worsening matters by doing too much rather than too little, persisted. Inaction—or, perhaps more precisely, *indirect* action rather than *direct* action—charted the downward course of empire.

Even men of action proved reluctant to act. Admiral Montagu had warned after the *Gaspee* affair that “British Acts of Parliament never go down in America unless forced by the point of a sword.”²³ He did not want to be the one to draw that sword from its scabbard. Still in Boston at the time of the Tea Party, he wrote London that he “could easily have prevented” the dumping of tea into Boston harbor the night of December 16, 1773, “but must have endangered the lives of many

22. Bernard Donoghue, *British Politics and the American Revolution* (London: Macmillan, 1964), 35, saw an “end to vacillation and compromise” in the government’s American policy because of the Tea Party. Peter D. G. Thomas, *Tea Party to Independence* (Oxford: Clarendon Press, 1991), 9, contended that “the North ministry had already demonstrated the previous year that it would not flinch from a colonial confrontation.” meaning its reaction to the *Gaspee* affair. But it did flinch then and it would vacillate in the aftermath of the Tea Party as well. I can accept more readily Thomas’s observation (*Tea Party to Independence*, 47) that “the measures of 1774 were neither in manner nor content what the North cabinet would have preferred,” and that, with the rejection of more “extreme” proposals, the policy adopted “was the minimum response that could have been adopted after news of the Boston Tea Party.” Also see H. T. Dickinson, “Britain’s Imperial Sovereignty: The Ideological Case against the American Colonists” in H. T. Dickinson, ed., *Britain and the American Revolution* (London: Longmans, 1998), 64–96; and Eliga Gould’s suggestive “Fears of War, Fantasies of Peace: British Politics and the Coming of the American Revolution” in *Empire and Nation*, eds., Eliga H. Gould and Peter S. Onuf (Baltimore: Johns Hopkins University Press, 2005), 19–34.

23. A statement related by the Reverend William Gordon in a letter to the Earl of Dartmouth, June 16, 1773, in the Historical Manuscripts Commission [hereafter HMC], *The Manuscripts of the Earl of Dartmouth*, 3 vols. (London: Eyre and Spottiswoode, 1887–1896), 2:156.

Innocent People, by firing upon the Town.”²⁴ On this evening the Royal Navy did nothing, the admiral choosing discretion as the better part of valor. We can only wonder if the sailors and marines looking across the water on the scene at Griffin’s wharf had to resist an urge to intervene. A frustrated crown and Parliament would afterward choose to punish the innocent—innocent in strictly legal terms, that is—along with the guilty, but politically, not militarily, without shedding blood.

A harried Governor Thomas Hutchinson warned London not to expect Massachusetts to punish the instigators of the Tea Party. To confess as much must have added to his deepening sense of alienation and failure. He presided as the colony’s chief executive in name only. Acting governor with the departure of Francis Bernard in 1769, then governor in his own right for three years, Hutchinson had seen his ability to lead slip away, leaving him with titular authority but little real political power. His council more often sided with the lower house of the legislature and against him. The Boston town meeting operated almost as if it ran a self-governing city–state. Hutchinson had foolishly engaged in constitutional bear-baiting with his opponents in the council and house, which further diminished his stature.²⁵ Exhausted and exasperated, he requested leave in London to explain himself there. But with one crisis following the next he would not get away until many months after the Tea Party.²⁶

Shocked as some of his council members were by the crowd action on December 16, they were not going to press to identify and prosecute the offenders. They were also leery about offering rewards to those who might step forward and identify the participants. Nor were they very encouraging about the province’s attorney general investigating and

24. Montagu to Philip Stephens, secretary to the treasury lords, December 17, 1773, in TNA, PRO/CO 5/247, fo. 174, also in the Dartmouth Papers, D (W) 1778/Iii/942/2, Staffordshire Record Office; sentiments expressed as well in a letter the same day to Charles Jenkinson, a vice-treasurer, in Add. Ms. 38208 (Liverpool Papers), fo. 23, British Library [hereafter BL]. Montagu had reported to Stephens, even before the Tea Party, that Boston and neighboring communities appeared “to be in anarchy and confusion.” Letter of December 8, 1773, Dartmouth Papers, D(W) 1778/Iii/942/1.

25. Brought together neatly in John Phillip Reid, ed., *The Briefs of the American Revolution* (New York: New York University Press, 1981), with Reid’s own insightful commentary.

26. William Nelson’s chapter on Hutchinson in *The American Tory* (Oxford: Clarendon Press, 1961), (“The Essential Tory,” pp. 21–39) foreshadowed the longer exploration by Bernard Bailyn in *The Ordeal of Thomas Hutchinson* (Cambridge: The Belknap Press of Harvard University Press, 1974), which carries the tragic undertone (see, especially, pp. 191–226) that Hutchinson had created for himself, perpetuated by his great-grandson, Peter Orlando Hutchinson, ed., in *The Diary and Letters of His Excellency Thomas Hutchinson, Esq.*, 2 vols. (London: Sampson, Low, Marston, Searle, & Rivington, 1883, 1886), especially at 1:104–151.

presenting evidence to a local grand jury for possible indictments.²⁷ Increasingly pessimistic, Hutchinson did not object publicly to their do-nothing position. He thought that some of those grand jurors had themselves been complicit in the unrest. “I see no prospect of persuading the people who disapprove of these proceedings, to support me in my opposition to them, unless they could be sure of protection,” a promise that he could not make, Hutchinson wrote resignedly in a letter to the Earl of Dartmouth, Hillsborough’s successor as secretary of state for American affairs.²⁸ In other words, if there was going to be a decisive response it would have to come from London.

News of the Tea Party reached a stunned king and his ministers before the end of January 1774. Over the coming weeks, Lord North and other cabinet members, with a few advisers added, held meetings late into the night, trying to set a course of action. Among them only Dartmouth had been sympathetic to some American grievances but even he began to think that London had been too permissive and too forgiving of past misbehavior.²⁹ “It is the King’s firm Resolution, upon the unanimous Advice of his Confidential Servants, to pursue such measures as shall be effectual for securing the Dependance of the Colonies upon this Kingdom” and, he sought to reassure a worried Hutchinson, support and protect “His Majesty’s faithful Servants” in the Bay Colony.³⁰

On that same day Dartmouth sent a long note to Attorney General Thurlow and Solicitor General Wedderburn, enclosing letters from Boston and enumerating twenty-two “facts” about the sequence of events leading up to the Tea Party. He began his chronology in early November 1773, when town leaders urged fellow Bostonians to protest the Tea Act and boycott East India Company tea at gatherings that took place out-of-doors around an elm that locals called the Liberty Tree, as well indoors at Faneuil Hall in the regular town meeting. He included, too, the attempt of men appointed by the town to pressure Richard Clarke, one of the agents authorized to sell company tea, to resign his commission. After Clarke and others refused they were warned that “they would be voted enemies

27. Hutchinson to Dartmouth, December 24, 1773, TNA, PRO/CO 5/763, fo. 35.

28. Hutchinson to Dartmouth, in a letter of February 1774 marked “private,” printed in Hutchinson, ed., *Diary*, 1:114. Also see Hutchinson’s reminiscence of events surrounding the Tea Party in his *The History of the Province of Massachusetts-Bay*, 3 vols. (Cambridge: The Belknap Press of Harvard University Press, 1936), 3:315–30.

29. Benjamin Woods Labaree, *The Boston Tea Party* (New York: Oxford University Press, 1964), 170–93, offers a nice overview of London’s reaction, whereas Donoghue, *British Politics*, 36–73 provides a detailed review of cabinet level decision making during the crucial period between February 4 and 28.

30. Dartmouth to Hutchinson, February 5, 1774, TNA, PRO/CO 5/763, fo. 29.

to their country and must expect to be treated as such.” One justice of the peace who tried to disperse a crowd that had pushed into Clarke’s house fled after being “hooted” at and struck.³¹ Two weeks later a crowd once again descended on Clarke’s house. Clarke barred the door, so they broke his windows. Hutchinson tried to get his council to do something; it would not. It advised him to rely on justices of the peace and sheriffs to keep the peace but he (like members of his council) knew that those men were either intimidated by opponents to the tea’s landing or sympathized with them.

When the *Dartmouth*, first of three tea ships en route, arrived, town leaders told the captain that he should not land any tea, pay a duty on it, or attempt to leave the harbor with his cargo. Volunteers offered to watch the *Dartmouth* and report anything that violated those instructions. So things continued until all three ships had docked. Town leaders kept up their harangues and Hutchinson watched it all, seemingly powerless.

As he worked his way through the chronology, Dartmouth mentioned some thirty men by name. He then posed two “queries” to the king’s law officers: “Do the acts and proceedings stated in the foregoing case or any of them amount to the crime of high treason?” and “If they do, who are the persons chargeable with such crimes and what will be the proper and legal method of proceeding against them?”³² When Thurlow and Wedderburn had not replied within five days Dartmouth pressured them to make haste.³³ They submitted their rather terse report the next day, February 11, 1774.

“We are of opinion that the Acts and Proceedings” related by Dartmouth and reported in the correspondence from Boston “do amount to the Crime of High Treason,” they concluded, “namely to the levying of War against His Majesty.”³⁴ The unlawful meetings where people were called upon to obstruct an act of Parliament, the attempts to prevent company agents from selling a commodity under parliamentary license, the destruction of the tea itself, all constituted treasonous activity. Thurlow and Wedderburn reduced

31. Dartmouth to the attorney general and solicitor general, February 5, 1774, in TNA, PRO/CO 5/160, fos. 1–8 (quotation from fo. 2); also in the Dartmouth Papers, D (W) 1778/II/807. This report, along with several other documents showing London’s response to the Tea Party, can also be found in K. G. Davies, *Documents of the American Revolution, 1770–1783*, 21 vols. (Shannon: Irish University Press, 1972–1981), 8:37–42 for this particular report. Also see the cabinet notes for February 4 and 5 in the Dartmouth Papers, D (W) 1778/II/814 and 819, respectively.

32. TNA, PRO/CO 5/160, fo. 11; also printed in Davies, ed., *Documents*, 8:41–42.

33. Dartmouth’s note of February 10, 1774 is in TNA, PRO/CO 5/250, fo. 144.

34. Thurlow and Wedderburn to Dartmouth, December 11, 1774, in TNA, PRO/CO 5/160, fos. 40–42, with another copy in PRO/CO 5/247, fos. 189–193. Also printed in Davies, ed., *Documents*, 8:46–48.

Dartmouth's thirty names to just eight, a list that included Samuel Adams and John Hancock, William Molineux, and Dr. Joseph Warren.³⁵ The total could easily be expanded, they noted, to include other town leaders and even members of the General Court. As to what Dartmouth should do to bring the traitors to justice, Thurlow and Wedderburn tossed the decision back on him.

The methods of proceeding against them are either by prosecuting Them for Their Treason, in the country in the ordinary course of Justice; or arresting Them there by the Justices of the Peace, or some of Them, and transmitting Them hither to be tried in some County in England, to be assigned by the King's Commission; or by sending over a Warrant of a Secretary of State, grounded on sufficient Information upon Oath, to arrest and bring over the Offenders to be tried here.

We take each of these courses to be legal; and that to be the most proper, which the circumstances of the case absolutely require. In the consideration of which we humbly submit, that a Preference is due to the more ordinary course, if it be thought, in other respects, equally sufficient and effective.³⁶

Beyond that they had nothing more to say, which became all too clear when Dartmouth asked for additional directions. He wanted their opinion on whether the king had the authority to send over commissioners to make inquiries or, even more, whether he could grant those commissioners "full Powers of Magistracy" so that they could exercise "such Powers" as those "now exercised by the Ordinary Civil Magistrates within the Colony?" Thurlow and Wedderburn apparently did not respond.³⁷ They obviously preferred that cases connected to the Tea Party be tried in Massachusetts, not England, so they did not, notably, fall back on the 1543 treason statute. Implicitly, they were admonishing the king and his

35. The other four were [Thomas] Denny, [Benjamin] Church, [Thomas] Young, and [Andrew] Johon[n]et. The "Evidence of Fact" that Dartmouth used for naming names in his note to Thurlow and Wedderburn included: Adams and Hancock along with William Phillips, John Rowe, and Jonathan Williams from town meeting minutes; Hancock, Rowe, Adams, and Phillips in a letter from Admiral Montagu; Williams, Adams, Molineux, Young, and Warren from a letter by a Captain Scott, all in the Dartmouth Papers, D (W) 1778/II/807; and Hancock again in a letter from Lieutenant Colonel Alexander Leslie, commander at Castle William, in *ibid.*, D (W) 1778/Iii/944/1. If Dartmouth had truly wanted to pursue treason charges in court, with treason defined broadly, he had a surfeit rather than a shortage of names from which to choose. TNA, PRO/CO 5/160, fo. 16.

36. *Ibid.*

37. Copies of Dartmouth's second query, dated February 11, 1774, can be found in TNA, PRO/CO 5/160, fo.44; and PRO/CO 5/250, fo.47, with a notation made later by another hand: "NB No Written Report was made to this Reference."

ministers to balance their desired outcome with any perceived legal impropriety or violation of fundamental rights.

If John Pownall, undersecretary to Dartmouth, is to be credited, Thurlow had had his fill of legal advice seekers. He and Wedderburn passed by Pownall after a cabinet meeting at Dartmouth's office. Pownall asked if it had been decided to prepare warrants for the arrest of Adams, Hancock, and others. To Pownall's question "is it done" an irritated Thurlow snapped, "No, nothing is done. Don't you see that they want to throw the whole responsibility of the business upon the Solicitor-General and me," he complained, "and who would be such damned fools as to risk themselves for such—fellows as these." With that he and Wedderburn "walked off, and the project was dropt." Thurlow was dismissively coarse and abrupt, but then he was notorious for being both.³⁸

Perhaps Thurlow did not like being pressured to find a legal solution to what he may have thought essentially a political problem, a solution he was expected to work out with Wedderburn. The two were not close, despite their being called North's "pillars of Jachin and Boaz." They had once been rivals in the House of Commons and Thurlow, formerly solicitor general, demanded the post of attorney general so that he would not have to serve under Wedderburn.³⁹ If Thurlow thought the appointment of commissioners to investigate the Tea Party would end up with the same result as the *Gaspee* inquiry—no convictions, no prosecutions, not even any indictments—he left no record of saying. But it is quite possible that he foresaw that the king would turn to Parliament for a solution anyway, and that he and Wedderburn, as members of the House of Commons, would address the issue there, among hundreds of other members of Parliament rather than as two lawyers acting alone. Not only that; they would lend a hand in drafting the legislation that resulted.⁴⁰

38. HMC, *Report on Manuscripts in Various Collections*, 8 vols. (London: Mackie & Co., 1901–1914), 6:270. Thurlow, an admirer of the now deceased George Grenville, supposedly added for good measure: "Now if it was George Grenville, who was so damned obstinate that he would go to hell with you before he would desert you, there would be some sense in it." (Ibid.)

39. Robert Gore-Browne, *Chancellor Thurlow* (London: Hamilton, 1953) relied to some extent on Sir John Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England*, 5th ed., 10 vols. (London: John Murray, 1868), 7:153–333, though Campbell did not dwell on the differences that split Thurlow and Wedderburn. Also see the brief sketches in Sir Lewis Namier and John Brooke, *The House of Commons, 1754–1790*, 3 vols. (London: Her Majesty's Stationery Office, 1964), 3:529–31 (Thurlow) and 3:618–20 (Wedderburn); and the longer pieces in the *Oxford Dictionary of National Biography*, 60 vols. (Oxford: Oxford University Press, 2004), 54:715–20 (Thurlow) and 57: 908–10 (Wedderburn).

40. Thurlow's irritation with Wedderburn, and with a "lazy" North as well, was commented on by Horace Walpole, whose caustic observations must always be used advisedly. See

Whether it was because of Thurlow's reluctance or for some other reason, the king and his ministers chose not to act independently of Parliament.⁴¹ The Privy Council, which had reviewed the materials gathered by and for Dartmouth and even interviewed witnesses, bowed out of the Tea Party business on February 19, leaving policy to the crown and Parliament, as advised by the attorney general.⁴² The cabinet decided on February 28 that, based on the evidence presented to it by that point, "the charge of high treason" could not be sustained and everything should be laid before Parliament, with a recommendation that the port of Boston be closed.⁴³

In a special message sent to the Lords and the Commons on March 7, 1774, George III expressed grave concerns about American conditions, a message that acted as a précis for well over 100 documents that he presented to both houses for their consideration. In some ways the king sounded less disturbed than he had in his speech from the throne in November 1768. Unlike then, he and the ministers who wrote the brief memorandum did not accuse disputatious colonists of seeking independence. They also scrupulously avoided the word "treason."

His Majesty, upon Information of the unwarrantable Practices which have lately been concerted and carried on in *North America*: and particularly of the violent and outrageous Proceedings at the Town and Port of Boston, in

A. Francis Steuart, ed., *The Last Journals of Horace Walpole During the Reign of George III From 1771–1783*, 2 vols. (London: John Lane, 1910), 1:313–14. The Earl of Buckinghamshire noted at least one disagreement between Thurlow and Wedderburn on how to proceed against Hancock and the others, in a meeting that he attended with them and Dartmouth on March 2, 1774. In HMC, *Report on the Manuscripts of the Marquess of Lothian* (London: His Majesty's Stationery Office, 1905), 290–91.

41. In a conversation with Hutchinson some months later, North admitted the need to "punish those concerned" with the tea business, but it would be difficult "carrying" 35 Henry VIII c. 2 "into execution. That the destruction of the Tea, connected with the Resolves of the Meeting was treason, he said was past doubt; but the lawyers were in doubt whether the evidence which appeared was sufficient: otherwise they should gone on to prosecute." Hutchinson, ed., *Diary*, 1:245, from September 21, 1774. Also see note 49, below. I doubt if Thurlow or Wedderburn would ever have felt that there was sufficient evidence to prosecute, because winning in court was not the ultimate goal; behavior modification is what they really wanted. Going to court is always risky, as lawyers know best.

42. John Munro and Almeric C. Fitzroy, eds., *Acts of the Privy Council of England. Colonial Series*, 6 vols. (London: His Majesty's Stationery Office, 1908–1912), 5:391–92. Also see the Dartmouth Papers, D (W) 1778/II/832 and 834, the cabinet minutes for February 16 and 19, respectively.

43. According to a note by John Pownall. (See HMC, *Dartmouth*, 2:199; also the Dartmouth Papers, D (W) 1778/II/839). Dartmouth wrote Hutchinson that "the King has thought fit to lay the whole matter before both Houses of Parliament" on March 9, 1774. TNA, PRO/CO 5/763, fo. 54; also printed in Davies, ed., *Documents*, 8:61.

the Province of *Massachusetts Bay*, with a View to obstructing the Commerce of this Kingdom, and upon Grounds and Pretences immediately subversive of the Constitution thereof, hath thought fit to lay the whole Matter before His Two Houses of Parliament, fully confiding, as well in their Zeal for the Maintenance of His Majesty's Authority, as in their Attachment to the Common Interest and Welfare of all His Dominions, that they will not only enable His Majesty, effectually, to take such Measures, as may be most likely to put an immediate Stop to the present Disorders, but will also take into their most serious Consideration what farther Regulations and permanent Provisions may be necessary to be established for better securing the Execution of the Laws, and the just Dependence of the Colonies upon the Crown and Parliament of *Great Britain*.⁴⁴

Parliament dutifully passed four laws that would come to be known as the “coercive” or “intolerable” acts, collectively designed to reform as well as punish. Debates took place over two months: March through May. In April, the Earl of Buckinghamshire essentially did for the House of Lords what Dartmouth had done for Thurlow and Wedderburn in February: he compiled a long chronology to demonstrate the unconstitutional, illegal, and even rebellious behavior of disobedient Americans.⁴⁵ For most peers he was preaching to the choir. What became the Boston Port Act made it through both houses first, followed by an Administration of Justice Act, then a Massachusetts Government Act that abrogated elements of the 1691 charter, and, finally, a new Quartering Act. The first two in particular opened with harsh language, complaining of “dangerous commotions and insurrections” in Boston that were in “defiance of his Majesty's authority, and to the utter subversion of all lawful government.”⁴⁶ None of the four, however, accused the town or any individual residing in it of committing treason.

44. For the message and list of supporting papers see Simmons and Thomas, eds., *Proceedings*, 4:26–31 (the House of Lords) and 4:31–35 (the House of Commons).

45. For the committee report presented to the House of Lords, as chaired by the Earl of Buckinghamshire, see April 20, 1774, in Simmons and Thomas, eds., *Proceedings*, 4:240–59, which began with disturbances in Massachusetts dating from 1764 through the Tea Party and its aftermath, noting that Governor Francis Bernard had warned as early as October 1765, with the Stamp Act crisis, “that the real Authority of the Government is at an End.” The committee had been formed on March 30, as soon as the House of Lords passed the Boston Port Bill, and in anticipation of debates over the Massachusetts Government Bill.

46. As excerpted from the Boston Port Act (24 George III c. 19) and the Administration of Justice Act (24 George III c.39) in Pickering, ed., *Statutes*, 30:336–40 and 367–71, respectively. The Massachusetts Government Act (24 George III c. 45) and the New Quartering Act (24 George III c. 54) are also in *ibid.*, 381–90 and 410, respectively. The Administration of Justice Act had obvious connections to the thinking behind a resurrected 35 Henry VIII c. 2. Whereas advocates of utilizing the earlier act were driven by a fear that there would

Nevertheless, the word “treason” had become part of the debates. The Earl of Mansfield, who, in addition to sitting in the House of Lords, presided as chief justice on the Court of King’s Bench, contended that what had happened in Boston was an “overt act of high treason, proceeding from over-lenity and want of foresight.”⁴⁷ He thought it gave Parliament the perfect opportunity to finally get tough and that Americans would surely back down. But even among supporters of the ministry and its “new” policy there were those who did not want Americans treated as traitors; they preferred the term “commotion” to “rebellion” when characterizing their behavior.⁴⁸ Others, by contrast, wanted an even tougher stance. They would have liked to see arrests and prosecutions, possibly even hangings, which, as they saw it, were the only way to insure that what Mansfield thought should happen, did happen.⁴⁹

be no convictions by local juries of colonists being tried for crimes against the crown, advocates of the latter were driven by the fear that no imperial administrator accused of a capital offense could expect to be acquitted by a colonial jury. The Quebec Act, passed in June, was linked in colonial minds with these four laws, but not in the minds of the king and his supporters in Parliament; a commentary in itself on their failure to imagine the extent of colonial anxiety and resentment (See *ibid.*, 549–54) (24 George III c. 83). Donoghue, *British Politics*, 51, considered this legislative approach “in its implications much more severe and hazardous” than that posed by the abandoned executive action because “it meant accepting the Tea Party as a general colonial challenge to British sovereignty, putting the question before the legislative assembly of the realm, and proposing radical legislation which must deal broadly with the many sources of trouble and grievance and which would apply to all the inhabitants of Massachusetts.” Even so, if the most vigorous legal action had been pursued—a broad interpretation of the treason statute as applied by an English judge and jury to accused colonists—the implications for both Britons and Americans were even more far reaching, as hinted at most notably by John Dunning during later debates in the House of Commons.

47. So reported the Earl of Shelburne to the Earl of Chatham (Pitt) in a letter of April 4, 1774, about debates in the House of Lords on March 28; as taken from Simmons and Thomas, eds., *Proceedings*, 4:146.

48. See Shelburne’s comments at *ibid.*

49. Thomas Hutchinson recorded in his diary that on a July 5, 1774 visit, John Pownall told him that “his plan was, to pass the Port bill, and to send over Adams, Molineux, and other principal Incendiaries; try them, and if found guilty, put them to death.” He also said that initially the cabinet had seen it that way, too, and that “the Lords of the Privy council actually had their pens in their hands, in order to sign the Warrant to apprehend them;” that is, until “Lord Mansfield diverted it by urging the other measures.” In Hutchinson, ed., *Diary*, 1:183. Mansfield, in an August 14 visit, left a different impression of what had happened. Their pens may have been in their hands, as Pownall had said, but they were persuaded by Thurlow and Wedderburn that there was too much “doubt whether the evidence was sufficient to convict them” although Mansfield himself felt that “things would never be right until some of them were brought over” (see *ibid.*, 219–20).

Opposition leaders, with no clear alternative policy of their own and being too few in number to stop the government's plan, offered dire predictions. During debates in the House of Commons Isaac Barré expressed disdain for the purported proof of American rebelliousness contained in the papers submitted for parliamentary perusal. He condemned the Administration of Justice Act for its presumption that a servant of the empire could not obtain a fair trial in the colonies. The verdict in the Boston "massacre" trial of Captain Thomas Preston, he contended, was proof enough that the new law was based on a groundless fear. He challenged Thurlow and Wedderburn to "declare, if they can, that there is upon" the table "a single evidence of treason or rebellion in *America*." He maintained that they knew that "there is not one, and yet are proceeding as if there were a thousand."⁵⁰ Former Solicitor General John Dunning raised the question again during debates over what became the Massachusetts Government Act. To sustain talk of treason, he emphasized, there had to be traitors and yet there had been no prosecution, not even an "inquiry for discovery of these supposed traitors." Determined to drive his point home, he linked the government act to the also-pending Administration of Justice Statute. "The first of those Bills" would "provoke" the people of Massachusetts "into rebellion;" the second, he charged, would "authorize people with impunity to cut their throats when they find them in that condition."⁵¹

Dunning painted a dramatic portrait but it probably left most listeners unmoved. William Pitt, the "Great Commoner," now Earl of Chatham, confided to his political ally in the House of Lords, the Earl of Shelburne, his worry that "the fate of Old England" was at stake, "not less than that of the New." A "fatal desire" to "crush the spirit of liberty among the Americans" had "taken possession of the heart of government."

50. From debates of April 15, 1774, as gathered in Peter Force, ed., *American Archives*, 9 vols. (Washington, D.C.: M. St. Clair Clarke and Peter Force, 1837–1853), 4th series, 1:114. Simmons and Thomas, ed., *Proceedings*, 4:162–64 and 174–75 went to two other sources for this speech, neither of which included this particular phrase. Force did not list his source, although it was most probably from a London newspaper that had been reprinted in the colonies. See, too, Edmund Burke in the House of Commons, March 25, 1774, where he tried (and failed) to argue that members of the ministry themselves erred in setting a punitive policy when they could not even decide among themselves whether there was a rebellion or just rioting and civil disobedience. Posing a question that a lawyer might well ask in court, he wondered how the ministry could settle on a punishment when it was not even sure of the crime. See Simmons and Thomas, eds., *Proceedings*, 4:124 and 136 (two different accounts).

51. During debates in the House of Commons, in *ibid.*, 332 and 337, respectively, with a different version at 374–375. He tied in 35 Henry VIII c. 2 as well.

Should the program pushed through Parliament be implemented, he sighed, “one need not be a prophet to say, England has seen her best days.”⁵²

* * *

The program would indeed be implemented, but not during the tenure of Governor Thomas Hutchinson. General Thomas Gage replaced him as the man that crown and Parliament expected to restore control. Hutchinson unrealistically hoped that Gage would be in Massachusetts temporarily; just long enough to make a more compliant colony, to which he would return.⁵³ Gage gave the impression that he would succeed where others had failed because he had the firmness they lacked. George III had been looking for just such a man. They met on February 4, before Dartmouth had even approached Thurlow and Wedderburn for their legal opinions about the tea affair. Gage told the king that the colonists “will be Lyons, whilst we are Lambs but if we take the resolute part they will undoubtedly prove very meek.”⁵⁴ He thought four regiments would suffice. Within a matter of months he would have liked ten times that number. For all of his years living in the colonies, for all his wartime American service and experience as a peacetime commander thereafter, for all his warnings about the autonomy-seeking tendencies of the people around him, he miscalculated and performed no better than the disgraced Hutchinson.⁵⁵

And yet he may have been thrust into an already impossible situation, give the ministry’s contradictory expectations. On the one hand, as “Our Captain General and Governor in Chief,” the king expected him to keep the peace, by force if necessary, “should the madness of the people” and the “timidity or want of strength of the peace-officers require it.” On the other, the king trusted “that such necessity will not occur” and that he ought to use “mild and gentle persuasion to induce their submission.”

52. Chatham to Shelburne, March 20, 1774, in William Stanhope Taylor and John Henry Pringle, eds., *Correspondence of William Pitt, Earl of Chatham*, 4 vols. (London: John Murray, 1838–1840), 4:337.

53. An unrealistic expectation, encouraged by Dartmouth the same day that he was writing Gage’s instructions as Hutchinson’s replacement. See Dartmouth to Hutchinson, April 9, 1774, in TNA, PRO/CO 5/765, fo. 297.

54. Note from George III to Lord North, February 4, 1774, in Sir John Fortescue, ed., *The Correspondence of King George the Third from 1760 to 1783*, 6 vols. (London: Macmillan, 1927–1928), 3:59.

55. Gage could be perceptive and had predicted as early as 1768 that protesting colonists would escalate their protests against imperial authority if their demands were not met, starting with denying Parliament’s authority and, if thwarted, that of the crown as well, until they had the independence they really wanted. See his letter to the secretary at war, Lord Barrington, of March 10, 1768, in Clarence Edwin Carter, ed., *The Correspondence of General Thomas Gage*, 2 vols. (New Haven: Yale University Press, 1931, 1933), 2:450.

He was supposed to work in concert with the council and house; at the same time, he was expected to pressure them into discontinuing the practice of hiring agents to speak for them in London—something that Hutchinson had been instructed to do in 1771. Hutchinson failed; there was no reason to think that Gage would be any more successful. With Thurlow and Wedderburn's February 11 finding passed on to him as part of his instructions, the king authorized Gage to investigate and see to the indictment, arrest, and prosecution before a Massachusetts—not an English—judge and jury for those accused of committing treasonous acts. Nonetheless he added this caveat: if the “prejudices of the people” made conviction unlikely, “however clear and full the evidence might be,” then it “would be better to desist from prosecution, seeing that an ineffectual attempt would only be triumph to the faction and disgraceful to government.”⁵⁶

The king and his ministers could not even be sure if Gage had the authority as governor to use regular troops against civilians in a situation short of civil war, unless a justice of the peace read the Riot Act. Nothing, apparently, had been done to clarify such issues, despite the “massacre” four years before.⁵⁷ But then nothing better illustrates the muddled, even delusive thinking that went on at Whitehall and Westminster.⁵⁸ Whether to

56. Copies of Dartmouth's April 9, 1774 charge to Gage can be found in TNA, PRO/CO 5, 763, fos. 77–81 and TNA, PRO/CO 5/765, fos. 298–307. Also printed in Davies, ed., *Documents*, 8:86–90; and in the outstanding collection assembled by L. Kinvin Wroth, George H. Nash III, and Joel Meyerson, eds., *Province in Rebellion: A Documentary History of the Founding of the Commonwealth of Massachusetts, 1774–1775*, 4 vols. (Cambridge: Harvard University Press, 1975), 1:1–7. Also see the list of 53 specific directives compiled on April 5, and given to Gage, many of which were simply unrealistic (*ibid.*, 17–44). Gage's commission as governor of April 7, 1774 should be compared with those issued to William Phips in December 1691 and Hutchinson in November 1770. They have much in common and Phips, like Gage, was given executive authority in Rhode Island (and Connecticut, which Gage was not) in the event of war. See *Massachusetts Royal Commissions, 1681–1774* (Boston: Colonial Society of Massachusetts, 1913), 69–75 (Phips), 164–73 (Hutchinson), and 174–183 (Gage).

57. For allusions to this unanswered question see Dartmouth's cabinet minute for April 7, 1774, in HMC, *Dartmouth*, 2:208; and Hutchinson's record of comments Wedderburn made to him months later, in Hutchinson, ed., *Diary*, 1:183, from Wedderburn's visit to Hutchinson on July 5. Therefore the move—that failed—to add special justice of the peace to Gage's duties as governor, which struck critics as contrived to achieve a political purpose.

58. Labaree, *Boston Tea Party*, 170–216; Donoghue, *British Politics*, 73–104; Thomas, *Tea Party to Independence*, 48–87; and Ian R. Christie, “The British Ministers, Massachusetts, and the Continental Association, 1774–1775,” in *Resistance, Politics, and The American Struggle for Independence, 1765–1775*, eds. Walter H. Conser, Jr., Ronald M. McCarthy, David J. Toscano, and Gene Sharp (Boulder: Lynne Rienner Publishers, 1986), 325–57 review British policy making during these months. For a more caustic

arrest suspects or not; prosecute the accused, or not, would all be up to Gage, the military officer now acting as a civilian official. If arrests could be safely made, if convictions could be expected in trials, he would not have been sent to Massachusetts in the first place. But the king's men could not admit to themselves that they did not know what to do.

Before he left London for Boston, Gage had had his authority as governor extended to include being able to grant pardons for all capital offenses.⁵⁹ If Whitehall and Westminster hoped that he would thereby feel emboldened to press for treason prosecutions, they would soon be disappointed. Gage passed Dartmouth's February 5 narrative, with Thurlow and Wedderburn's February 11 report, along to provincial Chief Justice Peter Oliver. Oliver advised him "that the times are not yet favourable for prosecutions and that those matters should be delayed."⁶⁰ Oliver had bigger concerns, starting with his own position on the bench. He faced condemnation by the Massachusetts house for taking a crown salary. Indeed, in a neat reversal of accusation that carried with it implications for political legitimacy, the Massachusetts house impeached Oliver and called for his removal, declaring him "an Enemy to the Constitution of this Province" whose actions were a "Perversion of Law and Justice" and "obnoxious to the Good People of this Province."⁶¹ With Oliver the one superior

assessment see David Ammerman, *In the Common Cause* (Charlottesville: University of Virginia Press, 1974), ix–xi, 1–17. Dismissing the king and his ministers as deluded would be harsh; to suggest that they were living in denial seems more forgiving. Perhaps it takes a troubled mind to say: "It is to be expected that every artifice which has been hitherto used with so much success to keep alive a spirit of sedition and opposition in the people will be exerted in the present occasion to entangle and embarrass, but the King trusts that by temper and prudence on the one hand, and by firmness and resolution on the other, you will be able to surmount all the obstacles that can be thrown in your way." So wrote Dartmouth to Gage on June 3, 1774. In TNA, PRO/CO 5/763, fos. 166–68; printed in Carter, ed., *Correspondence*, 2:163–66; also in Davies, ed., *Documents*, 8:122–25.

59. By order of the crown, April 9, 1774, in TNA, PRO/CO 5/765, fos. 294–96. Pardons for treason and murder had not originally been within his purview.

60. Gage to Dartmouth, June 26, 1774, printed in Carter, ed., *Correspondence*, 1:357; also in Davies, ed., *Documents*, 8:137.

61. Resolution of February 11, 1774, *Mass House Journals*, 50:146. Hutchinson refused to remove Oliver, so the House impeached him on March 7, after having drafted the formal articles on February 24. Hutchinson and his lieutenant governor, Peter's older brother Andrew, had already been impeached by the House, which had then demanded to the Privy Council that they be removed. Instead, the Privy Council endorsed their actions and removed Benjamin Franklin from his position as deputy postmaster for the colonies; an indirect way of punishing him for acting as agent for the Massachusetts House. For Wedderburn's scathing verbal assault on Franklin before the privy council on January 29, 1774, which stopped just short of accusing Franklin of treason, see Leonard W. Labaree,

court justice who resisted pressure to renounce a crown salary, Gage knew not to expect any firmness there. Even Oliver would eventually wilt before public pressure. As a military man, Gage most likely would not have looked to a court to lead the way, regardless. That he was appointed governor at all was an indicator that the ministry anticipated a showdown on the battlefield, and not in a courthouse, in any event.⁶²

Even so, at almost the same moment that Oliver steered Gage away from court, Gage leveled his own treason accusation. It came in response to the “solemn league and covenant” sent out to towns around the province by the Boston Committee of Correspondence on June 8. The committee called for a complete boycott of British goods until Parliament repealed the Port Act. Not everyone in the town meeting had wanted to push this hard but the boycott was endorsed after the fact and the town had already condemned the Port Act for its “Impolicy, Injustice, Inhumanity and Cruelty.”⁶³ As Samuel Adams wrote in a circular sent to other colonies, the people of Boston “have been tryed” and “condemned” but “without their having been accus’d of any crime” because no “crime is alleged in the Act.”⁶⁴

To Gage what set the “solemn league” apart from the previous circular or the town’s formal condemnation was its obstructionist intent: its using boycott as a political tool to force Parliament to repeal one of its laws. In a public proclamation Gage condemned the Boston Committee of Correspondence for its “scandalous, traitorous, and seditious letter, calculated to influence the Minds of the People.” He expected magistrates throughout the province “to apprehend and secure for Trial” anyone

et al., eds., *Papers of Benjamin Franklin*, 39 vols. (New Haven: Yale University Press, 1959), 21:43–70. For months thereafter, Franklin thought that he would be charged with treason. See Franklin to Thomas Cushing, April 16, 1774 (*ibid.*, 193). He was not being paranoid. See Dartmouth to Gage, June 3, 1774, in Carter, ed., *Correspondence*, 2:167.

62. See John Richard Alden, *General Gage in America* (Baton Rouge: Louisiana State University Press, 1948); but more especially on this point, see Allan J. McCurry, “The North Government and the Outbreak of the American Revolution,” *Huntington Library Quarterly* 34 (1971):141–57; and Julie Flavell, “British Perceptions of New England and the Decision for a Coercive Colonial Policy, 1774–1775,” in *Britain and America Go to War*, ed. Julie Flavell and Stephen Conway (Gainesville: University Press of Florida, 2004), 95–115.

63. Text from the town meeting resolution of May 18, 1774, reprinted in Wroth, et al., eds., *Province*, 1:79–80. The solemn league circular, printed as a broadside, is reprinted in *ibid.*, 453–55. It is discussed in Albert Matthew, “The Solemn League and Covenant, 1774,” *Colonial Society of Massachusetts. Transactions* (1915–1916):103–20; and more expansively in Richard D. Brown, *Revolutionary Politics in Massachusetts* (Cambridge: Harvard University Press, 1970), 191–99, especially.

64. Sent May 13, 1774. Printed in Wroth, et al., eds., *Province*, 1:96.

printing or passing out the call for the solemn league or “aiding” or “abetting” the circulation of “the aforesaid or a similar Covenant.”⁶⁵

It was a sweeping call for enforcement of the law and utterly ineffectual. All Gage did was to cause some who thought the Boston committee had gone too far to believe that the governor had in turn overreacted and they ended up supporting the committee. Admittedly, the solemn league failed to achieve its political purpose, as did virtually every attempt by the colonists after the Stamp Act crisis to force a change in imperial policy by waging economic warfare. But it also showed that Gage could no more control the rising opposition than Hutchinson before him.

At this point Gage was still trying to make his way under the rules of the 1691 charter. It would be the end of August before he had in hand the new government act and the names for a new council as provided under it. By then he finally had a few thousand troops at his disposal and Boston, troop-free since 1770, was re-occupied. The soldiers’ arrival underscored his imperial Catch-22: he could do nothing without them, but whatever he attempted to do with them tended only to worsen his situation.⁶⁶

The more he found himself thwarted, the more likely he was to cry treason. But the “treason” that he encountered was that of the many, not of the few. It would take him months to realize that his primary problem was not the “Timidity & Backwardness” of a frightened majority that secretly supported the crown and was willing to live with the legislative changes swept in by Parliament. He was up against colony-wide opposition and was expected to implement an ambitious program that most Bay colonists would resist if pressed. As a case in point: he had been sent a list of thirty-six names for councillors under the new government act. By mid-August

65. Gage’s proclamation was printed in Boston newspapers and is reprinted in *ibid.*, 545–46. Looking back after the fact, Peter Oliver would call the solemn league treasonous, although he did not do so from the bench. See Douglass Adair and John A. Schutz, eds., *Origin & Progress of the American Rebellion: A Tory View* (San Marino: Huntington Library Press, 1961), 104.

66. Gage was at least astute enough to recognize that some of his opponents had been “Impatient for the arrival of the Troops,” which would give more weight to their protests. “I am told that People will then speak and act openly, which they now dare not do.” Could there be a more interesting irony? Protest was easier—because arguments were vindicated—with the troops in town than not, (Gage to Dartmouth, May 30, 1774, in Carter, ed., *Correspondence*, 1:356), which is not to say that the break between Gage and the General Court was immediate and irreparable from the moment that he arrived. He refused to accept thirteen of the twenty-eight names that the house submitted to him for a new council but he did accept Thomas Cushing as the house speaker, and the house and council voted him an annual salary of £1300. Gage and his antagonists spent months in political maneuvering, eyeing each other warily, looking for just the right moment, just the right issue, before going into open opposition.

he had twenty-five who were willing to take the oath of office; the other eleven would not. Nine of the twenty-five resigned within a month, not simply because they were “timid” in the sense that Gage once believed—that is, unwilling to stand against a handful of “demagogues”—but because a public had been formed that stood opposed to them and the government that they represented.⁶⁷

Consequently the hopeful Gage of May, who tried to minimize the opposition he encountered, became the discouraged Gage of September, not knowing what to make of, or do about, the oppositionist behavior that he encountered. “Civil government is near its end” he lamented to Dartmouth. “Nothing can be done but by forcible means” and “a check anywhere would be fatal and the first stroke will decide a great deal.” Although Gage’s troops did not hold the locals in high regard, Gage saw something ominous in their being “numerous, worked up to a fury, and not a Boston rabble but the freeholders and farmers of the country.”⁶⁸ Courts could not begin new sessions because judges were afraid to take the bench, and grand and petit jurors refused to be sworn. Utterly exasperated, before the month was out Gage wrote Dartmouth that “nothing less than the conquest of almost all the New England provinces will procure obedience to the late Acts of Parliament.”⁶⁹

It had it been difficult enough for Gage to accept that daily life in Boston lay beyond his control and that attempting to impose martial law within the town posed too many risks. He wanted to believe that the “disease” started there and had only begun to spread to outlying districts.⁷⁰ But the countryside was no easier to control and he had been mistaken when he thought that the political resistance there was orchestrated from Boston. Those outlying towns had a will of their own; they did not all march to Boston’s tune.⁷¹ They too produced men whom Gage denounced as traitors.

67. The resignations of the nine are included in Wroth, et al., eds., *Province*, 1:525–43.

68. Gage to Dartmouth, September 2, 1774, in Carter, ed., *Correspondence*, 1:369–75 (quotation from 182); reprinted in Davies, ed., *Documents*, 8:179–82.

69. Gage to Dartmouth, September 20, 1774, in *ibid.*, 198.

70. See Gage to Dartmouth, September 25, 1774, in Carter, ed., *Correspondence*, 1:376–77.

71. “It is agreed that popular fury was never greater in the Province than it is at present, and it has taken its rise from the same old source at Boston, tho’ it has appeared first at a distance. Those Demagogues trust their safety to the long forbearance of Government and an assurance that they cannot be punished here.” Gage to Dartmouth, August 27, 1774, in TNA, PRO/CO 5/769, fos. 112–13. Printed in Carter, ed., *Correspondence*, 1:367, and Davies, ed., *Documents*, 8:165. For context see Robert S. Taylor, *Western Massachusetts in the Revolution* (Providence: Brown University Press, 1954); Lee Nathaniel Newcomer, *The Embattled Farmers* (New York: King’s Crown Press, 1953); Michael Zuckerman, *Peaceable Kingdoms* (New York: Alfred A. Knopf, 1970); William Pencak, *War*,

Nonetheless, as with every other instance, none would be prosecuted for treason.

* * *

Events in Worcester demonstrated more plainly than anywhere else that Gage lay under political siege. “In Worcester,” he complained to Dartmouth in London, “they keep no terms, openly threaten resistance by arms, preparing them, casting ball and powder, and threaten to attack any troops who dare to oppose them.”⁷² He had to confess that conditions were so far beyond his control in and around Worcester that there was no point in trying to use troops to restore order—this, after telling Dartmouth that he might soon be “obliged” to march his men “into that township and perhaps into others as occasion happens to preserve the peace.”⁷³ Worcester was no longer his, nor would it even be again, if it ever had been at all.⁷⁴ Barring a miracle, he was already beaten, before there had been a provincial congress in Salem or a first Continental Congress in Philadelphia. What he saw as disorder had in fact become the new order, and with that change was raised the question of whose behavior was most treasonous: his against the province or that of his opponents against the empire? Because he was all but powerless, his authority, as most in Massachusetts saw it, ultimately became illegitimate—informally, long before anything would be proclaimed formally.

He had encountered obstructionism in Boston, such as local leaders who evaded the new limitations on town meetings by claiming that they were reconvening adjourned sessions rather than starting new ones. What he heard coming out of the countryside made his Boston problems pale in comparison. He sent the reports of what happened there to Dartmouth, who in turn gave them to Thurlow and Wedderburn. They produced a finding in December 1774 that went well beyond what they had ruled

Politics, & Revolution in Massachusetts (Boston: Northeastern University Press, 1981); and L. Kinvin Wroth, *Province in Rebellion* (Cambridge: Harvard University, 1976), which serves as an introduction to the four volume set of documents noted in note 56 above.

72. Gage to Dartmouth, August 27, 1774, TNA PRO/CO 5/769, fos. 112–13.

73. *Ibid.*

74. With Worcester as his case study, Ray Raphael argued that by October 1774 “The British had lost all control of the Massachusetts countryside, and they would never get it back.” In *The First American Revolution* (New York: The New Press, 2002), 3. Also see Kevin Joseph MacWade, “Worcester County, 1750–1774: A Study of a Provincial Patronage Elite” (PhD diss., Boston University, 1973); Donald E. Johnson, “Worcester in the War for Independence” (PhD diss., Clark University, 1953); and the documents gathered in William Lincoln, *History of Worcester, From Its Earliest Settlement to September 1836* (Worcester: Charles Hersey, 1862); and Albert A. Lovell, *Worcester in the War of the Revolution* (Worcester: Tyler & Seagrave, 1876).

the previous February in response to the Tea Party. They determined that the letters from Massachusetts presented to them by Dartmouth “contain the History of an Open Rebellion and War,” named seven men involved in two incidents that qualified as “overt Acts of High Treason,” and added, ambiguously, that “several others at different times” could also have been named. In particular “the Acts of Treason imputed to them are the leading of Rebel Forces; which, as we collect from those Letters, possess the whole of the open Country and every part of the Province, except the Town of Boston; wholly prohibiting the Exercise of His Majesty’s authority and suppressing the Execution of His Laws; inso-much that there exists no internal Legislature, or Court of Justice within the Limits of the Colony.”⁷⁵

Assuming that they would rule as they did, Dartmouth asked them to draft a proclamation directing all those who were named in it “to surrender themselves by a certain day” or “be treated as Rebels & Traitors.” Thurlow and Wedderburn were willing to do as asked. They awaited Dartmouth’s instructions as to what “inducement” might be provided to those who should surrender, what the “terms of Submission” would be, what should be required as “Security for their future Loyalty,” and who, if any, would be excepted from the provision.⁷⁶ And there, for all intents and purposes, the legal effort ended. Thurlow and Wedderburn did not draft a proclamation; Dartmouth did not order Gage to make arrests; none of those involved turned to 35 Henry VIII c. 2. The king himself said “no” to any type of commission or board of inquiry being sent over to Boston from Britain.⁷⁷

It was a notable response—or perhaps it should more accurately be called a non-response—because imperial authorities had specific names, dates and incidents in hand. Two reports from Worcester appear to have been crucial to Gage’s thinking as he passed them on to Dartmouth. Thurlow and Wedderburn used them to identify those who ought to be charged with treason. If nothing else, the circulation of this sort of detailed

75. Thurlow and Wedderburn to Dartmouth, December 13, 1774, in TNA, PRO CO5/160, fos. 48–49; also in TNA, PRO/CO 5/159, fos. 3–4; and printed in Davies, ed., *Documents*, 8:239–40.

76. *Ibid.* William Knox mentioned the proposed proclamation, which would offer pardons to those who took a loyalty oath by a certain date, “except such persons as should be named,” in a visit to Hutchinson of December 9, 1774. See Hutchinson, ed., *Diary*, 1:319.

77. Doing so could make “the Mother Country” appear afraid, which would make the colonists less reasonable, not more; at the same time, “I do not want to drive them to despair but to Submission.” How that might be accomplished he did not say, although he was not averse to sending a higher ranking general, such as Jeffrey Amherst, to replace Gage and take more decisive action. See his undated note to North, sometime in December 1774 (for the quotation), and one dated the 18th of that month, in Fortescue, ed., *George III*, 3:157 and 158, respectively.

information serves as a reminder that Whitehall and Westminster did not make policy in the dark. They responded to “facts” sent to them from the colonies. The seven men that they identified were the same seven who appeared in the evidence that Gage sent to London.

The first Worcester report dated from August 27, and the second was composed the very next day in the neighboring town of Rutland. Timothy Paine, one of the “mandamus” Council members who took office under the Massachusetts Government Act, wrote the first. Daniel Murray, son of John Murray, another of those council members, penned the second. Both described how men from various towns in the county had descended on the Paine and Murray homes, carrying the message that they needed to resign their Council seats or suffer the consequences. As Paine told it, some 2000 had gathered on the Worcester common by the morning of August 27. They sent a delegation to speak with him inside his house: Joshua Bigelow, Edward Rawson, and Thomas Denny, all of whom had sat in the Massachusetts house. They were joined by John Goulding and Joshua Gilbert—in total, five of the seven who would be enumerated by Thurlow and Wedderburn. They insisted that Paine resign; they even stood over him as he wrote a letter of resignation and would not accept it until he made changes to their liking. “Thus, sir, you see an open opposition has taken Place to the Acts of the British Parliament,” Paine warned Gage, and “I dread the consequence of enforcing them by a Military Power.” The “People’s Spirits are so raised they seem determined to risk their Lives and everything Dear to them” to prevent the government act from being implemented. They had also made it known that they would prevent the court session scheduled to begin soon from opening; again, by force if necessary. “I wish your Excellency all that Wisdom necessary to direct you at this Time, Paine closed.”⁷⁸ Other than that he had no advice to offer.

Some of those who had been in Worcester departed for Rutland, to join others who decided to pay a similar visit to John Murray. Forewarned, Murray had slipped away the night before. The next day at noon a “Captain” Wilder and “Captain” Holden demanded to see Murray. They gave their rank as militia officers although they could not, technically speaking, be there as militiamen. Wilder and Holden, the other two individuals to eventually be named by Thurlow and Wedderburn, acted as spokesmen for the approximately 1500 stick-wielding men gathered just

78. Timothy Paine to Thomas Gage, August 27, 1774, in TNA, PRO/CO5/763, fos. 271–74 (quotations from fo. 273); also printed in Davies, ed., *Documents*, 8:166–68. Paine and Murray are on the list of councillors that Dartmouth sent to Gage on June 3, 1774, in TNA, PRO/CO 5/765, fo. 323.

off the Murray property. Some had brought muskets, but left them a short distance away; they would go back for them if necessary. Murray's son Daniel, like his father a formidably large man, refused to let them inside the house. With tension building, he relented and allowed a group to search the premises. "Exasperated" to find that the elder Murray had slipped away, they left a letter, giving him until September 10 to publicly resign or they threatened to make "another Visit and destroy all your Buildings" and, should he be there, he would suffer "the greatest Indignities." The son believed them. "I have too much reason to fear you might expect nothing short of Death" and the same fate would await any who stood against them. Telling them that they were committing an act of rebellion "only serves as Oil to increase the Flame." Those wanting to enforce the new laws may "be obliged to take Arms in the defence of this cause, or suffer the loss of their lives."⁷⁹

What transpired in Worcester also occurred elsewhere. Gage could have included other letters from other towns or counties reporting similar occurrences.⁸⁰ Resistance did not begin and end with intimidation, that is, pressuring council members to resign or badgering judges into not taking the bench. It carried into the calling of county conventions and it would be those county conventions that gave life to the first provincial convention, which gathered in Salem in early October before moving to Concord and eventually to Cambridge.⁸¹ Using the standards that Thurlow and

79. Daniel Murray to John Murray, August 28, 1774, in TNA, PRO/CO 5/763, fos. 276–78 (quotation from fo. 278). Davies did not include this letter in his collection. Wilder was from Templeton, Holden from Princetown. According to Murray most of the men who descended on the family home were from there and Hubbardstown. For comments on the Murrays see Winthrop Sargent, "Letters of John Andrews, Esq., of Boston, 1772–1776," *Publications of the Colonial Society of Massachusetts* 1st series 8 (1865):346, letter of August 23, 1774.

80. See Thomas Oliver to Dartmouth, September 3, 1774, TNA, PRO CO 5/769, fos. 98–102. Oliver, Gage's lieutenant governor, agreed to resign from the Council when a crowd that he estimated at 4000 surrounded his house in the aftermath of the "powder alarm." David Hackett Fischer discusses these "First Strokes" in *Paul Revere's Ride* (New York: Oxford University Press, 1994), 44–64. For an excellent case study of public pressure to force a behavioral change see Nicholas W. Gentile, "The Addressers' Affair: The Struggle for Consensus Amidst the Revolutionary Transformation of Marblehead, Massachusetts, From the Coercive Acts to Lexington and Concord" (MA thesis, Brandeis University, 2007).

81. See William Lincoln, *The Journals of the Provincial Congress of Massachusetts in 1774 and 1775* (Boston: Dutton and Wentworth, 1838), which includes records from the 1774 county conventions (pp. 601–60) as well as the 1774 provincial convention (pp. 1–74). For judges and lawyers who pledged their confidence in Gage during June and July, only to be intimidated into silence by August and September, see the resolutions in Wroth, et al., eds., *Province*, 1:560–70.

Wedderburn followed to identify eight men in February and another seven in December who could be charged with treason, the numbers could have been increased tenfold, even a hundredfold, and still not have included everyone. Reading between the lines, they had warned Dartmouth of this in their legal opinions. The law offered no solution here. Massachusetts had become a land apart.

* * *

The well-remembered Samuel Adamses and John Hancocks were no more important to what had happened than the almost forgotten Joshua Bigelows and “Captain” Holdens. And for all the Bigelows and Holdens, there were countless others wholly forgotten. They were law-breakers from London’s perspective, but as they saw it, they defended a higher law. Most of their neighbors agreed, and together they reconstituted their political society, which Gage could only watch. Nothing better illustrates his fundamental lack of control. He had dissolved the General Court in June and decided against calling elections for a new session under the new government act in the fall. The “people” had already begun acting for themselves, electing men to represent them in an extralegal legislative body, a shadow government that would displace royal authority altogether outside Boston by the spring of 1775. They had chosen to call the convention before Gage decided not to convene the General Court. In doing so they followed on a larger scale the precedent set in 1768 by town meetings throughout the province, Boston’s leading the way, in response to British policy at that time.⁸²

Gage could do nothing to stop what went on in the countryside, except to complain, yet again, that those resisting imperial authority were guilty of treason. This he did in a proclamation of November 10, 1774, condemning the so-called “Provincial Congress” because it embodied “a most dangerous Tendency to ensnare His Majesty’s Subjects, the Inhabitants of this Province, and draw them into Perjuries, Riots, Sedition, Treason, and Rebellion.”⁸³ In what had become a familiar sequence, Dartmouth passed along what Gage sent him to Thurlow and Wedderburn. They responded

82. John C. Miller’s characterization of this “Massachusetts Convention of 1768” remains interesting though somewhat overdone, in *Sam Adams: Pioneer in Propaganda* (Boston: Little, Brown and Co., 1936), 134–65. Richard D. Brown, “The Massachusetts Convention of Towns, 1768,” *William and May Quarterly* 3rd series 26 (1969):94–104 provides a good contrast. More helpful on the deeper issues involved, pitting local law and authority against imperial law and authority, is John Phillip Reid’s *In a Defiant Stance* (University Park: Penn State University Press, 1977) and *In a Rebellious Spirit* (University Park: Penn State University Press, 1979).

83. Printed as a broadside, *By the Governor. A Proclamation* (Boston: M. Draper, 1774).

that the actions he had reported—the reconstitution of the militia to purge it of those obedient to London, the use of public funds for unauthorized purposes, the resolutions coming out of the provincial convention asserting colonial rights and condemning acts of Parliament—did amount to “High Treason.” They would soon after put the actions of the Continental Congress in the same category. And still they advised a “wait and see” approach.⁸⁴

As before, their legal opinion did not carry over directly into formal policy. But also as before, talk of treason bled into the parliamentary debates, eventually producing that policy. The king’s message to Parliament on the opening of a new session on November 30, 1774 had returned to the theme expressed in March, although this time with an even greater sense of urgency. The problems that so many thought confined to Boston had manifested themselves elsewhere in Massachusetts, and beyond. Dartmouth had had Gage’s dismal report of early September in hand for well over a month before the king’s speech, which he conceded showed that too many people in the Bay colony “were determined at all events to refuse obedience to the law” and that “they have still in their power to trample upon it with impunity, and to bid defiance to all control.”⁸⁵ George III echoed Dartmouth’s concern when he addressed the combined Houses. He complained of “a most daring Spirit of Resistance and Disobedience to the Law,” of “fresh Violences of a very criminal Nature” and of “unlawful Combinations” spreading throughout the colonies. He did not, however, use the word “treason” nor did he call for the prosecution of colonial mal-factors in England. Rather, he assured his listeners that he was doing everything he could to restore order and called on them to help him.⁸⁶

84. See John Pownall’s notes for a cabinet meeting of December 18, 1774 in D (W) 1778/11/1022, with Thurlow and Wedderburn condemning the Suffolk Resolves as “treasonous”; likewise the Continental Congress’s endorsement of them. Note too North’s frustration with Gage’s apparent do-nothing approach. He may not have seen how Gage’s indecision simply reflected that of the men who sent him there. Dartmouth, at the king’s command, had forwarded Thurlow and Wedderburn information on the Massachusetts Provincial Convention as printed in Boston newspapers, noted in Gage’s dispatches, and mentioned in a few other sources. They were to report to him their “Opinion, for His Majesty’s Information, whether said Resolutions, and Proceedings are Acts of Treason & Rebellion, & whether the persons present, & acting in such Congress, may not be arrested & imprisoned as Traitors & Rebels.” January 20, 1775, in TNA, PRO/CO 5/250, fo. 180. Their February 2, response is in TNA, PRO/CO 5/159, fos. 46–48; with another copy in TNA, PRO CO 5/160, fo. 50.

85. Dartmouth to Gage, October 17, 1774, in HMC, *Dartmouth*, 1:365.

86. Message from the throne, November 30, 1774, in Simmons and Thomas, eds., *Proceedings*, 5:234. For this parliamentary session in context see Donoughue, *British Politics*, 201–65; and Thomas, *Tea Party to Independence*, 143–219.

Although the king did not voice his resentment against what he personally deemed treasonous acts, supporters in Parliament did. They drew the same criticism from the opposition as they had in March. Papers on American affairs presented by Whitehall to Westminster were the focal point of debate and the ministry delayed making policy proposals for months, from October 1774 through January 1775, as it awaited dispatches from the far side of the Atlantic. Among them was Gage's letter to Dartmouth that had included Timothy Paine's letter to Gage from Worcester, which Thurlow and Wedderburn had also seen,⁸⁷ just as in the previous March those papers had served as proof to most parliamentary leaders that Massachusetts was in a state of rebellion and that treason had been committed.

But to others—a distinct minority in both Houses—they proved no such thing. In a replaying of the January 1769 debate in the Commons over extending 35 Henry VIII c. 2 to the colonies, Thurlow emphasized that the high-handed action taken in Worcester constituted treason, as did the calling of a provincial convention and the sending of delegates to a continental congress in Philadelphia. Dunning fired back, as he had in 1769 and as he repeated in March 1774, that there was no proof of rebellion or treason in such acts. "There is no difficulty in proving the direct contrary position," Dunning insisted. Votes and resolutions in those meetings had been "decent and moderate." Affirmations of liberty had been properly "firm" and "tempered with the highest expressions of loyalty and duty to their sovereign."⁸⁸ Thurlow would have none of that. "I am convinced that their intentions are to open hostility against the troops, and to become independent of this country," he countered. "Nothing can prevent their throwing off their allegiance, and becoming independent states, but a vigorous adherence to the measures now proposed."⁸⁹

87. Paine's August 27 letter to Gage was no. 33, and Gage's September 2, letter to Dartmouth was listed as no. 26, among nearly 150 written pieces of evidence that North submitted to the Commons on January 19, 1774. They are itemized in Simmons and Thomas, eds., *Proceedings*, 5:261–66. More papers were submitted on January 31 (*ibid.*, 323) and February 2 (*ibid.*, 341–42).

88. Dunning in the House of Commons, February 2, 1775, in *ibid.*, 346. George Johnstone basically concurred with the position taken by Dunning, subsequently printed as *Governor Johnstone's Speech* (London: G. Allen, 1775). Unlike others who took a leading part in these particular debates, Johnstone, who had served in the Royal Navy and as governor of West Florida, was not a lawyer. In an earlier debate (December 16, 1774) Johnstone contended that Americans were like Englishmen who had protested the "unjust claims of the crown" made by Charles I as well as the "high doctrine of parliamentary supremacy" then current, and warned "that our rivals in Europe cannot be idle spectators in such a scene." Simmons and Thomas, eds., *Proceedings*, 5:252.

89. Thurlow in the House of Commons, February 2, 1775, in *ibid.*, 345–46. For another exchange between Dunning and Thurlow, in which Dunning distinguished between rebellion

North revealed what the government had in mind on February 2, 1775, which initially would take the form of an address to the king from the Lords and the Commons. His measures eventually included a bill to restrict New England's trade and deny access to Newfoundland fishing grounds, and—what he considered to be a conciliatory resolution—allowing the colonists to raise funds for imperial expenses under a requisition system to avoid direct parliamentary taxation.⁹⁰ He could anticipate a reasonably quick passage through both houses.

The Lords reflected the same divisions as in the Commons: a solid majority with the government, a vocal but small minority against. Just as in the Commons, treason came up in the Lords as often as rebellion, even though rebellion and not treason had been alleged by North. As proof that the formal policy held back from stating deeper belief, most of those who thought that rebellion and treason were indistinguishable as a practical matter apparently sided with the king and his ministers. Mansfield stood by his earlier position that acts of rebellion had occurred. The chief justice of King's Bench was challenged by Baron Camden, the former lord chancellor—and before that, chief justice on the Court of Common Pleas—who adverted to the 1352 treason statute and the opinions of Justice Hale to contend that the colonists had neither rebelled nor committed treason. Voted down easily, Camden signed a dissentient with seventeen other peers. They complained that “no legal Grounds were laid in Argument or in Fact” to justify the policy being proposed, which would only compound the difficulties brought by the policies introduced in the spring.⁹¹

and treason while contending that the colonists were guilty of neither, see *ibid.*, 413, debates on 10 February.

90. The act to restrain trade is at 15 George III c. 10, in Pickering, ed., *Statutes*, 31:4–11. Wedderburn helped draft it. Neither treason nor rebellion are alluded to; rather, the new policy is explained as necessary because of the “combinations and disorders” that “at this time prevail” in Massachusetts, New Hampshire, Rhode Island, and Connecticut. Trade privileges would be restored when “peace and obedience to the laws” had been re-established. The address to the king approved on February 10 is in Simmons and Thomas, eds., *Proceedings*, 5:357–58. North also carried another resolution, the famous “conciliatory” measure introduced on February 20 that was designed to get around the problem of Parliament taxing the colonies directly by allowing each of them to set up their own requisition system (see *ibid.*, 432–51). The conciliatory measure passed the House of Commons a week later, and may have eased final passage of the New England Trade and Fisheries Bill, a week after that. It did not make it through the House of Lords and, revised, back through the House of Commons again until April.

91. Camden's response to Mansfield on February 7 and the dissentient (signed by Rockingham and Richmond as well as Camden) can be found in *ibid.*, 389–90 and 382–83, respectively. Walpole, *Last Journals*, 1:425–16 contended that Mansfield and other

Camden offered a prescient warning; his opponents ignored him and pressed ahead. A joint committee from the Lords and the Commons agreed to the wording of North's proposed address to the king, which the king himself approved and ordered printed. It did not explicitly accuse anyone in Massachusetts of committing treason but it did state that a "part" of the king's subjects there were in rebellion, and it threatened punitive action to end the disorder. Sir William Mayne may well have expressed the thinking behind the address when he defended North's approach in the Commons:

Therefore, upon the whole, if a universal resistance to the civil government of America, as by law established, if denying a free and reciprocal interchange of British and American commodities, if resisting every Act of the British legislature, and absolutely, in word and deed, denying the sovereignty of this country, if laying strong hands on the revenues of America, if seizing his Majesty's forts, artillery and ammunition, if exciting and stimulating every means, the whole subjects of America to take arms and to resist the constitutional authority of Great-Britain, are acts of treason, then are the Americans in a state of the most flagrant rebellion; a state, that every good man must lament, and none more than myself, as I sincerely wish every moderate and constitutional method to be taken to bring these unhappy and deluded people to a sense of their duty. But if, after all conciliating measures shall fail, this country has no alternative left, but to make use of that power they enjoy, under heaven, for the protection of the whole empire; and to shew the Americans, that as our ancestors deluged this country with their blood, to gain this constitution for us, we like men, in defiance of faction at home, or rebellion abroad, are determined in glorious emulation of their example, to transmit it perfect and unimpaired to posterity, or perish in the attempt.⁹²

Even if Mayne captured the sentiment behind the policy, the policy itself would not be laid out so explicitly. What Parliament stated formally through statute and resolution was not, and could not be, that direct. Besides, despite all the evidence that had been reviewed over the past months there remained a refusal to accept what that evidence showed. Whitehall and Westminster seemed to think that the disloyal could be made to come to their senses and that the loyal—that silent but large majority—would finally rally and prove that they were dutiful subjects

members of a small "junto" had done all that they could to drive dissident colonists into rebellion so that they could have the excuse they needed to bring them down. But their plans backfired: they had not expected such inter-colonial unity, or so claimed Walpole.

92. From his speech in the House of Commons, February 6, 1775 (*ibid.*, 5:372). He referred to Fort William and Mary in the harbor of Portsmouth, New Hampshire, where munitions had been taken by disguised local militiamen the previous December. Governor John Wentworth condemned the raid as "treasonable" in a proclamation of December 26, 1774, printed in Force, ed., *American Archives*, 4th series, 1:1069.

of the crown. Otherwise it is difficult to explain why Dartmouth in London and Gage in Boston could have fooled themselves into thinking that they were on the verge of a breakthrough; that with just the right show of political resolve or military might their opponents would collapse.⁹³

Dartmouth was unusual among cabinet members in his religiosity, but if he was searching for some way to hate the sin and love the sinner or, in this context, to denounce the treason but not punish the traitor, so were his colleagues. The same was true of Gage. He considered the colonists who opposed him to be traitors and had said as much, publicly as well as privately. The officers under his command probably shared his sentiments. Their inaction gnawed at them; they longed to do something decisive, something to reverse the inexorable flow of power away from imperial authority and to the shadow governments growing up around them.⁹⁴ Gage did not, however, order them to arrest the presumed ringleaders for prosecution in either Massachusetts or England. As much as they all wanted to bring greater force to bear and make an example or two of those who broke or evaded the law, they did not want to create martyrs or risk an embarrassing defeat, which is why Gage, left to his own discretion, chose not to try and arrest anyone when he sent a column to Concord in April 1775.⁹⁵

Dartmouth let Gage decide for himself, just as he had before, because he was not sure what to do beyond what was already being done. He was not alone.⁹⁶ It was no great surprise that Gage would be second-guessed

93. Thus Gage to Dartmouth, with nothing to support his misplaced hope but the hope itself, that fed off of the unrealistic expectations of the similarly inclined: "I am assured if she [Britain] continues firm, and a respectable Army is seen in the Field, that Numbers will declare themselves and join the King's Troops," this, despite his own trepidation about marching too deep into the countryside. Letter of December 15, 1774, in Carter, ed., *Correspondence*, 1:387.

94. See, for example, the frustration expressed by Brigadier Hugh, Earl Percy, in letters from Boston of July 27 and September 12, 1774, in Charles Knowles Bolton, ed., *Letters of Hugh Earl Percy* (Boston: Charles F. Goodspeed, 1912), 28–29 and 37, respectively; and Captain Glanville Evelyn of October 31, 1774 and February 12, 1775, in G. D. Scull, ed., *Memoirs and Letters of Captain W. Glanville Evelyn* (Oxford: James Parker and Co., 1879), 38–40 and 45–52, respectively.

95. See Dartmouth's orders to Gage of January 27, 1775, in TNA, PRO CO5/756, fos. 349–65, which set the stage for Lexington and Concord on April 19. Also printed in Carter, ed., *Correspondence*, 2:179–83.

96. Hutchinson wrote that Thurlow confessed to him as early as September 14, 1774 that he was not averse to making concessions to the colonists, "but in what way or manner this could be done without giving up all, he was utterly at a loss." Hutchinson, ed., *Diary*, 1:261. That Dartmouth could even suggest to Gage the possibility of disarming all the people of Massachusetts, Connecticut, and Rhode Island shows how desperately unrealistic he could be. True, he did not order Gage to do it, but his even suggesting it indicates someone

constantly by his superiors in London, criticized for doing too little before Lexington and Concord, and then condemned for having done too much in the aftermath.⁹⁷ Future Massachusetts loyalists who had looked to him with such hope on his arrival felt betrayed when he did not restore their authority and power. They had been stubbornly unrealistic, refusing to accept the new political world that was emerging around them.⁹⁸ There was an acute schizophrenia at work here, a temptation to lash out coupled with a longing to reconcile. The king would not publicly condemn the colonists who had long thwarted him as traitors and rebels until his proclamation of August 23, 1775, well after blood had been shed.⁹⁹ But because he had already viewed them as rebels and traitors many months before, perhaps that shedding of blood had been a self-fulfilling prophecy. “The New England Governments are in a State of Rebellion,” George III had lamented to North in November 1774, and “blows must decide whether they are to be subject to this Country or Independant.”¹⁰⁰

Angry as he was, the king still wanted his errant children to come back into the family fold. Therefore his concern that arrangements for pardons

with a goal in sight and no clear way to reach it. See his letter to Gage of October 17, 1774 in TNA, PRO CO 5/765, fos. 342–46; also printed in Carter, ed., *Correspondence*, 2:173–75, and Davies, ed., *Documents*, 8:210–12.

97. Suffolk, Dartmouth’s fellow cabinet member, wanted Gage out, saying “it is idle to do things by halves,” by the time of his note to Dartmouth of November 22, 1774, in HMC, *Dartmouth*, 1:370. Also see a more tactful Joseph Yorke (as befitted a diplomat) to his brother the earl of Hardwicke, February 7, 1775, in Add. Ms. 35371, fo. 3, BL.

98. Peter Oliver stands as an excellent example, voicing his enthusiasm for Gage after he arrived, and then, retrospectively, blaming Gage for the larger failure. See Oliver to Gage, July 30, 1774, in Wroth, et al. eds., *Province*, 1:589, and his look back in Adair and Schutz, eds., *Origins and Progress*, 114–15.

99. The king charged that “ill-designing Men” who had forgotten their “Allegiance to the Power that has protected and sustained them” had oppressed “Our loyal Subjects” in what had become “an open and avowed Rebellion.” Those men had done so “by arraying themselves in hostile Manner to withstand the Execution of the Law, and traitorously preparing, ordering, and levying War against Us.” Since they had been encouraged “by the traitorous Correspondence, Counsels, and Comfort of divers and wicked desperate Persons within this Realm,” the king’s loyal subjects were reminded of their duty to assist in suppressing the rebellion, which included exposing “all traitorous Conspiracies and Attempts against Us,” thereby assisting the king’s officers, “Civil and Military,” in bringing “the Traitors to Justice.” Printed in various colonial newspapers and reprinted conveniently in Clarence S. Brigham, *Royal Proclamations Relating to America, 1603-1783* (Worcester: American Antiquarian Society, 1911), 228–29.

100. George III to North, November 18, 1774, in Fortescue, ed., *Correspondence*, 3:153. According to Horace Walpole, back in May 1774, when speculation was rife as to what the death of Louis XV would mean to Britain’s geopolitical position, “nothing was more shocking than the King’s laughing and saying at his levee “*that he should as lief fight the Bostonians as the French.*”” Walpole, *Last Journals*, 1:346.

be worked out in advance of his condemning as traitors those who opposed him. Even Gage thought that it might be possible to seize a few leaders but not necessarily do anything more than that with them. In the meantime, pardons could be extended to others who, fearing what awaited them if they persisted in their rebelliousness, took loyalty oaths.¹⁰¹ Dartmouth considered pairing pardons with arrests, and the king went so far as to ask Thurlow and Wedderburn to draft formal legislation to provide for pardons—assuming, of course, that those who opposed him would seek his forgiveness.¹⁰² After the fighting at Lexington and Concord, Gage finally did extend a pardon to those who would meet the terms as Thurlow and Wedderburn specified; with the exception, that is, of Samuel Adams and John Hancock, “whose offences are of too flagitious a nature to admit of any other consideration than that of condign punishment.”¹⁰³

Gage’s June 1775 offer went out to people who were not yet formally proscribed as traitors, although they had been called that informally for many months. And in what must be considered one of the most important developments to occur over that same period, dissident colonists had begun to reverse the allegation: they contended that the servants of Whitehall and Westminster, not they, were guilty of treason. When Timothy Bigelow went as a representative from Worcester to the Massachusetts Provincial Convention in October 1774 he carried with him a declaration approved by the town meeting. It claimed that charter rights had been destroyed, that Gage had waged war on the people, and that all who agreed to serve as councillors to him ought to “be impeached as traitors to the

101. See Gage to Dartmouth, January 18, 1775, TNA, PRO/CO 5/765, fos. 160–62; also printed in Carter, ed., *Correspondence*, 1:390.

102. Dartmouth to Gage, January 27, 1775, where he suggested arresting leaders, and April 15, 1775, where he recommended combining prosecutions with pardons, TNA, PRO/CO 5/765, fos. 349–65 and 376–99, respectively; printed in Davies, ed., *Documents*, 9:37–41 and 97–102, respectively. Also see Dartmouth to Thurlow and Wedderburn, February 17, 1775, in TNA, PRO/CO 5/159, fos. 50–51; printed in Davies, *Documents*, 9:50–51, for the king’s request that they draft a pardons bill. The bill that they came up with is in TNA, PRO/CO 5/160, fos. 54–61. “His Majesty being desirous of quieting the Minds of His Subjects in general,” they made provision for all those who took an oath before a duly authorized imperial official to obey the laws of crown and Parliament. Still, the cabinet advised that some should be excluded, such as those who served in the provincial congress or any who had attacked “His Majesty’s forts or ships.” Cabinet meeting minute of March 30, 1775, in HMC, *Dartmouth*, 2:283.

103. See the broadside *By His Excellency The Honorable Thomas Gage, esq; A Proclamation* (Boston, June 12, 1775); satirized by John Trumbull in *A New Proclamation* (Hartford, 1775). As Alden, *Gage*, 263–64 noted, the proclamation did nothing for Gage’s stature in the province. Gage’s proclamation was widely reprinted in the colonies, as were criticisms and parodies of it—Trumbull’s and others.

constitution of this province and that they be taken into custody and secured for trial.”¹⁰⁴

What Worcester did in support of a provincial convention, individuals would do in support of the Continental Congress, calling it “treason” not to support what the delegates in Philadelphia had resolved.¹⁰⁵ Some would even contend that crown and Parliament, through their oppressive policies, had reduced Massachusetts to a state of nature. There could be no treason against royal government, since that government by its tyrannical acts absolved the people of any obligation to obey it.¹⁰⁶ Where the political led, the legal followed, and it would be the patriots, not the loyalists, who defined what constituted treason in the local setting. In the process, they proved true Sir John Harington’s well-known witticism: “Treason doth never prosper, what’s the reason? For if it prosper, none dare call it Treason.”¹⁰⁷

* * *

Proof of Revolutionary Era historian David Ramsay’s assertion that colonists revolted against tyranny anticipated rather than tyranny experienced can be seen with the interjection of 35 Henry VIII c. 2 into the dispute.¹⁰⁸ George III never relied on this 1543 statute as a way to prosecute colonists who would otherwise escape punishment. And yet it still became an issue in 1774 because Parliament had urged him to, and there was always the possibility that he might just decide to listen. “If this should be attempted,” warned one letter writer in Massachusetts to his friend in London, “it will produce a resistance and reprisals, and a flame through all *America*, such as the eye hath not seen, nor ear heard, neither hath it entered into the head of the Minister [North] or his ministers to

104. Dated October 4, 1774; printed in Davies, ed., *Documents*, 8:205, and Wroth et al., eds., *Province*, 2:1312. A copy would be included by Gage in the evidence that he sent to Dartmouth two weeks later. *The Crisis*, a London-based weekly, was just one of the publications to pick up on—and accept—this reversal. See, for example no. 16, the issue for May 6, 1775.

105. See “Political Observations, without Order; Addressed to the People of America,” dated November 14, 1774, reprinted in Force, ed., *American Archives*, 4th series, 1:976.

106. See a supposed “letter from Boston, to a gentleman in Philadelphia,” dated February 6, 1775, reprinted in *ibid.*, 1216–17. Or as the author of “To the Freemen of America,” put it, moving to yet another level, “the man who refuses to assert his right to liberty, property, and life, is guilty of the worst kind of rebellion; he commits high treason against God.” *Ibid.*, 335.

107. “Of Treason,” in *The Most Elegant and Witty Epigrams* (London: John Budge, 1618), Book IV, 5.

108. David Ramsay, *The History of the American Revolution*, 2 vols., ed. Lester H. Cohen (Indianapolis: The Liberty Fund, 1990; orig. ed., 1789), 1:105–6, a phenomenon that Bernard Bailyn explored at greater length in *Ideological Origins*.

conceive.”¹⁰⁹ The First Continental Congress would not be quite so explicitly threatening but it was equally emphatic in resolving that the colonists “are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers.”¹¹⁰

Protesting colonists also warned that they would not tolerate a broad interpretation of treason by Whitehall and Westminster in any attempt to coerce them. Alarmed by Gage’s declaring it treason for the people of Massachusetts to call a provincial convention, the Virginia convention pledged solidarity with them, not him. “If he considers himself as acting in the character of his Majesty’s Representative, we would remind him that the Statute of 25th Edward III, has expressed and defined all treasonable offences” and Parliament was bound by that statute. The purpose behind it had been to prevent “tyrannical Kings” and “weak and wicked Ministers” from using “CONSTRUCTIVE TREASON,” that “deadly weapon” to deprive the people of their rights. Accordingly, Gage’s proclamation violated rather than protected the law and resistance to it could be fully justified.¹¹¹

Even though no rebellious colonist would ever be prosecuted for treason, crown and Parliament kept that option open to the end.¹¹²

109. From a “gentleman in Massachusetts to his friend in London,” reprinted in Force, ed., *American Archives*, 4th series, 1:228.

110. The fifth of twelve resolutions, passed in Congress in October 1774. In Worthington Chauncey Ford, ed., *Journals of the Continental Congress*, 34 vols. (Washington, D.C.: Government Printing Office, 1904–1937), 1:69. Also see the July 1774 proceedings of the Pennsylvania convention, where delegates to the Continental Congress from that colony were directed to demand that 35 Henry VIII c. 2 be renounced by Whitehall and Westminster, in Force, ed., *American Archives*, 4th series, 1:419–20. For resolutions of a similar nature coming out of Delaware and South Carolina in the summer of 1774, see *ibid.*, 668 and 525, respectively. And for the long-running dispute over whether the colonists enjoyed common-law protections see Daniel J. Hulsebosch, *Constituting Empire* (Chapel Hill: University of North Carolina Press, 2005).

111. From the Virginia Convention’s instructions to its delegates to the First Continental Congress, August 6, 1774, reprinted in Force, ed., *American Archives*, 4th series, 1:690.

112. Although the enterprising Stephen Sayre, an American living in London, came close in the fall of 1775. See John Alden, *Stephen Sayre: American Revolutionary Adventurer* (Baton Rouge: Louisiana State University Press, 1983), 67–96 for the “bizarre proceedings” (p. 82) surrounding his arrest and brief confinement in the Tower of London. Sayre later brought suit for false imprisonment and won in a first jury trial, only to have the decision reversed by the jury in a second trial, after he had left England and been marked as a rebel (T. B. Howell, ed., *A Complete Collection of State Trials*, 33 vols. (London: T. C. Hansard, 1809–1826), 20:1286–1316. There would be some interest in prosecuting the captured Ethan Allen but the implications for captured British soldiers proved more of a concern; therefore, Allen was treated as a prisoner of war rather than as a traitor, and was eventually exchanged. Five years later, Henry Laurens, captured at sea on his way to the Continent, would also spend time in the Tower. There were those who thought he

Parliament in fact passed a habeas corpus act in 1777 that it renewed annually through 1782, a fallback device to hold without bail those who might be charged with treason until the king decided what he wanted to do with them.¹¹³ John Dunning entered into the same sort of heated exchange with Edward Thurlow on this bill as he had on others that involved definitions of rebellion and treason. "Treason and rebellion were properly and peculiarly the native growth of America," Thurlow huffed.¹¹⁴ Dunning repeated his denial that the Americans had been guilty of either rebellion or treason and insisted that they had risen in response to oppressive policies. He contended that fault for the war lay in London rather than Boston; the majority of his colleagues disagreed.

As with so many other issues raised in the imperial crisis, the implications for Britons weighed more heavily on the minds of men like Dunning than did the question of American rights. Dunning connected the disputes over parliamentary sovereignty in the colonies with larger questions of constitutional government; he worried over what imperial policy meant for limiting the royal prerogative at home and not just how it was applied across the Atlantic. American affairs undeniably played a more significant role in British politics in the early 1770s than they had just twenty years earlier and yet they became most pressing, and the debates over them most divisive, when they could be linked to more universal questions of liberty and authority.

Revolutionary American leaders would experience some of the same frustrations as their British counterparts as they inched toward independence and the creation of their own nation. They too found it difficult not to try to silence their critics by condemning them as traitors.¹¹⁵ Whether they were a true majority from the beginning, or only a minority

ought to be tried as a traitor, even that late in the conflict. He was later exchanged for the Earl Cornwallis, who had been captured at Yorktown, and was allowed to leave England.

113. Parliament passed the habeas corpus bill in February 1777 and renewed it annually in each session through 1782, at which point it had been extended through January 1, 1783. It was then finally allowed to lapse. For the act as first passed see 17 George III c. 9 in Pickening, ed., *Statutes*, 31:212–13, with the final installment at 22 George III c. 2, in *ibid.*, 34:1–2.

114. During debates in the Commons on February 10, 1777, as recorded in Cobbett, ed., *Parliamentary History*, 19:9.

115. For the classic instance of this problem, when treason was alleged against the American cause before there was an American nation, see David James Kiracoffe, "Dr. Benjamin Church and the Dilemma of Treason in Revolutionary Massachusetts," *New England Quarterly* 70 (1997):443–62. For the loyalty oaths as they were formed and applied after the provinces left the empire to become states in the nation see the discussion and charts in Claude Van Tyne, *The Loyalists in the American Revolution* (New York: The Macmillan Company, 1902). Also see Chapin, *Treason*, 10–80.

determined to speak as if they were the majority, they had the advantage over their counterparts in Whitehall and Westminster. They had a local constituency that their imperial opponents lacked. There were those in 1774 Massachusetts wanting to stand by London but they were never numerous enough to prevail for long. It would be misleading to say that those they accused of being traitors *first* took power, *then* disingenuously established their legitimate authority, because the two developments were so intertwined and because so much of what they did fell outside the law rather than clearly in violation of it.

Whatever the colonists' proper place in the empire was supposed to be, calling their resistance to unpopular policies "treasonous" had not served the imperial cause well. Treason under law was ambiguous; to allege it, whether as formal charge or informal accusation, tended to alienate rather than intimidate. No matter how many in Whitehall and Westminster believed that traitors had taken over Massachusetts and plunged the province into rebellion, that view could not be sustained in Massachusetts itself. People there once proud to call themselves British-Americans formed a different set of loyalties as they formed a new identity, both of which were well under way before any blood had been shed. Events as they played out on April 19, 1775 had been predictable; the only question that remains is whether they were preventable. Massachusetts was something other than what imperial theory said it ought to be. There, one man's treason was another man's patriotism, a difference of perspective that framed the problem of empire.

What transpired in Massachusetts is a reminder that imperial authorities did not move beyond "half measures" until after the fighting started, as Robert Tucker and David Hendrickson argued nearly thirty years ago.¹¹⁶ Aggravated colonists complained about tyranny and oppression, and of designs to yoke them in bondage. In reality, crown and Parliament proved reluctant to impose any harsh policy once colonial resistance to it became pronounced. If the shooting war had not erupted in April 1775, London might well have vacillated yet again, as North's conciliatory move in February 1775 hinted. Britain's imperial policy had been ad hoc in nature, a stimulus-response approach that does not fit neatly into fixed constitutionalist categories. A rising "command constitution" in Britain versus a "constitution of custom" in the colonies may well have developed by the 1770s, as John Phillip Reid and other scholars have argued. Even so, imperial policy was marked by London's repeated efforts to avoid constitutional disputes, if some sort of political accommodation could be

116. Robert C. Tucker and David C. Hendrickson, *The Fall of the First British Empire* (Baltimore: Johns Hopkins University Press, 1982).

arranged.¹¹⁷ Failure came because of political impasse, not constitutional difference, as the empire stumbled into a war that few wanted but none seemed able to prevent.

The British had been wrong to believe that, once fighting erupted, they only needed to help “the good Americans subdue the bad.”¹¹⁸ If such sentiments are proof of bad psychology, of even delusive expectations, London’s resisting the temptation to prosecute Americans for treason showed a more realistic, even wiser, side to London’s thinking. Although George III declared rebellious Americans to be traitors in the summer of 1775, he did nothing more than Gage had done the year before to punish them under law; this, despite the shedding of blood and prisoners in hand. On some level, then, the king and his men understood that prosecution, conviction, and execution for treason would further alienate rather than intimidate. Whether they would have continued to hold back had the war gone better for them is of course moot. And yet it seems most unlikely that a Washington or a Franklin would have been tried for treason, even if there had been a different military outcome. I suspect that a victorious Britain would have treated rebellious Americans more the way the Lincoln administration treated rebellious Southerners than the way George II’s government treated leaders of the Scottish uprising of 1745.

Time and again Attorney General Edward Thurlow and Solicitor General Alexander Wedderburn showed a reluctance to try Americans for treason in English courts, despite their ruling on numerous occasions that treasonous acts had been committed. Rather than looking for some sort of latent American sympathies on their part, we should remember that Thurlow and Wedderburn were officers of the court as well as servants of the crown. As politicians they supported attempts to force Americans back into line, whether through royal decree, parliamentary statute, or even military force. However there were limits to how far they would go in using the law as a political tool. Their reluctance to prosecute may simply have been the result of political pragmatism; it may also have

117. See Reid’s *Constitutional History* (note 1, above), and the abridged version published under that same title in 1995; and Barbara A. Black, “The Constitution of Empire: The Case for the Colonists,” *University of Pennsylvania Law Review* 124 (1976):1174–91, both of which should be contrasted with Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford: Oxford University Press, 1999). The pragmatic, ad hoc side to empire is revealed nicely in Mary Sarah Bilder’s *The Transatlantic Constitution* (Cambridge: Harvard University Press, 2004). But then, as Daniel Hulsebosch, *Constituting Empire*, 7, commented, ultimately the “constitution” of empire could only be “self-enforcing” if there was a basic transatlantic political consensus, and that consensus did not exist.

118. An oft-quoted statement, made by Major General James Robertson; repeated, for example, in Troyer Steele Anderson, *The Command of the Howe Brothers during the American Revolution* (New York: Oxford University Press, 1936), 145.

been based on a desire to keep law and politics separate, to not use the law to achieve a desired political end. Americans left the empire with their respect for English law undiminished. Prosecutions for treason could have changed those feelings and thereby changed the postwar development of American law, with implications we can only begin to imagine.