

# British Impeachments (1376- 1787) and the Preservation of the American Constitutional Order

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## Introduction: Why British Impeachments Matter

Impeachment is a British invention, employed by Parliament beginning in 1376 to resist the general tendency of the monarchy to absolutism and to counter particularly obnoxious royal policies by removing the ministers who implemented them. The invention crossed the Atlantic with the British colonists who would one day rebel against their mother country and create an independent United States of America.

During the Constitutional Convention of 1787, the delegates decided that presidents and other federal officers could be impeached, but they recoiled from the severe and occasionally fatal punishments imposed by Parliament, and they wrestled over what conduct should be impeachable. Early in their deliberations they resolved that the sole punishment for impeachment would be removal from office and in some cases disqualification from future office-holding.<sup>1</sup> But defining the nature of impeachable offenses proved more troublesome. Various formulations were advanced. As the convention rounded into the home stretch, the phrase that had taken hold was “treason or bribery.”<sup>2</sup> George Mason objected because

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1. U.S. CONST. art. I, § 3.

2. In July 1787, the delegates twice voted in favor of the general proposition that the president should be removable for “malpractice or neglect of duty.” 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 61, 69, 116 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS, VOL. 2]. Many delegates endorsed impeachment of presidents and other federal officials for a body of offenses outside the common law crimes, using terms such as “maladministration,” “corrupt

he thought “treason or bribery” far too narrow. Mason was a student of British impeachment and had authored the post-revolutionary impeachment provisions of the Virginia state constitution.<sup>3</sup> He wanted a federal impeachment remedy analogous to British practice, at least in the conduct it covered, even if not in the sorts of brutal punishments Parliament could impose.<sup>4</sup>

“Treason,” Mason said, “will not reach many great and dangerous offences. Hastings is not guilty of treason.”<sup>5</sup> He was referring to the impeachment trial of Warren Hastings, Governor-General of India, just about to start in England.<sup>6</sup> Mason wanted American impeachments to reach beyond the two indictable crimes of treason and bribery to important breaches of public trust in both the domestic and foreign sphere, the kinds of offenses charged against Hastings, and as we will see, against many other British officials over the preceding four centuries.

Mason’s solution was to add the word “maladministration” after “bribery.” But James Madison rose to object, saying, “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate.”<sup>7</sup> Mason thought the matter over and came back with a compromise. Omit “maladministration” but add to treason and bribery “other high Crimes and Misdemeanors.”<sup>8</sup> The new language passed eight states to three.<sup>9</sup>

Mason’s choice of “high crimes and misdemeanors” was not whimsical. Rather, he lifted it from centuries of British practice in which Parliament increasingly (though not invariably) used this phrase to describe conduct it charged as impeachable. As a result, one of the perennial arguments in American impeachments is over whether the Framers intended “high crimes

administration,” “neglect of duty,” and “misconduct in office.” *Id.* at 64–69. On August 20, 1787, the Committee on Detail reported to the convention that federal officers “shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption.” *Id.* at 337. In its report of September 4, 1787, the Committee of Eleven proposed that the President be removable only on conviction of “treason or bribery.” *Id.* at 495.

3. PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 65–66 (1984).

4. Though not the focus of this Article, it is fair to say that the indispensable innovation of America’s adaptation of impeachment to the sphere of representative democracy was not in the definition of impeachable conduct, but in the limitation of the consequence of impeachment to removal from office.

5. FARRAND, *RECORDS*, VOL. 2, *supra* note 2, at 550.

6. *See infra*, notes 200–604, and accompanying text.

7. FARRAND, *RECORDS*, VOL. 2, *supra* note 2, at 550.

8. *Id.* Mason’s original formulation was “other high crimes and misdemeanors against the State.” *Id.* The phrase “against the State” was later amended to “against the United States,” *id.* at 551, and then deleted altogether by the Committee on Style in the final draft of the Constitution.

9. *Id.*

and misdemeanors” as a term of art limiting impeachable conduct to only those misdeeds impeached by Parliament prior to 1787.<sup>10</sup>

My study of both British and American impeachments convinces me that “high crimes and misdemeanors” do not limit the Congressional impeachment power to the particular, and with the passing years increasingly antique, list of transgressions Parliament had addressed by 1787.<sup>11</sup> Both Parliament and the Framers were acutely conscious that the sorts of dangerous public misconduct for which impeachment is a necessary remedy could not easily be described in advance. Therefore, even as an original matter, the adoption of the phrase “high crimes and misdemeanors” invites an elastic application of the impeachment remedy tailored to the needs and circumstances of the political era in which it is invoked. The appeal of a more expansive reading is even greater if one leans toward the “living constitution” view of our founding charter. However, the argument of this Article does not depend on resolving either the debate over originalism as an interpretive method or the question of whether the Framers intended “high crimes and misdemeanors” to be a narrowly restrictive term of art. Because even if one takes the most restrictive view of the phrase, one that absolutely prohibits to Americans impeachment for any sort of conduct not addressed by British parliamentary precedents, the Framers’ choice of “high crimes and misdemeanors” nonetheless sets a baseline minimum for the scope of American impeachments. In other words, even if one accepts both a strict originalist approach to American constitutional interpretation and that the Framers meant to confine American impeachment within the boundaries set

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10. For example, Raoul Berger famously argued that the phrase was a “technical term” derived from British practice, with which the Framers would have been familiar, and therefore that its technical meaning “furnishes the boundary of the [impeachment] power.” RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 71, 86–87 (1973). See also, HOFFER & HULL, *supra* note 3, at 266–70 (arguing that the American understanding of impeachable offenses essentially incorporates the British understanding). I think that British impeachment precedents are central to understanding the Framers’ ideas about impeachment—hence, this article—but I have also long thought that one can overstate the case. Frank O. Bowman, III, “*High Crimes and Misdemeanors*”: *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1525 (1999). As this Article demonstrates, the British did not always use the phrase “high crimes and misdemeanors” to define impeachable offenses, and as scholars since Berger have amply demonstrated, see HOFFER & HULL, *supra* note 3, at 1–106, by 1787, Americans had developed a body of colonial and state impeachment precedent derivative of, but not identical to, British practice. As noted in the text, I think it is right to say that British impeachment precedents create a baseline minimum for the reach of the term “high crimes and misdemeanors.” The argument about how much further the term may properly reach is one for another day and need not be resolved for the purposes of this Article.

11. This argument is developed at length in my forthcoming book, FRANK O. BOWMAN, III, *HIGH CRIMES & MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (forthcoming 2019).

by British practice, that means American officials are properly impeachable for *at least* the range of conduct covered by British practice.

Therefore, at a moment when impeachment talk is rampant, a reexamination of British impeachments up to 1787 is in order. The subject is hardly novel. Every political generation confronted with a major impeachment crisis has trawled parliamentary records for guidance or grist for partisan argument. But comprehensive examinations of the whole sweep of British impeachment practice are rare.<sup>12</sup> And almost all treatments of the subject tend, understandably, to focus on the issues and types of conduct peculiar to the contemporary controversy that moved their composition. This Article examines the entire arc of British impeachments from 1376 to 1787, with particular attention to issues raised by the current presidency.

The Article concludes that, although British impeachment employed many of the forms of a criminal trial and could produce dire personal punishments of the sort we associate with criminal law, it was, first, last, and always, a political tool in the larger sense. Parliament invented and periodically resorted to impeachment as a means of resisting particular objectionable policies of the crown or its ministers, but even more fundamentally as a mechanism for bending the kingdom's basic constitutional order away from absolutism and toward representative government. This is a critical point. The most recent American impeachment battle, the tawdry inquiry into Bill Clinton's extramarital sexual dalliances and his desperate efforts to hide them, finally turned on the question of whether such low and degraded matters amounted to "high crimes." It transformed the most august tribunal of American democracy into a sort of constitutional police court, obsessed with oral sex, the meaning of "is," and the technicalities of perjury statutes.<sup>13</sup> One effect of the Clinton debacle was to condition the current generation of citizens and scholars to discuss impeachment in terms of the minutiae of whether some presidential action offends the letter of this or that statute.<sup>14</sup> A study of the long run of

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12. The last reasonably comprehensive American treatment of the subject was in Raoul's 1973 classic, BERGER, *supra* note 10, at 7–78, but Berger spends an inordinate amount of time addressing the question of what he calls "retrospective treasons," to the detriment of consideration of other issues that I confess to thinking more germane to present circumstances. Perhaps the most comprehensive, if dated, American treatment is ALEXANDER SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 150–51 (1916). *See also*, H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT 13–29 (2010) (touching some important high points of British impeachment history).

13. *See generally* Frank O. Bowman, III, *Falling Out of Love With America: The Clinton Impeachment and the Madisonian Constitution*, 59 MD. L. REV. 5 (2001).

14. *See, e.g.*, the debate over whether the June 16, 2016, Trump Tower meeting between Donald Trump, Jr. and other figures in the Trump presidential campaign and some Russian persons may have constituted a violation of federal election laws, summarized in Frank O. Bowman, III, *The Russian Lawyer Meetings and Election Law Crimes: The Experts Weigh In*, IMPEACHABLE

British impeachments reminds us that, like any other legal mechanism, impeachment will sometimes be employed for petty or ignoble purposes, but it was invented as a mighty weapon against executive tyranny and a powerful tool for preservation of the constitution. Thus, the “high” transgressions that should most readily provoke impeachment may not be indictable crimes, or even discrete incidents of technical misconduct, but policies or patterns of behavior destructive of the constitutional order.

That said, the legalistic form of impeachment—the specification of offenses by the lower legislative house in articles of impeachment followed by a trial of those offenses in the upper house—mandates an inquiry into the particular types or categories of misbehavior that Great Britain’s Parliament found impeachable. Even when Parliament expressly alleged that the behavior of the accused endangered the constitution, the Commons laid out the particulars and the Lords put them to their proof. Thus, over the centuries, Parliament developed a body of precedent that roughly defined and loosely cabined its impeachment power. To the extent that the Framers incorporated British precedent into their model of American impeachment, knowing what Parliament embraced as impeachable conduct helps us set the parameters for impeachment under the United States Constitution.

In sum, Parliament found the following categories of conduct impeachable: (1) treason, particularly of the crude sort that involved armed rebellion, plotting against the monarch’s life, or aiding avowed foreign enemies in war, but also including a good deal of much more subtly subversive behavior (arguments over the proper reach of treason consumed much parliamentary energy); (2) ordinary criminality, such as false imprisonment, rape, or murder; (3) corruption, which might consist of indictable behavior like outright bribery or extortion, but just as often involved misuses of office for private gain that were not strictly criminal, but were nonetheless understood to drain the public purse or subvert public confidence in government to an intolerable degree; (4) incompetence, neglect of duty, or maladministration in office; (5) betrayal of the nation’s foreign policy interests, sometimes characterized as treason, but always based on a determination that a minister had engaged in behavior (with or without the monarch’s sanction) directly at odds with Parliament’s view of the nation’s fundamental interests; and (6) as noted, subversion of the constitution and laws of the realm.

## I. The Origins of Impeachment

Ever since human beings first formed hierarchical societies they have wrestled with the problem of how to displace powerful people who misbehave. In absolute monarchies (or personal dictatorships), the solution is simple. An absolute ruler's subordinates remain in office at his pleasure and are removed, and perhaps punished, when he is sufficiently displeased. The monarch himself can only be displaced by palace coup, national revolution, or external invasion, with all the bloodshed and general inconvenience those remedies imply.

The problem becomes more complicated once political and economic power is dispersed among competing centers of authority. A monarch whose continued reign depends in some measure on the support of powerful hereditary nobles can no longer be quite so arbitrary in his treatment of those who hold positions of authority under him, many of whom will be those nobles or members of their families. As a result, the nobility gains a voice in the selection and removal of officials who may please the ruler but displease the nobility. The more centers of power develop external to the monarchy—land-holding lesser gentry, clergy, merchants, bankers, professional lawyers and judges—the more complicated the problem of removal of the powerful becomes. The challenge lies not merely in determining who will have authority to remove an official, but also in the questions of whether removal should be accompanied by additional punishment and what process should be employed in judging each case.

Great Britain began contending with these challenges very early in its history. Magna Carta, now hailed as the Great Charter of English liberties, was actually a peace treaty between King John and his rebellious barons signed in 1215.<sup>15</sup> Most of it dealt with issues of no modern relevance, such as special kinds of rents and taxes called scutage and socage and placement of fish weirs in the River Thames.<sup>16</sup> But several clauses addressed the issue of removal and punishment of officials and persons of rank. The barons wanted protection from royal arbitrariness. Accordingly, multiple provisions of Magna Carta protect the nobility and “free men”<sup>17</sup> generally

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15. JAMES C. HOLT, *MAGNA CARTA* 13–14 (3d ed. 2015).

16. *Id.* See also WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 343–44 (2d ed. 1914).

17. The class of “free men” was smaller than might be supposed because it excluded those bound to service, the unfree peasantry or “villeins.” THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 507–08 (4th ed. 1948) [hereinafter PLUCKNETT, *CONCISE HISTORY*]; T.F.T. PLUCKNETT, *TASWELL-LANGMEAD’S ENGLISH CONSTITUTIONAL HISTORY* 177–83 (1960) [hereinafter PLUCKNETT, *TASWELL-LANGMEAD*].

from punishment, including fines<sup>18</sup> and loss of lands or status, except by “the lawful judgment of his equals.”<sup>19</sup> But the barons also wanted to get rid of some of King John’s retainers, so the king agreed in Magna Carta itself to turn out of office all the kinsmen and followers of a fellow named Gerard de Athée.<sup>20</sup> This result was no doubt pleasing to enemies of de Athée, but the episode was entirely unsatisfactory as a model for how to deal with troublesome royal officials. A system that requires strapping on your chainmail and rallying the rest of the barons for a rebellion anytime you disapprove of the Chancellor of the Exchequer or the Keeper of the Privy Seal is tiresome in the last degree.

In the centuries following Magna Carta, the national governing body we know as Parliament evolved in fits and starts from ad hoc assemblies of notables such as Simon de Montfort’s parliament of 1265<sup>21</sup> into a bicameral legislature consisting of the House of Commons and the House of Lords. From the earliest times, the relations between Parliament and the crown were marked by two persistent and cross-cutting themes. On the one hand, the great subjects of the realm were determined to influence the selection, and removal, of royal ministers.<sup>22</sup> On the other hand, those same great subjects sought to ensure that, should they take office under the crown, something akin to due process stood between themselves and removal, ruin, and possibly death, whether at the whim of a capricious monarch or at the hands of the crown’s adversaries.<sup>23</sup>

For a good many years, the king could convict and sentence traitors and other malefactors “by record,” meaning that he simply recounted what he believed to be the prisoner’s misdeeds and a quasi-judicial body of noblemen or common law judges, or perhaps the king himself, would then pronounce judgment based on what the king had said.<sup>24</sup> But in time it came to be accepted that all criminal proceedings, including those against officials,

18. Magna Carta, clause 21, provides that “[e]arls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.” *English translation of Magna Carta*, BRITISH LIBRARY (July 28, 2014), <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

19. *Id.* at cls. 39, 52.

20. *English translation of Magna Carta*, *supra* note 18, at cls. 50. For a discussion of why the barons so disliked Athée, see MARGARET CAROLINE RICKABY, GIRARD D’ATHEE AND THE MEN FROM THE TOURAINE: THEIR ROLES UNDER KING JOHN (2011), <http://theses.dur.ac.uk/901/>.

21. S.T. Ambler, *Magna Carta: Its Confirmation at Simon de Montfort’s Parliament of 1265*, 130 ENG. HISTORICAL REV. 801 (2015).

22. D.A. CARPENTER, THE MINORITY OF HENRY III 407–12 (1990) (discussing the determination of upper nobility to influence the choice of royal ministers).

23. T.F.T. Plucknett, *The Origin of Impeachment*, 24 TRANSACTIONS OF THE ROYAL HISTORICAL SOC’Y 47, 48 (1942) [hereinafter Plucknett, *Origin*].

24. *Id.* at 56–58.

should be initiated in legal form and tried by a juridical body separate from the crown. In cases involving persons of rank, the mandate of Magna Carta that judgment should be imposed only by a body of one's equals meshed with the natural inclinations of the notables who made up Parliament to confer jurisdiction in such matters on Parliament itself.<sup>25</sup> This innovation ensured that the king could not easily strike against high-placed enemies without the assent (however coerced or grudging) of Parliament. In due course, it also evolved into a weapon Parliament could employ against royal officers or policies of which it disapproved.

One might wonder how parliamentary pursuit of the king's men would be thought an effective means of altering the king's policy. The short answer lies in the modern catchphrase, "Personnel is policy," which recognizes that implementation even of clear directives from an energetic ruler will fail absent loyal, forceful, competent subordinates. But an absolute and hereditary monarchy presents particular problems for the would-be reformer because neither the monarch nor his subordinates are subject to institutionalized limitation or control. In the thirteenth and fourteenth centuries, Parliament gained increased formal authority over lawmaking and the monarch's sources of revenue.<sup>26</sup> Nonetheless, a king resolutely determined to pursue his own courses despite parliamentary opposition had considerable power to do so and, the monarchy being hereditary, he could not be removed absent a genuine revolution. Therefore, parliaments displeased by a king's policies, but unwilling to go so far as open rebellion, indulged the fiction that the king was not at fault, but was being misled by incompetent or malicious royal ministers.<sup>27</sup> Parliament found it could hobble unpopular royal policies by removing the minister charged with carrying them out without disrupting the continuity of royal rule. If the most effective executants of a king's policy are removed from the political board, the king's policy will be crippled. If the king's ministers know that pursuit of the king's policies in defiance of the will of Parliament presents a real risk of removal from office and additional painful punishments, their enthusiasm for implementing the king's will is likely to be sensibly diminished.

Another constant thread in the long debate over parliamentary condemnation of erring officials was concern over retrospective

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25. T.F.T. Plucknett, *State Trials Under Richard II*, 2 *TRANSACTIONS OF THE ROYAL HISTORICAL SOC'Y* 159, 159 (1952) (noting that by the reign of Richard II (1377-1399), "[t]he principle had . . . been accepted that parliament was the proper jurisdiction for the trial of eminent or official persons who were accused of misconducting public affairs").

26. See, e.g., PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 184-93.

27. For a relatively modern expression of this sentiment, see the speech of the Duke of Argyll during the debate in the House of Lords on the motion of Lord Carteret for the removal of Sir Robert Walpole, 11 T.C. HANSARD, *THE PARLIAMENTARY HISTORY OF ENGLAND* 1098-101 (1812).

punishments. Insofar as Parliament merely acted as the forum in which nobles or servants of the crown were charged and tried for conduct that had previously been defined by statute or common law as illegal, the process presented no conceptual novelty. The principal matters requiring resolution were the roles to be performed by each house, the degree and forms of due process to be afforded the defendants, and the appropriate remedies in the event of conviction. Most of these questions could be resolved by analogy to legal procedures already employed in regular courts. But cases of the great and powerful presented a special problem arising from two interlocking features.

First, the misconduct alleged in these cases did not always violate a pre-existing law. For example, in 1388, Michael De la Pole, the Earl of Suffolk, and others were charged with “high treason” for, in effect, taking advantage of their privileged access to young King Richard II to persuade the king to adopt bad policies and to confer a variety of titles and favors on themselves.<sup>28</sup> Allegations of this sort had never previously been denominated treason.<sup>29</sup> Nonetheless, in a monarchy, the behavior charged against Suffolk—the king’s favorites distorting national policy and grabbing wealth and power—is precisely the kind of thing vigilant parliamentarians will be alert to prevent. So it is not surprising that Parliament chose to treat it as treason in Suffolk’s case. Moreover, because it will often be difficult to predict, still less to define in advance, the sorts of misbehavior, incompetence, or outright knavery that should properly produce scrutiny and perhaps removal of government officials, there was a natural disposition to keep the scope of chargeable conduct indeterminate.

Second, for centuries, the possible penalties for losing a state trial were not limited to removal from office, but included crippling fines, forfeiture of lands and titles, imprisonment, and death (sometimes preceded by the prolonged agony of being hanged, drawn, and quartered).<sup>30</sup> In short, these were criminal cases, at least in the sense that the punishments were of the sort otherwise reserved for the most serious criminal offenses. During the

28. T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS VOL. 1 91–112 (1816) [hereinafter HOWELL, VOL. I]. Suffolk was first impeached in 1386 by the House of Commons and convicted by the House of Lords on a set of charges not apparently denominated as treason. *Id.* at 90–91. The impeachment removed Suffolk from office. *Id.* Later, in 1388, a set of “appeals” (in essence, criminal charges) alleging treason were filed by certain lords in the House of Lords. Suffolk was convicted, but by that time had prudently decamped to France. *Id.* at 97–98.

29. BERGER, *supra* note 10, at 2.

30. PLUCKNETT, CONCISE HISTORY, *supra* note 17, at 194–95, 418–19, 675 (describing varieties of forfeitures as punishment for treason and in cases of attainder). The penalty of drawing and quartering for treason was only abolished by the Forfeiture Act of 1870. A.B. KEITH, RIDGES’ CONSTITUTIONAL LAW OF ENGLAND 412 (6th ed. 1937).

medieval and early Renaissance periods, the severity (and occasional finality) of punishments imposed upon those convicted in state trials was scarcely surprising. The losers of political struggles in those eras rarely retired to the country to write their memoirs, but were distressingly apt to respond by arranging a coup, assassination, or insurrection.<sup>31</sup> Accordingly, simple prudence on the part of the winners of these contests dictated that those convicted of state crimes should be disabled from creating future mischief through imprisonment, exile, impoverishment, or death.

Nonetheless, a central principle of the evolving British common law of crimes, expressed in the Latin phrase *nulla poena sine lege*, was that people should not be punished except for violation of pre-existing law.<sup>32</sup> Therefore, British impeachment was always plagued by tension between the suspect legitimacy of retrospective punishment and that pragmatic realization that misconduct by public officials may subvert the proper functioning of government and represent a danger to the state without being criminal or indeed violating any existing law. So long as parliamentary trials produced not only purges from office, but severe personal punishment, the process bore a taint of fundamental unfairness.

## II. The First British Impeachments

The term “impeachment” as a description of one mode of conducting a state trial in Parliament made its appearance in the 1300s. Scholars of the period speak of proceedings against notables accused of public misconduct being initiated using various procedural vehicles: indictment, appeal of felony, original writ, or even public clamor expressed in the House of Commons.<sup>33</sup> It seems to be broadly agreed that the first true “impeachments” occurred in 1376, during the reign of Edward III in what was known as “the Good Parliament.”<sup>34</sup>

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31. See generally J.M. ROBERTS, *A HISTORY OF EUROPE*, 106–238 (1996).

32. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement.

1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS* 46 (15th ed. 1809).

33. T.F.T. Plucknett, *The Impeachments of 1376*, 1 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 153, 154 (1951) [hereinafter Plucknett, *Impeachments of 1376*]; 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 378 (3d ed. 1931) [hereinafter HOLDSWORTH, VOL. I].

34. *Id.* at 380; PLUCKNETT, *TASWELL-LANGMEAD*, *supra* note 17, at 164; Plucknett, *Origin*, *supra* note 23, at 69; JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND*, VOL. 1, 148–49 (1883); KEITH, *supra* note 30, at 215.

These first impeachments set the paradigm for later parliamentary actions against unpopular ministers. At the end of Edward's fifty-year reign, when both the old King and his eldest son, Edward, known as the Black Prince, were ailing, critics of some of the King's favorites moved against them. The opposition's targets included the royal chamberlain, Lord Latimer, the Steward of the Household, Lord Neville, as well as Richard Lyons, William Ellis, and John Peake.<sup>35</sup> The charges brought against them, to which we will return momentarily, were various, but the distinctive feature of the process is that each case was initiated by a formal accusation by the House of Commons followed by a trial in the House of Lords.<sup>36</sup>

Even though these "impeachments" were directed at men who had long enjoyed the favor of the King, the notables in opposition were at pains to avoid the appearance of defying or undermining the authority of the crown. During the impeachments of Lord Latimer and Richard Lyons, the Commons specifically sought and obtained the sick King's approval to proceed in the first instance and at several points thereafter.<sup>37</sup> And the charges were carefully framed to avoid casting blame on the crown, alleging instead that the defendants had in effect deceived the king and misused his delegated authority. Among the charges against Latimer was that he had "notoriously accroached royal power."<sup>38</sup> Likewise, parliament did not proceed to judgment until receiving assurance that the king was effectively abandoning his former courtiers. Lyons was condemned only after several of the lords testified that the king had disavowed Lyons' claim to have been acting on the authority of the king and his council.<sup>39</sup>

There are two other points of interest for us in these first ancestral impeachments. First, as is true down to the present day in American practice, the lower house not only framed the charges for the upper house, but acted as prosecutors or "managers" in presenting the case for trial.<sup>40</sup> Second, while a good many of the charges against those impeached in 1376 involved corruption of varieties that might have been contrary to some preexisting law, some of the allegations charged no apparent crime. For example, Lord Latimer was impeached in part for his failure as a military leader to hold the English-occupied French towns of Bécherel and St. Saviour.<sup>41</sup>

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35. STEPHEN, *supra* note 34, at 149.

36. *See generally* Plucknett, *Impeachments of 1376*, *supra* note 33.

37. *Id.* at 156–57, 162.

38. *Id.* at 160.

39. *Id.* at 163.

40. *Id.* at 164.

41. Plucknett, *Impeachments of 1376*, *supra* note 33, at 158.

After Edward III died, he was succeeded in 1377 by his grandson, Richard II, then only ten years old.<sup>42</sup> In the early years of his reign, there were ongoing disputes between the favorites and ministers of the young king and an opposition party well-represented in Parliament.<sup>43</sup> The details are unimportant here. The key developments were that the lords and notables in Parliament used the instrument of impeachment to remove several of Richard's advisors, but when Richard gained political strength thereafter, he attempted to seize royal control over the impeachment mechanism.

In 1386, the Commons brought charges in the form of impeachment against Richard's Chancellor, Michael de la Pole, Earl of Suffolk.<sup>44</sup> Three of the charges alleged garden variety corruption—purchasing crown property at a discount or appropriating to himself revenues that ought to have gone to the crown<sup>45</sup>—but several alleged simple incompetence or misconduct in office. Article 3 charged that Suffolk had failed to use parliamentary appropriations for maritime defense to good effect, and Article 7 alleged that Suffolk had bungled the military expedition to relieve Ghent.<sup>46</sup> The Lords convicted Suffolk on some of the charges and, after great pressure was placed on the King, Suffolk was removed from office and imprisoned pending payment of a fine or ransom.<sup>47</sup>

Not content with the impeachment and removal of Suffolk, the opposition magnates forced Richard to accept a “commission of reform” consisting of fourteen nobles with wide powers to set government policy.<sup>48</sup> Unsurprisingly, Richard acceded only grudgingly and began working to reverse these encroachments on his authority. Among his moves in this direction was a formal set of inquiries directed to the judges of England in 1387, in one of which he asked whether, as a matter of law, his ministers could be impeached without his consent. The judges, perhaps under considerable royal pressure, said Parliament had no such power.<sup>49</sup>

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42. NIGEL SAUL, *RICHARD II* 12, 24 (1997).

43. SIMON SCHAMA, *A HISTORY OF BRITAIN: AT THE EDGE OF THE WORLD? 3500 B.C. 1603 A.D. 244–45* (2000); WINSTON S. CHURCHILL, *THE HISTORY OF THE ENGLISH SPEAKING PEOPLES: THE BIRTH OF BRITAIN 372–81* (1956).

44. HOWELL, VOL. I, *supra* note 28, at 90–94.

45. *Id.*

46. *Id.* at 94; N.B. Lewis, *Article VII of the Impeachment of Michael de la Pole in 1386*, 42 *ENG. HISTORICAL REV.* 402, 402 (1927).

47. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 170–71.

48. CHURCHILL, *supra* note 43, at 379.

49. *Id.* at 171–72; *see also* Stanley B. Chrimes, *Richard II's Questions to the Judges, 1387*, 72 *L. Q. R.* 365, 370 (1956); T.F.T. Plucknett, *Impeachments and Attainder*, 3 *TRANSACTIONS OF THE ROYAL HISTORICAL SOC'Y* 145, 145 (1953) [hereinafter Plucknett, *Impeachments and Attainder*].

The Lords struck back in 1388 by bringing charges of treason against Suffolk and other supporters of the King using the mechanism of the “appeal.”<sup>50</sup> An appeal differed from impeachment in that it was a conventional means of bringing a criminal charge in which an aggrieved party formally accused the wrongdoer and became in effect a private prosecutor.<sup>51</sup> In Suffolk’s case, five lords, known to British history as “the Lords appellant,” made their charges of treason directly in the House of Lords, with no participation by the Commons.<sup>52</sup> Not only did the House of Lords convict Suffolk and his allies, but it then proceeded to impeach and banish the judges who had previously declared that Parliament lacked the power to impeach without the king’s assent.<sup>53</sup> In due course, however, the King slowly regained power relative to dissident members of the nobility. In 1397-1398, Richard and his political allies used a combination of appeals and impeachments to charge various of his opponents with treason and other offenses.<sup>54</sup> Several were executed, murdered, or died in prison; others were banished.<sup>55</sup> In the course of these proceedings, Richard was careful to reclaim the right of royal assent to impeachment proceedings.<sup>56</sup> However, his reassertion of authority did not last long. He was deposed by Henry Bolingbroke in 1399 and died in captivity in early 1400.<sup>57</sup>

There were no impeachments in the half-century following the death of Richard II.<sup>58</sup> However, in 1450, William de la Pole, grandson of the Michael de la Pole impeached in 1386 and also bearing the title Earl of Suffolk, was impeached by the House of Commons for various supposed offenses connected to his negotiation of King Henry VI’s marriage to the French noblewoman, Margaret of Anjou.<sup>59</sup> Before Suffolk could be tried in the House of Lords, Henry sought to save him from serious punishment by

50. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 172–73; Matthew Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767, 777 (2016).

51. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 309 (1769).

52. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 172–73.

53. *Id.* at 173; Plucknett, *Impeachments and Attainder*, *supra* note 49, at 146–47.

54. The Dukes of Gloucester and the Earls of Warwick and Arundel were charged by appeal. Plucknett, *Impeachments and Attainder*, *supra* note 49, at 149. Sir Thomas Mortimer and Sir John Cobham were impeached. *Id.* at 151–52. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 175–76. *See* HOWELL, VOL. I, *supra* note 33, at 125.

55. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 175–76.

56. Plucknett, *Impeachment and Attainder*, *supra* note 49, at 153.

57. Anthony Tuck, *Richard II (1367–1400)*, in OXFORD DICTIONARY OF NAT’L BIOGRAPHY (2009), <http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-23499>.

58. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 194.

59. *Id.* at 194; HOWELL, VOL. I, *supra* note 28, at 272–73.

banishing him on his own authority.<sup>60</sup> The king's evasive maneuver did Suffolk no good because the ship taking him into exile was captured in the English Channel by brigands, who beheaded him on the side of a longboat.<sup>61</sup> The important point for us in Suffolk's downfall is that it represented a resurrection of Parliament's claim of power to impeach ministers against the wishes of the crown.

Parliament may have reasserted its theoretical power to remove troublesome ministers, but the power then lay dormant in practice for a century and a half until the reign of James I in the first quarter of the seventeenth century. Historians provide various explanations for the interruption, but the basic one seems to have been the weakness of Parliament relative to the crown during this period.<sup>62</sup> Parliament was active in the reign of Henry VIII (1509-1547), but primarily as an instrument of the king's will on projects like the reformation of the English church.<sup>63</sup> During Elizabeth I's forty-five year reign (1558-1603), she called parliaments about every five years, but the body was only in session for a total of three years while she was on the throne.<sup>64</sup> Throughout the Tudor period, ministers, high clergy, noblemen, and others were cast out of office and some severely punished or even executed, but these falls from grace were driven primarily by the wishes of the monarch.<sup>65</sup> In any case, as a procedural matter, the crown chose not to reassert control over the impeachment mechanism, but to employ other vehicles for condemning its enemies and erring servants, most notably for our purposes the bill of attainder.

### III. Bills of Attainder

A brief explanation of bills of attainder is in order here. Bills of attainder differed from impeachments in several key respects. An impeachment has the form of a judicial proceeding. Formal charges are composed and approved by the lower legislative house and its representatives act as prosecutors before the upper house, presenting evidence in support of the charges. The upper house then acts as judges passing on the question of whether the charges have been proven.<sup>66</sup> By contrast, a bill of attainder is a legislative act, meaning that the subject of the

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60. HOWELL, VOL. I, *supra* note 28, at 274–76.

61. *Id.* at 275–76.

62. *See, e.g.*, STEPHEN, *supra* note 34, at 158.

63. MAURICE ASHLEY, CHARLES I AND OLIVER CROMWELL: A STUDY IN CONTRASTS AND COMPARISONS 141 (1987).

64. *Id.* at 141–42.

65. *See generally* J.J. SCARISBRICK, HENRY VIII (1968); DIARMAID MACCULLOCH, THOMAS CRANMER (1996); ELIZABETH JENKINS, ELIZABETH THE GREAT (1958).

66. BERGER, *supra* note 10, at 57; 4 BLACKSTONE, *supra* note 51, at 256–57.

bill can be condemned without any violation of law, or even clearly articulable wrong, having been charged or proven.<sup>67</sup> The bill passes through Parliament like any other, with no necessary provision for those accused to defend themselves.<sup>68</sup> Punishments could be severe, including execution, imprisonment, exile, ruinous fines, and forfeiture of lands and titles.<sup>69</sup> Bills of attainder were often associated with “corruption of blood,” which not only stripped the offender of his property and titles, but barred his heirs from inheriting.<sup>70</sup>

During the Wars of the Roses (1455-1487),<sup>71</sup> the warring Yorkist and Lancastrian factions used bills of attainder rather than impeachments or appeals to oust and eliminate their opponents.<sup>72</sup> The heyday of attainders arrived in the reign of Henry VIII, during which 130 regime opponents were attainted and thirty-four executed.<sup>73</sup> Notable victims included Thomas Cromwell<sup>74</sup> and the king’s fifth wife, Catharine Howard.<sup>75</sup> Notoriously, Henry secured from the judges of England a declaration that, although it would be bad form, an accused could be attainted by Parliament and executed without any opportunity to be heard in his own defense.<sup>76</sup> It was also common to pass bills of attainder posthumously to provide legal justification for seizures or forfeitures of property or disinheritance of heirs.<sup>77</sup>

Bills of attainder were a very rough business. Not only did they produce draconian punishments that could extend beyond the lifetime of the offender,

67. KEITH, *supra* note 30, at 216 (“Attainder served as a means of proceeding against a person when no real charge could be substantiated.”); PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 232–34. *But see* BERGER, *supra* note 10, at 29 (asserting that an attainder “is only by courtesy labelled ‘legislative,’ for it is a judgment of individual guilt in everything but name”); *see generally* Steilen, *supra* note 50 (arguing that bills of attainder should be considered forms of summary legal process, rather than legislative acts).

68. Steilen, *supra* note 50, at 793.

69. J.R. Lander, *I. Attainder and Forfeiture, 1453–1509* 4 HISTORICAL J. 119, 119 (2009), <https://www.cambridge.org/core/journals/historical-journal/article/i-attainder-and-forfeiture-1453-to-1509/1EA8D0EFB954878797B941400045B969>.

70. Alison Reppy, *The Slayer’s Bounty: History of Problem in Anglo-American Law*, 19 N.Y.U. L. Q. 229, 233 (1942).

71. *See generally* DAVID GRUMMITT, *A SHORT HISTORY OF THE WARS OF THE ROSES* (2013).

72. HOLDSWORTH, VOL. I, *supra* note 33, at 381; PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 233; KEITH, *supra* note 30, at 216–17.

73. Stanford E. Lemberg, *Parliamentary Attainder in the Reign of Henry VIII*, 18 HISTORICAL J. 675, 681 (1975).

74. Lemberg, *supra* note 73, at 692–94.

75. *Id.* at 694–97.

76. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 233; EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS* 37 (1644).

77. Steilen, *supra* note 50, at 821–22.

but their availability as a means of circumventing even the outward forms of legal process for those in bad odor with the dominant power in the state ran contrary to the evolving British dedication to fair procedures. Bills of attainder were not a feature of colonial America, there being no parliament in North America and no occasion for the British parliament to attaint colonists, at least until the American Revolution, after which the issue was moot. However, in the immediate aftermath of American independence, several state governments did enact bills of attainder or their substantial equivalents against unrepentant royalists.<sup>78</sup> These enactments were highly controversial at the time, in part because attainders had garnered such ill fame in British history. The U.S. constitution banned bills of attainder and ex post facto laws in Article I, Section 9.<sup>79</sup>

#### IV. Impeachment in the Era of the Stuart Kings

In Great Britain, impeachment reemerged from its long dormancy during the reigns of the Stuart kings—King James I (1603-1625), his son Charles I (1625-1649), and his grandson Charles II (1649-1651, 1660-1685). The uses of impeachment in this tumultuous period are an important key to the American founders' understanding of the mechanism. The Stuart era was not that far in the historical past for the delegates to the Philadelphia Convention and their contemporaries. It was only as far behind them as the period from the American Civil War to the First World War is for us. Moreover, the conflicts between the Stuarts and Parliament helped define the ideas of eighteenth century Britons, whether in the home islands or their colonies, about proper constitutional relations between an executive and a legislature.

James Stuart was the son of Mary, Queen of Scots, and a great-great-grandson of King Henry VII of England.<sup>80</sup> He became King James VI of Scotland in 1567 when he was barely a year old, after Queen Elizabeth I forced his mother to abdicate in his favor.<sup>81</sup> When Elizabeth died childless in 1603, he succeeded her as James I of England and Ireland, thus placing England, Scotland, and Ireland under one monarch.<sup>82</sup> During the twenty-two years in which he wore the three crowns of the newly consolidated kingdom, he seems to have been a tolerably good ruler,<sup>83</sup> leaving among other legacies

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78. *Id.* at 880–89 (describing post-war events in Pennsylvania).

79. U.S. CONST. art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed”).

80. PAULINE CROFT, KING JAMES 11 (2003).

81. *Id.*

82. WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE NEW WORLD 147–48 (1956).

83. CROFT, *supra* note 80, at 6.

the English translation of the Bible we know as the King James Version.<sup>84</sup> Critically for our purposes, James' accession to the British crown coincided with the launch of the English project of settling the east coast of North America. In 1607, the first permanent English colony in the New World set up shop in Virginia (so-called after Elizabeth I, the Virgin Queen) and christened itself Jamestown, in honor of the reigning monarch.<sup>85</sup> From that moment until the new United States declared independence from the parent country in 1776, the histories and collective consciousness of Great Britain and its children across the Atlantic were intimately intertwined.

James I believed firmly in the divine right of kings, a governmental theory he articulated in two learned works, *The True Law of Free Monarchies*<sup>86</sup> and the *Basilikon Doron*<sup>87</sup> James' theory of kingship claimed not only heavenly sanction for monarchical rule, but also espoused royal absolutism.<sup>88</sup> Parliaments, in particular, he viewed as nothing more than advisors to be consulted or ignored as the ruler deemed best. The authority upon which law itself rested, in James' view, was the royal will and not any legislative assembly.<sup>89</sup> In *The True Law*, he wrote:

The kings, therefore, in Scotland were before any estates or ranks of men, before any parliaments were holden, or laws made, and by them was the land distributed, which at first was wholly theirs. And so it follows of necessity that kings were the authors and makers of the laws, and not the laws of the kings.<sup>90</sup>

True to his convictions, James ruled for long periods without convening Parliament; however, he could not raise the funds necessary to support his

84. See generally DAVID NORTON, *A TEXTUAL HISTORY OF THE KING JAMES BIBLE* (2005).

85. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 44–45 (1965). See generally CHARLES E. HATCH, JR. *THE FIRST SEVENTEEN YEARS: VIRGINIA 1607-1624* (1957).

86. KING JAMES I, *THE TRUE LAW OF FREE MONARCHIES: OR THE RECIPROCAL AND MUTUAL DUTY BETWEEN A FREE KING AND HIS NATURAL SUBJECTS* (Daniel Fischlin & Mark Fortier eds., 1616) [hereinafter *THE TRUE LAW*]. The work was first published in Scotland 1598 and later in England upon James' accession to the English throne.

87. KING JAMES I, *THE BASILIKON DORON OF KING JAMES VI* (1603). *The True Law* was a treatise, possibly written to counteract emerging contractarian theories of government. *The Basilikon* was a sort of ruler's manual addressed to James' eldest son Henry and, after Henry's premature death, passed on to his second son Charles, who followed James as next king of England. ASHLEY, *supra* note 63, at 21.

88. 6 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 11–12 (2d ed. 1937) [hereinafter HOLDSWORTH, VOL. VI].

89. *Id.* at 20–23, 71; CHRISTOPHER HIBBERT, *CHARLES I* 100–01 (1968).

90. KING JAMES I, *THE TRUE LAW OF FREE MONARCHIES: AND, BASILIKON DORON* 69 (Daniel Fischlin & Mark Fortier eds., 1996).

sometimes extravagant court and pay for various military ventures without occasionally turning to that body.<sup>91</sup> For their part, the notables, grandees, and propertied men of middle station who made up Parliament were concerned about royal finance, foreign policy, and religion.<sup>92</sup> They were determined that the King's spendthrift tendencies not be financed from their purses.<sup>93</sup> They were at times more bellicose, particularly towards Catholic Spain, than the King.<sup>94</sup> And the majority were devoutly Protestant and deeply suspicious of any real or perceived tendency toward backsliding into papism.

The religious conflicts of the age are of some importance to understanding tensions between James I, his son Charles I, and their Parliaments. Since Henry VIII's divorce from his first wife in 1533 and the separation of the Church of England from Rome-centered Catholicism, England had become firmly Protestant, or at least severed from the Church of Rome.<sup>95</sup> However, the transition was turbulent. Henry's methods were not gentle and stirred considerable, if fruitless, resentment.<sup>96</sup> From 1553–1558, Henry's daughter Queen Mary I tried bloodily, but unsuccessfully, to reverse the English Reformation.<sup>97</sup> Queen Elizabeth reaffirmed the Protestant character of the Church, but during her long reign, adherents of the old faith remained numerous and hopeful, even among the aristocracy.<sup>98</sup> James I, as a Scot, was himself a Protestant, but he was seen by some as distressingly tolerant of Catholics and he openly sought alliance with Catholic Spain through the marriage of his son Charles to a Spanish princess.<sup>99</sup>

Moreover, the spirit of the Protestant Reformation was always at least somewhat at odds with a theory of divinely sanctioned absolute royal rule of the sort espoused by James.<sup>100</sup> Kings as God's instruments made certain sense so long as those kings ruled under the sanction of a universal Catholic Church. But wherever the concept of a faith based on scripture accessible to all literate persons supplanted salvation through adherence to the rules of the

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91. CROFT, *supra* note 80, at 75–81, 93.

92. See, e.g., PETER ACKROYD, 3 THE HISTORY OF ENGLAND: CIVIL WAR 6–12, 22–25, 29–36 (2014).

93. ASHLEY, *supra* note 63, at 143.

94. ASHLEY, *supra* note 63, at 144–47.

95. J.J. SCARISBRICK, HENRY VIII 509–16 (1968).

96. *Id.* at 241–354.

97. EAMON DUFFY, FIRES OF FAITH: CATHOLIC ENGLAND UNDER MARY TUDOR 79 (2009); DAVID M. LOADES, MARY TUDOR: A LIFE (1989).

98. JENKINS, *supra* note 65, at 156–58, 262–63.

99. ACKROYD, *supra* note 92, at 43, 65, 68, 73–74, 77.

100. HOLDSWORTH, VOL. VI, *supra* note 88, at 128.

Church of Rome, the foundations of absolute royal rule softened. If the truth was discoverable through inquiry, rather than attainable only by submission to authority, then automatic acquiescence in the whims of hereditary rulers deserved rethinking. If the path to God ran, as the Protestants claimed, direct from man to his maker and not through ordained intermediaries, then the substitution of kingly intermediaries for priestly ones made poor sense.

At all events, as James I's reign progressed, tensions between crown and parliament increased. Among the leading parliamentarians was Sir Edward Coke, a learned judge and lawyer who believed that the common law of England proceeded from ancient sources and, on some fundamental points, superseded expressions of royal will.<sup>101</sup> This view was not admired by the King's party and in 1616, Coke was dismissed from the bench.<sup>102</sup> Coke's leading antagonist among supporters of James and the royal prerogative was Sir Francis Bacon,<sup>103</sup> famous to us as one of the great minds of the age.<sup>104</sup> In 1618, the King appointed Bacon to be Lord Chancellor of England, the highest office of the realm combining executive, judicial, and legislative responsibilities.<sup>105</sup> Three years later, in 1621, James was obliged by extreme financial exigency to call only his third parliament since coming to the throne in 1603.<sup>106</sup>

The parliamentarians ultimately came through with the supplies James required, but they used their leverage to seek reforms of various deficiencies of royal government. Among these were corruption in the system of raising funds for the crown by granting royal licenses and monopolies on certain kinds of trade,<sup>107</sup> and corruption and mismanagement in what were known as courts of chancery which operated under the aegis of the Lord Chancellor and derived their authority from the royal prerogative rather than the legal precedents that governed the common law courts beloved of Lord Coke.<sup>108</sup>

101. HOLDSWORTH, VOL. VI, *supra* note 88, at 84; 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 428, 430, 453–54 (1931) [hereinafter HOLDSWORTH, VOL. V].

102. Damien X. Powell, *Why was Sir Francis Bacon Impeached? The Common Lawyers and the Chancery Revisited: 1621*, 81 HISTORY 511 (1996).

103. *Id.* at 515–16.

104. *See generally* BENJAMIN FARRINGTON, THE PHILOSOPHY OF FRANCIS BACON: AN ESSAY ON ITS DEVELOPMENT FROM 1603 TO 1609 (1964).

105. Peter Michael Urbach, Anthony M. Quinton, and Kathleen Marguerite Lea, *Francis Bacon*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Francis-Bacon-Viscount-Saint-Alban> (last visited Mar. 31, 2019).

106. ACKROYD, *supra* note 92, at 70.

107. *See* JOHN BOWLE, CHARLES I 58–59 (1975).

108. *See infra* notes 109–110, and accompanying text. *See also*, ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 102–04 (1923) (noting long history of opposition by Commons to courts of chancery).

In March 1621, parliamentary investigators reported that Sir Giles Mompesson, who presided over the licensure of inns and held the gold and silver thread monopoly, had been up to financial shenanigans.<sup>109</sup> At about the same time, a parliamentary committee investigating the chancery courts discovered that Chancellor Bacon had been accepting generous gifts from litigants in cases over which he presided.<sup>110</sup> Bacon's receipt of bribes cannot have been a great surprise since litigant payments to judges were a common practice of the period, frowned upon by the high-minded, but rarely the source of any official rebuke.<sup>111</sup> In any case, the House of Commons, to what must have been general astonishment, excavated the forgotten impeachment mechanism from under a century-and-a-half of dust and used it, first, to charge Mompesson with various forms of corruption and abuse of authority and later to charge Bacon with multiple counts of bribery. Mompesson was convicted and banished, after the King himself came down to Parliament to disavow abuses of the royal grants.<sup>112</sup> Bacon, perhaps assuming that the ordinariness of his infraction would spare him any serious punishment, confessed.<sup>113</sup> The Lords convicted him, King James was either unwilling or unable to save his chief servant, and Bacon was stripped of his offices and condemned to relative penury for the rest of his days.<sup>114</sup>

Three points emerge from these first impeachments of the Stuart period. First, in rediscovering impeachment as a means of removing royal officials and ministers, Parliament signaled its awakening from long torpor as a serious legislative counterweight to royal authority, or what we would think of as the executive branch of government. Second, impeaching Bacon was part of a larger effort to assert the primacy of law over executive branch absolutism. Finally, the convictions of both Mompesson and Bacon struck blows against the misuse of government office for self-enrichment. All three themes resonate in the present day.

At the close of James I's reign, in 1624, Parliament took another ministerial scalp by impeaching the Earl of Middlesex, the Lord High

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109. THOMAS B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 1119–32 (1816) [hereinafter HOWELL, VOL. II]. Note that the dates in HOWELL, VOL. II are different than those cited in the text. It appears that Howell used the dates noted in the original records, and does not adjust for the official change to the Gregorian Calendar which occurred in 1752. I.M. Kerzhner, *Converting Dates from the Julian (Old Style) or French Republican (Revolutionary) Calendars to the Gregorian (New Style) Calendar*, 33 TAXON 410 (1984).

110. HOWELL, VOL. II, *supra* note 109, at 1086–120.

111. BOWLE, *supra* note 107, at 59.

112. HOWELL, VOL. II, *supra* note 109, at 1125–32.

113. *Id.* at 1102–04.

114. *Id.* at 1112–14.

Treasurer. The true reason of Parliament's enmity may have been the Earl's support for James' unpopular pro-Spanish foreign policy, but he was removed on charges of corruption.<sup>115</sup> Though convicted and temporarily imprisoned and stripped of his offices, he was quickly pardoned and restored to grace after King James died in 1625 and was succeeded by King Charles I.<sup>116</sup>

Charles I inherited his father's absolutist view of monarchy with its attendant disdain for parliaments. That alone would have ensured some tension between the king and the notables who populated Parliament, but Charles seems to have had fewer political gifts than his father<sup>117</sup> and he assumed the throne in an age increasingly disinclined to unquestioning acceptance of claims of authority, whether secular or religious. Tensions between Charles and the parliamentarians eventually produced open warfare, the defeat of the royalist forces by Oliver Cromwell's New Model Army, Charles' capture,<sup>118</sup> imprisonment, and finally, in 1649, his execution.<sup>119</sup> The details of the politics of Charles' turbulent reign are far beyond the scope of this discussion. Instead, we will address only the use of impeachments as a tool in the disputes between king and parliament.

In 1626, only two years after Charles' accession to the throne, Parliament impeached George Villiers, the Duke of Buckingham, who had been a favorite, and possible lover, of James I and remained the closest confidant of young King Charles I.<sup>120</sup> Buckingham, a man of modest origins, made his way into royal affection through good looks and considerable intelligence and charm. Once firmly ensconced in royal favor, he wielded great personal power and enriched his family and friends liberally with titles, property, and valuable royal concessions.<sup>121</sup> The rapid rise of a social climber like Villiers would have stirred resentment in any case,<sup>122</sup> but he was rendered still less popular by being associated with the unsuccessful and unpopular attempt to marry Charles to the daughter of the Catholic king of

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115. BOWLE, *supra* note 107, 79–80; PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 354.

116. R.H. TAWNEY, *BUSINESS AND POLITICS UNDER JAMES I: LIONEL CRANFIELD AS MERCHANT AND MINISTER* (1958).

117. HOLDSWORTH, Vol. VI, *supra* note 88, at 17.

118. BOWLE, *supra* note 107, at 280–81.

119. ASHLEY, *supra* note 63, at 216.

120. HIBBERT, *supra* note 89, at 29–32.

121. *Id.* at 31.

122. BOWLE, *supra* note 107, at 99–100 (describing some among the older aristocracy complaining about “abuse of honor” by arrivistes who gained titles through royal favor or purchase).

Spain,<sup>123</sup> as well as the successful, but also controversial, marriage of Charles to the equally Catholic French princess Henrietta Maria.<sup>124</sup> A number of botched military ventures including a failed naval assault on the port of Cadiz in 1625,<sup>125</sup> gave Charles's second parliament an excuse to seek Buckingham's impeachment in 1626.

King Charles, who adored Buckingham, prevented the matter from going to trial in the House of Lords with the simple expedient of dismissing Parliament.<sup>126</sup> The charges against Buckingham, which the formal articles of impeachment labeled "misdemeanors, offences, misprisions, and crimes,"<sup>127</sup> are nonetheless revealing for our purposes. They fall into at least six categories: first, acquiring a "plurality of offices" that were beyond the ability of one man to perform; second, buying, selling, or dispensing royal offices and titles for his own benefit or that of his family; third, general misappropriation of royal funds concealed by misuse of the king's personal seal (the "privy seal"); fourth, mismanaging his responsibilities as Lord Admiral of England and Ireland so that trade diminished and piracy increased; fifth, being responsible for the loan of certain English ships to the French king to use against Protestant Huguenots at Rochelle; and sixth, suggesting that King James take some useless medicines during his final illness.<sup>128</sup>

Few, if any, of these would have been considered either ordinary crimes or treason against the crown. Unauthorized use of the privy seal, if proven, might have fit into either or both categories. Buying and selling offices may under certain circumstances have violated the law, but it was perfectly legal in many situations and was at worst a venial offense in those days.<sup>129</sup> And there is no indication that either James I or Charles I disapproved of Buckingham's activities. The charges involving naval matters express parliamentary outrage on two points—Buckingham's persistent military incompetence or misfortune and Protestant parliamentarians' suspicion that the courts of both James I and Charles I were soft on Catholicism. But neither allegation made out either a crime or treason. The business about the

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123. PEREZ ZAGORIN, *THE COURT AND THE COUNTRY: THE BEGINNING OF THE ENGLISH REVOLUTION* 63 (1969).

124. ACKROYD, *supra* note 92, at 108–09.

125. BOWLE, *supra* note 107, at 95–96.

126. *Id.* at 100.

127. HOWELL, VOL. II, *supra* note 109, at 1308.

128. *Id.* at 1307–21.

129. PEREZ ZAGORIN, *REBELS AND RULERS 1500–1660: SOCIETIES, STATES AND EARLY MODERN REVOLUTION* 100 (1982); Douglas W. Allen, *Purchase, Patronage, and Professions: Incentives and the Evolution of Public Office in Pre-Modern Britain*, 161 J. INSTITUTIONAL THEORETICAL ECON. 57 (2003), <http://www.sfu.ca/~allen/venality.pdf>; John Miller, *The Potential for 'Absolutism' in Later Stuart England*, 69 HISTORY 187 (1984).

medicines was merely a nasty, but almost certainly baseless, insinuation that Buckingham had tried to poison the old king.

In sum, Parliament believed impeachment to be proper for ministers who employed the powers of office for self-enrichment, grossly mismanaged their governmental responsibilities, or betrayed the fundamental interests of the country in dealings with foreign powers. Buckingham's impeachment has been said to have decisively "negated Charles I's contention that not only was he personally above the law, but also his ministers acting at his orders."<sup>130</sup> But it is not clear that Buckingham's true offenses were violations of law in the conventional sense. There were instead offenses against what the notable personages who made up Parliament perceived to be the proper constitutional relationship between themselves and the crown, and also against parliamentarians' ideas of proper national policy.

Charles managed to forestall further use of impeachments against his ministers for the next fourteen years by keeping parliaments infrequent and short in duration.<sup>131</sup> But in 1640, financial exigencies forced Charles to reconvene Parliament and accede to an Act stipulating that it could not be dissolved without the consent of its members.<sup>132</sup> That body, known as the Long Parliament, remained formally in session until 1660 and did not dissolve even during the war that dethroned King Charles.<sup>133</sup>

When Parliament assembled in September 1640, King Charles was not only in financial distress, but was facing armed rebellion by his Scottish subjects, political chaos in Ireland, and widespread dissension in England.<sup>134</sup> The leaders of the newly assembled legislature, knowing that the king's situation was desperate, were determined to use their leverage to make significant reforms.<sup>135</sup> They resolved to reassert parliamentary control over taxation and revenue. Many of them were concerned that the king's dedication to the Protestant religion was suspect and distressed at the

130. HOLDSWORTH, VOL. I, *supra* note 28, at 382.

131. *Parliaments, 1604-1629 The reigns of James I and Charles*, THE HISTORY OF PARLIAMENT, <http://www.historyofparliamentonline.org/research/parliaments/parliaments-1604-1629> (last visited July 18, 2018); *Parliaments, 1640-1660 Civil War, Commonwealth and Protectorate*, THE HISTORY OF PARLIAMENT, <http://www.historyofparliamentonline.org/research/parliaments/parliaments-1640-1660> (last visited July 18, 2018). However, in 1637 Parliament did impeach a group of judges for ruling that it was lawful for the King to collect the so-called ship money tax without the consent of Parliament. D.L. Keir, *The Case of Ship Money*, 52 L.Q. REV. 546 (1936); T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS (1816) [hereinafter HOWELL, VOL. III].

132. BOWLE, *supra* note 107, at 177–78.

133. ACKROYD, *supra* note 92, at 360–61.

134. Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2062 (2002).

135. HOLDSWORTH, VOL. VI, *supra* note 88, at 112–14, 135–36.

aggressive hostility of his ecclesiastical appointees like Archbishop of Canterbury William Laud to the religious reform movement we know as Puritanism.<sup>136</sup> Most fundamentally, the parliamentarians rejected Charles' disposition to personal rule. In modern terms, their quarrel with Charles was a constitutional argument. Charles believed he was anointed by God to govern subject to no lesser authority.<sup>137</sup> Parliament viewed the monarch as a pillar of the state, to be sure, but also as constrained by the law enacted by Parliament in statutes and declared by judges of the common law courts.<sup>138</sup>

In their view of the law, the leaders of the Long Parliament were intellectual heirs of Sir Edward Coke, who had died in 1634,<sup>139</sup> but whose influence had if anything grown since his falling-out with James I in 1616. Accordingly, they sought to reform the legal system, in particular the practices of two special courts, the Court of Star Chamber<sup>140</sup> and the Court of High Commission,<sup>141</sup> which derived their authority from the royal prerogative rather than either common or statutory law. The Court of Star Chamber enforced Charles' proclamations, which it held to have the force of law.<sup>142</sup> The Court of High Commission was the highest religious court in England, but also had wide civil jurisdiction.<sup>143</sup> Its powers seem to have been wielded particularly aggressively against Puritans and others disposed to reform of the established church, a faction increasingly well-represented in Parliament.

The parliamentarians abolished the Courts of Star Chamber and High Commission in 1641,<sup>144</sup> but recognized that their program also required removing or neutering the King's most powerful ministers and retainers. Accordingly, they deployed impeachments liberally in the first three years of the Long Parliament, bringing at least twenty sets of charges against more

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136. *Id.*

137. C.V. WEDGEWOOD, *A COFFIN FOR KING CHARLES 4* (1964).

138. ACKROYD, *supra* note 92, at 133–34.

139. *See generally* CATHARINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE: 1552–1634* (1990).

140. Edward P. Cheyney, *The Court of Star Chamber*, 18 *AM. HISTORY REV.* 727, 746–50 (1913).

141. JOHN SOUTHERDEN BURN, *THE HIGH COMMISSION: NOTICES OF THE COURT AND ITS PROCEEDINGS* (1865), <https://babel.hathitrust.org/cgi/pt?id=hvd.hx3iig;view=1up;seq=5>.

142. HOLDSWORTH, *VOL. VI*, *supra* note 88, at 31.

143. *See generally* BURN, *supra* note 141.

144. Cheyney, *supra* note 140, at 750; *THE ACT FOR THE ABOLITION OF THE COURT OF STAR CHAMBER* (1641), *reprinted in* *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660*, at 176–80 (Samuel Rawson Gardiner ed., 1906), <http://oll.libertyfund.org/pages/1641-the-act-for-the-abolition-of-the-court-of-star-chamber>; *THE ACT FOR THE ABOLITION OF THE COURT OF HIGH COMMISSION* (1641), *reprinted in* *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660*, at 181–83 (Samuel Rawson Gardiner ed., 1906), <http://oll.libertyfund.org/pages/1641-the-act-for-the-abolition-of-the-court-of-high-commission>.

than thirty individual defendants.<sup>145</sup> The impeachments of 1640 and 1641 are perhaps of most current significance because they struck both at the King's most able retainers and through them at his theory of kingship.

King Charles' most forceful and energetic secular official was Thomas Wentworth, Earl of Strafford.<sup>146</sup> Curiously, before joining the King's party and rising to an earldom, Wentworth had been a member of the House of Commons himself, was an active supporter of the 1628 Petition of Right (which endeavored to set limits on royal power),<sup>147</sup> and had even been imprisoned in the Tower of London for refusing to pay the "forced loans" Charles used early in his reign to finance his government.<sup>148</sup> However, as soon the Petition of Right passed Parliament and was (grudgingly) accepted by Charles, Wentworth switched sides.<sup>149</sup> Once committed to the King's cause, Earl Strafford, née Wentworth, became an ardent defender of the royal prerogative and the most effective instrument of Charles' preferred absolutist mode of governance. In Ireland, where he served as the Lord Deputy (essentially the king's viceroy) beginning in 1633, Strafford was particularly aggressive in using prerogative power to sweep away opposition to a program of ruthlessly efficient administration.<sup>150</sup> Recalled to England in 1639, Strafford urged the King to adopt the same sorts of unyielding tactics that had proven successful in Ireland.<sup>151</sup> The English proved less tractable.

King Charles' most prominent servant among the churchmen was William Laud, consecrated Archbishop of Canterbury and thus head under Charles himself of the Church of England.<sup>152</sup> Laud was determined to regularize religious practice and to stamp out dissenters of a Puritan bent. The particulars of his religious project are of less importance than his methods because he shared with Strafford authoritarian instincts and disdain for any law not founded on the will of the King. Laud ruthlessly wielded prerogative courts like the Courts of High Commission and Star Chamber to suppress those he felt to be enemies of true religion or its royal head.<sup>153</sup> For example, in 1637, William Prynne, John Bastwick, and Henry Burton were

145. STEPHEN, *supra* note 34, at 159.

146. HOLDSWORTH, VOL. VI, *supra* note 88, at 73–77; C.V. WEDGWOOD, THOMAS WENTWORTH FIRST EARL OF STRAFFORD, 1593–1641: A REVALUATION (1961).

147. See Harold Hulme, *Opinion in the House of Commons on the Proposal for a Petition of Right, 6 May, 1628*, L THE ENG. HIST. REV. 302, 302–06 (1935); HOLDSWORTH, VOL. VI, *supra* note 88, at 74–75.

148. LERNER, *supra* note 134, at 2064–65.

149. ACKROYD, *supra* note 92, at 139.

150. HUGH F. KEARNEY, STRAFFORD IN IRELAND, 1633–41: A STUDY IN ABSOLUTISM (2d ed. 1989).

151. ACKROYD, *supra* note 92, at 186–87, 192.

152. See generally CHARLES CARLTON, ARCHBISHOP WILLIAM LAUD (1987).

153. *Id.* at 77–80.

all sentenced to have their ears cut off for libeling the Church and its bishops.<sup>154</sup>

Laud was a regular correspondent with Strafford and the two commiserated over the impediment to royal government presented by the pestilential common law lawyers and courts. In 1633, just before becoming Archbishop of Canterbury, Laud wrote Wentworth in Ireland and warned him not to expect too much assistance from Laud in his new position because, “the Church it is so bound up in the forms of the Common Law, that it is not possible for me, or for any Man to do that good which he would, or is bound to do.”<sup>155</sup> In his reply, Strafford expressed his determination that the king’s objectives would not be thwarted by the common law courts, declaring that he would not rest until he saw his royal “Master’s power and greatness set out of wardship and above the exposition of Sir Edward Coke and his Year Books.”<sup>156</sup> In the ensuing years, both men became, if anything, less tolerant of legalistic opposition to their projects and more committed to the king’s absolute authority.

Shortly after Parliament convened in the fall of 1640, the Commons impeached Strafford on charges of high treason. The articles are long, detailed, and at times delve into seemingly trivial matters, but they allege five general theories: first, that Strafford, through both his advice to the king and his personal actions had attempted to “subvert the fundamental laws and government of the realms of England and Ireland, and instead thereof, to introduce an arbitrary and tyrannical government against law”;<sup>157</sup> second, that he corruptly enriched himself;<sup>158</sup> third, that he colluded with Catholics to encourage that religion and to secure Catholic support in his “tyrannical designs”;<sup>159</sup> fourth, that he mismanaged the unsuccessful military sally against the invading Scots in mid-1640;<sup>160</sup> and fifth that he had counseled the king to bring an Irish army to England to make war on his subjects.<sup>161</sup>

154. BOWLE, *supra* note 107, at 149–50.

155. Letter from Wm. Laud to Thomas Wentworth, Lord Deputy (Sept. 9, 1633), *reprinted in* GEORGE RADCLIFFE, *THE EARL OF STRAFFORD’S LETTERS AND DISPATCHES* 111 (1739).

156. G.M. TREVELYAN, *ILLUSTRATED HISTORY OF ENGLAND* 396 (1956); RICHARD BAGWELL, *IRELAND UNDER THE STUARTS AND DURING THE INTERREGNUM*, VOL. 1 1603-1642, at 192 (1909).

157. HOWELL, VOL. III *supra* note 131, at 1385–86 (noting this is a quote from article one of the first summary articles of impeachment levied against Strafford).

158. *Id.* at 1386. This is the essence of article three of the first summary articles of impeachment, expanded on at length in supplemental articles seemingly filed later, particularly articles nine through fourteen. *Id.* at 1391–94.

159. *Id.* at 1386.

160. *Id.*

161. This charge has always been controversial because it turned on interpretation of an ambiguous statement by Strafford that could have meant either that the Irish army should be used to confront the Scots forced mustered in the north, or that it should be used to suppress dissidents

Note that these articles include two types of charges prominent in Buckingham's case and other earlier impeachments—abuse of office for self-enrichment and mismanagement of government or military affairs. The novelty in Strafford's impeachment is the charge of promoting tyranny through subversion of law. What makes this allegation particularly striking is that it depended on Coke's view that law exists independent of the will of the King. Everyone knew that all Strafford's actions were taken with the King's sanction in pursuit of the King's policies. Thus, the "arbitrary and tyrannical government against law"<sup>162</sup> Strafford was accused of promoting was the absolute rule of the king administered through unaccountable ministers and prerogative courts. The articles also alleged that Strafford promoted tyranny by encouraging the king to dismiss Parliament.<sup>163</sup> In effect, Commons charged Strafford with high treason for putting into action Charles' theory of kingship.<sup>164</sup> Even the charge that Strafford had urged Charles to bring the "foreign" Irish army to England to levy war against the people only makes sense if one believes that a king has no right to use force against rebellious subjects.

All the allegations in Strafford's articles of impeachment were particulars in the overarching capital charge of high treason. As multiple commentators have observed, this necessarily implied the existence of two theories of treason—there could be treasons against the person of the monarch, but also treason against the constitution of the state.<sup>165</sup> John Pym, leader of the Commons, argued when prosecuting Strafford before the House of Lords, that "this crime of subverting the laws, and introducing an arbitrary and tyrannical government, is contrary to the pact and covenant between a King and his people . . . the legal union of allegiance and protection."<sup>166</sup> He added that, "to alter the settled frame and constitution of government is treason in any state."<sup>167</sup>

Despite Pym's confident declaration, the Lords hesitated to convict to Strafford, in part because Strafford was able to refute the factual basis of some charges and, as some scholars have argued, in part because there was lingering doubt that what Strafford had done amounted to treason as

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in England itself. The first reading would have been unobjectionable, and as noted, even the second was treason only if one believed that a king may not use force against his own rebellious subjects.

162. HOWELL, VOL. III, *supra* note 131, at 1385–86.

163. *Id.* at 1388–89.

164. D. ALAN ORR, TREASON AND THE STATE: LAW, POLITICS AND IDEOLOGY IN THE ENGLISH CIVIL WAR 61 (2002) ("Essentially, Strafford stood trial for his role in Charles I's personal rule of 1629-40. . .").

165. BERGER, *supra* note 10, at 33.

166. 8 JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS IN LAW, REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS 666 (1721).

167. *Id.* at 669.

previously defined by law.<sup>168</sup> Twentieth century lawyer and politician F.E. Smith, Lord Birkenhead, himself a Lord Chancellor of England, maintained that in helping Charles to, “substitute arbitrary government for the rule of law,” Strafford committed a “high crime” and a “heinous” offense, but not the technical crime of treason because his behavior did not violate the statute defining treason.<sup>169</sup> In the end, for reasons not fully understood, Parliament abandoned the Commons’ articles of impeachment and substituted a bill of attainder alleging high treason on the same grounds. It passed both houses.<sup>170</sup> Unlike an impeachment, attainder required the consent of the sovereign, but Charles yielded to pressure, gave his assent, and Strafford was beheaded on May 12, 1641.<sup>171</sup>

The Commons moved against Archbishop Laud at the same time as Strafford. Laud, too, was arrested and impeached by the House of Commons for high treason in December 1640,<sup>172</sup> but he was imprisoned and his trial was delayed until 1644.<sup>173</sup> Several sets of articles of impeachment were prepared against Laud, but both sets mirrored those against Strafford in

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168. *See generally* ORR, *supra* note 164, at 62.

169. Lord Birkenhead observed:

Was Strafford guilty of treason? The answer in strict law must clearly be in the negative. Treason is an offence against the allegiance due to the Sovereign in aid and counsel. The underlying theory of the Commons that there were fundamental laws, and that to aim at overturning them was treason, is erroneous. In legal theory there are in this country no laws, not even the Act of Settlement or the Act of Union, which Parliament may not alter as easily as a Statute providing for by-laws in a country parish. To break the law is a crime. To break the laws upon which civil liberty depends is a high crime. But to call treason that which falls clearly outside the terms of the Statute of Treason does not justify a conviction. He was charged with treason, but at best the evidence proved offences, heinous indeed to the last degree, but not treasonable. Nevertheless, if one sets aside the purely legal aspect of the case and regards it from the wider standpoint, there can be little doubt that Charles and his advisers were working to substitute arbitrary government for the rule of law. Strafford had shown himself to be a grave menace to the constitution, and in that untechnical sense he was a traitor.

F.E. SMITH, EARL OF BIRKENHEAD, *FAMOUS TRIALS OF HISTORY* 44–45 (1926). More recent commentators have taken the opposite view, *see, e.g.*, ORR, *supra* note 164, at 61–100.

170. ACKROYD, *supra* note 92, 210, 213.

171. *Id.* at 98.

172. *See* 4 T.B. HOWELL, *COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS* 315 (1816) [hereinafter HOWELL, VOL. IV]; CARLTON, *supra* note 120, at 200–01.

173. *Id.* at 214.

critical respects.<sup>174</sup> The principal charge, repeated in various forms, was that Laud had committed treason by endeavoring to set up an arbitrary and tyrannical government, destroy Parliament, and subvert the rule of law.<sup>175</sup> The primary difference between the Laud and Strafford impeachment charges was that Laud was alleged to have promoted tyrannical government primarily in the ecclesiastical sphere of the king's sovereignty, while Strafford's transgressions fell in the secular realm.<sup>176</sup> The technical treason case against Laud was, if anything, weaker than that against Strafford. Laud had no military authority and could not be charged with marshaling foreign armies against the people. His actions, however brutal, high-handed, and subversive of Parliament and the common law courts, were taken both with the King's sanction and through established institutions like the courts of Star Chamber and High Commission. Indeed, it was explicitly argued on Laud's behalf that, though the allegations against him may indeed have been "crimes and misdemeanors," they were not in law treason.<sup>177</sup> Nonetheless, Parliament viewed Laud as a dangerous pillar of the King's disposition to absolutism. In late October 1643, Commons suddenly abandoned the formal impeachment process and drew up a bill of attainder asserting that the charges in Laud's impeachment had been proven, thus meriting his attainder for high treason.<sup>178</sup> Both houses passed the bill in January 1644, rejected a pardon of the Archbishop the King had issued the previous year by deeming it invalid against parliamentary condemnation, and sent Laud to the executioner.<sup>179</sup>

Charles I's conflict with his Parliament degenerated into the English Civil War (1642-1651) and led to his own execution, the kingless Commonwealth of England (1649-1660), the Cromwell Protectorate, and finally in 1660 the restoration of the English monarchy under Charles II.<sup>180</sup> Although Parliament invited the Stuart monarchs back to the throne, it remained protective of its own authority and suspicious of royal overreach. One of Charles II's chief ministers, the Earl of Clarendon, a stout monarchist, fell afoul of his political enemies in Parliament beginning in 1663. Two

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174. Apparently, there is some doubt about the exact terms of the articles, due in part to the absence of contemporaneous records and in part to the fact that Laud's trial did not occur for five years after his arrest and multiple sets of charges seem to have been drawn against him. *Id.* at 217.

175. HOWELL, VOL. IV, *supra* note 172, at 321–30 (articles passed by Commons in December 1640); *id.* at 332–36 (additional articles passed in October 1643). He was also accused of subverting the Protestant faith in England and promoting Catholicism, as well as bribery.

176. ORR, *supra* note 163, at 101–02.

177. HOWELL, VOL. IV, *supra* note 172, at 585; CARLTON, *supra* note 152, at 218, 222.

178. HOWELL, VOL. IV, *supra* note 172, at 599; CARLTON, *supra* note 152, at 223.

179. HOWELL, VOL. IV, *supra* note 172, at 600; CARLTON, *supra* note 152, at 223.

180. *See generally* RICHARD CUST, CHARLES I: A POLITICAL LIFE (2005); HIBBERT, *supra* note 89.

efforts were made to impeach him: the first was widely deemed frivolous, but the second, in 1667, succeeded in driving him from office.<sup>181</sup> The primary charges in the second impeachment involved supposed advice to the king to raise a standing army and govern through it rather than Parliament, seeking money for the crown from France in order to evade parliamentary control of royal finance, and abuses of habeas corpus for sending prisoners out of England and holding them without trial.<sup>182</sup> The parallels to the cases of Strafford and Laud are plain; again the essence of the allegations was that Clarendon was subverting the constraints on monarchy imposed by the elected parliament and the common law. Clarendon's impeachment was technically unresolved because he fled to France before final votes could be taken in the House of Lords, but Parliament thereafter passed a bill of banishment to keep him out of the country.<sup>183</sup>

The final notable impeachment under the Stuart kings was that of the Earl of Danby in 1678. Still at loggerheads with Parliament over finance, Charles II authorized Danby to write letters to an intermediary, offering the French king British neutrality in the Franco-Dutch war for a huge cash annuity paid to Charles.<sup>184</sup> When the letters leaked, Parliament promptly impeached Danby for treason.<sup>185</sup> The form of the charge was in one respect strikingly similar to those against Clarendon, Laud, and Strafford in that he was alleged to have "endeavored to subvert the ancient and well established form of government in this kingdom, and instead thereof to introduce an arbitrary and tyrannical way of government."<sup>186</sup> The essence of the complaint was also similar to prior impeachments in that Commons was perturbed that Danby was simultaneously attempting to circumvent parliamentary control over the king's revenue and carrying out a pro-French foreign policy which many parliamentarians believed contrary to the country's interests. The Lords were markedly reluctant to convict a minister for treason for carrying out the king's policy, however obnoxious they found that policy to be, but the matter was not resolved because the King prorogued Parliament to stop the proceedings. A later Parliament, nonetheless, revived

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181. ACKROYD, *supra* note 92, at 398–400.

182. 6 T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 330–34 (1816) [hereinafter HOWELL, VOL. VI]. Clarendon was also charged with the by-now customary allegations of corruption and official incompetence. *Id.* at 333–34.

183. See Clayton Roberts, *The Impeachment of the Earl of Clarendon*, 13 CAMBRIDGE HIST. J. 1, 15 (1957); HOLDSWORTH, VOL. VI, *supra* note 88, at 174–78.

184. 11 T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 600–18 (1816) [hereinafter HOWELL, VOL. XI].

185. *Id.* at 619–21.

186. *Id.* at 620–27.

the charges and ruled that an attempt by the King to pardon Danby was ineffective against an impeachment.<sup>187</sup> In the end, Danby spent some years in custody before the whole business was dropped.<sup>188</sup>

## V. The Glorious Revolution of 1688 and the Last Large Flurry of British Impeachments (1715-1716)

The last king of the Stuart lineage was James II.<sup>189</sup> His Catholicism and various of his policies proved so obnoxious to leading elements in Parliament and England at large, that they invited William of Orange the statholder of the Netherlands and husband of Mary (James II's daughter) to invade and assume the British crown jointly with Mary.<sup>190</sup> He did so, successfully and largely bloodlessly, in 1688. The removal of James II and ascendance of William and Mary became known as the "Glorious Revolution."<sup>191</sup> It is important for our purposes, primarily because a condition of William and Mary's assumption of the throne was the passage and acceptance by the crown of a Bill of Rights that codified increased parliamentary authority at the expense of royal prerogatives.<sup>192</sup> Although the transition would not be complete for many years, the Glorious Revolution is commonly said to be the beginning of constitutional monarchy in Britain. Accordingly, as ministers and officials became less and less agents of the monarchs and more and more the creatures of Parliament, impeachment assumed decreasing importance.

There was a flurry of impeachments in 1715-1716 occasioned by the turmoil caused by the death in 1714 of Queen Anne, the daughter and successor of William and Mary,<sup>193</sup> and the accession of George I, a

187. BERGER, *supra* note 10, at 45.

188. ACKROYD, *supra* note 92, at 451.

189. *Stuart Family Tree*, NAT'L ARCHIVES, <http://www.nationalarchives.gov.uk/education/resources/jacobite-1715/stuart-family-tree/>.

190. PLUCKNETT, *CONCISE HISTORY*, *supra* note 17, at 59; HOLDSWORTH, VOL. VI, *supra* note 88, at 193-94; DAVID OGG, *ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III* (2nd ed. 1957).

191. PLUCKNETT, *CONCISE HISTORY*, *supra* note 17, at 59. *See generally* J.R. JONES, *THE REVOLUTION OF 1688 IN ENGLAND* (1988).

192. HOLDSWORTH, VOL. VI, *supra* note 88, at 240-43; KEITH, *supra* note 30, at 8-9 (enumerating the provisions of the Bill of Rights of 1689).

193. Mary died of smallpox in 1694. Abbas M. Behbehani, *The Smallpox Story: Life and Death of an Old Disease*, 47 *MICROBIOLOGICAL REV.* 455, 458 (1983), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC281588/pdf/microrev00019-0005.pdf>. William continued to reign until his

Hanoverian prince who assumed the throne only because he was Anne's closest Protestant relative.<sup>194</sup> Anne's death raised hopes for restoration of a Catholic monarchy in the person of James Francis Edward Stuart, the "Old Pretender." The result was armed rebellion in Scotland, known as the Jacobite Rising of 1715, which was joined by a number of Scottish peers.<sup>195</sup> When the rising failed, seven peers were impeached for high treason and several were executed.<sup>196</sup> Likewise, after George I was installed on the throne, parliamentary critics of the foreign policy pursued under Queen Anne impeached the Earl of Oxford, Viscount Bolingbroke, and the Earl of Strafford in 1715 for giving "pernicious" advice to the queen to enter into the Treaty of Utrecht in the War of the Spanish Succession.<sup>197</sup>

## VI. The Impeachment of Warren Hastings

Impeachment largely disappeared from the British scene once the issue of parliamentary supremacy was settled by the Glorious Revolution and its aftermath, and the issue of Protestant succession was firmly resolved by the accession of George I and the failure of the Jacobite rising of 1715. The only notable exception was the impeachment of Warren Hastings, Governor General of India, that, by happenstance, was beginning just as the Philadelphia convention commenced in 1787.

At the time Americans achieved independence, there had not been an impeachment of a Crown official for misconduct in office since 1725<sup>198</sup> and

death in 1702 after a fall from a horse. 8 RICHARD LODGE, *THE HISTORY OF ENGLAND FROM THE RESTORATION TO THE DEATH OF WILLIAM III* 450 (1910).

194. ANDREW C. THOMPSON, *GEORGE II: KING AND ELECTOR* 95 (2011).

195. 15 T.B. HOWELL, *COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS* 1129, 1159 (1816) [hereinafter HOWELL, VOL. XV].

196. HOWELL, VOL. XV, *supra* note 195, at 762, 806; SIMPSON, *supra* note 12, at 150–51.

197. SIMPSON, *supra* note 12, at 62; BERGER, *supra* note 10, at 71–72. The charges against Oxford and Bolingbroke were couched as both treason and high crimes and misdemeanors. Strafford's charges were labeled high crimes and misdemeanors. Bolingbroke was attainted and later pardoned. SIMPSON, *supra* note 12, at 152. Strafford was never tried. *Id.* at 156. Oxford was tried and acquitted. *Id.* at 162. In addition, in 1715, the Duke of Ormond was impeached for treasonous collusion with French forces while acting as commander of British forces in the Netherlands during the war. HOWELL, VOL. XV, *supra* note 195, at 1007.

198. In 1725, the Earl of Macclesfield was impeached, convicted, fined, and imprisoned for corruption during his term as Lord Chancellor. 16 T.B. HOWELL, *COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS* 767–68 (1816). The impeachment procedure was also employed in 1746 to try and execute Simon Fraser, Lord Lovat, for his role in the Scottish rebellion of 1745. 18 T.B. HOWELL, *COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS* 529–857 (1816). Lovat's demise differed from the sorts of impeachment that concern us here because the choice of the impeachment vehicle had nothing to do with imposing legislative constraint on crown policy or removing a corrupt minister. Lord Lovat was a peer of

the practice was on the verge of becoming a mere relic of an earlier age. However, complaints about Hastings' conduct in India had been brewing since his retirement and return to Great Britain in 1785. In April 1786, the great orator, conservative essayist,<sup>199</sup> and supporter of American liberties,<sup>200</sup> Edmund Burke, presented specific accusations against Hastings in the House of Commons.<sup>201</sup> On May 10, 1787, Commons approved articles of impeachment<sup>202</sup> and on May 21, 1787, less than a week before the Philadelphia convention was called to order on May 27, Hastings was arrested and taken before the House of Lords to hear the charges.<sup>203</sup>

Hastings' impeachment trial before the Lords did not begin until February 1788, and it dragged on at irregular intervals for seven years until, in April 1795, he was acquitted on all charges.<sup>204</sup> The *verdict* is unimportant for our purposes because it was handed down long after the American constitution was ratified in 1788, and thus could have had no influence on either the Philadelphia drafters or the state ratifiers of the American impeachment mechanism. But the existence of the Hastings impeachment and the nature of the charges were well-known in 1787-88, and, as mentioned at the outset of this Article, they were specifically mentioned in the key exchange between George Mason and James Madison that produced the constitutional definition of impeachable conduct: "treason, bribery, or other High Crimes and Misdemeanors."<sup>205</sup>

Hastings' case was a cause célèbre throughout the English-speaking world, and was of particular fascination to newly independent Americans because it centered on Hastings' conduct as the chief administrative officer of the major British colonial possessions outside of the western hemisphere—the growing accumulation of territory that would in time become the Indian Raj. From 1772 to 1785, Hastings had served as the first Governor General of British territories and interests in India.<sup>206</sup> The position

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the realm who had taken up arms against the king and, according to the law of the time, could only be condemned to death by trial in the House of Lords. Hence, his impeachment.

199. Perhaps Burke's most famous written work was EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

200. SAMUEL B. GRIFFITH, IN DEFENSE OF THE PUBLIC LIBERTY 102, 161–62 (1976); CHARLES R. RITCHESON, EDMUND BURKE AND THE AMERICAN REVOLUTION (1976), <https://www.questia.com/read/11097739/edmund-burke-and-the-american-revolution>.

201. SMITH, *supra* note 169, at 168–69.

202. *Id.* at 170.

203. PATRICK TURNBULL, WARREN HASTINGS 205 (1975).

204. 4 SPEECHES OF THE MANAGERS AND COUNSEL IN TRIAL OF WARREN HASTINGS, at lxiv–lxviii (E.A. Bond ed., 1861).

205. See FARRAND, RECORDS, VOL. 2, *supra* note 2, at 550; THE HERITAGE GUIDE TO THE CONSTITUTION: FULLY REVISED 293 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

206. LAWRENCE JAMES, THE RISE AND FALL OF THE BRITISH EMPIRE 135 (1994).

was created to centralize administration of what was, at the time, a hodge-podge of territorial possessions, trading concessions, and treaty relationships with indigenous rulers across the Indian subcontinent largely conducted by and through the British East India Company.<sup>207</sup> The Company was to modern eyes an anomalous creature. It was, in part, a private corporation and trading venture, but it also behaved as a government with a huge private army drawing its authority from acts of Parliament, grants from or treaties with native Indian rulers, or simple right of conquest.<sup>208</sup> The Company's critics viewed it as exploitative and tending to corrupt both the regions it ruled, and politics back home.<sup>209</sup> The creation of the office of Governor General and Hastings' appointment to that post were part of an effort to restrain the Company's excesses and bring its activities and possessions under more direct control by the British government.<sup>210</sup>

Hastings' supporters, both at the time and since, viewed him as an earnest, hardworking, aggressive, and on the whole successful administrator who laid the foundation for British control of India and integration of its possessions there into a system of empire. His critics saw in him the personification of the errors and excesses of imperialism and attributed to him both personal corruption and egregious abuses of authority.<sup>211</sup> The twenty-two articles of impeachment against Hastings charged him with a miscellany of misbehavior,<sup>212</sup> including disregard of instructions from the Company's directors,<sup>213</sup> mismanagement of regions under his administrative control (often to the disadvantage of the native population),<sup>214</sup> high-handed

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207. KEITH, *supra* note 30, at 512–13. See generally JOHN KEAY, *THE HONORABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY* (1993).

208. SMITH, *supra* note 169, at 164.

209. *Id.* at 164–68. See also *The East India Company: The Company that ruled the waves*, *THE ECONOMIST* (Dec. 17, 2011), <https://www.economist.com/christmas-specials/2011/12/17/the-company-that-ruled-the-waves>.

210. See generally Neil Sen, *Warren Hastings and British Sovereign Authority in Bengal*, 25 *J. OF IMPERIAL AND COMMONWEALTH HISTORY* 59 (1987).

211. SMITH, *supra* note 169, at 165–76.

212. SIMPSON, *supra* note 12, at 167–88.

213. For example, the seventh article alleges that Hastings violated Company policy in favor of securing goods and services through publicly advertised solicitations with the “most reasonable proposal” to be accepted when he entered into a contract with George Templer for draught animals and provisions at rates 30% higher than a competing proposal. *Id.* at 173. Articles ten and eleven allege other violations of company contracting policies. *Id.* at 174–75. Articles nine and ten also relate to Hasting's alleged disregard of instructions from the Company board. *Id.* at 174.

214. Articles five and sixteen allege mismanagement of the affairs of the provinces of Farruckabad and Oude. *Id.* at 177.

or deceitful dealings with local rulers,<sup>215</sup> misconduct of local wars,<sup>216</sup> and allegations of corruption benefiting either Hastings himself or other Company officials.<sup>217</sup> A cynic might characterize most of the charges as merely behaving like an efficient imperialist. None of the charges could fairly be classed as criminal conduct in any technical sense. Even the allegations of corruption were phrased so vaguely that it would have been impossible to frame them within any existing criminal statute. The essence of the claims against him was abuse of official power. This feature of the articles was so patent that their principle author, Edmund Burke, was obliged to expend his eloquence contending that Hastings' offenses were against natural law or ancestral principles of the British constitution rather than any particular statute. In his opening statement, Burke said the charges against Hastings "were crimes, not against forms, but against those eternal laws of justice, which are our rule and our birthright. His offenses are not, in formal, technical language, but in reality, in substance and effect, High Crimes and High Misdemeanors."<sup>218</sup>

Burke's description of Hastings' offenses is important not merely because it confirms, once again, that in British practice impeachable offenses need not have been indictable crimes. In addition, Burke's words, together with other facts about the Hastings case, illuminate a broader point. Note that Commons voted to impeach Hastings not to remove an obnoxious official from office, nor to hobble the policy of a willful monarch. Hastings had already resigned his office and retired two years before his impeachment.<sup>219</sup> And by 1787, Great Britain was already a parliamentary monarchy in which the personal authority of the king was largely subordinate to the parliamentary majority. Thus, the impeachment of Hastings only makes sense if some other objective was in view.

Certainly, one cannot ignore that the move against Hastings had immediate political objectives. For opponents of the government of William

215. Articles two through six, as well as articles fourteen, sixteen, seventeen, eighteen, and twenty-two, fall generally in this category. *Id.* at 168–73, 176–81, 185–88.

216. Article one alleges that Hastings violated instructions not to engage in "any offensive war whatever" by instigating and employing British troops in a war against the Rohilla people. *Id.* at 167–68. Article fourteen relates to a war between Ranna of Gohud and Madajee Scindia. *Id.* at 176. Article twenty concerns a war with the Mahrattas. *Id.* at 182–84.

217. Articles eight and sixteen allege personal or collective corruption. *Id.* at 174, 177.

218. EDMUND BURKE, ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 388 (David Bromwich ed., 2000).

219. THOMAS BABBINGTON MACAULAY, *Warren Hastings*, in 1 CRITICAL AND HISTORICAL ESSAYS (A.J. Grieve ed., 1907), <http://www.gutenberg.org/files/2332/2332-h/2332-h.htm>.

Pitt the Younger, Hastings was a convenient whipping boy.<sup>220</sup> But Burke, at least, had larger aims. For him and like-minded others, the Hastings case was an opportunity to establish fundamental points about the nature of the emerging British Empire, the standards of conduct to be expected of government servants of that Empire, and the rights of the Empire's subjects.<sup>221</sup> In this sense, Burke's impeachment of Hastings was a continuance of his arguments before the American Revolution in favor of colonists' enjoyment of the traditional rights of Englishmen. In framing the charges against Hastings, Burke was asserting that the Empire would be a unitary whole in which officials would be subject to central authority and obliged to operate in accordance with the rule of statutory law and natural justice. And he was making bold claims for the rights of British subjects, regardless of national origin. Perhaps the most notable feature of Burke's charges against Hastings is their insistence that the primary victims of Hastings' alleged misbehavior were, not Englishmen or British commercial interests, but the indigenous rulers and inhabitants of India. Burke does not deny that Britain may rule an Empire, but he insists that the peoples under its sway not be robbed, exploited, or impoverished.

Whether this view carried the day in the Hastings impeachment or in the development of the British Empire after the 1780s is not important for our purposes. The key point is that, at the same moment Americans were redesigning their government in Philadelphia, Burke was using impeachment as a vehicle, not for the chastisement of one man, but to establish basic constitutional principles—and important Americans were aware of his efforts and wanted a similar power for themselves.

## VII. Lessons of British Impeachments for American Practice

British impeachment practice is important for students of the American constitution because the Framers were conscious heirs to British traditions of representative government and because at Philadelphia they settled on language to define the scope of impeachable conduct—"Treason, Bribery, or other high Crimes and Misdemeanors"—drawn directly from British impeachment precedents.<sup>222</sup> As noted at the outset, whether the Framers

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220. Chris Monaghan, *In Defence of Intrinsic Human Rights: Edmund Burke's Controversial Prosecution of Warren Hastings, Governor-General of Bengal*, 2 L., CRIME AND HISTORY 58, 63–64 (2011), <http://lawcrimehistory.org/journal/vol.1%20issue2%202011/Monaghan.pdf>.

221. P.J. MARSHALL, THE IMPEACHMENT OF WARREN HASTINGS 15–16 (1965). See generally THOMAS BABINGTON MACAULAY, WARREN HASTINGS (1886); JOHN MORLEY, EDMUND BURKE, A HISTORICAL STUDY (1924).

222. This phrase also appears in some American impeachments of the colonial and post-Revolution-but-pre-Constitution periods. Those impeachments and their likely effect on the Founders' thinking are discussed in Chapter Three of BOWMAN, HIGH CRIMES AND MISDEMEANORS, *supra* note 11.

meant to adopt British language, particularly the phrase “high crimes and misdemeanors,” as a term of art tightly restricting the scope of American impeachments by reference to British practice, and if that was their intention, whether we should honor it, are questions for another time. For the moment, it is necessary only to ascertain how the British understood impeachment, because a proper reading of British precedents sets the baseline minimum for the scope of American impeachments. We can fairly draw at least the following conclusions.

### **A. Impeachment, Crime, Treason, and Retrospective Punishment**

As noted above, a persistent conundrum of British impeachment proceedings arose from the dual character of impeachment. It was a political tool, but was also criminal insofar as conviction triggered severe personal penalties far beyond mere removal from office. Thus, the growing parliamentary resistance to absolutist royal rule and affinity for government under statutory and common law that produced some of the most memorable impeachments necessarily implied that even politically dangerous ministers ought not be personally punished for conduct not previously specified as illegal. This tension existed in all British impeachments, but was most acute when treason was among the charges.

Indeed, many parliamentary arguments about retrospective or declaratory treason seem to have been driven primarily by concern about the extreme penalties for conviction on that ground. Those impeached for treason, or their parliamentary defenders, were often heard to argue that they may well have committed crimes, even serious ones, but not treason.<sup>223</sup> The real issue in many such cases seems to have been that Commons wanted, not merely removal of an obnoxious minister from office, but also his physical and civil death in the form of execution and/or deprivation of lands, titles, and wealth. The technical arguments about whether an accused’s conduct fell within previous definitions of treason often seem driven by resistance,

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223. Among the numerous instances of this phenomenon are: (1) the statement of Charles I when he went to the House of Lords to intercede on behalf of Lord Strafford that, “I cannot condemn him of High-Treason; yet I cannot say I clear him of Misdemeanor.” HOWELL, VOL. III, *supra* note 131, at 1513; 2 WILLIAM COBBETT, PARLIAMENTARY HISTORY OF ENGLAND 755 (1807); 5 JAMES MCINTOSH, HISTORY OF ENGLAND 253 (1835). (2) The statement of the Bishop of Lincoln, a member of the House of Lords during the 1715 impeachment trial of the Earl of Oxford for treason, that, “To high crimes and misdemeanours I could readily agree, and I hoped, and therefore wished, that their prosecution might have stopped there. The H[ouse] of Commons have gone further.” Clyve Jones, *The Opening of the Impeachment of Robert Harley, Earl of Oxford, June to September 1715: The ‘Memorandum’ of William Wake, Bishop of Lincoln*, 4 ELECTRONIC BRITISH LIBRARY J. 4, 7 (2015).

particularly among the Lords, against the idea that faithful service to an erring King could result not merely in removal from office, but extinction.

For example, it has been argued that the last-minute switch from impeachment to attainder in the 1640 cases of both Lord Strafford and Archbishop Laud, and the absence of formal convictions in the House of Lords in later impeachments, arose from the Lords' reluctance to impeach officials for treason for conduct not clearly treasonous under existing law. But to draw this conclusion from the Strafford and Laud affairs is to ignore their ultimate fates—in both cases, both houses of Parliament approved bills of attainder based on the same charges contained in the articles of impeachment and condemned the accused to death.<sup>224</sup> Whatever Parliament thought it was doing, it was not forswearing the power to punish, as treason, conduct that had not expressly been held to be treasonous before.<sup>225</sup>

The general question of whether Parliament could impeach an official for treason based on conduct not unambiguously defined as treason, by either statute or existing precedent, has been the subject of dense scholarly debate. Raoul Berger concluded in his influential Nixon-era book on impeachment that Parliament had the power to declare what he called “retrospective treasons.”<sup>226</sup> Historian Clayton Roberts, wrote a biting rebuttal.<sup>227</sup> In essence, he argued that while the Stuart-era House of Commons voted articles of impeachment alleging innovative theories of treason—what he calls “declarative treasons”—for Strafford, Laud, and other officials, these impeachments rarely went to trial in the House of Lords, and never resulted in convictions. Roberts concluded that the Lords were consciously resisting the claim that they had the power to define and punish declaratory treason.<sup>228</sup>

Roberts' argument from parliamentary practice has some force. He cleverly characterizes Berger's emphasis on the treason charges brought by the Commons, rather than the inaction of the Lords on those charges, as an argument for the prosecution's view of law as opposed to the view of those who sit as judges.<sup>229</sup> But he falls victim in some degree to the reverse fallacy by relying heavily on contemporaneous arguments from defenders of the impeached officials for explanations of why impeachments did not achieve conviction in the Lords. Moreover, he tends to gloss over the fact that in multiple cases the Lords failed to convict, not because of any principled legal judgment about the nature of treason, but due to events such as the king's

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224. See *supra* notes 157-78, and accompanying text.

225. See BERGER, *supra* note 10, at 35-52.

226. BERGER, *supra* note 10, at 7-52.

227. Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE L.J. 1419, 1427 (1975).

228. *Id.* at 1423-27.

229. *Id.* at 1426.

dissolution of Parliament (Danby) or the accused's flight from the country (Clarendon). In any event, his insistence that the judgment of the House of Commons on what constitutes an impeachable treason is of no legal weight pushes too far the analogy of parliamentary impeachment to an ordinary criminal trial. In an English impeachment, the actions of both the Commons and the Lords (like those of the American House and Senate) are moved by complex judgments on law, fact, and politics. In England, just as in the United States, the decisions of both the lower and upper house create precedent. The fact is that throughout the seventeenth and early eighteenth centuries, the Commons repeatedly impeached ministers, judges, and officials for "declaratory" or "retrospective" treason and thereby secured its objective of politically neutering those impeached, whether by transformation of the impeachment to an attainder, an order of banishment, or the defendant's flight from the jurisdiction.<sup>230</sup> One may disapprove of Parliament's persistent practice of loosely defining treason to achieve political ends, but it is idle to deny that this was their practice.<sup>231</sup>

The potentially grisly result of an English treason conviction had considerable influence on the Framers of the American constitution. The Framers quite consciously removed the tension between the political necessity of a non-electoral mechanism for removing erring officials and the criminal theory rule against retrospective personal punishment by barring

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230. Roberts' argument about treason seems misconceived on one other point. He contends that the House of Lords acted as judges and was empowered to find treason only by reference to pre-existing statutes or common law precedents, but he seems to misconceive the nature of common law judging. Even in the modern United States where courts have expressly disavowed the power to create new common law crimes, the power to interpret statutes, regulations, and the constitution itself is de facto the power to make new law. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (finding in the Equal Protection Clause of the Fourteenth Amendment a previously unknown prohibition against racially segregated education facilities in the United States).

In the England of the Stuart period, this was even more the case because the "common law" was judge-made law—an evolving set of principles and particular rules created by judges ruling by analogy to prior decisions. To say that the Lords could not declare new treasons because they had only the power of common law judges is a contradiction in terms. Common law judges created "new" crimes all the time (even if they did not give their creations new names) by beginning with old principles and precedents and using logic or the exigencies of changed circumstances to expand the law.

231. The great British judge Sir Matthew Hale in his monumental work, *History of the Pleas of the Crown*, was extremely critical of what he called "constructive treasons," decrying the danger of departing from the precise terms of treason statutes "to multiply and inhanfe crimes into treafon by ambiguous and general words, as *accroaching of royal power, subverting of fundamental laws, and the like.*" 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN* 86 (1736) [hereinafter HALE, *PLEAS OF THE CROWN*]. However, the point of his criticism was to express disapproval of Parliamentary practice, not to deny its existence. Indeed, he seems to grudgingly admit the power of Parliament to adjudge new treasons in particular cases, while resisting the inference that such judgments create precedent for future cases outside of the parliamentary setting. *Id.* at 262–64.

bills of attainder<sup>232</sup> and limiting the consequence of a successful impeachment to removal from office, leaving personal punishment to the criminal courts.<sup>233</sup> In the American setting, the fierce debates over Parliament's power to declare retrospective treasons lose their point, leaving only the question of the kinds of behavior that demand removal from office for the good of the nation. Moreover, in the four centuries from 1376 to 1787, a great many British officials were impeached for offenses other than treason.<sup>234</sup> The most obvious lesson of these cases is that Parliament routinely impeached, and often convicted people, for conduct that was neither an indictable crime nor a plain violation of any existing law. We have already discussed the Duke of Buckingham, impeached in 1626, for, among other things, holding a plurality of offices, mismanaging his office as Lord Admiral, and loaning English ships to the French king to use against Protestant Huguenots;<sup>235</sup> the Earl of Strafford, impeached in 1715, for giving "pernicious" advice to the crown to enter into the Treaty of Utrecht in the War of the Spanish Succession;<sup>236</sup> as well as Warren Hastings, impeached for conduct that even his chief accuser conceded were not crimes.<sup>237</sup>

Other examples include:

In 1642, Commons impeached Sir Richard Gurney, Lord Mayor of London, principally it appears because Gurney made certain proclamations in support of Charles I, attempted to suppress a petition of grievances directed to Parliament, supported another petition critical of Parliament,<sup>238</sup> and failed to transfer certain munitions to a storehouse in London contrary to the orders of Parliament. On the strength of these allegations, Gurney was charged with, among other things striving to "bring in an arbitrary and tyrannical government."<sup>239</sup> He was convicted, stripped of the mayoralty, disqualified from further office, and cast into prison.<sup>240</sup>

232. U.S. CONST. art. I, § 9, cl. 3.

233. *Id.* at § 3, cl. 7.

234. *See supra* Parts III & IV.

235. *See supra* note 158, and accompanying text.

236. As noted above, *supra* note 158 and accompanying text, Strafford was impeached, along with the Earl of Oxford and Viscount Bolingbroke, for essentially the same offenses, but Strafford's charges were labeled high crimes and misdemeanors only, while Oxford and Bolingbroke were also charged with treason. SIMPSON, *supra* note 12, at 151–62; BERGER, *supra* note 10, at 71–72.

237. *See supra* notes 159–180, and accompanying text.

238. HOWELL, VOL. IV, *supra* note 172, at 160–63. Several other men, including George Benyon and Sir Edward Dering, were impeached around the same time for promoting a "false, dangerous, and seditious petition" impugning Parliament. *Id.* at 141–43, 151–52.

239. *Id.* at 159–63.

240. *Id.* at 165–66. The articles contain no general descriptor of the charges. One source says that the Speaker of the House of Commons informed Gurney that he was charged with "High Crimes and Misdemeanors." Gurney's various pleadings in answer to the charges refer to them as

In 1668, Peter Pett, a commoner in charge of the naval shipyard, was impeached for allegedly failing to secure portions of the British fleet from Dutch attack.<sup>241</sup>

In 1701, the Earl of Orford, Lord Somers, Lord Halifax, and William, Earl of Portland were impeached for advising King William to enter into treaties of which their parliamentary critics disapproved, as well as for garden-variety corruption and, in the cases of Orford and Somers, playing a role in the granting of letters of marque (a commission to act as a private naval vessel) to William Kidd, who turned pirate as the infamous “Captain Kidd.” All were acquitted.<sup>242</sup>

In 1710, an Anglican minister named Henry Sacheverell was impeached and convicted for preaching a sermon at St. Paul’s attacking church dissenters and those in government disposed to tolerate them.<sup>243</sup> He was convicted, banned from preaching for three years, and his sermons were ordered to be burned by the public hangman.<sup>244</sup>

## **B. The Meaning of “High Crimes and Misdemeanors” in British Practice**

Careful perusal of four hundred years of British impeachments convinces me that there was never any precise definition or even well-settled understanding of what constituted impeachable conduct. With increasing frequency beginning in the 1600s, Parliament employed the phrase “high crimes and misdemeanors” at the beginning of articles of impeachment to describe the list of offenses specified in the body of the document. But I find no indication that this phrase, so critical to discussions of the impeachment power under the U.S. constitution, was for the British ever a term of art in the sense of necessarily including or excluding certain kinds of conduct. A reasonable analogy in American practice is the common use of phrases like “unlawfully and feloniously” at the beginning of each count of a criminal indictment (“On or about January 1, 2019, the defendant, Sam Smith, did

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“crimes and misdemeanors” or as “offences, practices, contempts, and misdemeanors.” *Id.* at 163–64.

241. HOWELL, VOL. VI, *supra* note 182, at 865–67. *See also* THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1660–1690 (B.D. Henning, ed., 2006), <http://www.historyofparliamentonline.org/volume/1660-1690/member/pett-peter-1610-1672>.

242. XIV T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 233–349 (1816). *See generally* Chester Kirby, *The Four Lords and the Partition Treaty*, 52 AM. HIST. REV. 477 (1947). Whether Kidd was really a pirate is disputed. *See* RICHARD ZACKS, THE PIRATE HUNTER: THE TRUE STORY OF CAPTAIN KIDD (2003).

243. HOWELL, VOL. XV, *supra* note 195, at 1–35.

244. *Id.* at 29.

unlawfully and feloniously” commit whatever crime he is being charged with). This and similar phrases serve no practical function in American law. They notify the defendant that the crime is a felony as opposed to a misdemeanor, but even that is superfluous due to the invariable inclusion in the indictment of a citation to the relevant statute. It is the statutory law that makes conduct a felony, not the addition of the descriptor “feloniously” in the indictment charging violation of a statute. Nonetheless, such phrases persist because they are traditional and add a level of solemnity to the accusation.

My sense is that the phrase “high crimes and misdemeanors” served a similar function in British impeachments. The words became traditional. They emphasized the nature and gravity of the accusations in the articles of impeachment. Putting it another way, “high crimes and misdemeanors” was a phrase the drafters of British articles of impeachment habitually used to preface their description of any conduct for which Parliament thought an official should be impeached; it did not refer to a specified set of impeachable offenses from which Parliament was obliged to choose if it wanted to impeach an official. As heirs to the English common law tradition, parliamentarians would have looked to prior impeachments as creating a body of precedent from which they could infer some general principles about the scope of properly impeachable conduct in future cases. But that is as much as they or we could say.

### C. The Scope of Impeachable Conduct in Great Britain

Parliament impeached people for a strikingly wide variety of official misbehavior.<sup>245</sup> It is possible to categorize the offenses charged under a number of general headings and therefore to gain a fair appreciation of the kinds of behavior Parliament thought to be impeachable:

#### 1. *Non-political Impeachments—Armed Rebellion and Ordinary Criminality*

A fair number of British impeachment proceedings resulted purely from the ancient requirement that peers of the realm could be tried only by other peers, that is by the House of Lords. Accordingly, if a hereditary peer was accused either of armed rebellion against the crown<sup>246</sup> or an ordinary felony,

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245. Parliament occasionally impeached private persons who held no official position. For example, in 1698, John Goudet and nine other merchants were impeached for violating wartime trade restrictions by doing business with France; most pled guilty and were fined. SIMPSON, *supra* note 12, at 141–43. But consideration of those cases is omitted here as irrelevant to the influence of British impeachment practice on the American institution of impeachment.

246. Levying war against the king in his realm was an undoubted capital treason. HALE, *PLEAS OF THE CROWN*, *supra* note 231, at 130.

the proceedings against him would often be framed either as an impeachment or in some cases as an appeal directly to the House of Lords. Examples of impeachments for armed rebellion include the seven Scottish lords condemned for the 1715 Jacobite Rising<sup>247</sup> and the case of Lord Lovat executed for his role in the 1745 rising.<sup>248</sup> A classic example of impeachment for ordinary criminality is the 1666 case against John Viscount Mordaunt for unlawfully imprisoning William Tayleur, the surveyor of Windsor Castle, and making “improper addresses” to Tayleur’s daughter (a charge later historians have interpreted as raping her).<sup>249</sup>

## 2. Corruption

The most common charge in British impeachments, even those in which Parliament’s primary concerns were political, was some variant of corruption. From the first impeachments of Lord Latimer and Richard Lyons in 1376<sup>250</sup> right down to Hastings’ case in 1787<sup>251</sup>, corruption was an almost invariable theme.<sup>252</sup> Even in the purely political cases, corruption allegations were commonly included in the articles of impeachment.

The essence of all such corruption charges was the misuse of office for private gain. Critically, a good many of the corruption charges were probably not criminal in the technical sense. In pre-modern Britain, public service was not compensated in the formal, regulated way we think of as customary. In large part because the finances of the Crown were commonly so irregular that budgeting for standardized salaries was impossible, officeholders were rewarded with varying combinations of salaries, allowances, titles, grants of land, rights to revenue, fees, monopolies, etc. Hence, distinguishing between proper and improper money-making activities was sometimes difficult. Nonetheless, the history of British impeachments illustrates that, even in a

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247. See *supra* notes 195-97 and accompanying text.

248. See *supra* note 196 and accompanying text.

249. *John Mordaunt, 1st Viscount Mordaunt, 1626-75*, BCW-PROJECT, <http://bcw-project.org/biography/john-mordaunt> (last visited July 19, 2018). Mordaunt was saved from judgment when Charles II prorogued Parliament. HOWELL, VOL. VI, *supra* note 182, at 785–806.

250. See *supra* notes 34-39 and accompanying text.

251. See *supra* notes 198-208 and accompanying text.

252. In addition to those mentioned above, consider the cases of the Lord Treasurer Middlesex (1624), HOWELL, VOL. II, *supra* note 109, at 1184; Sir William Penn (1668), HOWELL, VOL. VI, *supra* note 182, at 869–78, SIMPSON, *supra* note 12, at 132; Edward Seymour, Treasurer of the Navy, 8 T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 127 (1816); and the Earl of Macclesfield (1725), 16 T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 767 (1816) [hereinafter HOWELL, VOL. XVI].

system in which public office was expected to produce some private profit, Parliament consistently viewed abuse of the system as impeachable. It was understood that officeholders would make a competency, but violation of formal rules and informal norms in pursuit of excessive self-enrichment was not acceptable.

This idea became even more powerful in the comparatively straight-laced American colonies where it would manifest itself in constitutional provisions such as the foreign and domestic emoluments clauses.<sup>253</sup> For the Framers, the connection between the anti-corruption norm<sup>254</sup> undergirding these clauses and the remedy of impeachment was explicit. Bribery is explicitly named as an impeachable offense, and at least one Framers declared that violation of the Foreign Emoluments Clause would be impeachable.<sup>255</sup>

### 3. *Incompetence, Neglect of Duty, or Maladministration in Office*

Another consistent theme of British impeachments was allegations of incompetence, neglect of duty, or maladministration of office. Charges of this sort often arose in connection with military disasters, including the impeachments of Lord Latimer (1376), the Earl of Suffolk (1386), the Duke of Buckingham (1626), the Earl of Strafford (1640), and Peter Pett (1668), but they were hardly limited to that sphere. The charges against Buckingham, Attorney General Henry Yelverton,<sup>256</sup> the Lord Treasurer Middlesex (1624), the Earl of Clarendon (1667), Lord Danby (1678), Edward Seymour, Treasurer of the Navy (1680),<sup>257</sup> and of course Warren Hastings (1787) were all grounded in part on maladministration, neglect, or sheer ineptitude. And several impeachments were grounded on ministers giving the sovereign bad advice.<sup>258</sup> The British routinely included allegations of this sort under the descriptive heading “high crimes and

253. U.S. CONST. art. I, § 9, para. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); U.S. CONST. art. II, § 1, para. 6 (prohibiting the President from receiving any “Emolument” from the federal government or the states beyond “a Compensation” for his “Services” as chief executive).

254. On the anti-corruption norm in the U.S. Constitution, see generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

255. Edmund Randolph was a delegate to both the Constitutional Convention in Philadelphia and the Virginia ratification convention. During the Virginia convention, he observed, “There is another provision against the danger, mentioned by the honorable member, of the President receiving emoluments from foreign powers. If discovered, he may be impeached.” 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION* 326 (1827).

256. HOWELL, VOL. II, *supra* note 87, at 1136.

257. HOWELL, VOL. VIII, *supra* note 209, at 127.

258. See e.g., *supra* note 238, and accompanying text.

misdemeanors.” The question of how to harmonize this British precedent with the Framers’ abandonment of “maladministration” as a ground for impeachment in favor of “high crimes and misdemeanors” is beyond the scope of the present Article. For present purposes, it is enough to say that, in light of British precedent, the effect of George Mason’s exchange of the two terms is less obvious than it seems.

#### 4. *Abuse of Power*

Most British impeachments involved some form of abuse of official power. Most of these can be placed in one of the preceding two categories—corruption or maladministration—insofar as the motive for the abuse was the hope of preferment or monetary gain, or the abuse arose primarily due to incompetence or neglect. Nonetheless, some cases involved abuses that seem to have been moved by simple bloody-mindedness or the enjoyment of exercising unchecked power. Some of the charges in Hastings’ case fall in this category. Even more apt are the charge against Viscount Mordaunt for falsely imprisoning the surveyor of Windsor Castle<sup>259</sup> and a case not previously mentioned, the impeachment of Chief Justice Scroggs for, among other things, “browbeating” witnesses and disparaging them to the jury.<sup>260</sup>

#### 5. *Betrayal of the Nation’s Foreign Policy*

Another persistent thread in British impeachments is the charge that the impeached minister had pursued a policy at odds with the nation’s basic foreign policy interests. Impeachments on this ground were a constant of parliamentary practice beginning with the charges against William de la Pole in 1450 for his role in arranging the marriage of Henry VI to Margaret of Anjou<sup>261</sup> through the 1701 impeachments of the four lords (Orford, Somers, Halifax, and Portland) in connection with the Treaty of Partition<sup>262</sup> and the 1715 impeachments of Oxford, Bolingbroke, and Strafford for their advocacy of the Treaty of Utrecht,<sup>263</sup> and including the 1787 impeachment of Warren Hastings over fundamental disagreements about the proper

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259. See *supra* note 249 and accompanying text.

260. BERGER, *supra* note 10, at 249.

261. PLUCKNETT, TASWELL-LANGMEAD, *supra* note 17, at 194

262. See *supra* note 241 and accompanying text.

263. See *supra* note 196 and accompanying text. Other cases include the impeachments of the Earl of Middlesex (1624), the Duke of Buckingham, charged with helping the Catholic French king against the Protestant French Huguenots (1626), the Earl of Danby, impeached for his role in negotiating British neutrality in the Franco-Dutch War (1678). See *supra* notes 183-86 and accompanying text.

relationship of Great Britain to its Indian possessions and the states that abutted them.<sup>264</sup>

Impeachments for betrayal of the country's foreign policy objectives have received relatively little notice among American impeachment scholars, presumably because the only arguably similar American case was the first impeachment of Senator William Blount charged in 1797 with conspiring to assist the British in acquiring Spanish territory in Florida.<sup>265</sup> However, this line of British precedent deserves renewed attention. Over and over again, Parliament employed impeachment to assert an authority independent of the royal executive to define the nation's true foreign policy interests.

The analogy to the current president's disparagement or outright abandonment of long-established defense and trade relationships with democratic states in Europe, the Americas, and Asia in favor of mercantilism, "America First" isolationism, and a growing affinity for authoritarian regimes such as Russia, China, Hungary, Turkey, and the Philippines is obvious. It can fairly be argued that, particularly when considered in the aggregate, this conduct is far more destructive of American interests than Senator Blount's failed Florida adventure or any of the policies for which Parliament routinely impeached royal ministers. More importantly, the active tilt away from the democratic West in favor of affiliation with authoritarians is not the manifestation of a considered policy difference between the political parties or of a significant body of opinion within the military and security establishment. It is, rather, a purely personal tendency suggestive of an affinity for domestic authoritarianism and thus shades into the next accepted ground for parliamentary impeachment.

## 6. *Subversion of the Constitution and Laws of the Realm*

From the first impeachments in 1376, through the tumults of the Stuart period, and right up to the case of Warren Hastings in 1787, Parliament employed impeachment against ministers and officials whose actions threatened its understanding of proper constitutional order. More particularly, Parliament acted repeatedly against those who sought to enlarge or misuse executive/monarchical power at the expense of those elements of society whose interests were represented in Parliament, or contrary to the legal order established by statutes and the common law courts. The impeachments of Francis Bacon in 1621, the Duke of Buckingham in 1626, the Earl of Strafford and Archbishop Laud in 1640, the Earl of Clarendon in

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264. See *supra* notes 196-218, and accompanying text.

265. MARTIN TOLCHIN & SUSAN TOLCHIN, GLASS HOUSES, CONGRESSIONAL ETHICS AND THE POLITICS OF VENOM 21 (2018).

1667, and the Earl of Danby in 1678 are the most notable examples of this category of impeachments. In the cases of Strafford, Laud, Clarendon, and Danby, Parliament explicitly alleged some variant of the charge against Danby that he “endeavored to subvert the ancient and well established form of government in this kingdom, and instead thereof to introduce and arbitrary and tyrannical way of government.”<sup>266</sup> And as noted above, the impeachment of Warren Hastings was an effort to extend the traditional constitutional relationships between rulers and ruled in the home islands to the structure of the growing British Empire.<sup>267</sup>

This use of impeachment is of paramount interest in the current moment of American history. It establishes that, at least in British practice, the most important function of impeachment was removal or exemplary chastisement of officials whose behavior presented a threat to constitutional order. In such cases, impeachment need not have been based on discrete incidents of violation of specified laws. Rather, the essence of such cases was a continuing pattern of conduct in opposition to Parliament’s conception of proper constitutional arrangements. To employ modern terminology, these impeachments were consciously undertaken either to restore or establish constitutional norms. I will leave to the reader contemplation of whether reinvigoration of this conception of impeachment is timely.

### Conclusion

In the end, impeachment is political, in both the small and large senses. That is, even when impeachment is sought to effect large constitutional ends, it will not occur unless the small politics of personal and party advantage produce the necessary votes. In that regard, then-Congressman Gerald Ford was right when he famously declared that, in the United States, an impeachable offense “is whatever a majority of the House of Representatives considers [it] to be at a given moment in history.”<sup>268</sup> Nonetheless, as I concluded some twenty years ago when writing about the Clinton impeachment, arguments about constitutional language and its antecedents matter because they have the effect of setting rough boundaries on the field on which the political battle is fought.<sup>269</sup> If an impeachment battle is to be fought again soon, perhaps this discussion of the British antecedents of American impeachment will assist in setting those boundaries.

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266. See *supra* notes 180-86 and accompanying text.

267. See *supra* notes 198-221 and accompanying text.

268. 116 Cong. Rec. H3313-14 (1970) (statement of Rep. Gerald Ford).

269. Bowman, *High Crimes and Misdemeanors*, *supra* note 10, at 1564.

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