

69 U. Chi. L. Rev. 2057

University of Chicago Law Review  
Fall 2002

Review

Craig S. Lerner<sup>d1</sup>

Copyright (c) 2002 University of Chicago; Craig S. Lerner

## **IMPEACHMENT, ATTAINDER, AND A TRUE CONSTITUTIONAL CRISIS: LESSONS FROM THE STRAFFORD TRIAL**

**Proceedings in the Opening Session of the Long Parliament: House of Commons and the Strafford Trial (Volume 3: 22 March-17 April 1641).** Maija Jansson, ed. University of Rochester Press, 2001. Pp xxxviii, 608.

In the months that preceded President Clinton's **impeachment** trial, observers in the media breathlessly reported the so-called "death struggle" between the President and Kenneth Starr.<sup>1</sup> Distinguished academic commentators, such as Ronald Dworkin and Arthur Schlesinger, Jr., were equally overheated in their rhetoric, predicting that the President's **impeachment** would shred the American constitutional fabric.<sup>2</sup> Of course, Clinton was **impeached**, with no discernible unraveling of the regime. The immediate political stakes were high, to be sure, and both sides fought with energy--as a minor participant in the struggle, I can attest to that.<sup>3</sup> But no lives, and very few persons' liberty, were ever in jeopardy and, contra Dworkin and Schlesinger, the U.S. Constitution was safe throughout the ordeal. If this all seems obvious to many now,<sup>4</sup> I mention it only to note the disproportion between \*2058 the "great politics" rhetoric employed widely at the time and the more pedestrian reality of the matter. The **impeachment** trial of a sitting president is always a "crisis," at least in the sense that it may herald a transfer of power. But in that sense every presidential election could equally be called a crisis.

There are crises, and then there are constitutional crises. For an illustration of the latter, let us--with gratitude to the Yale Center of Parliamentary History for the publication of its most recent volume--retreat through the corridors of time to the 1641 **impeachment** trial of King Charles I's principal advisor, Thomas Wentworth, the **Earl of Strafford**. At stake in Strafford's trial was nothing less than the future of English constitutionalism and limited monarchy: Would the Stuart kings enlarge the powers of the monarchy along French lines or would Parliament preserve, and even expand, its own powers and privileges? And, on a more personal level, whose head would fall-- Strafford's or that of his principal antagonist in the House of Commons, John Pym?

It was the stuff of riveting drama,<sup>5</sup> and rivet it did: The King attended every day of the month-long trial, usually accompanied by the Queen and Prince of Wales (the future Charles II), crowds gathered each day to witness Strafford's arrival in Westminster by barge from the Tower of London, and, towards the end of the Lords' deliberation on Strafford's fate, the city erupted in violence. A contemporary diarist reported "great clamor" in the city of London; another warned of "army riots or tumults which may happen to be attempted during the trial" (p xxii). Yet another described crowds mobbing carriages of their peers, demanding to know how they would vote.<sup>6</sup> Contrast this with the waning interest in the Lewinsky affair by the time of the Clinton **impeachment** trial in the United States Senate.<sup>7</sup> One of the first \*2059 lessons from history is that not every political crisis raises fundamental issues. I think it fair to conclude or simply posit that a constitutional crisis may be expected to excite

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

widespread interest outside the academy.<sup>8</sup> If this is accurate, an **impeachment** trial that sets off an avalanche of law review articles, but garners fewer than ten million television viewers,<sup>9</sup> is not a constitutional crisis.

From the constitutional crisis surrounding Strafford's **impeachment**, the Framers of the U.S. Constitution drew lessons, and we in the twenty-first century can draw several more. The lessons that the founders of the American republic drew from Strafford's trial--widely regarded as a "great watershed in English constitutional history"<sup>10</sup>--are imprinted on the U.S. Constitution. The Strafford trial posed the following problem: What should be done with an executive officer who has gravely misbehaved, but who has not, arguably, committed an offense against the law of treason? In Strafford's trial, Parliament (or at least the House of Lords) hewed to a rigorous standard of what constituted an **impeachable** offense. If one were to be **impeached** for treason, as Strafford was, there must be proof of treason in its circumscribed, statutory sense. Judged by this standard, Strafford had not committed an **impeachable** offense. Yet, as we shall see, in his case (as in the case of Archbishop Laud), a bill of attainder proved to be a safety valve, allowing Parliament to proceed--in a legislative, rather than a judicial, capacity--even though no violation of the law of treason had been proven.

The Framers of the U.S. Constitution did not allow Congress this safety valve<sup>11</sup> and were, as a consequence, impelled to create another. \*2060 It was widely agreed among the Framers that the legislature should not possess the power to impose criminal punishment through a bill of attainder. Yet as originally drafted, the Constitution provided that **impeachment** was appropriate only in cases of "treason and bribery." At the Constitutional Convention, George Mason objected that "(t)reason as defined in the Constitution will not reach many great and dangerous offenses," and he added, perhaps alluding to Strafford's trial, that because "bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of **impeachments**."<sup>12</sup> Mason moved to add "maladministration" to the litany of **impeachable** offenses, but James Madison responded that "maladministration" was "(s)o vague a term" that the President would only have "tenure during (the) pleasure of the Senate."<sup>13</sup> Mason, incorporating Madison's objection, proposed the now familiar language, "other high crimes (and) misdemeanors."<sup>14</sup>

The House of Lords in the Strafford trial and the Senate in Clinton's trial grappled with similar questions, including what constitutes an **impeachable** offense and whether a safety valve should be used to remove a misbehaving executive officer. Virtually all of the senators agreed that Clinton had acted badly in some sense, but the question remained whether his actions merited **impeachment** and removal. On the one hand, the phrase "high crimes and misdemeanors" was originally intended to serve as a safety valve, authorizing the removal of officers whose offenses, though not treasonous, threatened the regime (Mason's concern). On the other hand, the deletion of the phrase "maladministration" reflected the possibility that too broad a category of **impeachable** offenses would undermine the independence of the presidency (Madison's concern). Are perjury and obstruction of justice in a civil suit, when committed by the chief executive officer of the nation, a threat to the regime; or would removal for such offenses weaken the presidency? The question is surely a difficult one.<sup>15</sup>

But while the House of Lords openly and seriously debated the legal issues before it, the Senate punted. Although some senators were impressed by their own performance in debating the issues raised in \*2061 the Clinton proceedings,<sup>16</sup> outside observers have not been nearly as congratulatory. An Israeli observer, contrasting the Clinton proceedings with the recent criminal investigation of Prime Minister Benjamin Netanyahu, observed that the Clinton "proceedings, legal in form, were merely ceremonial. Their substance was political."<sup>17</sup> And from his Olympian heights, Judge Richard Posner declared the Clinton trial to be "a travesty of legal justice" in which the legal arguments marshaled by both sides were powerless to affect the senators, many of whom had announced their verdicts before the trial was complete or had even begun.<sup>18</sup> The Strafford trial is, in this respect, an illuminating comparison, for the legal arguments really mattered. The House of Lords, unlike the Senate,

took seriously its judicial responsibilities in an **impeachment** trial. And this is perhaps another lesson from the past: Individuals and institutions may serve as examples to encourage our own faltering steps.

In the present volume, the Yale Center for Parliamentary History has collected the extant diarist accounts (there are about a dozen) of Strafford's trial and organized them by day, from March 22 to April 17, 1641. Each day is divided into various accounts of the trial in the House of Lords (which met Mondays through Saturdays, from 9:00 a.m. to 2:00 p.m.) and the late afternoon deliberations of the House of Commons.

In addition to the importance and drama of the trial, the present volume is fascinating as a test of predictions about perspectivism and subjectivity. It is, nowadays, sometimes assumed that multiple viewers of the same event will have different observations and recollections, indeed so much so that the very notion of "truth" is mocked as a chimerical aspiration. Kurosawa's legendary movie *Rashomon*, which explored this theme through four eyewitness accounts of the same crime, has inspired a copious legal scholarship,<sup>19</sup> not to mention an oblique reference from Clinton himself during the Independent Counsel's investigation into his conduct. The former President suggested during his grand jury testimony that Clarence Thomas and Anita Hill "both thought they were telling the truth" in recounting what had happened between them.<sup>20</sup>

\***2062** Observers of Strafford's trial ran the spectrum from devoted admirers to bitter enemies, so one opens the present volume expecting a divergence of reports. Such an expectation is disappointed: The congruence of the various accounts is striking.<sup>21</sup> The consistency of the accounts in the present volume speaks, perhaps, to the intellectual honesty of the observers, their ability to overcome personal attachments and attain a measure of objectivity. Although one hesitates to draw momentous conclusions from a single data point, perhaps another lesson gleaned from history is that human powers of observation and cognition are not as unreliable as now assumed. Perhaps contemporary assumptions about the subjectivity of the observer are not so much explanatory of either the nature of reality or the frailty of human powers as they are a convenient liberation from any duty to seek, and report, the truth.

This Review is divided into five Parts. Part I sketches the trial's historical background, emphasizing the truly fundamental nature of the crisis that confronted England. Part II explores the remarkable fact that the mechanism for resolving this constitutional crisis--**impeachment**--is, in some sense, a legal and judicial procedure. I then consider the debates in the Commons and the House of Lords, first on **impeachment** for treason in Part III, and then on the safety valve of attainder in Part IV. The final Part asks whether the preceding four Parts, while surely fascinating, provide any concrete lessons for us today.

## I. The Constitutional Crisis of 1640

On August 17, 1998, the day that President Clinton testified before the grand jury, the New York Stock Exchange rose 150 points. On August 17, 1640, less than one year before Strafford's trial, the Scottish army, gathering just over the English border, was days away from launching an invasion; Ireland was a political vacuum, with its parliament recently prorogued and the governor departed; and violence was spreading across the English countryside, with intermittent shooting outside the royal garrison in Edinburgh, protests in Yorkshire about the billeting of soldiers, and mutinies among the troops in Newcastle.<sup>22</sup>

\***2063** King Charles I had sought funds to raise an army to meet the Scots first from Venetian bankers and then from a hastily called Parliament, the first in eleven years, only to be rebuffed by both. Charles dismissed the aptly named Short Parliament (it had met for less than a month) on the morning of May 5, 1640. At an afternoon meeting that day of the King and his closest advisors, one man pierced the fog of panic and vacillation. He began his recommended course of action by emphasizing the probity of the King's conduct (always a good opening). And the advisor continued, in trenchant words that were analyzed and re-analyzed in ensuing years: "You have an army in Ireland you may employ here to reduce this kingdom" (p 494). The advisor's name was Thomas Wentworth, the **Earl of Strafford**.

That Strafford was present at that crucial meeting was testimony to the depth of the crisis. Charles had summoned Strafford to London less than a year earlier, and it was not personal affection that had moved him to do so. For more than a decade, Strafford had served the King zealously in a series of positions, yet only when conditions were at their most dire and all others had failed him had Charles embraced Strafford.<sup>23</sup> Charles had previously surrounded himself, albeit to a lesser degree than his father, with men whose principal recommendations were their graceful manners and beaux yeux, and Strafford had neither. What Strafford had in abundance was energy and shrewdness. While everyone else dithered in the face of the Scottish army and the brewing domestic unrest, Strafford alone advocated decisive action. Yet what precisely had he recommended at that May 5 meeting? Had he advised the use of the Irish army “here,” meaning England, or “here,” meaning Scotland? Alas, an **impeachment** trial would turn, in part, on the meaning of the word “here.” If “here” meant England, then Strafford was advising the King to use a foreign army to subjugate the English people--treason! If “here” meant Scotland, then Strafford was advising the King to take the initiative in the war with the Scots--at most misguided, but hardly illegal.<sup>24</sup>

No one could have predicted, fifteen years earlier, that Strafford would emerge as the King's closest advisor. In the 1620s, the young Wentworth had been a leading member of the Commons in its struggles \*2064 with the Crown, and he had even enjoyed the distinction of being imprisoned in the Tower of London for refusing one of Charles's “forced loans” of the gentry. The parliaments of the 1620s had battled with Charles over foreign policy, religion, and, most ominously, money, with the King demanding subsidies and a wary Parliament refusing him.<sup>25</sup> (Hence his recourse to “forced loans,” and hence Wentworth's first state-subsidized visit to the Tower of London.) The parliaments of that decade had embarked upon a series of indirect attacks on the King. Assisted by Edward Coke, the great common law lawyer and later Lord Chief Justice, the parliaments had revived, albeit in a modified form, the medieval procedure of **impeachment**, and had, in this way, succeeded in removing certain irksome royal advisors.<sup>26</sup> Such actions inevitably aroused the King's ire, and the **impeachment** trial of his great favorite, the Duke of Buckingham, had culminated in his dismissal of Parliament before a verdict was reached.

As a member of Parliament, Wentworth's greatest success came in 1628, when he orchestrated the King's acquiescence in the enactment of the Petition of Right. But against the intransigence of Charles on the one side and certain members of Parliament on the other, Wentworth's mediating efforts foundered. It was then that Wentworth stunned his contemporaries: He switched sides. Abandoning Parliament, Wentworth threw in his lot with the King and was immediately rewarded with a baronetcy and the leading royal position in his native Yorkshire, Lord President of the North.<sup>27</sup> His erstwhile colleagues in Parliament, and Whig historians ever afterwards, have directed at Wentworth the full measure of venom that is appropriate to turncoats. Macaulay pronounced Wentworth to be “the lost Archangel, the Satan of the apostasy;”<sup>28</sup> a contemporary of Wentworth almost outdid \*2065 Macaulay, writing that Wentworth was as “libidinous as Tiberius, cruell as Nero, covetous as rich Cressus, as terrible as Phalaris, as mischievous as Sejanus.”<sup>29</sup>

Wentworth, now a baron, took his seat in the House of Lords in 1629. When the Commons in that year refused supplies to the King, Charles had had enough. He dismissed Parliament and threw its leaders, Denzil Holles and John Eliot, in prison, where Eliot would die three years later. That could have been Wentworth's fate, he may have mused to himself; however, a switch in time had saved not only his life, but vastly improved his political fortunes. Within a year Wentworth was elevated to viscount and appointed to a place on the Privy Council. And after proving himself as Lord President of the Council of the North in Yorkshire from 1629 to 1631, Wentworth was made Lord Deputy of that graveyard of English politicians: Ireland.

Wentworth's conduct in Yorkshire and Ireland would form much of the basis of his later **impeachment** trial. The details need not detain us here, but one aspect is noteworthy--Wentworth's prickly relationship with lawyers. Although Wentworth had studied modern law at Cambridge, he never practiced law and in fact quickly developed towards lawyers an enmity that members of the bar enthusiastically reciprocated. Wentworth referred to lawyers as “gownmen,” “moot men,” or “Magna Charta m(e)n,” and

he chafed at their interference with his plans.<sup>30</sup> Both in Yorkshire and in Ireland, Wentworth held positions at such a distance from Westminster that he was able to exercise a great deal of autonomy from the meddlers at court. And as the head first of the Council of the North and then of the Irish privy chamber, he exercised a vast, discretionary power akin to that wielded by the English prerogative courts. On several occasions he watched with impatience as the courts failed (in his opinion) to mete out justice, especially when one of the parties was a “man of distinction” who could wrangle favors from the judge or the jury. Wentworth's principal response to the perceived failure of the legal system was to expand the jurisdiction of the prerogative courts, over which he held sway, to include disputes among private parties. After he had succeeded, more or less, in bullying Irish lawyers into submission, Wentworth wrote to Archbishop Laud that the King should emulate his strategy: “I know \*2066 no reason but you may as well use the Common Lawyers in England as I, poor beagle, do here (in Ireland).”<sup>31</sup>

Wentworth's hostility towards lawyers was emblematic of a more fundamental antipathy, shared by the King, towards any legal principles that hindered the immediate implementation of royal plans. By 1640, unrest was growing in England, Ireland, and Scotland, and there was a perception among some at court that swift action was needed. Ideas percolating at the time--such as Robert Filmer's defense of patriarchy and Thomas Hobbes's paean to absolutism--were congenial to the broadest notions of royal power;<sup>32</sup> and such ideas were made concrete, at least in part, just across the English Channel. The Stuart kings were apt to regard their French counterparts with envy: How much easier governing would be if there were no Cokes throwing up precedents against royal action, and no tiresome “Magna Charta men” making reference to the privileges of Parliament.

For many of his contemporaries and for Whig historians afterwards, Wentworth's evil consisted principally in his being the most capable of Charles's advisors, and therefore the most likely to implement Stuart plans to replace the constitutional regime with an absolutist one. This view is most dramatically stated, or overstated, by Macaulay:

(Wentworth's) object was to do in England all, and more than all, that Richelieu was doing in France; to make Charles a monarch as absolute as any on the Continent; to put the estates and the personal liberty of the whole people at the disposal of the crown; to deprive the courts of law of all independent authority, even in ordinary questions of civil right between man and man, and to punish, with merciless rigor, all who murmured at the acts of the government, or who applied, even in the most decent and regular manner, to any tribunal for relief against those acts.<sup>33</sup>

\*2067 Arrayed against Wentworth were men such as John Pym, soon to become the leader of the Long Parliament. In describing Pym, the word “courage” is, in its most literal sense, appropriate. Political courage, Aristotle reminds us, is a pale imitation of the real thing; for courage means risking one's life, not the chairmanship of a committee or one's seat in Congress.<sup>34</sup> Pym was well aware of the fates (imprisonment and death) of the parliamentary leaders in 1629; and he also had before him the more recent example of Charles's actions after the dismissal of the Short Parliament in May 1640, namely, Charles's imprisonment of four members of the Commons. Pym was not a revolutionary seeking to overthrow the monarchy; indeed, he bore little resemblance to the Levellers who would soon acquire prominence. Nor, in perfect justice, was Wentworth a Richelieu.<sup>35</sup> But it is still fair to view the battle in which they would soon be engaged as a turning point in English history. Would England embrace a Continental model of government, in which the monarch is absolute? Or would England chart its own course and enlarge the powers of Parliament?

The summer of 1640, as a prelude to that battle, was one of gathering tumult. Soon after the dismissal of the Short Parliament and the fateful May 5 meeting, violence spread throughout London, and much of the anger was directed against Wentworth, now exposed as the King's top advisor. To supply funds for the war with the Scots, Wentworth cajoled and extorted money out of merchants in London and the gentry in Yorkshire (actions which would also figure prominently in the **impeachment** charges). As the military situation in the North deteriorated, Wentworth, who had no military experience, assumed leadership over the beleaguered English army and was at last rewarded \*2068 with the title “**Earl of Strafford**.” The campaign proved



IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

to be a period of agony for Wentworth-- assailed by gout, his strategic plans sabotaged at court, and the Irish troops, on whom he had placed so many hopes, having never arrived on English (or Scottish) soil. The King, his army trounced by the Scots and unable to raise funds to continue the war, eventually submitted to a humiliating peace agreement and then acquiesced in the calling of a new Parliament.

Parliament met on November 3, 1640. The Commons, led by Pym, had an ambitious legislative agenda of reform.<sup>36</sup> The King was over a barrel, for the truce agreement with the Scots required the payment of nearly £1,000 per day until a final peace treaty was signed. Charles needed the Commons to vote him subsidies, the Commons knew it, and they delayed any final settlement with the Scots for precisely that reason. Pym recognized, however, that meaningful reform was impossible until the principal obstacle--Strafford--had been eliminated. The other advisors to the King, the miscellaneous rotting planks of monarchy, could be ignored, but not Strafford. No one doubted that, as soon as he had the opportunity, he would not only unwind any reforms thrust upon Charles, but also strike personally at those who had brazenly challenged the King's authority.

To the surprise of many, Strafford did not flee England (as, for example, did Thomas Hobbes)<sup>37</sup> in fear of the Long Parliament's wrath. In preparation for the ensuing battle, Pym collected allies and galvanized sentiment (within the House of Commons and in the public generally) against Strafford until striking on November 11.<sup>38</sup> Pym stated the case for the **impeachment** of Strafford in the Commons, contending that his "design was to destroy the laws and liberties" of the people.<sup>39</sup> One might have thought that a sufficient reason to vote \*2069 for **impeachment**, but Pym, astute politician that he was, was taking no chances: After cataloguing several examples of Strafford's intent to overthrow the Constitution, Pym (according to some accounts) unfurled a final, decisive charge--that Strafford was guilty of sexual impropriety.<sup>40</sup> Any misgivings on the part of the Puritans in the House of Commons were, in that moment, dissolved, and Strafford's **impeachment** sealed.

## II. **Impeachment** as a Legal Procedure

It was in this way that the constitutional crisis of 1640, and the personal battle between Pym and Strafford, came to be resolved, however imperfectly, through the **impeachment** mechanism. The preparation for the **impeachment** trial would take months, the trial itself over a month, and the subsequent debate over a bill of attainder yet another month. Such elaborate procedures baffled a Scottish observer, accustomed to the rougher justice of the Highlands, who pressed Pym to explain why Strafford could not simply be beheaded in "two or three days."<sup>41</sup> However barbaric the Scot's reaction might appear, it reminds us that a constitutional crisis need not be resolved in a legal or judicial manner.<sup>42</sup>

**Impeachment** is often said to be a "political weapon,"<sup>43</sup> and it is widely agreed to have played an important role in the political development of England.<sup>44</sup> But as "weapons" go, **impeachment** is relatively \*2070 bloodless; and though it may be wielded to serve political ends, it is, in some sense, also a legal procedure. It is a procedure in which the Commons, represented by a committee, prosecuted quasi-criminal charges before the House of Lords, who sat in a judicial capacity. One of the most striking differences between the Strafford and Clinton trials is the seriousness with which the House of Lords, as opposed to the Senate, took its judicial responsibilities in presiding over what was, at least in part, a legal and not a political proceeding.

The procedure of **impeachment**--by which Parliament exercises criminal jurisdiction--arose in the fourteenth century.<sup>45</sup> Medieval **impeachment**, although a new growth in English parliamentary judicature, had roots in pre-existing practice. Principally, the traditional use of a "petition" by the Commons to the Lords or monarch did much to conceal the novelty of **impeachment**, which eventually implied a right by the Commons to proceed against an offender, not dependent upon the grace of the Lords or the monarch. Moreover, the similarity to common law indictment further lent an aura of familiarity to what was in fact a revolutionary procedure.<sup>46</sup>

\*2071 And yet, the new procedure was forever colored by its origins and its implicit link to the legal procedure of common law indictment. The legal cast of **impeachment** is reflected in Blackstone's observation that an **impeachment**, unlike a bill of attainder, "is a prosecution of the already known and established law."<sup>47</sup> Although the **impeachment** mechanism would lapse into disuse by the mid-fifteenth century, it would be revived in the 1620s when Parliament renewed its struggles with the Crown.<sup>48</sup> The thirteen **impeachment** trials of that decade were often politically motivated, and members of the House of Commons drew haphazardly from the medieval precedents to serve their immediate goals in attacking royal ministers. But it would be incorrect to characterize those **impeachments** as show trials. To the contrary, a close examination of the actual debates in Parliament reveals the seriousness with which the members took their legal and judicial responsibilities. For example, at issue, in part, in a 1621 **impeachment** trial (of Francis Michell, the commissioner for the enforcement of the alehouse patent) was whether the Commons had the authority to fine the accused. After a searching inquiry of the precedents, the Commons concluded, albeit reluctantly, that they did not.<sup>49</sup> As one historian has written, throughout the **impeachments** in early Stuart England, "the Commons were influenced not only by precedent but also by certain general attitudes about the judicial process and . . . these attitudes imposed certain real constraints on the Commons' judicial proceedings."<sup>50</sup>

The Strafford **impeachment** provides an even more rigorous test of the proposition that there were real constraints on Parliament because of the judicial nature of the **impeachment** proceedings. In the Strafford case, the political and personal stakes were far higher than in the **impeachments** of the 1620s. The political stress on the legal procedures was overwhelming: Would **impeachment** degenerate into a three-day formality and prelude to execution, as the Scottish observer \*2072 expected, or would the legal and judicial "constraints" impose meaningful limits on the actions of the Commons and the Lords?

Pym secured a victory in the opening round of the **impeachment** struggle when the Lords on November 11 ordered that Strafford be confined until his trial. While Strafford was thus rendered harmless in the Tower of London, Pym and his allies were free to foment ill will against Strafford among the general public. And yet the general public would not decide Strafford's fate--the Lords would. Although the Lords would surely be influenced by public sentiment, ultimately they would be called upon to evaluate the charges in an **impeachment** trial. The three-and-a-half months that passed between the **impeachment** and the trial were consumed in bickering (among the Commons, Lords, and Strafford) over the procedures to be employed. The procedural debates reveal an exacting formalism that is far from the atmosphere of a show trial.

First and foremost was the simple question of where to conduct the trial. It was assumed that the Lords would be the judges at the trial and that the prosecution would be "managed" by certain members of the Commons.<sup>51</sup> But the Commons were eager to make their collective presence felt at trial, and pressed the Lords to move the trial to roomier quarters in Westminster.<sup>52</sup> Initial resistance by the Lords was overcome when the Commons succeeded in excavating a precedent for such a forum transfer in a 1377 **impeachment** trial.<sup>53</sup> A scaffold was built to accommodate the trial in a room in Westminster, and special side chambers were constructed for the King and Queen, who were expected to attend.<sup>54</sup>

But having resolved that the Commons could, en masse, be present at the trial, the question then became, in what capacity would they be in attendance? The form this debate took may seem humorous to the modern reader: The Commons insisted that they could attend the trial "covered," that is, wearing hats. The ferocity of the debate, and the amount of ink spilled on this issue,<sup>55</sup> is almost unintelligible to \*2073 the modern reader, although it is worth noting that the writers at the time took for granted the gravity of the issue. (One can only wonder what issues that we moderns treat with unquestioning seriousness will bemuse historians 350 years hence.) The nub of the hat controversy was that, from the Commons' perspective, to sit bareheaded before the House of Lords would imply the inferiority of their house to the Lords.<sup>56</sup> A compromise was struck when the Commons

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

agreed that the managers would appear uncovered, but with the understanding that they were appearing as a committee of the Commons, not as representatives of the entire House, thus preserving the dignity of the Commons.

The bulk of the pretrial procedural skirmishing turned on requests by Strafford to claim privileges available to defendants in criminal trials. Strafford petitioned the Lords for the ability to call witnesses (a privilege which judges often allowed criminal defendants) and to have counsel speak on his behalf (which was a right accorded accused misdemeanants); both requests the Commons opposed. Debate ensued, precedents were unearthed, and the Lords eventually split the difference: Strafford would be permitted to call witnesses, but not under oath (p 70 n 79); and he would be permitted to have counsel present his case, but only on matters of law, not of fact (p 64 n 31).<sup>57</sup> This was consistent with the ordinary practice in treason prosecutions in common law courts until the Treason Act of 1696.<sup>58</sup>

In a fundamental respect, however, there seems to have been virtually no debate: Strafford was entitled to know the specific charges against him. It is worth noting that accused felons at the time would probably not have been accorded this privilege;<sup>59</sup> and, indeed, in this respect, and several other minor ones, Strafford seems to have been accorded rights that were generous, at least viewed by the standards of \*2074 the time.<sup>60</sup> Pym chaired a committee of the Commons authorized to formulate the articles of **impeachment**.<sup>61</sup> After two months, they presented the articles in the Lords with Strafford, summoned from the Tower of London, in attendance. Strafford was given three weeks to submit his written responses to the charges.

The articles of **impeachment** were framed as seven general articles, alleging that Strafford had traitorously sought to subvert the fundamental laws of England, and twenty-eight particular articles, supporting the charge of High Treason with serried examples from Strafford's career. The twenty-eight articles canvassed a time period of nearly a decade: Articles 1 and 2 dealt with events in 1633, when Strafford served as President of the Council of the North in Yorkshire; Articles 3 through 19 dealt with his tenure as Lord Deputy of Ireland from 1633 to 1638; and Articles 20 through 28 dealt with actions taken by Strafford during the preceding two years, both in the military campaign against the Scots and in domestic efforts to raise funds for that campaign. Although it was an impressive catalog of horrors, the Commons would be forced during the trial to abandon several charges for lack of evidence.

As a political document, the articles of **impeachment** were fabulously successful. Together with written remonstrances against Strafford delivered to London from the Irish and the Scots, the articles of **impeachment** were widely circulated and whipped up public sentiment against Strafford.<sup>62</sup> The general articles were a triumph of political writing, hammering away on an easily understood theme--that Strafford was a tyrant. The particular articles were well-drafted to support the theme with colorful vignettes from Strafford's career.

Yet as a legal document--that is, viewed as a criminal indictment--Pym seems to have made two classic prosecutorial errors. First, \*2075 he "overcharged." Perhaps it is the eternal temptation for prosecutors to lard an indictment with dozens of allegations in the hope that a jury will be overwhelmed by the sheer mass, if not the quality, of the charges. Yet as Pym and countless prosecutors have learned, that strategy has risks. Allegation after allegation against Strafford withered away in the fire of cross-examination. The effect, inevitably, was to cast doubt on all of the charges, as well as the fairness of the accusers.

Pym's second error was in failing to scrutinize his sources of information in drawing up the charges. Perhaps his passion for conviction blinded him to the foibles of several of his key witnesses, such as Lord Mountnorris, Richard Cork, Adam Loftus, and Henry Vane. Many of them had clashed with Strafford in the past, invariably to their misfortune. That they were eager to give evidence against Strafford could not be doubted, but whether the evidence they were prepared to give was wholly truthful was quite another matter. As the managers of the prosecution would soon learn, proving something in the court of public opinion is one thing--proving it in a court of law quite another.



### III. The Trial

There is an old French legal maxim, on juge l'homme, pas les faits (judge the man, not the facts), and at times during the trial the managers seem to have wished, despite their horror of French royal absolutism, that at least in this one respect and on this one occasion England could have emulated the French model. Strafford was a cruel minister; he had exhorted Charles to expand his royal powers. As a man, Strafford was, the managers believed, worthy of execution; for as long as he lived the English Constitution was in jeopardy. But to the managers' chagrin, this would be an **impeachment** trial and not a political referendum. Could the managers prove their charge against Strafford-- "High Treason"--in an English court of law? The proceedings became enmeshed in disputes of both fact and law. As a factual matter, which of the twenty-eight allegations against Strafford could be proven? And of the factual allegations proven, which, as a matter of law, constituted High Treason? That of course turned on the question: What was the law of treason? Was it limited by statute (as Strafford argued) or did it include attempts to subvert the fundamental laws of England (as the managers argued)? And what were the fundamental laws of England that Strafford had endeavored to subvert? In response to many of the articles of **impeachment**, Strafford argued that the facts alleged were not proven, and, in the alternative, even accepting the \*2076 charges as true, that the facts alleged did not constitute treason.<sup>63</sup> The managers, in reply, were repeatedly compelled to combat Strafford on both the facts and the law.<sup>64</sup>

It is worth emphasizing that by "Strafford argued," I mean that Strafford himself argued. In the modern American criminal trial, by contrast, thanks to an ever-widening interpretation of the privilege against self-incrimination,<sup>65</sup> the defendant has been rendered the proverbial potted plant. The Clinton trial reflected the logical conclusion of modern interpretations of the Fifth Amendment, for it was no longer deemed necessary for the potted plant to decorate the courtroom.<sup>66</sup> Strafford's trial was a different affair. Until the last day, in which his lawyers argued questions of law, Strafford was always talking.<sup>67</sup> Indeed, whatever else one may say of Strafford, his stamina can excite only feelings of awe. From mid-March to mid-April 1641, he was in trial six days a week from 9:00 a.m. to 2:00 p.m. He acted as his own attorney, cross-examining and calling witnesses, and arguing mixed questions of law and fact. Strafford then spent the remainder of the afternoon each day engaged in personal and official correspondence, for despite being in the Tower of London he continued to be the King's most valued advisor in a time of national emergency. The \*2077 rest of the evening and through the night, he prepared for the next day's trial with his lawyers.

In proving their factual allegations against Strafford, the prosecution got off to a rocky start. On the first day of the trial proper,<sup>68</sup> the prosecution charged Strafford with crimes dating back nearly a decade, to his time as the leading administrator in Yorkshire. The first of the twenty-eight articles alleged that, as President of the Council of the North, Strafford had illegally obtained a commission from the King to expand the Council's jurisdiction. Strafford made brief work of this article, proving that he was in Ireland when the commission had been obtained and that the managers had backdated it (p 102). The second article charged that, at a Council meeting eight years previous, Strafford had said that "the little finger of the King is heavier than the loins of the law." The article doubtless resonated with the prevailing view of Strafford as a budding tyrant, but again the problem of proving the allegation arose. Here, the prosecutors were saddled with a major liability: Their key witness, Thomas Layton, was deaf. In his response, Strafford joked that Layton "cannot hear without whooping at the bar" (p 103), and he then plausibly showed,<sup>69</sup> by placing the words in context, that he had said exactly the opposite of what was alleged.<sup>70</sup> John Maynard had the final word and stubbornly insisted that "Sir Thomas Layton says that before Christmas he had his hearing well" (p 103).

Several days of the trial followed the general course of the first: The managers would unveil a charge with great fanfare only to go slinking irritably away at the end of the day, unable to prove the facts contained in the charge. At times, they were embarrassed by the revelation of an obvious error in an article.<sup>71</sup> And perhaps no difficulty \*2078 proved to be more endemic for the prosecution than its reliance on witnesses with scores to settle. Politics in Ireland was not a place for the faint of heart,

or clean of hands, and the men with whom Strafford had tussled, and who now lined up to testify against him, were a rather unsavory bunch. Strafford repeatedly objected to such witnesses, claiming that they were prejudiced against him because, for example, he had once had the witness imprisoned or had sued him for libel. Again and again, the Lords overruled Strafford's motions, and permitted such witnesses to testify, which was the legally correct decision, as Strafford's objections went to bias, not admissibility.<sup>72</sup> But the procession of witnesses of this sort, whom Strafford exposed in their true colors in his cross-examinations, aroused sympathy for Strafford and eventually undermined the case against him.

A more profound difficulty for the prosecution was its failure to advance a compelling legal theory of "treason" during the trial. What constituted "treason" under the laws of England in 1641 is a perplexing question that a leading modern scholar has concluded is "probably unanswerable."<sup>73</sup> The parliaments of the medieval ages had generated a "hugger-mugger jumble"<sup>74</sup> of treason statutes, which individually and collectively pointed inconclusively in a variety of directions. A 1352 statute (25 Edw III, st 5, ch 2, pp 601-02) appeared to limit treason to seven enumerated offenses, the most serious of which was "compassing the death of the king." But the 1352 statute also contained a "salvo" provision that purported to preserve Parliament's authority to proscribe other offenses as treason. Subsequent treason statutes, in 1399 (1 Hen IV, ch 10, p 602) and 1553 (1 Mary 1, ch 1, p 603), however, arguably clarified that nothing outside the terms of the 1352 statute (not including the salvo) constituted treason.

Strafford urged the Lords to adopt the narrowest and most legalistic understanding of the law of treason--that "treason" was those offenses specifically named by the 1352 statute and nothing more. He displayed the argument in his written responses to the twenty-eight articles, where he emphasized that, whatever other crimes he may have committed, he was "free of all offenses declared treason (in 1352)" (p 47). Focusing on the "Statutes of the Realm," rather than the airy and undefined "fundamental laws of England" invoked by the \*2079 managers of the prosecution, Strafford contended that he was at most guilty of misdemeanors, and "a hundred misdemeanors will not make a felony, and therefore not a treason" (p 92).<sup>75</sup> If the Lords were to adopt Strafford's view of treason, the results would be devastating to the case against him: All but three of the twenty-eight articles--Articles 15 (illegal billeting of soldiers in Ireland), 23 (conspiring to use the Irish army to conquer England), and 27 (using force to levy money from the Yorkshire gentry)--would fall away.

This brings us to one of the great ironies of the Strafford trial: The same Strafford who throughout his career had been so impatient with lawyers and so contemptuous of their niggling attention to formalities, reinvented himself during the trial as an uber-textualist and lawyer par excellence. He had two months to prepare for the trial, assisted by several of the most accomplished lawyers of the day. For the development of his factual responses to the charges, Strafford, isolated from other witnesses in the Tower of London, relied exclusively upon his capacious memory; but for the development of his legal argument, the same Strafford who had always sought to do justice reckless of the law and its odious servants, the common law lawyers, scoured the statute books. One can practically hear the glee in Strafford's voice when, armed with sheaths of precedents, he challenged the managers' legal case against him, throwing up parchment barriers to assaults on his person and, he portentously intimated, the rights of all Englishmen.

Strafford was new to playing lawyer, and plainly relished it. By contrast, several of the managers of the case against him really were lawyers; and yet they urged the Lords to adopt a view of treason that was untrammelled by statutory or common law and that focused instead on the "fundamental laws of England," a phrase that would become their mantra during the trial. At the opening of the trial, Pym summed up the accusation against Strafford in this way: "(W)e shall charge him with nothing but what the Law in every man's breast condemns, the Light of Nature, the Light of common reason, the Rules of common Society."<sup>76</sup> It was a quite a litany of laws and rules, but conspicuous in its absence was the statutory or common law of England. Indeed, the managers seemed to approach the trial as if Strafford's treason were self-evident as a matter of logic. As one member of the \*2080 Commons succinctly put it during a debate: "If it bee treason to . . . kill the governor, then sure 'tis treason to kill the government."<sup>77</sup>

For much of the trial, the managers seemed to have little inclination to engage Strafford in an exacting debate on the law of treason. In response to Strafford's appeal to the letter of the law in his written responses to the articles of **impeachment**, Pym countered that Strafford "does in this but like the adulterous woman in the proverbs that wipes her mouth as though all were well" (p 61).<sup>78</sup> The managers repeatedly implored the Lords to consider the charges collectively, as if voting on the man, rather than individually, as if rendering a verdict. As one manager told the Lords, "The charge is a treason, a mystery of treason, not one single act but a habit of treason. It is to take away our fundamental laws" (p 99). The managers even conceded that many of the articles, taken individually, did not constitute treason; and it was only when considered together, as evidence of Strafford's intent to subvert the fundamental laws, that treason was proven.<sup>79</sup>

In fairness to the managers, their position was a difficult one. They were prosecuting Strafford nominally on behalf of the Crown, but the King, it was widely known, supported Strafford and was hostile to the **impeachment** effort. Parliament was thus treading the fine line of accusing Strafford of seeking to subvert the fundamental laws of England, but disclaiming any such charges of treason as to the King himself. Strafford tirelessly pointed out, however, that many of his allegedly traitorous acts had been sanctioned by the King. For example, with respect to the charge that he had illegally forced many Scots living in Ireland to take an oath of allegiance, Strafford produced a letter from the King authorizing his conduct (p 353). And Strafford taunted the managers not only for the novelty of the charge, but also for its apparent incoherence: How could administering an oath of allegiance to the Crown constitute treason to the Crown (pp 337-38)?<sup>80</sup> As Raoul Berger notes, "Menacing as the acts of Strafford were, they did not \*2081 amount to treason within the common understanding because they were not in the strict sense acts committed against the authority of the king: They had his tacit consent, if not encouragement."<sup>81</sup>

Many other actions by Strafford, not explicitly sanctioned by the King, had the apparent blessing of custom. How, Strafford further challenged, could he be guilty of subverting the fundamental laws of England if his predecessors as deputies in Ireland had engaged in the same practices: Were all of them likewise guilty of subverting the fundamental laws?<sup>82</sup> The managers responded, rather formalistically, that the laws in Ireland were the same as the laws in England; and that, accordingly, Strafford's conduct, illegal under the latter, was likewise illegal under the former (p 169). This argument gained little traction among the Lords, who may have thought it unrealistic to expect of a deputy in Ireland the same punctilious respect for law as one might demand from an administrator in England. Eventually, the managers acknowledged that some precedents for Strafford's imperious conduct in Ireland existed, but they insisted that he had exploited those precedents well beyond his predecessors.<sup>83</sup> The difficulty with this argument was that it conceded too much. At most, then, the difference between Strafford and his predecessors was one of degree, not kind: Surely this is not the stuff of treason. The managers had promised to prove an intent to subvert the fundamental laws of England, but how could the charge be sustained if the managers acknowledged that Strafford had not fundamentally broken with the past?

\*2082 Whatever the incoherence of the overall case against Strafford, the managers had three articles that arguably constituted treason under a "constructive theory" of the 1352 statute: Articles 15, 23, and 27.<sup>84</sup> Although the managers would devote great efforts to Article 15<sup>85</sup> and Article 27,<sup>86</sup> both of which alleged that Strafford had unlawfully used armed force to punish his enemies, it was Article 23 that proved to be the pivotal charge. It alleged that, at the meeting of the King's eight closest advisors on May 5, 1640, the day the Short Parliament was dismissed, Strafford had exhorted Charles to use the Irish army "here," possibly meaning England.

A moment's reflection quickly exposed the hurdles the managers would face in proving this charge. The article entailed only words, not deeds; and, unfortunately for the prosecution, no Irish soldiers actually set foot on English (or Scottish) soil in 1641, for despite Strafford's urgings and the King's consent, unrest in Ireland eventually precluded the idea. A further difficulty was that the managers were \*2083 relying almost exclusively on the testimony of only one of the advisers present at the eventful

meeting. Henry Vane, yet another witness with an axe to grind against Strafford, was questioned by the Commons on three occasions before the trial. At the first two depositions, Vane testified he had no recollection of Strafford's advice with respect to the Irish army. And then at the third pretrial deposition, Vane recalled not simply the general outlines of Strafford's advice, but the specific words he had uttered: "You (Charles) have an army in Ireland and you may employ it here" (p 369 n 15). Witness coaching indeed!

One can imagine the managers' fears, however, as they contemplated Vane on the witness stand. Strafford had chiseled away at the preceding articles, and the managers were determined that Article 23 not meet a similar fate. The trial had not gone well for the managers on Saturday, April 3, 1641-- when Strafford had picked apart Article 19 (involving the oath to the Scots)-- and the managers regrouped on Sunday, April 4 to plot a new strategy: in a word, ambush. On April 5, the lead manager that day surprised the Lords and Strafford by announcing that he intended to argue Articles 20-24 (which involved Strafford's conduct in the military campaign against the Scots) as a group.<sup>87</sup> Strafford protested that he was not prepared to address all five articles, but the Lords denied his motion. It was a double victory for the managers, for it not only allowed them to catch Strafford unprepared, but also allowed them to consider the five articles in the aggregate, rather than one by one.

The strategy appeared to be working well. The prosecution gained momentum, proving that Strafford, in deliberations in the summer of 1640, had urged the King to take the offensive against the Scots and to take whatever steps necessary to fund the war (Articles 20-22). Such allegations, which were undisputed, hardly rose to the level of treason but contributed to the general impression that Strafford had led the King astray. Then the well-coached Vane took the stand and testified to his recollection of Strafford's advice on May 5, and in particular to the word on which everything seemed to turn, "here."

But the edifice so artfully constructed by the prosecutors came under assault, remarkably, from the Lords themselves. Several of them interrupted Vane and demanded to know if he specifically recalled that Strafford had said "here" (possibly meaning England) and not "there" (meaning Scotland). Vane insisted on the former, but he was then pressed as to what Strafford meant by the ambiguous "here": England or Scotland? The prosecutors objected and sought to prevent \*2084 the line of questioning, although Vane ultimately conceded that he did not know what Strafford had intended (p 380).<sup>88</sup>

Strafford then responded to the charge. After some preliminaries,<sup>89</sup> he called most of the other councilors at the meeting in question. Some testified that they recalled that Strafford had said "there," not "here"; others testified that, although they lacked a specific recollection, it was clear in context that Strafford had meant that the Irish armies would be used in Scotland, not England. Strafford's cross-examination of Vane was, by some accounts, masterful. He sarcastically expressed his astonishment that Vane could recall the details of his advice with greater precision than any other person present at the meeting.<sup>90</sup> Vane was, moreover, the only councilor who specifically recalled that Strafford had used the word "here." Yet a law of Parliament enacted during the reign of Edward VI required that charges of treason be supported by at least two witnesses.<sup>91</sup> Strafford had not drawn attention to the two-witness rule earlier in the trial,<sup>92</sup> but he would hammer it relentlessly in the trial's final days. It was an extremely vulnerable point for the managers of the prosecution, and they were aware that Coke himself had, like Strafford, insisted on the vitality of the two-witness rule in treason prosecutions.<sup>93</sup>

Strafford, having talked for three consecutive hours,<sup>94</sup> was not yet done. He used the occasion of Article 23 to blast the core of the prosecution's case. He cautioned his judges against indiscriminate accusations of treason, for if "this lion" be let "loose it will tear us all" (p 384). The theory of treason advanced by the managers, Strafford argued, was particularly dangerous insofar as it was often based, as in \*2085 Article 23, on nothing more than words.<sup>95</sup> "And this shall be charged for Treason," he challenged. "My Lords, who dare impart his mind to his friends or neighbors. And, my Lords, the world will presently become mute" (p 384).<sup>96</sup>

In arguing for a conception of treason defined and limited by statute, Strafford, in a magnificent turnabout, insinuated that he, and not his accusers, was defending the fundamental laws of England. Surely, the “fundamental laws” of England, whatever they precisely were, foreclosed the manufacturing of criminal charges after the fact. Strafford argued that the purpose of the 1352 statute was to create a bulwark against accusations of treason manufactured post hoc by Parliament (p 48). He developed the point in the course of the trial, most emphatically in his summation a few days later, on April 10, when he concluded, “It were better to live under no law than under a law (one) cannot tell” (p 538).

Strafford had met his accusers on their terrain--the fundamental laws of England--and had achieved at least a draw. Parliament invoked one fundamental law--involving the rights of subjects and Parliament; and Strafford had appealed to another--proscribing retrospective punishment. Without some basis for prioritizing among fundamental laws, the managers' case collapsed. In a heated session of the Commons, it was clear that Strafford had won over many members. Several declared that “they were unsatisfied that he had endeavored the subversion of the law” (p 552). One member, the poet Edmund Waller, skeptically asked the managers what “the fundamental laws of the kingdom” exactly were. Maynard replied “that he that did not know the fundamental laws of this kingdom is no fit man . . . to sit (in Parliament)” (p 556). It was the petulant response of a man on the verge of suffering defeat.

#### IV. Attainder and the Triumph of Politics

For the managers of Strafford's prosecution, however, there remained a safety valve: a bill of attainder.<sup>97</sup> As George Mason noted at \*2086 the Constitutional Convention, a bill of attainder allowed Parliament to “save () the British Constitution” by removing a potential agent of its demise, even though Strafford had not committed treason under law.<sup>98</sup> Although “the shift from **impeachment** to attainder” has “puzzle(d)” one distinguished observer,<sup>99</sup> it is, in fact, readily explicable. The House of Commons moved to attainder because it surmised that the **impeachment** trial was hurtling towards an acquittal.<sup>100</sup> Such a prospect, upsetting for any prosecutor, must have been especially distressing for Strafford's pursuers. They had a “wolf by the ears,” one member of the Commons noted, and if they relinquished hold, they would “hardly escape scot-free.”<sup>101</sup> Their lives were at stake, as was Strafford's. But why did the Commons think that the Lords would be more receptive to a bill of attainder? The answer to this question turns, in part, on the distinction between a judicial proceeding and a legislative or political one. The political crisis enveloping the nation would soon overwhelm judicial deliberations on Strafford's fate, and would lead to a political solution: attainder.

In the final week of the trial, the Lords signaled their continued determination to treat the **impeachment** trial like a judicial proceeding. After achieving little success on April 7 with Articles 25-27, the prosecutors on April 8 announced that they were discarding the final article, Article 28, and demanded that Strafford begin his summation. Strafford said he was not ready to do so, for he had assumed the managers would argue the inflammatory final article.<sup>102</sup> He requested an adjournment, and the Lords, to the managers' dismay, consented (p 461).<sup>103</sup>

\*2087 Two days later, on April 10, the Lords dealt the Commons yet another procedural defeat, and yet another reminder that they likened their role in the **impeachment** trial to that of judges. As Strafford prepared to begin his summation, the lead prosecutor, John Glynnne, interrupted and announced that the prosecutors wished to return to Article 23 and present recently uncovered evidence. Strafford objected that if the managers were permitted to re-open the evidence, he demanded the same privilege (p 487). The Lords adjourned to debate the issue, and, in what must have been interpreted as a telling gesture, they posed the following question to the Lords' justices: “Whether it be according to the course of practice and common justice before the judges in their several courts, for the prosecutors in behalf of the King, during the time of trial, to produce witnesses to discover the truth, and whether the prisoner may not do the like” (p 492). The Lord Chief Justice delivered the unanimous



IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

opinion of the judges that until the jury was sent away, “either side may give their evidence” (p 492). The Lords accepted this judgment, and so informed Strafford and the managers, asking both sides to name their witnesses. Glynne announced that they were present. Strafford, however, cheerfully told the Lords that he would need a few days to gather his witnesses, and, tweaking the manager further, added that he intended to introduce evidence with respect to not just one article, but four (p 492). Strafford's insolence provoked the prosecutors, and several members of the Commons, according to one diarist, rose, put on their hats and “cocked their beavers in the King's sight.” The diarist adds: “We all did fear it should go to a present tumult. They went all away in confusion; Strafford slipped away . . . glad to be gone lest he should be torn in pieces; the King went home in silence” (p 489 n 7).

Starting on April 10, the **impeachment** trial began to lose the quality of a judicial proceeding. The determination on the part of many in the Commons to execute Strafford, whatever the means, was mounting; the impulse of the Scottish observer months earlier, which Pym had deflected at the time, became irresistible. At the afternoon meeting of the Commons on April 10, concern was building that the Lords might acquit Strafford, and the wolf they now had by the ears would escape and turn on them. Perhaps to steel the resolve of the Commons, Pym produced the newly discovered evidence Glynne had wanted to introduce that day at the trial to the Lords: Vane's written notes of the May 5, 1640 meeting after the Short Parliament had been dismissed. Next to the abbreviation, “LLIr,” in other words, Lord Lieutenant of Ireland, Vane had recorded, “Go on with a vigorous war, \*2088 as you first designed; loose and absolved from all rules of government. . . . You have an army in Ireland you may employ here to reduce this kingdom” (p 494 (emphasis added)).<sup>104</sup> With passions inflamed against Strafford, an obscure member of the Commons raised the idea of abandoning **impeachment** and instead enacting a bill of attainder against Strafford (p 501).

The possibility of a bill of attainder had been briefly considered in the Commons months earlier, in the days after Strafford's **impeachment**.<sup>105</sup> It was rejected with almost no explanation,<sup>106</sup> and we can only speculate as to the reasons why the Commons, and most particularly its chief strategist, Pym, opted to pursue **impeachment** instead. The simplest explanation may be that **impeachment**, not attainder, had emerged in the 1620s as the customary method for removing obnoxious ministers of the king. In addition, Pym may have feared that the Lords would view the Commons' enactment of a bill of attainder as an infringement upon the Lords' “monopoly of judgment.”<sup>107</sup> Although a successful attack on Strafford required the acquiescence of the Lords one way or the other, the Lords were widely viewed as claiming, in matters of parliamentary judicature, the exclusive authority of judgment for themselves. A final, likely decisive, disadvantage associated with a bill of attainder is that it, like any other bill, would need the King's assent; by pursuing Strafford by **impeachment**, the Commons could circumvent Charles.<sup>108</sup>

\*2089 Perhaps for these reasons, Pym resisted the shift to attainder when it was raised in the late stage of the trial, counseling the Commons to continue the **impeachment** proceeding to its conclusion. Setbacks in the final week, however, would force his hand. The managers, after all the brouhaha on April 10, made the dubious tactical decision not to call Vane at the trial, or seek to introduce his notes, and therefore the trial resumed on April 13 with both sides presenting their summations of the facts of the case (with summations of law deferred for another day). Speaking first, Strafford divided the articles into those involving statutory or common law treason, in which he placed Articles 15, 23, and 27, and those alleging “constructive treason,” in which he grouped the remainder (p 528). To the former, he repeated defenses made earlier in the trial, laying emphasis on his accusers' inability to produce two witnesses to prove Article 23 (p 536); and with respect to the latter, he attacked them individually and as a group. The bulk of the case against him was, he maintained, contrary to both the statutory law of treason and the fundamental principle proscribing retrospective legislation (p 538).

Glynne and Pym responded for the prosecution. Their speeches reveal the extent to which Strafford had moved the debate, and how much he had forced his accusers to confront the law of treason. It is worth recalling that in his opening statement to the Lords weeks earlier, Pym had scarcely condescended to respond to Strafford's insistence, in his written responses to the charges, that he was “free of all offenses declared treason by the statute of (1352)” (p 48). By the end of the trial, however, and in summations nominally of the facts, not the law, Glynne and Pym engaged Strafford on many of his legal points. Interestingly,

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

Glynne emphasized that each of the charges was supported by multiple witnesses, which seemed to accept Strafford's insistence on the vitality of the two-witness rule, although he then cryptically added, "one witness is enough," thus calling the rule into question (p 538). For his part, Pym advanced a broad interpretation of the language in the 1352 statute that designated as treason any acts that "compass(ed)" the king's death. Strafford's offenses, Pym argued, had provoked a violent division between Charles and his subjects; constructively, then, Strafford had "endanger(ed) the King's life" and thus committed treason under the statute (p 534).

Two of Strafford's lawyers, Richard Lane and Thomas Gardiner, poked holes in these arguments on April 17, when they were permitted, in yet another procedural defeat for the prosecution, to present a summation of the law on Strafford's behalf (pp 593-601).<sup>109</sup> Lane and \*2090 Gardiner emphasized points Strafford himself had made throughout the trial--that the law of treason was defined by statute, and especially by the 1352 statute, that there were no common law treasons, and that Parliament was powerless to declare retrospective treasons. In addition, Lane countered Pym's ingenious, if strained, reading of the 1352 statute by invoking a rule of lenity. He reminded the Lords that the treason statute was "a penal law, and penal laws . . . must not be taken by equity" (p 595). The lawyers also stressed the two-witness requirement, which seemed to have struck a chord with the Lords, and for which the Commons had no convincing response, at least with respect to Article 23.

The Lords were prepared to hear the managers' summation on the law, but Pym declined the opportunity. Instead, on April 19, Pym acknowledged in the Commons that the **impeachment** effort was dead.<sup>110</sup> "Without question they (the Lords) will acquit him," one observer wrote in his diary that day, "there being no law extant whereupon to condemn him of treason."<sup>111</sup> The decision to proceed with attainder was, however, not without dissent. Several members of the Commons--indeed, it seemed to the Strafford critic Simon D'Ewes, a surprising number (p 552)--expressed misgivings about the continued effort to get Strafford, whatever the means and in defiance, of the law. Members such as the poet Edmund Waller, who challenged the managers of the prosecution to define their oft-cited "fundamental laws of England," were meeting with sullen and increasingly vituperative responses. But the accusers stood accused: Although they were prepared to execute Strafford for disregarding the laws of England, were they not guilty of the same crime?<sup>112</sup> One member, who would \*2091 vote to convict, nonetheless acknowledged that in attainting Strafford, it looked as if "we had condemned him because we would condemn him."<sup>113</sup>

On April 20, the day the vote on attainder would be taken, only 263 of nearly 500 M.P.s were present, many of the rest scared away by "dangerous-looking crowds."<sup>114</sup> In an atmosphere of growing menace and intimidation (Pym had the doors of the Commons locked to prevent people from leaving), George Digby, a member who had worked for **impeachment** only to conclude after the trial that the charge had not been proved, stunned the audience by speaking out against attainder: "Let every man lay his hand upon his heart and sadly consider what we are going to do with a breath, either justice or murder."<sup>115</sup> Digby's cautionary words went largely unheeded, however. The bill of attainder passed by a final vote of 204-59.<sup>116</sup>

The bill itself (pp 501-02) is testimony to Strafford's success at the trial in challenging the legal and factual case against him. Although it begins with the familiar charge that Strafford had subverted the "fundamental laws," only two particular allegations from the articles of **impeachment**--15 and 23-- found their way into the bill of attainder. Dropping twenty-six of the twenty-eight articles was tantamount to a concession that the other articles had not been factually proven, or were not treason under the law.<sup>117</sup> Still more striking is the Commons' decision to include in the bill provisos to the effect that the bill never be used as a precedent in the courts,<sup>118</sup> nor be interpreted to alter the law of treason.<sup>119</sup> D'Ewes objected, to no avail, that the provisos were an admission of the weakness of the case against Strafford.<sup>120</sup>

Although the Lords originally received the bill coolly,<sup>121</sup> they permitted the Commons to send a representative, Oliver St. John, to speak on matters of law raised by attainder. The bulk of St. John's argument \*2092 was devoted to showing that

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

**impeachment** Articles 15 and 23, now incorporated in the bill of attainder, were treason under the letter of the law, under common law treason, or under Pym's constructive theory of treason.<sup>122</sup> This was all makeweight: If it were true, what need was there to abandon **impeachment** in favor of attainder?

For the answer to that question, St. John waited until his final argument. If none of the preceding legal arguments were convincing, he argued that “meer Legislative Power may be exercised” to punish Strafford.<sup>123</sup> Attainder might, in other words, be used as an escape device if judicial proceedings proved insufficient. Unlike **impeachment**, which, as Blackstone would later note, was restricted to violations of “the already known and established law,”<sup>124</sup> attainder allowed Parliament to declare an act to be criminal after the fact. Acknowledging the objection that even Parliament should emulate the “Supreme Law-giver, who commonly warns before he strikes,” St. John responded that such a principle had no application when dealing with the likes of a Strafford:

(H)e that would not have had others to have a Law, Why should he have any himself? . . . (W)e give Law to Hares and Deers, because they be Beasts of Chase; It was never accounted either cruelty or foul play, to knock Foxes and Wolves on the head, as they can be found, because these be Beasts of Prey. The Warrener sets Traps for Polcats and other Vermine for preservation of the Warren.<sup>125</sup>

Thus, St. John argued, the mechanism of attainder allowed Parliament to punish Strafford despite the fact that he may not have violated any existing laws. Indeed, St. John argued that Parliament had, in the past, enacted bills of attainder to punish individuals whose offenses, while jeopardizing the national interests, did not fall within the 1352 statute.<sup>126</sup> Moreover, St. John urged the House of Lords to recognize that in the exercise of its “legislative power,” Parliament was not bound by the two-witness requirement--the “private satisfaction to each man's Conscience” would be enough to convict.<sup>127</sup>

**\*2093** Over the next week, amidst congregating mobs and rumors of miscellaneous mischief, attendance in the House of Lords plummeted.<sup>128</sup> On May 5, the Lords, having apparently absolved themselves, as St. John had urged, of the strictures of the two-witness rule, or from ordinary notions of legal proof, voted their “consciences,” and decided that Articles 15 and 23 had been factually proven. There still remained the legal question: Did the offenses merit execution under the law? The Lords posed that question to the King's judges in the House, many of whom were themselves being threatened by the Commons with **impeachment**. Sufficiently cowed, the judges delivered the following terse answer:

We are of opinion upon all that your lordships have voted to be proved: that the **Earl of Strafford** doth deserve to undergo the pains and forfeitures of high treason by law.<sup>129</sup>

What law? The law of the 1352 treason statute? The common law? The fundamental laws? Or is it meaningless to parse the language of the decision, it being little more than the product of political necessity (or cowardice)? The Lords then voted on the judges' recommendation, which they affirmed by a slim majority, 26-19.<sup>130</sup>

The bill still required the King's assent. Strafford urged the King to acquiesce in his execution as the only hope to quell the growing unrest.<sup>131</sup> Charles, after some hand-wringing and to his later regret, signed the bill. Strafford's execution occurred days later. Strafford may have been surprised that Charles had accepted his advice and assented to his attainder,<sup>132</sup> and it is rumored that he made the Biblical reference, “Put not your trust in princes.”<sup>133</sup>

It is easy to view the final chapter of the saga as the triumph of political expediency over the rule of law. A bill of attainder is “a legislative act which inflicts punishment without a judicial trial,”<sup>134</sup> and without the protections ordinarily accorded the accused. The shift to \*2094 attainder can be viewed as an abandonment of the judicial procedures that had governed deliberations on Strafford's fate during the trial. In this vein, Akhil Amar has written of the “iniquity” that befell Strafford, “one of the most famous attainder victims ever, ( ) beheaded in 1641, simply for being himself.”<sup>135</sup>

However, had Strafford been freed, he would have posed a mortal danger to his accusers and to their efforts to preserve the powers of Parliament. Although we may use grand rhetoric in describing contemporary American political debates-- “death struggles,” “constitutional crises,” etc.--it is worth recalling that these phrases may not always have had entirely metaphorical meaning. As the historian J.R. Tanner writes, “Although it was impossible to convict Strafford of legal treason, it was also impossible for the leaders of the Commons to let him go free, for he was not only the personification of absolutism in the past, but they deemed him dangerous to liberty in the present.”<sup>136</sup> The clash of principles had reached such a point that it was unrealistic to expect a resolution to occur with judicial formalities, or even to occur anywhere other than on the field of battle.

And yet one cannot help but be struck, and impressed, by how long the legal formalities withstood the winds of politics. That the Commons were obliged to shift ground to a bill of attainder against Strafford is a tribute to the seriousness with which the Lords took their judicial role in the **impeachment** trial. The same shift would occur a few years later, when the Commons, having **impeached** Archbishop Laud, recognized that the Lords were likely to acquit and attainted Laud instead. The attachment to legal formalities would, however, wither in the course of the 1640s. From the Strafford trial to the later trials of Laud and Charles I, the law of treason put forward by the Commons and embraced by the Lords would be increasingly unmoored from the text of the 1352 statute.<sup>137</sup> And by the end of the decade--a decade that witnessed over half of the pitched battles ever fought on English soil--the monarchy itself would be abolished.<sup>138</sup>

#### \*2095 V. Lessons from History?

History--including distant English history--plays a curious role in the American **impeachment** process. On the one hand, it seems to have a power over contemporary discourse that is lacking in many other areas of the law. Alexander Hamilton wrote that during the Constitutional Convention, the Framers looked to England as their “model” in crafting the **impeachment** mechanism,<sup>139</sup> and during **impeachment** proceedings against President Nixon, the Committee on the Judiciary of the House of Representatives thought it logical to begin its report on the **impeachment** with a section reviewing English practice.<sup>140</sup> Of course, many other provisions in the Constitution and Bill of Rights have roots in pre-Revolutionary English practice. Yet in construing these provisions, the Supreme Court seems to have strayed far from these seventeenth-century English roots.<sup>141</sup>

There is, moreover, the suspicion that appeals to history, in the midst of ongoing **impeachment** proceedings at least, are merely forensic. When, in his memo to the Senate, President Clinton argued that “(t)he English precedents illustrate that **impeachment** was understood to apply only to fundamental offenses against the system of government,”<sup>142</sup> or when the House managers argued precisely the opposite,<sup>143</sup> no one took such claims as the result of an objective inquiry into the \*2096 past.<sup>144</sup> Of course, Clinton and his accusers were hardly the first to engage in result-driven historical inquiries: Pym and Strafford each scoured the medieval **impeachment** precedents, and their impulse in so doing was plainly not a love of things antiquarian. The cynicism that may easily arise from such result-oriented excavations of history may lead one to prefer the candor of a Gerald Ford who, in urging the **impeachment** of Supreme Court Justice William O. Douglas, argued that “there are few fixed principles among the handful of precedents,” and that, accordingly, “an **impeachable** offense is whatever a majority of the House of Representatives considers (it) to be at a given moment.”<sup>145</sup>

One may also question whether there is much value in the study of English history in answering questions relating to American **impeachment** proceedings. Hamilton's claim that England provided a "model" is something of an exaggeration. The provisions of the United States Constitution relating to **impeachment** reflect, in many respects, not an adoption of, but a departure from, English precedents, as well as an effort to put a "uniquely American stamp" on the **impeachment** process.<sup>146</sup> To take just one example, the supermajority requirement for a conviction under the U.S. Constitution was "without parallel in prerevolutionary constitutionalism."<sup>147</sup>

Still more fundamentally, one might well wonder whether there is negligible utility in the study of history generally in resolving contemporary **impeachment** (or even purely political) problems. Less radically stated, the concrete, if limited, benefits to be gained through the study of history are outweighed by the risks that students of history will draw the wrong lessons. As Judge Richard Posner has written, as a gloss on Nietzsche:

(P)recedents provide good solutions to current problems only if the present resembles the past very closely. . . . History provides a template for framing and "sizing" contemporary problems; but \*2097 the template may prove to be a straitjacket. The use of historical analogies ("another Munich") is full of pitfalls. Hence the adage that the only lesson of history is that there are no lessons of history.<sup>148</sup>

And this assumes that the historian is at least trying to be objective and trying to sort out fairly the appropriate "lessons from history." As Posner argues, the performance of historians during the Clinton **impeachment** inquiry, when they mined the past to further whatever happened to be their current political agendas, "has engendered doubts as to how many academic specialists in such fields as history, moral and political philosophy, and even law are competent to offer useful and disinterested advice on novel issues of public policy."<sup>149</sup>

Judge Posner is surely correct that the study of history alone cannot resolve contemporary issues of public policy. But the inference he draws--that history can contribute "little to the public life of a nation"<sup>150</sup>--overstates the case.<sup>151</sup> Unlike Judge Posner, the Framers of the U.S. Constitution recognized that similar circumstances will arise such that the past has useful guidance to offer. The dismissal of the past as a fruitful source of learning and guidance seems premised, in part, on a questionable assumption of moral and political progress, that is, a conviction that our age is immeasurably more important, and decisively better, than the past. But the study of the past may puncture claims that the present situation is quite as dramatic as we may think (my first modest lesson). Specifically, apocalyptic claims that an **impeachment** trial is enmeshing the country in a constitutional crisis, when viewed in the light of history, may be found wanting.<sup>152</sup> Quite a few such claims were bandied about during the Clinton **impeachment** saga, typically by his defenders, but occasionally by his critics as well. \*2098 Alan Dershowitz (a Clinton defender), for example, called the Clinton **impeachment** proceedings "(t)he greatest constitutional crisis in modern American history,"<sup>153</sup> and predicted that, had Clinton been removed, the "long-term damage to our system of government" would have been "incalculable."<sup>154</sup>

Whatever the merits of Dershowitz's argument, he was at least writing as a Clinton advocate, avowedly employing his considerable polemical talents in the President's defense. The same could not have been said of Princeton professor Sean Wilentz who, writing (self-described) "as a historian," made the following claim: "It is no exaggeration to say that upon this **impeachment** inquiry, as upon all presidential **impeachment** inquiries, hinges the fate of our American political institutions."<sup>155</sup> This is a remarkable statement. One wonders what the "historian" Wilentz has learned from history. It would perhaps have been fair to say that upon Strafford's fate hinged the fate of English political institutions; can the same be said of the



IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

verdict in Clinton's trial? What emerges (to me at least) is precisely how little, in a fundamental or constitutional sense, hinged upon the Clinton proceedings. Simply put, no one's head was lopped off, nor were fundamental understandings of government at stake.

If my first lesson from history is that the present may not be as dramatic as we think, a second lesson is that the political questions that so vex us are seldom peculiar to our age, and it is possible, therefore, to learn from arguments made in the past. History will not provide ready-made solutions, to be sure, but it may guide our debates and provide cautionary lessons. Plainly, this was how the Framers of \*2099 the Constitution viewed history (and its utility). We owe the constitutional phrase “high crimes and misdemeanors” to George Mason's insight, prompted by Strafford's trial, that a very high standard for **impeachment** is imprudent when coupled with a prohibition on the safety valve of attainder.

When reading accounts of the Strafford trial in the twenty-first century, one experiences--even in the midst of bizarrely foreign debates such as the hat controversy--the shock of the familiar. The formal similarities between Strafford's and Clinton's trials are striking. Both trials became mired in difficulties because there was no clarification of the law prior to the trial on the facts. And at their core, the trials posed a fundamentally similar problem: When an executive officer has misbehaved, but (in the opinion of many judging his fate) there is not definitive evidence that he has committed an **impeachable** offense, what recourse is available?

Because the past is not so different from the present, we can look to it not only for substantive arguments, but also to judge how well those in the past tackled the problems that likewise confront us. The past may provide a benchmark by which our modern efforts may be evaluated. Indeed, it is worthwhile to compare the performance of the Lords and the Senate in the two trials. In Strafford's case, the Lords seemed to have viewed their role as a judicial one, at least during the **impeachment** trial, and they resisted the effort to expand treason beyond its legal meaning. What the Lords were willing to do, albeit reluctantly and by a narrow margin, in their legislative capacity (that is, with respect to the bill of attainder), they were unprepared to do in their judicial capacity (that is, in the **impeachment** trial).

The senators in Clinton's trial seemed to make no distinction of this sort.<sup>156</sup> Disregarding elementary rules of judicial ethics, a majority of the senators publicly announced their judgments prior to the trial's conclusion, and several senators had ex parte contacts with either Clinton's lawyers or the House managers.<sup>157</sup> Since most of the senators \*2100 had reached their judgments prior to submission of all the evidence, the trial itself seemed superfluous.<sup>158</sup> As Judge Posner observed, “(T)he Senators were so terribly fidgety having to sit still hours on end listening to arguments that would not affect their vote.”<sup>159</sup>

But in Strafford's trial, the arguments mattered. During the trial, Strafford convinced many of the Lords that the law and facts were on his side, and the Commons had no choice but to abort the **impeachment**. As noted in the introduction, the congruence of the accounts of the trial in the present volume speaks to the seriousness with which those arguments were received. Is it likely that accounts of Clinton's trial prepared by members of Congress on both sides of the aisle would have been so similar?

The study of the Strafford trial may lead us, most broadly, to question whether our age is so far superior, morally and politically, to the past as we might think. The Strafford trial and attainder were conducted at a remarkably high level. One thinks, for example, of George Digby, refusing to countenance the attainder of Strafford, though he despised the man, because he thought him innocent of treason. One also thinks, of course, of Pym, who literally risked his life to defend the powers of Parliament and guard against the dangerous enlargement of the King's power.<sup>160</sup> And finally, one thinks of Thomas Wentworth, the **Earl of Strafford**.

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

Yes, even Strafford. To the victors go, among other spoils, the privilege of writing the definitive histories; and Strafford, having chosen the wrong (or, in any event, the losing) side in the constitutional crisis of 1641, is generally remembered, if at all, as the despotic advisor who made the apt Biblical reference, “Put not your trust in princes,” on the eve of his execution. Strafford was no saint. He was often ruthless and occasionally underhanded. (For whatever it's worth, the insinuation of sexual impropriety was probably bogus.<sup>161</sup>) But he was passionate in his devotion to the King and England. And he was certainly courageous.

\*2101 When he returned, as a defeated general, to London in November 1640, he well knew the stakes. Others, including the great philosopher Thomas Hobbes, fled England, so fearful were they of Parliament's wrath. But Strafford returned, defiant, and when he lost in Parliament, he could easily have urged the King to refuse to sign the bill of attainder. Apparently, the King was in fact not disposed to sacrifice his chief minister. In Strafford's final letter to the King from the Tower of London, he wrote, “I understand that the minds of Men are more and more incensed against me, notwithstanding Your Majesty hath Declared, That in Your Princely opinion I am not Guilty of Treason.”<sup>162</sup> Strafford nonetheless urged the King to acquiesce in the attainder and his own death in the hope that the people would be reconciled to the King and peace restored: “I do most humbly beseech Your Majesty for prevention of evils, which may happen by Your refusal to pass the Bill.”<sup>163</sup> But the most remarkable paragraph in the letter is Strafford's effort to put the King's conscience “at liberty”:

Sir, my Consent shall more acquit you herein to God than all the World can doe besides; To a willing man there is no injury done, and as by Gods grace I forgive all the World, with calmness and meekness of infinite contentment to my dislodging Soul . . . . God long preserve Your Majesty.<sup>164</sup>

To me at least, the study of the fierce struggle between Strafford and Pym, and the courage and honor that both displayed, is bracing and even humbling. I am reminded of Winston Churchill's reflection on another momentous conflict in English history (between Henry II and Thomas Becket): “It is proof of the quality of the age that these fierce contentions, shaking the souls of men, should have been so rigorously and yet so evenly fought out. . . . What claim have we to vaunt a superior civilization to Henry II's time?”<sup>165</sup>

Footnotes

- d1 Assistant Professor, George Mason University School of Law. The author thanks Michael Abramowicz, Frank Buckley, Philip Hamburger, Peter Hansen, Renee Lettow Lerner, Nelson Lund, and Daniel Polsby.
- 1 See, for example, Jill Abramson, *Baby Boomers, and There the Likeness Ceases*, NY Times A11 (Feb 16, 1998).
- 2 See The Committee for Censure, Not **Impeachment**, An Appeal to the U.S. Congress and the Public, NY Times A21 (Oct 7, 1998) (including Dworkin and Schlesinger, Jr. among signatories to open letter that termed **impeachment** proceedings against Clinton “a danger to our country”).
- 3 The author served as Associate Independent Counsel from August 1996 to August 1997 and March 1998 to December 1998.
- 4 It is by no means obvious to all. See Alan M. Dershowitz, *Sexual McCarthyism: Clinton, Starr and the Emerging Constitutional Crisis 1* (Basic Books 1998) (calling the Clinton scandal “(t)he greatest constitutional crisis in modern American history”). I consider Dershowitz's argument below. See text accompanying notes 152-54.
- 5 In fact, Robert Browning wrote a drama in which Strafford and Pym were the lead characters. See Robert Browning, *Strafford: A Tragedy* (George Bell 1st ed 1884).

- 6 See C.V. Wedgwood, Thomas Wentworth, First **Earl of Strafford** 1593-1641: A Reevaluation 372 (Jonathan Cape 1961), citing a letter of Robert Baillie found in David Laing, ed, 1 The Letters and Journals of Robert Baillie 352 (Bannatyne Club 1841). Wedgwood's first estimation of Strafford, written in 1935, is generally more sympathetic to him. See C.V. Wedgwood, Strafford 1593-1641 (Jonathan Cape 1935). For a discussion of the atmosphere surrounding Strafford's trial, see generally Terence Kilburn and Anthony Milton, The Public Context of the Trial and Execution of Strafford, in J.F. Merritt, ed, The Political World of Thomas Wentworth, **Earl of Strafford**, 1621-1641 230 (Cambridge 1996) (describing the public interest and media attention surrounding Strafford's trial).
- 7 As the Lewinsky investigation progressed in 1998, pundits claimed that the public became "sick and tired" of the affair. Americans Weary of Clinton Investigation, CNN Inside Politics (July 8, 1998), available online at <<http://www.lexis.com>> (visited June 3, 2002) (quoting Bill Schneider, CNN political correspondent). There is indeed polling evidence to support this view. See PR News Media Hotsheet (Sept 21, 1998), available online at <<http://www.lexis.com>> (visited June 3, 2002) (citing a Sept 17, 1998 Harris poll that 82 percent of Americans thought the media gave the issue too much attention). The televised broadcast of Clinton's grand jury testimony on September 21-- expected to be a blockbuster--garnered a Nielsen rating, when the results from ABC, CBS, NBC, CNN, MSNBC, and FOX News are aggregated, of roughly that of a typical "E.R." episode. See Media Advisory: President Clinton's Grand Jury Testimony, Nielsen Media Research (Sept 22, 1998), available online at <<http://www.nielsenmedia.com/newsreleases/releases/1998/clintonvideo.html>> (visited June 3, 2002) (stating that combined household rating of broadcast of grand jury testimony was 18.8); The Ratings Game, available online at <<http://library.thinkquest.org/17067/entertain/nfrgame.html>> (visited June 3, 2002) (stating that average household rating for "ER" during 1997-98 season was 18.6). The **impeachment** trial itself in January 1999 was overwhelmingly ignored by the American public. See Linda Chavez, Political Football; Super Bowl vs. **Impeachment**: How We Lost Our Sense of Proportion, Chi Trib A13 (Jan 27, 1999) (noting that there were fewer than ten million viewers of the trial).
- 8 See Bruce A. Ackerman, The **Storrs Lectures: Discovering the Constitution**, 93 Yale L J 1013, 1022 (1984) ("One form of political action--I shall call it constitutional politics--is characterized by Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms.").
- 9 See Chavez, Political Football, Chi Trib at A13 (cited in note 7).
- 10 See Raoul Berger, **Impeachment**: The Constitutional Problems 30 & n 107 (Harvard 1973), citing Josiah Quincy, Jr., Boston Gazette (Jan 4, 1768) (writing approvingly of English **impeachments**, including that of Strafford, "for high treason in subverting the fundamental laws and introducing arbitrary power").
- 11 See US Const Art I, § 9, cl 3 ("No Bill of Attainder or ex post facto Law shall be passed.").
- 12 Max Farrand, ed, 2 Records of the Federal Convention of 1787 550 (Yale 1937).
- 13 Id.
- 14 Id. See US Const Art II, § 4 ("The President . . . shall be removed from Office on **Impeachment** for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").
- 15 Once again, this author's opinion is not universally held. Indeed, many illustrious historians viewed Clinton's case as an easy one--for acquittal. See Historians Committee for Open Debate, Historians in Defense of the Constitution, NY Times A15 (Oct 30, 1998) (advertisement), available online at <<http://www.historians.org/constitution.html>> (visited June 3, 2002) ("The theory of **impeachment** underlying these efforts (to **impeach** Clinton) is unprecedented in our history.").
- 16 See, for example, Robert C. Byrd, A Vote for Acquittal: A Statement of Robert C. Byrd 1 (Feb 12, 1999) (press release on file with author) ("I was proud of this Senate when, early last month, we gathered at the Old Senate Chamber to choose a path on which to proceed.").
- 17 Ariel L. Bendor, **Investigating the Executive Branch in Israel and in the United States: Politics as Law, The Politics of Law**, 54 U Miami L Rev 193, 215 (1999).
- 18 Richard A. Posner, An Affair of State: The Investigation, **Impeachment**, and Trial of President Clinton 127-28 (Harvard 1999).

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

- 19 See generally Ann Althouse, [Invoking Rashomon](#), 2000 Wis L Rev 503.
- 20 Appendices to the Referral to the U.S. House of Representatives, H Doc No 105-311, 105th Cong, 2d Sess 573 (Sept 18, 1998).
- 21 Even members of the House of Commons who reviled Strafford, and who attended the trial each day to lend hearty support to the managers of the prosecution, produced accounts that are broadly consonant, and often completely aligned, with accounts of others who did not share their animosity toward the accused. Some observers, to be sure, could at times hardly restrain their exasperation with Strafford. John Moore, for example, complains that Strafford went on “impertinently” in responding to one charge (p 196), and Simonds D'Ewes precedes a summary of one of the Earl's responses noting that he “made an exceeding(ly) tedious answer” (p 140). And yet to D'Ewes's credit, he then puts his distaste aside and supplies a long and, indeed, tedious summary of the objectionable answer.
- 22 The account below of the situation in England in 1640 draws in part upon the helpful introduction to the present volume (pp xiv-xviii). There are several informative accounts of the period. See, for example, David M. Loades, *Politics and the Nation 1450-1660: Obedience, Resistance and Public Order 337-50* (Blackwell 1999) (describing events that preceded the outbreak of war); Conrad Russell, *The Crisis of Parliaments: English History 1509-1660 323-41* (Oxford 1971) (same).
- 23 For a series of excellent essays on Strafford's career from which I have drawn, see generally Merritt, *The Political World of Thomas Wentworth* (cited in note 6). For highly readable, although less rigorous accounts, of Strafford's career, see generally Wedgwood, **Earl of Strafford: A Revaluation** (cited in note 6); Lady Burghclere, *1 Strafford* (Macmillan 1931).
- 24 For the controversy surrounding the May 5 meeting, see text accompanying notes 87-93.
- 25 See Russell, *The Crisis of Parliaments* at 299-310 (cited in note 22) (describing Charles's battles with Parliament in the 1620s).
- 26 See generally Colin G.C. Tite, **Impeachment** and Parliamentary Judicature in Early Stuart England (Athlone 1974).
- 27 As with much else in Wentworth's career, his decision to switch sides has excited controversy. See Perez Zagorin, *Did Strafford Change Sides?*, 101 Eng Hist Rev 149, 149 (1986) (contrasting views on whether Strafford's “conduct signified a genuine political reversal”). Although older historians assumed that Wentworth rejected parliamentary ideals in 1628, a group of twentieth-century historians have offered a more sympathetic account of his political turnabout. His abandonment of Parliament was, it is argued, motivated by a distaste for the parliamentary extremism that developed after the enactment of the Petition of Right. See Wedgwood, **Earl of Strafford: A Revaluation** at 67-68 (cited in note 6) (“(Wentworth's) plan for a joint act for supply and redress of grievances . . . had failed owing to the intransigence of the extremists in Parliament and the delaying obstinacy of the King . . . . (I)t must have been evident to (him) that the Elizabethan system of government by King and Parliament was no longer workable.”); Burghclere, *1 Strafford* at 104-05 (cited in note 23) (discussing Wentworth's “profound” distaste for Puritan zealotry, such that “he may well have considered that with the passing of the Petition he had fulfilled his obligations to the reforming party”).
- 28 Thomas Babington Macaulay, *1 Critical and Historical Essays* 1, 19 (Dutton 1966-67).
- 29 Kilburn and Milton, *Public Context* at 238 (cited in note 6).
- 30 Anthony Milton, *Thomas Wentworth and the Political Thought of the Personal Rule*, in Merritt, ed, *Political World of Thomas Wentworth* 133, 139 (cited in note 6). Lawyers seemed to inspire poetic hatred on Wentworth's part. He wrote in one letter, “I disdain to see the Gownmen in this sort hang their Noses over the Flowers of the Crown, blow and snuffle upon them, till they take both Scent and Beauty off them.” Id. He urged the dismissal of one judge, whom he called a “peevish indiscreet piece of Flesh.” Id.
- 31 Id at 140.
- 32 Thomas Hobbes published *The Elements of Law Natural and Politic* in 1640 and fled England in November of that year, perhaps fearful that the work might be introduced during Wentworth's trial. See id at 154.
- 33 Thomas Babington Macaulay, *1 The History of England from the Accession of James II 67-68* (Phillips, Sampson 1856). See also J.P. Kenyon, *The Stuarts: A Study in English Kingship 94* (B.T. Batsford 1958):

Black Tom the Tyrant was a figure of horror; his mellifluous voice issuing incongruously from a ravaged, parchment face periodically suffused with angry blood, his hooded eyes intermittently blazing as of some searing inner light. . . . In (Wentworth's) awful presence questions of taxation, privilege, vestments, even doctrine, faded into pallid obscurity, because he envisaged a polity in which such things had no place.

Conservative authors have taken a more favorable view of Strafford. David Hume, for example, called him “one of the most eminent persons that has appeared in England.” David Hume, 5 *History of England* 327 (Liberty Classics 1983). On the historical controversies that have long surrounded Strafford, see J.F. Merritt, *The Historical Reputation of Thomas Wentworth*, in Merritt, ed, *Political World of Thomas Wentworth* 1, 1-3 (cited in note 6) (summarizing historians' debates over Wentworth's career).

34 Aristotle, *Nicomachean Ethics* 69-70 (Macmillan 1962) (Martin Ostwald, trans) (defining “as courageous a man who fearlessly faces a noble death and any situations that bring a sudden death”).

35 Macaulay's case against Wentworth is exaggerated. As his defenders have noted, the argument that Wentworth was, on principle, averse to Parliament is rebutted by his successful collaboration with the Irish parliament in 1634, and by the fact that he, more than any of Charles's other advisors, had strenuously urged the calling of Parliament in 1639 as the Scots prepared to invade England. See Milton, *Thomas Wentworth and the Political Thought* at 136 (cited in note 30). Indeed, some historians, such as Wedgwood and Burghclere, have gone so far as to downplay the differences between Pym and Strafford, arguing that the latter never abandoned his attachment to parliamentary principles. See Wedgwood, **Earl of Strafford: A Reevaluation** at 71 (cited in note 6) (Wentworth believed that “(a)t best . . . there was harmony between (the Crown and Parliament). That this harmony was based on Parliament's ultimate submission to the Crown in any case of dispute he did not doubt . . . . (So) until harmony should be restored, the Crown must govern, since Parliament had neither the power nor the mechanism to do so.”); Burghclere, 1 *Strafford* at 105-07 (cited in note 23) (claiming that Wentworth's entry into the ministry owed mainly to his distaste for the religious extremism of Pym's party).

36 The legislative agenda included abolishing the ship money tax, limiting the king's power to levy custom duties without parliamentary consent, and the exclusion of bishops from the House of Lords. See Russell, *The Crisis of Parliaments* at 330 (cited in note 22). In addition, the Commons were eager to press for major legal reform, including the dismantling of the prerogative courts and the abolition of trial by battle. See Maija Jansson, ed, 2 *Proceedings in the Open Session of the Long Parliament: House of Commons: 21 December 1640-20 March 1641* 712-14 (Rochester 2000). Curiously, in the press of events, the Long Parliament never found the time to eliminate trial by battle, which remained, at least in theory, lawful until 1819. See *An Act to abolish Appeals of Murder, Treason, Felony or other Offences, and Wager of Battel, or joining Issue and Trial by Battel*, in *Writs of Right*, 59 George III, ch 46 (1819) (“(I)n any Writ of Right now depending, or which may hereafter be brought . . . the Tenant shall not be received to wage Battel, nor shall Issue be joined nor Trial be had by Battel in any Writ of Right.”).

37 See note 32.

38 Rumors were circulating that day that Charles intended to have certain opponents imprisoned; the garrison at the London Tower was on review and fear spread that it might be used to prevent the escape of the King's opponents. See Maija Jansson, ed, 1 *Proceedings in the Opening Session of the Long Parliament: House of Commons: 3 November-19 December 1640* 96-97 (Rochester 2000).

39 *Id* at 104.

40 See Wedgwood, *Strafford 1593-1641* at 268 (cited in note 6) (summarizing Pym's speech in the Commons, which culminated with his accusation of “sexual immorality”). (Propriety seems to have inclined Wedgwood to drop this detail from her revised biography.) One of the women in question, Lucy Carlisle, was later linked to Pym. Both charges were likely unfounded. See Burghclere, 2 *Strafford* 229 (Macmillan 1931) (describing Pym's charges against Strafford as “trumped up”).

41 Burghclere, 2 *Strafford* at 256 (cited in note 40).

42 This was Trotsky's insight in 1918. Although the Bolsheviks had demanded a democratically elected constitutional convention through the first half of 1917, their enthusiasm for such a convention dissipated, predictably, after they had seized power in October. The “constituent assembly” (in which the Bolsheviks were vastly outnumbered by other parties) nonetheless convened in January 1918. Many of the non-Bolshevik members arrived with candles and sandwiches, hoping to signal their iron determination to stay as long as necessary, through the night if need be, to craft and adopt a constitution. The Bolsheviks brought not candles or sandwiches, but a



IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

brigade of soldiers, armed with rifles. The rest, as they say, is history. The opponents of the Bolsheviks thought that the constitutional crisis could be resolved through negotiation and debate; Trotsky understood that it would be resolved by the party with the guns, and the willingness to use them. See Leon Trotsky, *Lenin* 122-24 (Garden City Books 1959).

43 See, for example, Jack N. Rakove, [Statement on the Background and History of Impeachment](#), 67 *Geo Wash L Rev* 682, 684 (1999) (“English **impeachment** was essentially a political weapon used by the House of Commons in its bitter struggles with the untrustworthy kings, ministers, royal advisors, and officials of Stuart England.”).

44 See Berger, [Impeachment](#) at 1 (cited in note 10) (“By means of **impeachment** Parliament, after a long and bitter struggle, made ministers . . . accountable to it rather than the Crown, replacing absolutist pretensions by parliamentary supremacy.”).

45 The word “**impeachment**” (or more precisely, its precursor in law French, “*empeschement*”) first appeared in the Parliament Roll in 1324, and the reign of Edward III (1328-77) witnessed a flurry of parliamentary efforts to punish royal advisors who had abused their powers. See M.V. Clarke, *Fourteenth Century Studies* 242 (Oxford 1937) (surveying the origins of **impeachment**). A turning point in the development of the procedure seems to be reflected in the contrast between the 1368 **impeachment** of the royal steward, John Lee, and the 1376 **impeachment** of the Chamberlain, William Latimer. In the former case, the Commons “petitioned” the Lords to initiate proceedings against Lee, and at the trial the leading prosecutorial role was played by the Chief Justice of the Commons Bench. See *id.* at 258. In the 1376 trial of Latimer, by contrast, members of the Commons assumed the leading role in the prosecution in the House of Lords. The historian Maude Clarke observed that in the Latimer trial, “(t)he Good Parliament . . . achieved the transition from procedure by petition, with all its implications of grace and favour, to procedure by indictment, which is an assertion of right.” *Id.* at 265. In an alternative account of how **impeachment** developed as a legal procedure, Theodore Plucknett downplays the differences between the Lee and Latimer trials. See T.F.T. Plucknett, *Studies in English Legal History* 155-62 (Hambledon 1983) (chronicling Latimer’s trial). Plucknett argues that **impeachment** as a mechanism for initiating criminal proceedings was based not on indictment, as Clarke maintains, but on “clamour.” *Id.* at 159. “Plucknett’s theory has received little support from other historians.” Tite, [Impeachment](#) and Parliamentary Judicature at 11 (cited in note 26).

46 See Clarke, *Fourteenth Century Studies* at 271 (cited in note 45) (“The links with procedure by petition and the close analogy to indictments at common law gave (**impeachment**) a sort of protective colour which, within a few years, hid all appearance of revolutionary novelty.”). **Impeachment** departed from common law indictment in a number of ways, a fact not lost on Latimer in 1376. He demanded to know the names of his accusers and asserted the right, to which the common law entitled him, to refuse to answer charges not brought by particular persons. The Speaker of the Commons, Peter de la Mare, answered dramatically, if evasively, that the Commons as a body was bringing the charges. De la Mare’s argument prevailed, and **impeachment** was thereby liberated from many of the limitations imposed by the common law. As Clarke writes:  
Had (Latimer) succeeded, his enemies would have run the risk of punishment under the statutes against false accusers and the venue of the trial would probably have passed altogether from Parliament. When his plea was overridden, the common-law rights of subjects, jealously secured by statute, were openly set aside by Parliament in favour of a totally new procedure.  
*Id.* at 263.

47 William Blackstone, 4 *Commentaries on the Laws of England* \*259 (Chicago 1979). See also Theodore W. Dwight, [Trial by Impeachment](#), 6 *Am L Reg* 257, 269 (1867) Theodore W. Dwight, [Trial by Impeachment](#), 6 *Am L Reg* 257, 269 (1867) (“(U)nl<sup>e</sup>s the crime is specifically named in the constitution, **impeachments** like indictments can only be instituted for crimes committed against the statutory law of the United States.”) (emphasis added).

48 See James Fitzjames Stephen, 1 *A History of the Criminal Law of England* 158 (Macmillan 1883) (“From 1459 to 1621 . . . no **impeachment** appears to have taken place . . . It was not till parliament reasserted itself under James I and Charles I that (**impeachments** resumed).”).


49 See Stephen D. White, [Book Review, Impeachment and Parliamentary Judicature in Early Stuart England](#), 89 *Harv L Rev* 1934, 1940-41 (1976) (discussing debates concerning Commons’ jurisdiction and the scope of its punishment power).

50 *Id.* at 1938-39 (emphasis added).

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

- 51 As one member of the Commons explained, “By which word ‘managing’ the evidence we mean the ordinary applying and enforcing the evidence according to the truth of the fact.” Jansson, ed, 2 Long Parliament Proceedings at 744 (cited in note 36). The leading managers of the prosecution were John Pym, John Glynne, John Maynard, and Bulstrode Whitelocke.
- 52 See id at 661-746 (following debates on March 8, 11, 12, and 13).
- 53 See id at 724, 743-44. Whitelocke notes that for the **impeachment** trial of John Gomeniz and William Weston the Lords used the Chambre Blanche in Westminster.
- 54 The Commons erected a screen so that the King would not be visible to the Lords, but the King ripped down the screen on the first day of the trial. See John H. Timmis III, *Thine Is the Kingdom: The Trial for Treason of Thomas Wentworth, Earl of Strafford*, First Minister to King Charles I, and Last Hope of the English Crown 65 (Alabama 1974).
- 55 See Jansson, ed, 2 Long Parliament Proceedings at 707-836 (cited in note 36) (following debates on March 11, 12, 13, 15, 16, and 20). In their accounts of the trial, several observers saw fit to note that the Commons were “uncovered,” as was Strafford, but not the Lords.
- 56 It would be incorrect to impute much of a class distinction between the two houses, however. See Russell, *Crisis of Parliaments* at 41 (cited in note 22) (“Many of the Commons were sons and brothers of lords, and it seems difficult to consider the two houses as if they represented two separate interests.”).
- 57 See Jansson, ed, 2 Long Parliament Proceedings at 516-773 (cited in note 36) (following debates on February 23 and March 8, 11, 12, 13, and 16).
- 58 See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 *Mich L Rev* 1047, 1056 (1994) (“The Treason Act of 1696 granted compulsory process and allowed defense witnesses to be sworn.”); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *Cornell L Rev* 497, 508 (1990) (“Advocates were barred from taking charge of the defense of those accused of felonies (during the sixteenth and seventeenth centuries). Not until 1696 did Parliament begin to dismantle this barrier.”).
- 59 Until the eighteenth century, people accused of treason and other felonies would ordinarily not be provided with the written charges against them until the trial. See Langbein, 92 *Mich L Rev* at 1058 (cited in note 58) (“The Treason Act of 1696 abrogated the rule against allowing the accused access to the text of the indictment.”).
- 60 For example, Strafford secured the right to challenge the Commons' witnesses against him, and to have his exceptions heard before the witness testified (p 62 n 18). In addition, although on trial for his life, Strafford was not accompanied by a jailor with a ceremonial axe, as was the gruesome custom in capital cases (p 5 n 11).
- 61 The committee drawing up the charges against Strafford originally included Denzil Holles, who had been arrested after the dismissal of parliament in 1629, and who was likely a personal reminder to the others of the fate that awaited them if they failed in their efforts. Holles was, however, related by marriage to Strafford, and, as the stakes became plain, Holles withdrew from the committee managing the prosecution of Wentworth. Holles “realized that Pym was out for Strafford's life; deeply as he abhorred Strafford's politics, the judicial murder of his sister's husband was more than he could stomach.” Wedgwood, *Earl of Strafford: A Revaluation* (cited in note 6). Though he abandoned a role in the prosecution, Holles was a devoted spectator of the trial and his notes comprise one of the most complete accounts in the present volume.
- 62 The Lords, not consulted before the Commons released the articles, were furious. They appointed a committee to investigate the matter. See Kilburn and Milton, *Public Context* at 232-33 & n 4 (cited in note 6) (noting the Lords' angry reaction to the articles' publication). Once again, this seems to reflect the Lords' view that the **impeachment** trial was a legal or judicial proceeding, not a political one.
- 63 For example, in response to the allegation that he had advised the King to revive a special tax without parliamentary consent, Strafford “answered that he did not acknowledge that he had spoken these words; but if he had spoken them, yet they were no Treason” (p 422).

- 64 A similar problem arose during Clinton's trial. Some argued that the threshold legal questions--what is an **impeachable** offense? what are high crimes and misdemeanors?--should be resolved before embarking on a factual trial. The Republicans declined, and a factual trial ensued before clarity had been obtained as to whether the charges, such as perjury in a civil suit, even if proven, would warrant conviction. In both Strafford's and Clinton's trials, legal questions hovered unanswered over the proceedings. Although some observers criticized the decision not to clarify the law prior to Clinton's trial, it is hard to see what purpose would have been served by an antecedent resolution of the law. In an ordinary trial (that is, one heard before judges) it is appropriate to resolve, as a threshold matter, any legal questions; for the judge is thereafter constrained by that legal conclusion. But in what sense would the senators have been constrained by a legal resolution prior to the factual trial? Assume that the Senate had voted 52-48 that perjury in a civil suit is an **impeachable** offense. (And is two-thirds required for such a legal conclusion, or is a mere majority enough?) Would the senators in the minority have viewed themselves as bound by that decision? Probably not. It is unlikely that a senator would announce, "It was previously my view that perjury is not an **impeachable** offense. However, I bow to the legal conclusion of the majority." A judge would (or should) act in this manner, but the senators did not view themselves as judges, so the antecedent resolution of law would have accomplished little.
- 65 See, for example,  [Mitchell v United States, 526 US 314, 325 \(1999\)](#) (extending the right to silence to sentencing proceedings).
- 66 One might speculate whether an observer 350 years hence might be puzzled by this aspect of the trial, which we take for granted. A future observer might question how we expect the truth to emerge from a trial in which the most valuable source of information is neither heard from nor seen.
- 67 Prior to trial, the Lords had ordered "that the **Earl of Strafford** in matters of mere fact shall not make use of his counsel, but in matter of law he shall be allowed counsel" (p 64 n 31). Although his lawyers were not permitted to speak during the entire trial on the facts, they sat behind Strafford, and he was able to consult with them before and during the trial.
- 68 The trial opened on March 22, but the entire day was consumed in the reading of both the charges against Strafford and his written responses. The following day was wasted in procedural skirmishing. The prosecutors did not begin with the proofs of their twenty-eight articles until March 24.
- 69 On this point, his story was supported by a respected member of the Commons, William Pennyman (p 98). The lead prosecutor that day tried to pressure Pennyman into recanting, a tactic that may have backfired. Strafford told the Lords: "This Gentleman, Sir William Pennyman, is my Noble Friend . . . and I would give him my Life on any occasion . . . (N)o man may suffer by me, I protest I had rather suffer ten thousand times my self." John Rushworth, *The Tryal of Thomas **Earl of Strafford*** 152-53 (London 1680).
- 70 See *Earl of Birkenhead, Famous Trials of History* 40 (Hutchinson 1926) ("It is unlikely that Strafford would, in the early days of a young King, model his language so closely upon that of the advice of the young men to Rehoboam. His version is more reasonable.").
- 71 For example, with respect to the charge that he had illegally deprived Lord Mountnorris of his land, Strafford produced a letter from the King authorizing his conduct (pp 206-07). And with respect to the charge that Strafford had, for personal profit, changed the Book of Rates to increase customs duties in Ireland, Strafford easily showed that the amended Book of Rates predated his arrival in Ireland by two years. Although Maynard, the lead prosecutor that day, shrugged off the error, he abandoned the following article, which also involved Anglo-Irish trade (pp 248-49).
- 72 See *Birkenhead, Famous Trials* at 40 (cited in note 70) ("Strafford objected to Sir David Foulis as a witness on the ground that he was a personal enemy, but the objection was rightly overruled. Such an objection is not to the admissibility of his evidence, but to his being believed.").
- 73 Conrad Russell, *The Theory of Treason in the Trial of Strafford*, 80 *Eng Hist Rev* 30, 45 n 4 (1965).
- 74 Clarke, *Fourteenth Century Studies* at 244 (cited in note 45).
- 75 For example, several articles alleged that Strafford had improperly claimed powers for royal courts (first in Yorkshire and then in Ireland) over which he presided. To these charges, Strafford invoked the maxim *boni iudicis est ampliare jurisdictionem* (it is the duty of a good judge to expand his jurisdiction), and he added that, whatever harm was done, no statute branded such actions treason.

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

See, for example, Strafford's response to Article 1: "The whole charge of it is but for enlarging the jurisdiction of his court, which cannot be heightened to High Treason" (p 97); and Article 8: "I conceive there is nothing in this that can make it Treason. And as I formerly said, the enlarging of a jurisdiction cannot be Treason" (p 222).

76 Rushworth, *The Tryal of Strafford* at 108-09 (cited in note 69).

77 Ralph Verney, *Notes of Proceedings in the Long Parliament* 54 (Camden Society 1845) (quoting Nathaniel Fines).

78 See Proverbs 30:20 (King James Version) ("Such is the way of an adulterous woman; she eateth, and wipeth her mouth, and saith, I have done no wickedness.").

79 See, for example, p 146 ("Glynne replies that the treason is an intention to subvert the laws. That this is proved by several words and several actions which all be one evidence to prove the treason, though taken severally by themselves happily may not be treason."); p 202 ("That though this particular article by itself be not a treason, yet it serves enough many other particulars to show his practice to subvert the laws and to prove an accumulative treason."); p 423 ("(W)e did not produce these words to make them Treason in themselves, but only to show that his counsels and purposes were still the same.").

80 The manager that day, Bulstrode Whitelocke, implausibly countered that Strafford had misconstrued the King's letter. The letter, however, was unambiguous: "Considering the great number of Scots in Ireland, I (Charles) hold it necessary you (Strafford) should do your best to try them with an oath" (p 353).

81 Berger, **Impeachment** at 33 (cited in note 10). Roughly the same point is made by Lord Birkenhead:  
Was Strafford guilty of treason? The answer in strict law must clearly be in the negative. Treason is an offence against the allegiance due to the Sovereign in aid and counsel. The underlying theory of the Commons that there were fundamental laws, and that to aim at overturning them was treason, is erroneous. In legal theory there are in this country no laws, not even the Act of Settlement or the Act of Union, which Parliament may not alter as easily as a Statute providing for by-laws in a country parish. To break the law is a crime. To break the laws upon which civil liberty depends is a high crime. But to call treason that which falls clearly outside the terms of the Statute of Treason does not justify a conviction. He was charged with treason, but at best the evidence proved offences, heinous indeed to the last degree, but not treasonable. Nevertheless, if one sets aside the purely legal aspect of the case and regards it from the wider standpoint, there can be little doubt that Charles and his advisers were working to substitute arbitrary government for the rule of law. Strafford had shown himself to be a grave menace to the constitution, and in that untechnical sense he was a traitor. Birkenhead, *Famous Trials* at 44-45 (cited in note 70).

82 See, for example, pp 167-68 (In invoking martial law, Strafford argued, "I do nothing but what had formerly been used by my predecessors (as Deputy of Ireland)."); p 428 (In urging the levying of ship money, Strafford argued that "I did no otherwise than was given before I came into England.").

83 For example, the managers appeared to concede that there was some basis for restricting the rights of Irish peers to travel to England, but they maintained that Strafford had wielded this authority with unequalled enthusiasm (pp 334-35).

84 One historian has argued that these three articles fell within the plain language of the treason statute. See Timmis, *Thine Is the Kingdom* at 220 (cited in note 54) ("The House of Commons . . . had a statutable case and there clearly was no need for the managers of the prosecution . . . to manufacture, as Wedgwood put it, a new theory of treason . . ."). This is a flawed reading of both the articles and the statute, however. None of the allegations in these articles "compass(ed) . . . the death of our Lord the King" in any literal sense, nor did they in any way suggest that Strafford had endeavored to "levy war against . . . the king." See pp 601-02 (quoting 25 Edward III, ch 2); William R. Stacy, *Matter of Fact, Matter of Law, and the Attainder of the Earl of Strafford*, 29 *Am J Legal Hist* 323, 345 (1985) (criticizing Timmis's argument). For example, Article 15 was based on a warrant that Strafford had issued to a sergeant-at-arms authorizing the billeting of four soldiers in the home of a person who had disobeyed his orders. Whatever the illegality of the warrant, it is unclear how it compassed the king's death, as required by the statute of 1352. To bridge the gap between the plain language of the statute and the allegations in Articles 15, 23, and 27, the managers were eventually forced to articulate what Conrad Russell calls a "constructive theory" of treason. See Russell, 80 *Eng Hist Rev* at 32-46 (cited in note 73) (calling the essence of this theory of treason "making a division between the king and the people"). In his summation, Pym would suggest that Strafford's acts

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

had provoked a division between Charles and his subjects, increased the likelihood of civil war, and thereby jeopardized the King's life (p 534). In this constructive sense only might the articles be said to fall within the meaning of the statute.

85 The managers encountered several problems in proving Article 15. First of all, the original warrant (that Strafford had issued and that gave rise to the allegation of an abuse of power) was missing. When the managers sought to introduce a copy of the warrant, Strafford objected, and the Lords, after recessing for half an hour, excluded the evidence. The managers regrouped and proved the existence of the warrant through oral testimony from several witnesses. In his response to the article, Strafford emphasized that he had ordered the billeting of at most four soldiers: how could that possibly fall within the ambit of "levy(ing) war against . . . the king," the precise wording of the 1352 statute (p 308). And moreover, he noted that the allegedly traitorous conduct had been the consistent practice of past Irish governors (p 299).

86 Article 27 alleged that Strafford had issued a warrant authorizing the use of force to levy money against the gentry of Yorkshire. Strafford denied issuing the offending warrant and then interposed a statute, which purported to insulate those "going . . . to the wars (on the side of the King)" from treason prosecutions (p 427 n 31). Of the three crucial articles, 15, 23, and 27, the managers themselves apparently viewed the last as the weakest: when they shifted to a bill of attainder, they incorporated Articles 15 and 23, but not 27 (pp 501-02).

87 The most comprehensive account of the trial that day is by John Robartes (pp 393-402).

88 See also Rushworth, *The Tryal of Strafford* at 544-45 (cited in note 69).

89 Rather than immediately countering Article 23, and in particular Vane's damaging testimony, he began by working his way through the preceding articles. He nearly ran out of energy before addressing the crux of the charge against him that day. One diarist reports Strafford groaning, "Now, my Lords, to the 23rd Article, and how I should get through the Lords of heaven knows" (p 384).

90 See Wedgwood, **Earl of Strafford**: A Revaluation at 349 (cited in note 6).

91 See 1 Edward VI, ch 12 (pp 602-03).

92 Strafford had instead called attention to a law that required that charges of treason based on spoken words be brought within three months of the utterance of the offending words (p 122 n 33).

93 The Commons obtained manuscripts of Coke's Institutes before the trial, and "doubtless read through his writings with dismay. . . . Coke denied that (later statutes) had repealed the two-witness provision of Edward's acts, and the fear that Strafford or his counsel might secure a copy of the Institutes must have tortured the opposition." Stacy, 29 *Am J Legal Hist* at 333 (cited in note 84).

94 The trial on April 5 went until 6:00 p.m., with Strafford collapsing at the end and requesting a recess the following day, which the Lords granted (p 375). See Wedgwood, **Earl of Strafford**: A Revaluation at 350 (cited in note 6) (noting that Strafford stumbled to his feet and was too ill to endure).

95 Coke agreed with Strafford that the law foreclosed treason prosecutions based on words alone. Coke had written in his Institutes that "(d)ivers latter acts of parliament have ordained that compassing by bare words or sayings should be High Treason; but all they are either repealed or expired" (p 385 n 100).

96 Invoking a notion of executive privilege, Strafford also argued that it was particularly imprudent to level a charge of treason based on advice given in confidence to the King: "(I)f the King's Privy Council should be questioned for what they speak there, no man would hereafter dare to speak freely" (p 375).

97 Nearly a century and a half later, during the **impeachment** trial of Warren Hastings, lead prosecutor Edmund Burke would not be as fortunate. As Strafford had ruled Ireland with a strong hand, Hastings had done the same in India. **Impeached** in 1787, and indefatigably prosecuted over the course of several years by Burke, Hastings would ultimately be acquitted. Whatever his offenses, he had committed no specific criminal acts, and by the late eighteenth century, Parliament was unwilling to resort to a bill of attainder. See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 *Duke L J* 1, 19 (1999) (describing the charges against Hastings).



IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

- 98 Farrand, 2 Records of the Federal Convention at 550 (cited in note 12). See also text accompanying notes 10-14.
- 99 Berger, **Impeachment** at 35 (cited in note 10) (calling explanations of this shift “unsatisfactory”).
- 100 See Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L J 1419, 1424 (1975) (“(C)ontemporaries then and historians since have expressed no puzzlement about the shift. They have attributed it to fear on the part of the House of Commons that it could not prove its case before the House of Lords.”).
- 101 Stacy, 29 Am J Legal Hist at 329 (cited in note 84).
- 102 Article 28 alleged that Strafford had betrayed the English army to the Scots during the battle at Newcastle. Although the managers dropped the article, Strafford could not resist mocking it a few days later in his summation: “Should I be an incendiary, and a confederate too, with the Scots? . . . I love the Scots well but not so as to let them take Newcastle” (p 532).
- 103 The following day, the prosecutors' anger would mount when Strafford did not show up: the Lieutenant of the Tower, who shuttled Strafford to Westminster each morning, reported that the accused was ill. The Commons, in a great huff, demanded that the Lieutenant take an oath, but he coolly replied “that he could testify nothing of his own knowledge but only what he had received by relation from the said Earl” (p 474). The Commons then demanded that Strafford's footboy be compelled to testify, although he too, indicated that “he could only say that his Lord told him that he was sick” (p 474).
- 104 The notes had been stolen from Vane's desk by his son, who passed them on to Pym. According to some accounts, Vane the elder contributed to the melodrama of the day's session in the Commons by angrily denouncing his son for his betrayal (p 498). Clarendon suggests, however, that the scene was staged, for the scheming Vane was eager to provide evidence against Strafford, but sought plausible deniability with the King. See Wedgwood, **Earl of Strafford: A Reevaluation** at 358 (cited in note 6) (“It is quite possible that this was play-acting on old Sir Harry's part.”).
- 105 On November 19, the Commons voted to entrust a committee with authority to search the records of the King's Bench for attainder precedents that might be employed. The security under which the records were kept foreshadows precautions taken with nuclear weapons. They were kept “under 3 locks. One key whereof is in the Lord Chief Justice's hand; the 2(nd), in Mr. Attorney General's hand; the 3rd, the Clerk of the Crown keeps.” Jansson, ed, 1 Long Parliament Proceedings at 191 (cited in note 38).
- 106 On November 28, the committee that had overseen the search reported back with a collection of musty precedents, and after a brief consideration, the possibility of attainder seems to have been discarded. See *id* at 354-56.
- 107 Stacy, 29 Am J Legal Hist at 330-31 (cited in note 84). Stacy notes the Lords' irritation in 1621 when the Commons sought to punish an individual without acknowledging the Lords' power to judge the individual first. See also Tite, **Impeachment** and Parliamentary Judicature at 128-29 (cited in note 26) (providing a detailed account of the 1621 proceedings).
- 108 See Stacy, 29 Am J Legal Hist at 331 n 46 (cited in note 84) (citing D'Ewes's diary). Another advantage to pursuing Strafford through **impeachment**, rather than attainder, is that the bishops in the House of Lords, who were for the most part favorable to Strafford, would recuse themselves in an **impeachment** trial, but were presumed to be eligible to vote on a bill of attainder (p 516). Ultimately, however, the bishops recused themselves from the vote on Strafford's attainder. See Stacy, 29 Am J Legal Hist at 340-41 (cited in note 84).
- 109 From April 14-16, the Lords and Commons debated whether Strafford's lawyers should be permitted to speak to matters of law. Although the Lords had indicated prior to trial that they likely would, the Commons were incredulous when the Lords reaffirmed their earlier ruling. This was yet another procedural defeat for the Commons, and doubtless exacerbated fears that the Lords were inclined to acquit.
- 110 The present volume ends on April 17, 1641. For a full compilation of accounts of subsequent debates in the Commons and the Lords, we must await volume 4 of the current series from the Yale Center for Parliamentary History. I have relied below on a variety of accounts, including that of John Rushworth, who produced a history of the Strafford proceedings in 1680, based in part on his first-hand observations nearly forty years earlier. See generally Rushworth, *The Tryal of Strafford* (cited in note 69).



IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

- 111 J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* 95 (Cambridge 1962). As the diarist observed, “(T)he Commons are determined to desert the Lords' judicature, and to proceed against him by bill of attainder, whereby he shall be adjudged to death upon a treason now to be declared.” *Id.* A manager of the prosecution, Bulstrode Whitelock, likewise observed that the Commons moved to attainder “because they perceived the Lords not forward to give judgment for treason against him.” Roberts, 84 *Yale L J* at 1425 n 23 (cited in note 100).
- 112 As the historian J.R. Tanner writes, “In condemning Strafford by attainder after a fair and open trial by **impeachment** had failed to secure the desired condemnation, the Long Parliament . . . was now ‘loose and absolved from all rules of government.’” Tanner, *English Constitutional Conflicts* at 281 (cited in note 111).
- 113 Russell, *Crisis of Parliaments* at 334 (cited in note 22).
- 114 Wedgwood, **Earl of Strafford**: A Revaluation at 366 (cited in note 6).
- 115 *Id.* at 367.
- 116 *Id.*
- 117 Indeed, the nineteenth-century legal historian J.F. Stephen concludes that the Commons' abandonment of **impeachment** in favor of attainder was an acknowledgment that the salvo provision in the 1352 statute, which purported to allow parliament to “declare” offenses to be treason, was no longer good law. See Sir James Fitzjames Stephen, 2 *A History of the Criminal Law of England* 252-53 (Macmillan 1883). See also Timmis, *Thine Is the Kingdom* at 220 (cited in note 54).
- 118 The bill provides: “(N)o judge or judges, or justice or justices whatsoever shall adjudge or interpret any act or thing to be Treason . . . in any other manner than he or they should or ought to have done before the making of this act” (p 502).
- 119 The bill provides: “(A)ll statutes and acts of parliament . . . (shall) be in full force as if this act had not been” (p 502).
- 120 See Stacy, 29 *Am J Legal Hist* at 348 (cited in note 84) (quoting D'Ewes's diary).
- 121 See *id.* at 337 n 86 (“The delivery of the bill to the Lords nearly led to a duel between Lord Savile, who opposed receiving the bill, and the Earl of Stamford.”).
- 122 See Rushworth, *The Tryal of Strafford* at 677 (cited in note 69) (“My Lords, The proceeding by way of Bill, it was not to decline your Lordships Justice in the judicial way . . . it was to Husband time, by silencing those doubts, they conceived it the speediest and surest way.”).
- 123 *Id.* at 701.
- 124 Blackstone, 4 *Commentaries* at \*259 (cited in note 47).
- 125 Rushworth, *The Tryal of Strafford* at 702-03 (cited in note 69).
- 126 With respect to one attainder, enacted to punish the murderer of a foreign ambassador, St. John argued that the offense was “out(side) of the Statute 25 E.3.,” but Parliament nonetheless “declared it Treason (in a bill of attainder), and Judgment afterwards of High-Treason.” *Id.* at 704.
- 127 *Id.* at 676-77.
- 128 See Stacy, 29 *Am J Legal Hist* at 340 (cited in note 84) (“Either intimidated by the mob and depending on Charles to veto the bill, or dismayed by the king's willingness to turn to force as revealed in the army plot, or resigned to sacrificing Strafford to avert a breach with the Commons and possible catastrophe in the realm, members ceased to attend in large numbers.”); Timmis, *Thine Is the Kingdom* at 197 (cited in note 54) (charting the Lords' attendance by day).
- 129 Russell, 80 *Eng Hist Rev* at 50 (cited in note 73) (emphasis added).

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

- 130 Timmis, *Thine Is the Kingdom* at 169 (cited in note 54).
- 131 See text accompanying notes 162-64.
- 132 See Burghclere, 2 *Strafford* at 331-32 (cited in note 40) (“It has sometimes occasioned surprise that although he had so freely offered up his life for his ‘Great Master,’ *Strafford* was nevertheless astonished when Charles took him at his word.”).
- 133 See Psalm 146:3-4 (King James version) (“Put not your trust in princes, nor in the son of man, in whom there is no help. His breath goeth forth, he returneth to his earth; in that very day his thoughts perish.”).
- 134  *Cummings v Missouri*, 71 US (4 Wall) 277, 323 (1866).
- 135 Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 *Mich L Rev* 203, 211 (1996).
- 136 Tanner, *English Constitutional Conflicts* at 280 (cited in note 111).
- 137 See Russell, 80 *Eng Hist Rev* at 46 (cited in note 73) (noting that after *Strafford's* trial, “the doctrine of constructive compassing of the king's death falls into the background”). See also Roberts, 84 *Yale L J* at 1426 (cited in note 100) (“The scruples which the Commons displayed against the declaratory power in 1667 melted away before the passions unleashed by the Popish Plot, an alleged conspiracy by papists in 1678 to assassinate Charles II and place his Catholic brother on the throne.”).
- 138 It would, of course, be restored in 1660.
- 139 Federalist 65 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 397 (Mentor 1961) (“The model from which the idea of this institution has been borrowed pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the **impeachment**, and the House of Lords to decide upon it.”).
- 140 See **Impeachment** of Richard M. Nixon President of the United States, HR Rep No 93-1305HR Rep No 93-1305, 93d Cong, 2d Sess 6-7 (1974).
- 141 Besides **impeachment**, another area of constitutional law in which it is de rigeur to research the distant English past is the Seventh Amendment. In determining whether a jury trial is constitutionally required, the Supreme Court regularly looks to the colonial and English practice in 1789. See, for example,  *Markman v Westview Instruments, Inc*, 517 US 370, 377-82 (1996) (relying on English common law to determine whether the interpretation of a patent claim was a jury question). Excavations of the distant past are increasingly commonplace in the Supreme Court's Fourth Amendment decisions, although the results have been judged uneven. See, for example, Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v Lago Vista*, 37 *Wake Forest L Rev* 239 (2002) (criticizing Justice Souter's use of history in a recent Fourth Amendment decision); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 *Colum L Rev* 1739 (2000) (criticizing Justice Scalia's eclectic use of history in construing the original intent of the Fourth Amendment). The impulse to rummage through the distant English past generally seems liveliest in addressing constitutional issues that have yet to develop a substantial body of American precedents. Hence the recent interest in the Second Amendment's seventeenth-century origins. See Joyce L. Malcolm, *Constitutional Firepower: New Light on the Meaning of the Second Amendment to Keep and Bear Arms, The Origins of an Anglo-American Right* (Harvard 1994).
- 142 Emily Field Van Tassel and Paul Finkelman, **Impeachable** Offenses: A Documentary History from 1787 to the Present 293 (Congressional Q 1999) (reprinting Memorandum Regarding Standards for **Impeachment**, released by President Clinton, Oct 2, 1998).
- 143 See, for example, *Trial of William Jefferson Clinton, President of the United States*, 106th Cong, 1st Sess, in 145 *Cong Rec* § 869, 877 (Jan 22, 1999).

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

- 144 Consider Richard A. Posner, [Path-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship](#), 67 U Chi L Rev 573, 595 (2000) (“Legal professionals are not competent to umpire historical disputes. Because they are not, inevitably they pick the side of the dispute that coincides with their preferences based on different grounds altogether.”).
- 145 Van Tassel and Finkelman, [Impeachable](#) Offenses at 59 (cited in note 142). Another House majority leader and future President had a different view. In the 1830 [impeachment](#) trial of federal judge James Peck, House manager James Buchanan told the Senate, “I freely admit that we are bound to prove that the respondent has violated the Constitution or some known law of the land.” Id at 109.
- 146 Michael J. Gerhardt, The Federal [Impeachment](#) Process: A Constitutional and Historical Analysis 10 (Princeton 1996).
- 147 Peter Charles Hoffer and N.E.H. Hull, [Impeachment](#) in America, 1635-1805 102-03 (Yale 1984) (“The association of [impeachment](#) with the two-thirds rule signified a final Americanization and republicanization of the [impeachment](#) process.”).
- 148 Posner, 67 U Chi L Rev at 578-79 (cited in note 144).
- 149 Posner, An Affair of State at 12 (cited in note 18).
- 150 Id.
- 151 Michael Gerhardt, a leading contemporary scholar on [impeachment](#), suggests that history is useful not “as an end in itself but only as an additional guide.” Gerhardt, The Federal [Impeachment](#) Process at 67 (cited in note 146).
- 152 Similarly, a familiarity with history (and the events surrounding the introduction of “revolutionary” technologies like the telephone and telegraph) may deflate claims that the Internet poses unprecedented problems for the legal system. See Jack L. Goldsmith, [Against Cyberanarchy](#), 65 U Chi L Rev 1199, 1239 (1998):  
(There is) no reason to think that the differences between cyberspace and prior communication technology are so much greater than the differences between pre-and post-telegraph technology (which reduced communication time from weeks and months to hours and minutes), or between pre-and post-telephone technology (which also dramatically reduced the cost and enhanced the frequency and privacy of transjurisdictional communication).“
- 153 Dershowitz, Sexual McCarthyism at 1 (cited in note 4).
- 154 Id at 224. For Dershowitz and others, the “damage” would have consisted in the shift to a “parliamentary system, where a head of state serves at the pleasure of the legislature.” Id at 236. This concern is questionable. First, unexplained is why the weakening of the presidency would necessarily be a bad thing. See Posner, An Affair of State at 177-78 (cited in note 18) (also noting that there have been many powerful prime ministers in parliamentary systems). Indeed, the passion with which some defended the institution of the (Clinton) presidency is curious, given that some of those same individuals (for example, Arthur Schlesinger) had previously lamented “The Imperial Presidency.” Second, had Clinton been removed, the precedent created might, on the margin, have expanded the [impeachment](#) power and thereby strengthened Congress vis-a-vis the President, but the suggestion that the president would thereafter “serve() at the pleasure of the legislature” is “overwrought.” Joseph Isenbergh, [Impeachment](#) and Presidential Immunity from Judicial Process, 18 Yale L & Pol Rev 53, 72 n 203 (1999) (“If Congress has a brain spike, goes berserk, and disregards the fundamental nature of [impeachment](#) as a criminal process, anything is possible.”). In any event, the failure to remove Clinton has served to strengthen the presidency (not restore it to the status quo ante) by demonstrating the “enormous difficulty of securing a conviction in a presidential [impeachment](#) trial as long as the senators from a president’s party unanimously support him. Rarely does a political party dominate more than two-thirds of the seats in the Senate.” Gerhardt, The Federal [Impeachment](#) Process at 179 (cited in note 146).
- 155 Posner, An Affair of State at 235 (cited in note 18), quoting Wilentz’s testimony in Congress.
- 156 Even Clinton, who argued in his “Memorandum Regarding Standards for [Impeachment](#)” that he was entitled to due process, nonetheless conceded that “(i)mp~~ea~~chment is not, of course, a judicial proceeding.” Van Tassel and Finkelman at 290 (cited in note 142). This was probably a prudent concession. Although the Senate, as originally conceived, was supposed to act in a quasi-judicial manner during [impeachment](#) proceedings, its capacity to do so has been eroded over time. The Seventeenth Amendment, by requiring the direct election of senators, has made the body more political, and the quadrupling of the size of the original Senate has

IMPEACHMENT, ATTAINDER, AND A TRUE..., 69 U. Chi. L. Rev. 2057

---

further undermined its “judicial character as a court for the trial of **impeachments**.” Federalist 65 (Hamilton) (cited in note 139). By comparison, the Senate deliberations during the first **impeachment** trial, that of Senator William Blount, “had a decidedly judicial character.” Buckner F. Melton, Jr., [Federal Impeachment and Criminal Procedure: The Framers' Intent](#), 52 Md L Rev 437, 441-53 (1993).

- 157 See Posner, *An Affair of State* at 127-28 (cited in note 18) (calling the trial “a travesty of legal justice”). See also Terry M. Neal, *As a Jury, Senate Is Full of Conflicts; Lawmakers Vow Impartiality Despite Personal Connections*, Wash Post A18 (Jan 15, 1999) (cataloging a number of Senate members with conflicts of interest).
- 158 The rigor of the Senate's judicial deliberations is exemplified in a public announcement by Senator Byrd a few days before the end of the trial. He opined that although Clinton had, in his opinion, committed high crimes and misdemeanors, he would nonetheless vote to acquit. See note 16. But see US Const Art 2, § 2 (“The President . . . shall be removed from Office on **Impeachment** for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”) (emphasis added).
- 159 Posner, *An Affair of State* at 128 (cited in note 18).
- 160 Pym would, in fact, later be charged with treason, but he escaped before he could be arrested. He died of natural causes in 1643 and was buried in Henry VII's chapel in Westminster Abbey. After the restoration in 1660, his body was exhumed and tossed in a common burial pit.
- 161 See note 40.
- 162 Rushworth, *The Tryal of Strafford* at 743 (cited in note 69).
- 163 *Id.* I do not intend to overly romanticize the last chapter of Strafford's life. As noted earlier, it is reported that Strafford was nonetheless surprised when the King acceded to his advice, and thus his rumored lament, “Put not your trust in Princes.” See Burghclere, 2 *Strafford* at 331-34 (cited in note 40). Still, Strafford's letter may well have tipped the judgment of the agonizing King in favor of attainder, see *id.* at 331, and it is striking that Strafford felt a sufficiently robust devotion (to the King? to the nation?) to write it.
- 164 Rushworth, *The Tryal of Strafford* at 743 (cited in note 69).
- 165 Winston S. Churchill, 1 *A History of the English Speaking Peoples: The Birth of Britain* 212 (Dodd, Mead 1956).

69 UCHILR 2057