

conjecture. In the latter category falls E's reading at 46. 3 "solae in sagittis spes, quas inopia ferri ossibus asperant." E has *sola*, reported in the apparatus by Koestermann, but suppressed by Winterbottom. Here I judge that *solae* arose because a scribe was misled by *quas* (which refers to *sagittis*) into believing *spes* to be plural. But *sagittae* constitute a single source of hope. A plural might yet be used if the objects of hope were several, or if Tacitus had wished to magnify the hope, but the closest parallels use the singular. Compare Sallust *Iugurtha* 14. 10 "spes omnis in armis erat," *Germania* 30. 2 "omne robur in pedite" (< *Agr.* 12. 1 "in pedite robur")—not the only parallels, but ones with which Tacitus' familiarity cannot be doubted, since he composed the *Germania* shortly after the *Agricola*, for which he liberally plundered the *Iugurtha*. For other parallels, see especially Caesar *Bellum Gallicum* 3. 14. 7 "cum omnis Gallicis navibus spes in velis armamentisque consisteret," Livy 32. 23. 6 "omnis inde spes <op>pugnantibus in vi et armis et operibus erat," 37. 5. 6 "omnis spes in armis et audacia erat," 39. 1. 7 "omnem spem in armis habentes." Tacitus used *sola* instead of *omnis* in part because of the context (there precedes a list of what the Fenni do not have), and in part for the alliteration.<sup>20</sup> Because of elision, *sola in* and *solae in* would be pronounced almost identically, facilitating scribal error. A scribe would pronounce to himself *sol' in . . . quas*, turn to his parchment and write *solae in . . . quas*. After completion of the sentence, the scribe or a corrector might detect the error and expunge the *e* by placing a dot under it. Subsequent scribes might copy *sola*, *solae*, or *solae* complete with dot. The last option might continue through several generations of MSS, with both *sola* and *solae* transmitted.<sup>21</sup> Although, then, we cannot be sure that E's *sola* did not arise through conjecture, it is yet the sort of reading that could easily survive in a single witness to a corrected codex.

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20. R. Renehan suggests to me that *sola spes* may be a variant on the common *unica spes*. But *unica* is not, to my knowledge, found in the pattern (blank) *spes in armis (est)*, which is the model for *sola in sagittis spes*. Further, the examples with *omnis* provide the basis for an argument *a fortiori*: although *unica* would not lend itself to a plural use, *omnis* would; the fact then that the closest models use a singular *omnis* makes it all the more unlikely that with *sola*, a word whose natural connotation is singular, Tacitus would have used a plural. In *Germ.* 46. 3, neither *omnis* nor *unica* would make a good connective, a function which *sola* fills.

21. For the failure to notice expunctions, see Murgia, "The Minor Works of Tacitus," p. 330, on *Agr.* 9. 4 *ostentanda*.

#### LAST WORDS ON THE *CALCULUS MINERVAE*

"Cassius Dion, le plus prodigue en renseignements, vulnérable aux critiques. . ."<sup>1</sup> Dio's report on the flood of honors and powers bestowed on Octavian between the fall of Alexandria on August 1, 30 B.C. and his return to Rome in the middle of 29 to celebrate his triple triumph is indeed prodigious—and vulnerable. Dio informs us that Octavian accepted "all but a few" of these distinctions,<sup>2</sup> but he is not

1. J. Béranger, *Recherches sur l'aspect idéologique du principat* (Basel, 1953), p. 97.

2. 51. 20. 4.

specific about the abnegations. There are, to be sure, discrepancies between what actually happened and Dio's report. The Senate, for example, decreed that August 1 be counted as the beginning of a new era in Egypt, the day of Octavian's taking power there; but Octavian instead began his regnal years in Egypt on August 29, the first day of the Egyptian New Year, Thoth 1.<sup>3</sup> Moreover, he did not accept the renaming of one of the thirty-five tribes to Tribus Julia;<sup>4</sup> nor did he exercise an unrestricted privilege of naming priests.<sup>5</sup> If he was in fact voted the *tribunicia potestas* for life at this time, as Dio states, he declined it.<sup>6</sup>

In this connection, in a very enigmatic and much disputed passage (51. 19. 6–7)<sup>7</sup> Dio described a number of constitutional powers voted to Octavian in 30 B.C. thus:

Καίσαρα τὴν τε ξουσίαν τὴν τῶν δημάρχων διὰ βίου ἔχειν, καὶ τοῖς ἐπιβουμένοις αὐτὸν καὶ ἐντὸς τοῦ πωμηνίου καὶ ἔξω μέχρις ὀγδόου ἡμισταδίου ἀμύνειν, δὲ μηδενὶ τῶν δημαρχούντων ἐξῆν, ἐκκλητὸν τε δικάζειν, καὶ ψῆφόν τινα αὐτοῦ ἐν πᾶσι τοῖς δικαστηρίοις ὥσπερ Ἀθηναῖς φέρεσθαι.

Hiding in these murky lines is Octavian's acceptance of some form of *ius auxilii* (ἐκκλητὸν δικάζειν). But Dio's remark about the unprecedented nature of his jurisdiction in such appeals, namely, that it extended to the first milestone outside the *pomerium* of Rome, is faulty, for tribunes and consuls earlier had this right; and in any case Octavian was consul. "To adjudicate appeals" rings more potent than was the fact; at most Octavian obtained power to adjudicate appeals from administrative acts of other magistrates.<sup>8</sup>

What are we to make then of the clause Dio added immediately after: ψῆφόν τινα αὐτοῦ ἐν πᾶσι τοῖς δικαστηρίοις ὥσπερ Ἀθηναῖς φέρεσθαι;<sup>9</sup> The term "vote of Athena"

3. See, e.g., U. Wilcken, *Griechische Ostraka aus Aegypten und Nubien*, vol. 1 (Leipzig and Berlin, 1899), pp. 786–88; idem, "Octavian and the Fall of Alexandria," *JRS* 37 (1937): 128–44; P. Bureth, *Les titulatures impériales dans les papyrus, les ostraca, et les inscriptions d'Égypte, 30 a.C.–284 p.C.* (Brussels, 1964), pp. 21–25.

4. The same honor was proposed for Caesar (Cass. Dio 44. 5. 2) but was also not implemented. See S. Weinstock, *Divus Julius* (Oxford, 1971), pp. 158–62.

5. M. W. Hoffman Lewis, *The Official Priests of Rome under the Julio-Claudians* (Rome, 1955), pp. 12, 89.

6. It was not until he stepped down from the consulship in 23 B.C. that the *tribunicia potestas* became, in a major constitutional readjustment, the *summi fastigii vocabulum* (Tac. *Ann.* 3. 56. 1). Augustus in the *Res Gestae* (RG 10) is unequivocal about two stages in the expansion of his tribunician power: "sacrosanctus in perpetuum ut essem et, quoad viverem, tribunicia potestas mihi esset, per legem sanctum est"; i.e., *sacrosanctitas* in 36 B.C., and tribunician power for life in 23 B.C. See, e.g., T. Mommsen, *Römisches Staatsrecht*<sup>3</sup>, vol. 2 (Leipzig, 1899), pp. 869–73; L. Wickert, s.v. "princeps," *RE* 22 (1954): col. 2285; M. Grant, *From Imperium to Auctoritas* (Cambridge, 1946), pp. 446–53; H. I. ast, "On the *Tribunicia Potestas* of Augustus," *Rendiconti Istituto Lombardo* 84 (1951): 93–110; Béranger, *Recherches*, pp. 97–101.

7. Cf. F. Millar, *The Emperor in the Roman World (31 BC–AD 337)* (Ithaca, 1977), p. 509.

8. The nature of Octavian's appellate jurisdiction granted at this time is much debated. Dio did not suggest that Octavian was granted the right of direct intervention in criminal trials. Nor is it conceivable that at this time of the principate he was granted the right to hear appeals from standing courts (*quaestiones perpetuae*) or from the juridical competence of the Senate. Cf., e.g., S. J. de Laet, "Où en est le problème de la juridiction impériale," *L'Antiquité classique* 14 (1945): 145–63; J. M. Kelly, *Principes Iudex* (Weimar, 1957), pp. 17–18; A. H. M. Jones, *Studies in Roman Government and Law* (New York, 1960), pp. 53–65; E. Meyer, *Römischer Staat und Staatsgedanke*<sup>3</sup> (Zürich, 1964), pp. 548–49; H. Volkmann, *Zur Rechtsprechung im Principat des Augustus*<sup>2</sup>, Münchener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte, 21 (Munich, 1969), pp. 12, 172–74, 177.

9. Dio's insertion of the phrase "in all juries" is erroneous, since only criminal cases, where exercise of mercy would be appropriate, could be covered by such a power.

was a Greek proverbial expression deriving from trials in Athens conducted by the Areopagus, in which a tie vote resulted in acquittal. The procedure was incorporated histrionically by Aeschylus in the myth of Orestes' trial before the Areopagus in Athens at which Athena cast a vote on his behalf when he was acquitted of murder of his mother. Since in Athenian law a tie vote (*ισοψηφία*) brought acquittal of the defendant, Athena's intervention in the *Eumenides* appears to be merely a symbolic act commemorating the tradition.<sup>10</sup> Much as our word "to lynch," the term "Athena's vote" passed into common usage. It was a proverbial statement, not a constitutional term.

The phrase "Athena's vote" did not in fact carry over into Latin. Under Roman law, however, a tie vote in a jury trial also resulted in acquittal.<sup>11</sup> If, as has been accepted by numerous scholars from Dio's statement, Octavian was granted (and accepted) the *calculus Minervae* (a modern term this, not documented in the sources), exercise of such power would be nugatory in the case of tied juries. It would be productive only when a defendant was found guilty by a majority of one; the resulting intervention of Octavian would cause a tie and bring about acquittal. The various interpretations of Octavian's supposed *calculus Minervae* by modern scholars demonstrate the opaqueness of the matter: (1) Octavian's vote was cast to break ties;<sup>12</sup> (2) when there was a majority of one for condemnation, Octavian's vote brought about an acquittal by creating a tie;<sup>13</sup> (3) Octavian had the power to intervene in all trials by casting the deciding vote, without regard to the numbers of votes for condemnation or acquittal;<sup>14</sup> (4) Octavian possessed in effect summary power of pardon.<sup>15</sup>

Contemporary sources, especially the *Res Gestae*, are silent on such a power of Augustus; and we know of no single instance of his use of a *calculus Minervae*. There are, moreover, only four pertinent references to "Athena's vote" in later sources: (1) Lucian *Piscator* 21, a humorous appeal to Athena to add her vote to save the speaker; (2) Ampelius *Liber Memorialis* 8. 5, a reference to the "actual"

10. Cf. Aesch. *Eum.* 735, 741, 753, 795; Eur. *IT* 965–66, 1469–72, *El.* 1265–68; G. Thomson, (ed.), *The "Oresteia" of Aeschylus*, vol. 2 (Cambridge, 1938), pp. 298–300. Arist. *Pr.* 2. 13 has a long disquisition on the moral and legal justification for acquittal on a tie vote, but he does not mention "Athena's vote."

11. E.g., M. Wassak, s.v. "centumviri," *RE* 3 (1899): col. 1948.

12. E. Gaillemer, s.v. "calculus Minervae," *Dar.-Sag.* 1:820. This would have been a useless procedure.

13. This is the prevailing view. See Mommsen, *Staatsrecht*<sup>3</sup>, 2:958; Leonhard, s.v. "absolutio," *RE* 1 (1894): col. 122; J. Bleicken, *Senatsgericht und Kaisergericht*, Abh. Akad. Wiss. Gött., Phil.-Hist. Kl., 3d ser. 53 (Göttingen, 1962), p. 71; E. Perrot, *L'appel dans la procédure de l'ordo iudiciorum* (Paris, 1907), p. 131; F. de Visscher, "La 'tribunica potestas' de César à Auguste," *Studia et Documenta Historiae et Iuris* 5 (1939): 114, n. 36; H. Volkmann, *Zur Rechtsprechung*, pp. 175–76; E. Meyer, *Römischer Staat und Staatsgedanke*, pp. 548–49.

14. Kelly, *Princeps Iudex*, pp. 15–18, 21. For Kelly ἐκκληθῆναι δικάσειν and ψήφος Ἀθηνῶν are virtually synonymous. Cf. A. W. Lintott, "Provocatio," *Aufstieg und Niedergang der römischen Welt*, part 1, vol. 2 (Berlin, 1972), p. 263: "It must have been . . . a vote to reverse the decision of the jury and . . . it was intended to be based on other considerations than the guilt of the accused as charged."

15. A. Zumpt, *Criminalprozess der römischen Republik* (Leipzig, 1871), p. 451; A. H. M. Jones, "Imperial and Senatorial Jurisdiction in the Early Principate," in *Studies in Roman Government and Law* (New York, 1960), pp. 94–96. According to Jones (p. 95), "In the law of 30 B.C. Octavian is given a general power of pardon in all cases under the criminal laws." On Cass. Dio 51. 19. 6–7 in relation to the *auxilium* of Octavian, cf. P. Garnsey, "The *Lex Julia* and Appeal under the Empire," *JRS* 56 (1966): 185–87.

voting tablet, "calculus, quem Minerva sortita est de Oreste"; (3) Philostratus *Vitae Sophistaram* 2. 3 ὥσπερ τις Ἀθηνᾶς ψῆφος; (4) Julian *Oratio* 3 (114D–115A), in his panegyric on Eusebia, in which he speaks of civilized Athens in olden times when the casting of "Athena's vote" resulted in acquittal, just as now the emperor decides; Eusebia, Julian adds, is even more merciful, since she urges mercy on the emperor even when the votes for "guilty" are far more numerous than just a bare majority. The passage from Julian's oration proves the summary power of pardon by the emperor in the fourth century. The other three passages, by Ampelius, Philostratus, and Dio, all of whom wrote in the second/early third centuries, prove nothing about a *calculus Minervae* earlier. Philostratus' use of the phrase "Athena's vote" is an antiquarian one, referring to the special favor of Herodes to enhance the reputation of the sophist Aristocles of Pergamum. Most instructive in evaluating Dio's meaning is the virtual identity of the formulations used by Dio and Philostratus, who were contemporaries: ψῆφόν τινα ὥσπερ Ἀθηνᾶς (Dio) and ὥσπερ τις Ἀθηνᾶς ψῆφος (Philostratus).<sup>16</sup>

Our knowledge of Dio's methods of note-taking and of composition, his antiquarianism and rhetorical inlays, his tendency to "find" enabling statutory precedents in the Augustan Age for imperial powers of the third century, his numerous errors, distortions and anachronisms, all arouse our caution.<sup>17</sup> There is now reason to conclude that when Dio recorded Octavian's appellate jurisdiction he was merely adding as an antiquarian embellishment a reference to the proverbial "appeal to Athena" (ψῆφος Ἀθηνᾶς), and that he did not intend to attribute to Octavian in 30 B.C. the *calculus Minervae* as a constitutional prerogative.

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16. On Dio's relationship with Philostratus and possible allusions to him in Dio's *Roman History*, see E. Gabba, "Sulla *Storia Romana* di Cassio Dione," *Rivista Storica Italiana* 67 (1955): 331–33.

17. Cf. D. McFayden, "The Rise of the Princes' Jurisdiction in the City of Rome," *Wash. Univ. Stud., Hum. Ser.* 10 (1923): 185, 229, 232–33; J. Bleicken, "Der politische Standpunkt Dios gegenüber der Monarchie," *Hermes* 90 (1962): 444–53; F. Millar, *A Study of Cassius Dio* (Oxford, 1964), pp. 102–18.