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British Impeachments, 1376–1787

Impeachment is a British invention, created by Parliament in 1376 to resist the 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 the mother country and create an independent United States of America. As we will see in Chapter 2, both the American colonies and the newly independent American states that sent delegations to the Philadelphia Constitutional Convention of 1787 had employed forms of impeachment adapted from British practice. The debates in Philadelphia about impeachment were framed primarily by American understanding of the strengths and weaknesses of the British model and its applicability to the new government they were inventing.

Even casual students of American impeachment likely know that the phrase "high crimes and misdemeanors," which helps to define the scope of impeachable conduct, was appropriated from British parliamentary usage. However, British influence runs much deeper than that. The customary structure of an American "impeachment" – a set of accusations made by the "lower" house of a bicameral legislature, followed by a trial in the "upper" house – is British, as is the practice of having the case in the upper house prosecuted by members of the lower one called "managers." Conversely, British impeachments traditionally carried very serious penalties, including banishment, imprisonment, and death, a feature the framers of the American constitution consciously and explicitly rejected. In short, one simply cannot understand the American iteration of impeachment without understanding its British antecedent.

This chapter examines the entire arc of British impeachments from 1376 to 1787. It demonstrates 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 created, and most commonly used, as a political tool in the large 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.

The British occasionally used impeachment for more prosaic ends such as removing middling officials guilty of garden-variety corruption, and in some periods it was employed by parliamentary allies of the crown to punish the king's enemies. Nonetheless, the central lesson of a study of British impeachment is that it was invented as a mighty legislative weapon against executive tyranny and wielded as a tool for preservation of the constitution (or at least of the legislature's view of what the constitution should be).

That said, the legalistic form of British impeachment mandates an inquiry into parliamentary impeachment procedure as well as the particular categories of misbehavior that Great Britain's Parliament found impeachable. Even when Parliament's motive for impeachment was fear that the behavior of the accused endangered the constitutional order, the House of Commons was obliged to lay out the particulars of its charges and the House of Lords to put them to their proof. Thus, over the centuries, Parliament developed a body of precedent that roughly defined and loosely cabined its impeachment power. As we will see in Chapter 3, the American framers were deeply influenced by British precedent when constructing their model of impeachment. Therefore, knowing how Parliament conducted impeachments and what behavior Parliament condemned as impeachable is indispensable to understanding the framers' choices and to interpreting the language they wrote into the US Constitution.

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 or her pleasure and are removed, and perhaps punished, when the ruler is sufficiently displeased. The monarch him- or herself can be displaced only 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 or her treatment of those who hold subordinate positions of authority, 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 – landholding lesser gentry, clergy, merchants, bankers, professional lawyers, and judges – the more complicated the problem of removing 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.[1] Most of it dealt with issues of no modern relevance, such as special kinds of rent and taxes called scutage and socage and placement of fish weirs in the River Thames. 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"[2] generally from punishment, including fines[3] and loss of lands or status, except by "the lawful judgment of his equals."[4] 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.[5] 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 any time that 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[6] into a bicameral legislature consisting of the House of Commons and the House of Lords. From the earliest times, two persistent and cross-cutting themes in the relation between Parliament and the crown were, on the one hand, the determination of the great subjects of the realm to influence the selection, and removal, of royal ministers[7] and, on the other hand, the desire of those same great subjects 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.[8]

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.[9] But in time it came to be accepted that all criminal proceedings, including those against officials, 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.[10] 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.[11] Nonetheless, a king resolutely determined to pursue his own course 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.[12] 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 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 concerning 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 preexisting 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 the young King Richard II to persuade the king to adopt bad policies and to confer a variety of titles and favors on themselves.[13] Allegations of this sort had never previously been denominated as treason.[14] Nonetheless, in a monarchy, the behavior charged against Suffolk – that is, 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 sort 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 hung, drawn, and quartered).[15] 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 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 an assassination, coup, or insurrection. 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 preexisting law.[16] Therefore, British impeachment was always plagued by tension between the suspect legitimacy of retrospective punishment and the 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. As long as parliamentary trials produced not only purges from office but severe personal punishment, the process bore a taint of fundamental unfairness.

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 by public clamor expressed in the House of Commons.[17] 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."[18]

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.[19] 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.

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.[20] Moreover, 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."[21] 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.[22]

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.[23] Second, while a good many of the charges against those impeached in 1376 involved corruption of a sort 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. Saveur.[24]

After Edward III died, he was succeeded in 1377 by his grandson, Richard II, then only ten years old.[25] 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. 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 a maturing Richard gained political strength, 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, the Earl of Suffolk.[26] Three of the charges alleged garden-variety corruption – instances of purchasing crown property at a discount or appropriating to himself revenues that ought to have gone to the crown – 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.[27] 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.[28]

Not content with the 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. 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.[29]

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." 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. 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.[30] Not only did the House of Lords convict Suffolk and his allies but they then proceeded to impeach and banish the judges who had previously declared that Parliament lacked the power to impeach without the king's assent.[31] In due course, however, the king slowly regained power relative to dissident members of the nobility. In 1397–98, Richard and his political allies used a combination of appeals and impeachments to charge various of his opponents with treason and other offenses.[32] Several were executed, murdered, or died in prison; others were banished.[33] In the course of these proceedings, Richard was careful to reclaim the right of royal assent to impeachment proceedings.[34] However, his reassertion of authority did not last long. Richard was deposed by Henry Bolingbroke in 1399 and died in captivity in early 1400.[35]

There were no impeachments in the half-century following the death of Richard II.[36] But in 1450, William de la Pole, grandson of the Michael de la Pole impeached in 1386 and also bearing the title Earl (later Duke) of Suffolk, was impeached by the House of Commons.[37] Those who recall their Shakespeare will remember that on St. Crispin's Day in 1415, Henry V was leading a shrinking and increasingly bedraggled army from Harfleur to Calais in pursuit of his pretensions to the French throne when that "happy few" triumphed at Agincourt.[38] Henry V's later military campaigns and diplomatic maneuvering, including his marriage to the French princess Katherine, strengthened his dynastic claim and won the English large territorial holdings in France, centered in Normandy.[39] However, in 1422, Henry V died leaving an infant son as his heir.[40]

For the next three decades, throughout the protectorate of Henry VI's childhood and his troubled adult reign, the English fought with decreasing success to hold their French possessions. By 1449, the French were on the offensive, well on the way to driving the English out of virtually all of France.[41] As the English retreat accelerated, scapegoats were required.[42] Those among the king's ministers held responsible for the failed French policy came under vicious attack. Principal among these was the Duke of Suffolk, who had helped arrange Henry VI's marriage to Margaret of Anjou[43] and was a primary architect of Henry's diplomatic strategy in France.[44]

During the Parliament of 1449–50, Suffolk's opponents began to circulate allegations that Suffolk was a traitor.[45] In response, on January 22, 1450, Suffolk

took the bold step of petitioning the king to require his accusers to state the charges against him during the term of the current parliament and to allow him to address the king, lords, and commons to rebut any charges that might be levied.[46] His opponents among the commons replied by sending a delegation on January 26 to the Lord Chancellor to say that, inasmuch as Suffolk had admitted "there was a grievous rumour and common talk of slander and infamy against him," he ought to be committed to custody pending resolution of the matter.[47] Whereupon the judges of the King's Bench and the lords declared that "rumour and common talk of slander and infamy" were not enough to hold the Duke absent particular charges.[48]

On January 28, the commons formally alleged to the Chancellor and the lords that Suffolk was involved in a plot to sell "this realm of England … to the king's enemy of France."[49] This time, Suffolk was sent to the Tower.[50] On February 7, the Commons produced a detailed bill of impeachment charging Suffolk with multiple acts of treason.[51] On February 12, the bill was read to the lords, but here the process stalled. Perhaps because impeachment was still a relatively novel parliamentary maneuver without a settled protocol, the lords did not move immediately to a trial but tried to refer the articles to the justices for advice on how to proceed.[52] Whether the referral occurred and, if so, what the justices may have said is unclear because, in an indication that Richard II's reclamation of royal power over impeachment survived his death, King Henry stepped in and blocked an immediate trial before the lords by declaring the matter would "be respited unto tyme he be otherwise advised."[53] This phrase from the rolls is somewhat ambiguous. It suggests both that the king himself intended to take advice (although from whom is unclear) and that he reserved to himself the final decision on whether a trial should proceed.

About three weeks later, on March 7, a majority of the lords decided that Suffolk should be given the opportunity he had requested to come before them to answer the charges.[54] In the interval, the Duke's enemies in the commons seem to have concluded that their original charges of treason might not stick. Hence, on March 9, they filed a second bill of impeachment alleging a grab bag of "misprisions and dreadful offences," none of which amounted to treason or even any statutory or common law crime.[55] Instead, they charged Suffolk with abusing his power and influence with the king in a variety of ways disadvantageous to the realm and in some cases financially advantageous to himself and his supporters. In effect, the second bill of impeachment charged Suffolk with what would later be termed maladministration and malversation.[56]

On March 13, Suffolk did appear before both the king and the lords and answered the charges of treason from the first bill at length and in detail.[57] There were two notable oddities about his appearance. The first was that neither he nor his audience apparently viewed it as a trial. As a member of the peerage, Suffolk could have insisted that the lords try him and deliver a verdict. But he wanted his fate to rest in

the hands of Henry, with whom he remained in favor, so he conspicuously declined to insist on a formal parliamentary trial. Instead, he requested, and got, a hearing from the king and lords together. Consequently, the March 13 audience seems to have functioned as a kind of preliminary hearing to determine whether the king would allow the lords to proceed with a trial or keep the matter in his own hands.[58]

It is also notable that Suffolk confined his March 13 presentation to the treason charges, not even deigning to address the second bill. His choice is perhaps not surprising given that the treason charges were the heart of the effort to bring him down (and were capital if proven), while the later list of "misprisions" was an obvious fallback position, an implicit confession by his enemies of the weakness of their central case.

On March 17, the king called the lords back together and brought Suffolk before the assembly. Suffolk reaffirmed his earlier answers to the treason charges.[59] At the king's behest, the Chancellor then addressed Suffolk, saying:

> Sir, I understand that you are not departing from your answers and declarations concerning the aforesaid matters, nor standing on your right as a peer, and that you submit yourself completely to the king's rule and governance. Wherefore the king commands me to say to you that regarding the great and dreadful charges contained in the said first bill, the king holds you neither declared nor charged.[60]

In sum, the king's view of the Duke's legal posture was that unless Suffolk insisted on a trial by the lords, the crown could forestall such a trial based on a royal determination that there was insufficient evidence. Here, the king in effect refused permission for the lords to proceed on the first bill. However, there remained the second bill of impeachment on lesser charges, as well as immense political pressure from Suffolk's enemies to take some action against him.

Accordingly, the Chancellor continued:

> And as regards the second bill submitted against you touching misprisions which are not criminal, the king, by force of your submission, by his own advice and not resorting to the advice of his lords, nor by way of judgment for he is not in place of judgment, puts you to his rule and governance [and banishes you from the realm for five years].[61]

The king's plain purpose was to save Suffolk's life while placating the opposition, hoping that in Suffolk's absence the furor would die down.[62] He also seems to have been cautiously avoiding a direct confrontation with the lords on the question of whether they could have insisted on an impeachment trial over his objection.[63] Politic though the king's evasive maneuvers may have been, they did Suffolk no good. The ship taking him into exile was captured in the English Channel by brigands, who beheaded him on the side of a longboat.[64] The important point for us in Suffolk's downfall is that it represented a resurrection, however unsuccessful,

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.[65] 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.[66] Parliament was active in the reign of Henry VIII (1509–47), but primarily as an instrument of the king's will on projects like the reformation of the English Church.[67] 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.[68] 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. 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.

BILLS OF ATTAINDER

A brief explanation of bills of attainder is in order here. Bills of attainder, which debuted in the fifteenth century,[69] 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. By contrast, a bill of attainder is a purely legislative act, meaning that the subject of the bill can be condemned without any violation of law, or even any clearly articulable wrong, having been formally charged or proven.[70] The bill passes through Parliament like any other, with no necessary provision for those accused to defend themselves. Punishments could be severe, including execution, imprisonment, exile, ruinous fines, and forfeiture of lands and titles.[71] 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.[72]

One key distinction between attainder and impeachment was that attainder required royal assent while, at least by the Stuart era beginning in the early 1600s, impeachment did not.[73] Hence, impeachment evolved as parliament's weapon against obnoxious supporters of the crown, while attainders were wielded against the crown's enemies except in rare cases where a monarch could be pressured into

consenting to the condemnation of his or her own adherent, as described below in the case of Charles I and Lord Strafford in 1640.

During the Wars of the Roses (1455–87),[74] the Yorkist and Lancastrian factions customarily used bills of attainder rather than impeachments or appeals to oust and eliminate their opponents.[75] The events and aftermath of the Battle of Blore Heath in 1459 illustrate the general tendency and provide one curious exception that demonstrated how impeachment could be used by the Crown against its enemies, as well as the unsettled state of parliamentary impeachment procedure in the first century after its invention.

In 1459, Henry VI of the House of Lancaster still sat precariously on the English throne. Unlike his dashing, ruthless father, the younger Henry was mild-mannered, equivocating, and at times so mentally unstable even after he reached adulthood that his powers were temporarily conferred on a Lord Protector.[76] However, his French bride, Margaret of Anjou, was entirely lucid. As queen, Margaret was tough, competent, often the true ruler of England even when Henry was nominally in his wits, and ferociously determined that her son Edward would succeed his father.[77] Arrayed against Henry, Margaret, and the Lancastrian court party were the Yorkists, so-called because they coalesced around Richard, third Duke of York, a powerful magnate with ambitions of his own, including in due course a desire to supplant or succeed Henry on the throne.[78]

Open battle between the Yorkists and Lancastrians first erupted in 1455 at the Battle of St. Albans,[79] followed by a three-decade tangle of affrays, truces, reconciliations, shifting alliances, double-crosses, and intermittent open warfare that reliably bewilders anyone but specialists in the period. A detailed understanding of that unhappy era is unimportant to our consideration of attainder and impeachment. Suffice it to say that in April 1459, Queen Margaret launched a military campaign against the Yorkists. At her behest, King Henry ordered his loyalists to assemble their armed retainers and gather in Leicester. Yorkist nobles, including the Duke of Salisbury, mustered their own forces in response.[80]

On September 23, 1459, the Lancastrians under Lord Audley confronted Salisbury's Yorkists at Blore Heath.[81] Although Audley's force was the larger of the two, Salisbury's men won the battle and killed Audley in the ensuing retreat.[82] The Queen and the royal party blamed the debacle in part on Thomas, Lord Stanley, an immensely wealthy and powerful aristocrat famous for adroitly maneuvering between the red and white roses. The King had summoned Stanley to join the royalist mobilization. Stanley brought two thousand men within a few miles of Audley's forces and even offered to lead the Lancastrian army if his men were placed in the vanguard. When this honor was refused him, he stayed in camp and took no part in the battle.[83] Worse, from the perspective of the Queen, Stanley's brother led a contingent of Salisbury's Yorkists, and after the battle Stanley sent a note of congratulation to Salisbury (who also happened to be Stanley's father-in-law).[84]

The Yorkists' ascendancy was short-lived. Henry consolidated his forces and in mid-October confronted the Duke of York's army, first near Worcester and again at Ludlow. Rather than fight a royal army personally led by their sovereign, York, Salisbury, and the Earl of Warwick fled, leaving their troops to surrender meekly to the King.[85] Though thwarted in her goal of capturing or killing the Yorkist leadership, the Queen struck at them in parliament.[86] The lords and commons convened in November 1459 and promptly passed a bill of attainder naming York, Salisbury, Warwick, and some twenty others as traitors.[87] The penalty for most of those attainted was death (should they be caught) and forfeiture of all property, titles, and estates by both those attainted and their heirs.[88]

Notably, the bill of attainder omitted Lord Stanley (although it included his brother who had fought with Salisbury at Blore Heath). However, the last recorded item of parliamentary business in this session was a long recitation of Stanley's perfidious behavior at Blore Heath, concluding with this passage:

> Of all which matiers doon and commytted by the said Lord Stanley, we youre said commens accuse and enpeche [impeach] hym; and pray youre moost high regalie, that the same lord be commytted to prison, there to abide after the fourme of lawe.[89]

After which the roll records, "Le roy s'advisera," meaning "The king will consider this further."[90] Note several key points here. Superficially this looks like the first stage of an impeachment in the emerging conventional form – the House of Commons alone is leveling charges against a purported wrongdoer.[91] However, there seems to have been no contemplation that the Lords would take up these charges and hold a trial. Rather, the commons petitioned the king to imprison Stanley "there to abide after the fourme of the lawe."[92] What that concluding phrase meant is difficult to discern. In later eras, a trial in the House of Lords would definitely have been the necessary next step. Perhaps in these formative years and in the midst of civil war, Stanley's accusers had some other form of "lawe" in mind. But it is notable that here, as had been the case with Suffolk nine years before, the decision about what to do with Stanley in the meantime was expressly confided to the king.

As it turned out, Stanley (characteristically) managed to insinuate himself back into royal favor and the idea of arresting or trying him in any forum was dropped.[93] For our purposes, the interesting features of his impeachment are that it was used by the parliamentary allies of the Crown against one suspected of disloyalty, and that it seems to have been consciously employed as a warning, not a vehicle for punishment.[94] Stanley was sufficiently powerful, and sufficiently ambiguous about his ultimate allegiance, that the Lancastrians were unwilling to condemn him unequivocally. Instead, they enumerated his indiscretions in an impeachment that served as a bill of particulars of his sins and, in juxtaposition to the harsh attainders approved earlier in the session, as a pointed reminder of Stanley's dependence on the king's mercy.

The heyday of attainders was the reign of Henry VIII, during which 130 regime opponents were attainted and 34 executed.[95] Notable victims included Thomas Cromwell[96] and the king's fifth wife, Catherine Howard.[97] 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 or her own defense.[98] It was also common to pass bills of attainder posthumously to provide legal justification for seizures or forfeitures of property or the disinheritance of heirs.[99]

Bills of attainder were a very rough business. Not only did they produce draconian punishments that could extend beyond the lifetime of the offender 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.[100] These enactments were highly controversial at the time, in part because attainders had garnered such ill fame in British history. The US constitution banned bills of attainder and ex post facto laws in Article I, Section 9.[101] And as we will see, the framers' historical memory of British attainders and their experience of attainders during their own Revolution influenced the debate over impeachment.

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 (1603–25), his son Charles I (1625–49), and his grandson Charles II (1649–51, 1660–85). 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 to 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. 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.[102] 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. 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,[103] leaving among other legacies the English translation of the Bible we know as the King James Version.[104] 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.[105] 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*[106] and the *Basilikon Doron*.[107] James' theory of kingship claimed not only heavenly sanction for monarchical rule but also espoused royal absolutism.[108] 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.[109] In *The True Law*, he wrote that kings emerged "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."[110] True to his convictions, James ruled for long periods without convening Parliament; however, he could not raise the funds necessary to support his sometimes extravagant court and pay for various military ventures without occasionally turning to that body.[111] 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. They were determined that the king's spendthrift tendencies should not be financed from their purses.[112] They were at times more bellicose, particularly toward Catholic Spain, than the king,[113] 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 the 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. However, the transition was turbulent. Henry's methods were not gentle and stirred considerable, if fruitless, resentment.[114] From 1553 to 1558, Henry's daughter Queen Mary I tried bloodily, but unsuccessfully, to reverse the English Reformation.[115] Queen Elizabeth I 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. 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.

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.[116] Kings as God's instruments made a certain sense as 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 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 to the whims of hereditary rulers deserved rethinking. If the path to God ran, as the Protestants claimed, directly from man to his maker and not through ordained intermediaries, then the substitution of kingly intermediaries for priestly ones made poor sense.

As James I's reign progressed, tensions between crown and Parliament increased. Among the leading parliamentarians was Sir Edward Coke, a learned lawyer and judge who believed that the common law of England proceeded from ancient sources and, on some fundamental points, superseded expressions of royal will.[117] This view was not admired by the king's party, and, in 1616, Coke was dismissed from the bench.[118] Coke's leading antagonist among supporters of James and the royal prerogative was Sir Francis Bacon,[119] famous to us as one of the great minds of the age.[120] In 1618, the king appointed Bacon to be Lord Chancellor of England, the highest office of the realm combining executive, judicial, and legislative responsibilities. 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.

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,[121] 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.

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 involved in financial shenanigans.[122] 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.[123] 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.[124] 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. Bacon, perhaps assuming that the ordinariness of his infraction would spare him any serious punishment, confessed. The Lords convicted him, and King James was either unwilling or unable to save his chief servant, so Bacon was stripped of his offices and condemned to relative penury for the rest of his days.[125]

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 a 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 to 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 Treasurer. The true reason for 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.[126] Though convicted and temporarily imprisoned and stripped of his offices, he was quickly pardoned and restored to grace after King James I died in 1625 and was succeeded by King Charles I.[127]

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[128] 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,[129] imprisonment, and finally, in 1649, his execution.[130] 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 the young King Charles I.[131] 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.[132] The rapid rise of a social climber like Villiers would have stirred resentment in any case,[133] 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 Spain,[134] as well as the successful, but also controversial, marriage of Charles to the equally Catholic French princess Henrietta Maria. A number of botched military ventures, including a failed naval assault on the port of Cadiz in 1625,[135] gave Charles' 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 by the simple expedient of dismissing Parliament.[136] Note that the king's gambit of proroguing Parliament to prevent a trial by the lords constituted an implicit confession that, contrary to the understanding in Henry VI's day, the crown could no longer simply forbid the upper house from proceeding. The charges against Buckingham, which the formal articles of impeachment labeled "misdemeanors, offences, misprisions, and crimes,"[137] 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, 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 La Rochelle; and, sixth, suggesting that King James take some useless medicines during his final illness.[138]

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.[139] Moreover, there is no indication that either James I or Charles I disapproved of Buckingham's activities. The charges involving naval matters expressed 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 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 "negatived Charles I's contention that not only was he personally above

the law, but also his ministers acting at his orders."[140] But it is not clear that Buckingham's true offenses were violations of law in the conventional sense. They 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.[141] 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.[142] 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.

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.[143] 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.[144] 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 were distressed at the aggressive hostility of his ecclesiastical appointees such as the archbishop of Canterbury William Laud to the religious reform movement we know as Puritanism. 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. 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.

In their view of the law, the leaders of the Long Parliament were the intellectual heirs of Sir Edward Coke, who had died in 1634,[145] 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[146] and the Court of High Commission,[147] which derived their authority from the royal prerogative rather than from either common or statutory law. The Court of Star Chamber enforced Charles' proclamations, which it held to have the force of law.[148] The Court of High Commission was the highest religious court in England, but also had wide civil jurisdiction. 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,[149] but recognized that their program also required the removal or neutering of 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 than thirty individual defendants.[150] The impeachments of

1640–41 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.[151] 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),[152] 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.[153] However, as soon as the Petition of Right passed Parliament and was (grudgingly) accepted by Charles, Wentworth switched sides. Once committed to the king's cause, the Earl of 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.[154] Recalled to England in 1639, Strafford urged the king to adopt the same sort of unyielding tactics that had proven successful in Ireland. The English proved to be 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. 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.[155] For example, in 1637, William Prynne, John Bastwick, and Henry Burton were all sentenced to have their ears cut off for libeling the Church and its bishops.[156]

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 to 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."[157] 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."[158] 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";[159] second, that he corruptly enriched himself;[160] third, that he colluded with Catholics to encourage that religion and to secure Catholic support in his "tyrannical designs";[161] fourth, that he mismanaged the unsuccessful military sally against the invading Scots in mid-1640;[162] and, fifth, that he had counseled the king to bring an Irish army to England to make war on his subjects.[163]

Note that these articles include two types of charges prominent in Buckingham's case and earlier impeachments dating to the very first impeachments in the 1300s: abuse of office for self-enrichment and mismanagement of government or military affairs.[164] 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" 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.[165] In effect, the Commons charged Strafford with high treason for putting into action Charles' theory of kingship.[166] 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.[167] John Pym, leader of the Commons, argued when prosecuting Stafford 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." He added that, "to alter the settled frame and constitution of government is treason in any state."[168]

Despite Pym's confident declaration, the Lords hesitated to convict 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 previously defined by law.[169] 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.[170] 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. 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.[171]

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,[172] but he was imprisoned and his trial was delayed until 1644.[173] Several sets of articles of impeachment were prepared against Laud, but all mirrored those against Strafford in critical respects.[174] 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.[175] 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.[176]

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. And 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.[177] Nonetheless, Parliament viewed Laud as a dangerous pillar of the king's disposition to absolutism. In late October 1643, the 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.[178] Both houses passed the bill in January 1644, rejected as invalid against parliamentary condemnation a pardon of the archbishop the king had issued the previous year, and sent Laud to the executioner.[179]

As tension between King Charles and his parliamentary opposition sharpened, Parliament employed impeachment against other royal officials less prominent than Strafford and Laud, as well as a series of private persons of royalist sympathy. In early 1642, the Commons impeached the attorney general, Sir Edward Herbert, for having, at the king's express command, presented to the House of Lords allegations of treason against six members of Parliament.[180] This was an odd business all around. In the first place, the document conveyed by the attorney general was styled "Articles of Accusation,"[181] but it fit no traditional form of accusatory pleading. It was not an indictment addressed to the judges of the king's bench that would commence an

ordinary criminal case. Nor was it an "appeal," a form of private prosecution which, as Blackstone said, "denotes an accusation by a private subject against another, for some heinous crime."[182] Because the accusatory document came directly from the king without any endorsement of the commons, it was not an impeachment. Likewise, not being a bill, it was not an attainder. Assuming that King Charles meant the Lords to take some legal action to punish the accused, he seemed to be suggesting a new mode of procedure that skipped over all traditional intermediaries en route to a trial of assertedly disloyal legislators by the hereditary aristocracy.

The outraged Commons responded to this novelty with an impeachment novel in its own right. They viewed the attorney general's transmission to the Lords of charges against sitting parliamentarians as an assault on "the Privileges of Parliament, tending to sedition, and to the utter subversion of the ancient Rights and being of Parliament,"[183] which their articles of impeachment characterized as "high Crimes and Misdemeanors."[184] In one sense, Sir Edward's case echoed those of Strafford and Laud in that he was charged with subverting the constitutional order by following express orders of the monarch. His case became even more striking when the evidence showed that, unlike Strafford and Laud who actively advised the king to pursue policies fortifying royal prerogative rule against parliamentary intrusion, the attorney general had played no role in drafting the "Articles of Accusation." The king himself attested that Sir Edward merely complied with a royal command to deliver a document Sir Edward had neither written nor planned.[185] The Lords convicted him anyway, although they declined to remove him from office or, at least at first, to impose any other penalty.[186] Under pressure from their colleagues in the Commons, the lords later decided to disqualify Sir Edward from all offices except that of the attorney general and to send him to the Fleet Street prison.[187] The impeachment of the attorney general foreshadowed the charges Parliament would ultimately bring against Charles himself in which it was alleged that even the king could be guilty of treason for undermining the constitutional position of the legislature.

In 1642, Parliament also impeached Lord Digby (a member of the peerage, but not a minister of the crown) for attempting to convince King Charles to wage war against his domestic opponents, and for "wickedly advis[ing] the framing of" the same "false and scandalous Articles of High Treason" against six parliamentarians that had gotten Attorney General Herbert in hot water.[188] Digby prudently decamped for Holland and was never tried.[189]

Also in 1642, Parliament struck against a number of men who were either expressly allied with the crown or had resisted parliamentary efforts to accrue power in the legislature. Parliament impeached, convicted, fined, and imprisoned Mr. George Benyon, a London silk merchant, for circulating a petition objecting to legislation giving Parliament control over mustering the militia.[190] They expelled Sir Edward Dering from Parliament for what they took to be his unduly monarchist and episcopalian views, and later impeached him for promoting

a petition in Kent that opposed reforms of the established church and also objected to the Parliament's militia bill.[191] That summer, Parliament impeached Sir Richard Gurney, Lord Mayor of London,[192] as well as Sir Thomas Gardiner, Recorder of the City of London,[193] for a variety of supposed offenses, all of which boiled down to taking the king's side in the escalating discord between king and parliament.[194] One must be cautious about assigning too much precedential weight to the spate of impeachments in 1642 issued by an increasingly militant Parliament teetering on the brink of open war with the crown. Still, it is noteworthy that they were political actions designed to defend the prerogatives of Parliament and, even though with a single exception the charges did not rest on allegations of common law or statutory crime, all were termed in the articles of impeachment as "high Crimes and Misdemeanors."[195]

Ultimately, Charles I's conflict with his Parliament degenerated into the English Civil War (1642–51) and led to his own execution, the kingless Commonwealth of England (1649–60), the Cromwell Protectorate, and finally, in 1660, the restoration of the English monarchy under Charles II.[196] 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 efforts were made to impeach him. The first was widely deemed frivolous, but the second, in 1667, succeeded in driving him from office. 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.[197] 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.[198]

The final notable impeachment under the Stuart kings was that of Thomas Osborne, 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.[199] When the letters leaked, Parliament promptly impeached Danby for treason.[200] 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 "endeavoured 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."[201] The essence of the complaint was also similar to prior impeachments in that the 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 to be 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 the charges and ruled that an attempt by the king to pardon Danby was ineffective against an impeachment.[202] In the end, Danby spent some years in custody before the whole business was dropped.[203]

THE GLORIOUS REVOLUTION OF 1688 AND THE LAST FLURRY OF BRITISH IMPEACHMENTS, 1715–1716

The last king of the Stuart lineage was James II. His Catholicism and various of his policies proved to be 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.[204] In 1688, he did so, successfully and (at least in England) largely bloodlessly. The removal of James II and the ascendance of William and Mary became known as the "Glorious Revolution."[205] 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 the 1689 Bill of Rights that codified increased parliamentary authority at the expense of royal prerogatives.[206] 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 1715–16 occasioned by the turmoil caused by the death in 1714 of Queen Anne, the daughter and successor of William and Mary,[207] and the accession of George I, a Hanoverian prince who assumed the throne only because he was Anne's closest Protestant relative.[208] Anne's death raised hopes for the restoration of a Catholic monarchy in the person of James Francis Edward Stuart, the "Old Pretender." The result was an armed rebellion in Scotland known as the Jacobite Rising of 1715. [209] When the rising failed, seven Scottish peers who had joined it were impeached for high treason and several were executed.[210] 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.[211]

THE IMPEACHMENT OF WARREN HASTINGS

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, impeachment largely disappeared from the British scene. 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 America achieved independence, there had not been an impeachment of a crown official for misconduct in office since 1725,[212] and 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,[213] and supporter of American liberties[214] Edmund Burke presented specific accusations against Hastings in the House of Commons.[215] On May 10, 1787, the Commons approved articles of impeachment,[216] 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.[217]

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.[218] 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 fact of the Hastings impeachment and the nature of the charges were well known in 1787–88, and would be 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."[219]

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 the western hemisphere, the growing accumulation of territory that would in time become the Indian Raj. From 1773 to 1785, Hastings had served as the first governor general of British territories and interests in India. The position 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.[220] The company was to modern eyes an anomalous creature, in part a private corporation and trading venture, but in significant part 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.[221] The company's critics viewed it as exploitative and

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tending to corrupt both the regions it ruled and politics back home.[222] The creation of the office of governor general and Hastings' appointment to that post were part of an effort to restrain the East India Company's excesses and bring its activities and possessions under more direct control by the British government.

Hastings' supporters, both at the time and since, viewed him as an earnest, hard-working, 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.[223] The twenty-two articles of impeachment against Hastings charged him with a miscellany of misbehavior,[224] including disregard of instructions from the company's directors,[225] mismanagement of regions under his administrative control (often to the disadvantage of the native population),[226] high-handed or deceitful dealings with local rulers,[227] misconduct of local wars,[228] and allegations of corruption benefiting either Hastings himself or other company officials.[229] A cynic might characterize most of the charges as "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 principal 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."[230]

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 the 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. And by 1787 Great Britain was already a parliamentary monarchy in which the personal authority of the king was increasingly subordinate to the parliamentary majority. Thus, the impeachment of Hastings makes sense only 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 Pitt the Younger, Hastings was a convenient whipping boy.[231] 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.[232] 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 should 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. He was also 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 should 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.

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.[233] Exactly which lessons the framers drew from their study of British impeachments is a question for later chapters. Among the issues to which we will return are whether the framers meant to adopt the British parliamentary phrase "high crimes and misdemeanors," as a term of art tightly restricting the scope of American impeachments by reference to British practice, and whether, if that was their intention, we should honor it. For the moment, it is sufficient to say that an accurate understanding of British impeachment practice will inform our study of how the framers intended impeachment to fit into America's constitutional architecture and our understanding of the language they chose for the constitution's impeachment clauses. We can fairly draw at least the following conclusions.

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 it was also criminal insofar as conviction triggered severe personal penalties far beyond mere removal from office. Thus, the combination of growing parliamentary resistance to absolutist royal rule and affinity for government under statutory and common law 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.[234] The real issue in many such cases seems to have been that the 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 to have been driven by resistance, 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. 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.[235]

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."[236] Historian Clayton Roberts wrote a biting rebuttal.[237] He noted 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.[238]

Roberts' argument from parliamentary practice has some force. He cleverly characterizes Berger's emphasis on the treason charges brought by the Commons, as opposed to 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.[239] 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 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 secured its objective of politically neutering those impeached, whether by transformation of the impeachment into an attainder, an order of banishment, or the defendant's flight from the jurisdiction.[240] 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.[241]

The potentially grisly result of an English impeachment conviction for treason had considerable influence on the framers of the American constitution. The framers quite consciously eliminated the tension between the political necessity of a nonelectoral mechanism for removing erring officials and the criminal theory rule against retrospective personal punishment by barring bills of attainder[242] and by limiting the consequence of a successful impeachment to removal from office and leaving personal punishment to the criminal courts.[243] In the American setting, the fierce debates over Parliament's power to declare retrospective treasons lose their point, leaving only the question of the kind of behavior that demands 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. And 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 Lord Latimer, impeached in 1376 in part for military failure;[244] 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;[245] the flurry of impeachments of 1642, including that of Attorney

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General Herbert for presenting to Parliament, at the king's command, disagreeable allegations of treason against some parliamentarians, the charges against Mssrs. Benyon and Dering for promoting anti-Parliament petitions, and that of London's lord mayor for favoring the king in his quarrel with Parliament;[246] 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;[247] as well as Warren Hastings, impeached for conduct that even his chief accuser conceded were not crimes.[248]

Other examples include: 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.[249] In 1701, the Earl of Orford, Lord Somers, Lord Halifax, and William, Earl of Portland, were all 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.[250]

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.[251] He was convicted, banned from preaching for three years, and his sermons were ordered to be burnt by the public hangman.[252]

The Meaning of "High Crimes and Misdemeanors" in British Practice

Careful perusal of 400 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 US constitution, was for the British ever a term of art in the narrow sense of necessarily including or excluding certain kinds of conduct. Over time, "high crimes and misdemeanors" became the phrase drafters of British articles of impeachment habitually used to preface their description of any conduct for which Parliament thought an official should be impeached; but 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.

The Scope of Impeachable Conduct in Great Britain

Parliament impeached people for a strikingly wide variety of official misbehavior.[253] It is possible to categorize the offenses charged under a number of general headings and therefore to gain a fair appreciation of the kind of behavior Parliament thought to be impeachable.

Nonpolitical 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[254] or an ordinary felony, 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[255] and the case of Lord Lovat executed for his role in the 1745 rising.[256] 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).[257]

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[258] right down to Hastings' case in 1787,[259] corruption was an almost invariable theme.[260] 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 premodern 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 moneymaking activities was sometimes difficult. Nonetheless, the history of British impeachments illustrates that, even in a 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 straightlaced American colonies where it would manifest itself in constitutional provisions such as the foreign and domestic emoluments clauses.[261] For the framers, the connection between the anticorruption norm[262] undergirding these clauses and the remedy of impeachment was explicit. Bribery is explicitly named as an impeachable offense, and at least one framer explicitly declared that violation of the Foreign Emoluments Clause would be impeachable.[263]

Incompetence, Neglect of Duty, or Maladministration in Office

Another consistent theme of British impeachments was allegations of incompetence, neglect of duty, or maladministration in 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, the Duke of Suffolk (1450),[264] Attorney General Henry Yelverton (1621),[265] the Lord Treasurer Middlesex (1624), the Earl of Clarendon (1667), Lord Danby (1678), Edward Seymour, Treasurer of the Navy (1680),[266] 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. Great Britain routinely included allegations of this sort under the descriptive heading "high crimes and misdemeanors." As we will see in Chapter 3, the framers rejected the term "maladministration" as a descriptor of impeachable conduct in favor of "high crimes and misdemeanors." In light of ample British precedent including conduct amounting to maladministration within the rubric of "high crimes and misdemeanors," the rejection of the word "maladministration" may be less consequential than it is often made to appear.

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. Others involved abuses so profound that they fall in the category considered momentarily of subversion of the constitution and laws of the realm. 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,[267] and a case not previously mentioned, the impeachment of Chief Justice Scroggs for, among other things, "browbeating" witnesses and disparaging them to the jury.[268]

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 leading role in promoting policies that led to England's failure to hold its French possessions,[269] through the 1715 impeachments of Oxford, Bolingbroke, and Strafford for their advocacy of the Treaty of Utrecht,[270] and including the 1787 impeachment of Warren Hastings over fundamental disagreements about the proper relationship of Great Britain to its Indian possessions and the states that abutted them. 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.

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.[271] However, this line of British precedent deserves renewed attention and we will revisit it when we consider the impeachments of President Donald Trump.

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 were 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 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 an arbitrary and tyrannical way of government."[272] 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.[273]

This use of impeachment is of paramount interest at the current period 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

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presented a threat to constitutional order. On the most dramatic occasions, Parliament used impeachment to forestall the Crown's efforts to impose royal absolutism in place of balanced constitutional government. In such cases, impeachment need not have been based on discrete incidents of violation of specified laws. Rather, the essential allegation 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. We will revisit this use of impeachment later in this book.