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# Impeachment and Assassination

Josh Chafetz

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## Article

# Impeachment and Assassination

Josh Chafetz<sup>†</sup>

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## INTRODUCTION

On July 20, 1787, in the course of a lengthy debate in the Constitutional Convention over whether the president ought to be subject to impeachment, Benjamin Franklin made a remarkable argument in the affirmative.

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History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.<sup>1</sup>

That is, Franklin, recognizing that presidents might sometimes “render [themselves] obnoxious,” recommended a formal, constitutional mechanism for bringing them to justice instead of what he saw as the inevitable alternative: assassination. Or, to put it differently, impeachment was an attempt to domesticate, to tame, assassination.

What are we to make of this claim? I suggest that it can shed light on one of the more vexing questions surrounding impeachment: just what *is* an impeachable offense? Some have suggested that, in the words of then-Congressman Gerald Ford, “an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history,” provided two-thirds of the Senators present concur.<sup>2</sup> But this sits uncomfortably with the Constitution’s use of the wording “Treason, Bribery, or other high Crimes and Misdemeanors”<sup>3</sup>—a phrase that sounds in legal standards.<sup>4</sup> Indeed, the Philadelphia Convention originally considered a draft that made the president impeachable only “for Treason, or bribery.”<sup>5</sup> George Mason complained that, as treason had a strict consti-

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1. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND’S RECORDS].

2. 116 CONG. REC. 11,913 (1970).

3. U.S. CONST. art. II, § 4.

4. See RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 90 (enlarged ed. 1974) (“[T]he Framers, far from proposing to confer illimitable power to impeach and convict, intended to confer a *limited* power.”); *id.* at 111–12 (“The last thing intended by the Framers was to leave the Senate free to declare any conduct whatsoever a ‘high crime and misdemeanor.’”); Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 107 (1970) (noting, after surveying impeachment trials of federal judges, that “Congressman Ford is in error”).

Of course, the fact that there are legal standards for impeachment does not mean that impeachments are justiciable. See *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (holding that impeachments are nonjusticiable); see also JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 61–66 (2007) (arguing that *Nixon* was correctly decided).

5. 2 FARRAND’S RECORDS, *supra* note 1, at 499.

tutional definition,<sup>6</sup> an impeachability provision limited to bribery and treason “will not reach many great and dangerous offenses.”<sup>7</sup> Accordingly, he proposed adding “maladministration” as a third category of impeachable offenses.<sup>8</sup> James Madison, however, cautioned that “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate.”<sup>9</sup> Mason then withdrew his proposal to add maladministration and suggested instead “other high crimes & misdemeanors,” and this proposal was accepted by the Convention.<sup>10</sup> Clearly, this new language was meant to be responsive to Madison’s concern—that is, it was meant to make it clear that impeachment was to be governed by legal standards and not by congressional whim.

But what should those standards be? The terms “impeachment” and “high crimes and misdemeanors” are lifted from English law,<sup>11</sup> and this history makes it clear that “high crimes and misdemeanors” was generally understood as encompassing distinctly political offenses.<sup>12</sup> But the history of English impeachment is of limited utility in discussing American presidential impeachment<sup>13</sup> for the simple reason that, at

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6. See U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

7. 2 FARRAND’S RECORDS, *supra* note 1, at 550.

8. *Id.*

9. *Id.*

10. *Id.*

11. See BERGER, *supra* note 4, at 57–58.

12. See *id.* at 64; see also THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that impeachable offenses “are of a nature which may with peculiar propriety be denominated POLITICAL”).

13. As Berger notes, discussion of impeachment at the Founding was focused almost exclusively on executive impeachment. See BERGER, *supra* note 4, at 96, 106, 146–47, 152–53. This emphasis is further highlighted by the location of the provision making “[t]he President, Vice President and all civil Officers of the United States”—including judges—impeachable. It comes in Article II, the article establishing the executive branch. U.S. CONST. art. II, § 4. Indeed, the provision originally applied only to the President; the Vice President and other civil officers were added, seemingly as an afterthought, only a little more than a week before the Convention adjourned. See 2 FARRAND’S RECORDS, *supra* note 1, at 552.

This Article will therefore follow the Founding generation in focusing on presidential impeachment. It should be noted, however, that it may make sense to have different conceptions of what constitute impeachable offenses when considering the impeachment of Presidents, other executive branch officers, and judges. See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 106–07 (2d ed. 2000) (noting that different impeachability standards may apply to different types of impeachable officers). This follows not only from the fact that different sorts of behavior are expected from different sorts

English law, the Crown was literally unimpeachable.<sup>14</sup> The impeachability of the American president thus marks a decisive break with English practice, and it is this break that explains the attention given to the issue of presidential impeachability in both the Philadelphia Convention<sup>15</sup> and in the ratification debates.<sup>16</sup> Indeed, Hamilton specifically pointed to presidential impeachability in order to defend the Constitution from the Anti-Federalist charge that the president would be as powerful as a king. The person of the British King, Hamilton noted, “is sacred and inviolable; there is no constitutional tribunal to which he can be subjected without involving the crisis of a national revolution.”<sup>17</sup> Because the impeachability of the chief magistrate was an area in which the American Constitution was meant to depart from British practice, and because the impeachability of the chief magistrate presents a unique set of issues, potentially justifying a unique substantive standard,<sup>18</sup> the British practice is of limited interpretive utility.<sup>19</sup>

But this does not mean that we have to throw up our hands and decide, with Ford,<sup>20</sup> that impeachment is lawless. In contrast to Ford, I suggest that, in the context of presidential impeachment, we accept Franklin’s provocative invitation—an invitation that scholars have thus far ignored<sup>21</sup>—to view

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of officeholders, but also from the constitutional uniqueness of the presidency. After all, a misbehaving judge, or even justice, does not constitute in herself one of the three coequal branches of government, as the President does. See U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.” (emphasis added)).

14. See William Lawrence, *The Law of Impeachment*, 6 AM. L. REG. 641, 644 (1867).

15. See 2 FARRAND’S RECORDS, *supra* note 1, at 53–54, 64–69.

16. See generally GERHARDT, *supra* note 13, at 19 (noting that the ratification debates focused on those aspects of impeachment that “looked innovative or novel, such as presidential impeachment”).

17. THE FEDERALIST NO. 69, *supra* note 12, at 416 (Alexander Hamilton).

18. See *supra* note 13 and sources cited therein.

19. See generally GERHARDT, *supra* note 13, at 3 (noting that preconstitutional impeachment practices are largely irrelevant to constitutional impeachment practices “because the framers set forth a special impeachment mechanism in the Constitution that reflected their intention to differentiate the newly proposed federal impeachment process from the English and state experiences with impeachment prior to 1787”).

20. See *supra* text accompanying note 2.

21. Franklin’s linkage of impeachment and assassination has occasionally been noted by scholars in passing or as a dramatic aside, but it has never been unpacked or even taken particularly seriously. See, e.g., BERGER, *supra* note 4, at 104–05; GERHARDT, *supra* note 13, at 7–8; Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365, 388

impeachable offenses as (what might otherwise be) *assassinable* offenses. On this view, impeachment maintains the link between removal and death, but attenuates it. Both impeachment and assassination deal with a situation in which a chief magistrate has rendered himself too obnoxious to be allowed to continue to rule, but whereas assassination by definition involves the death of its object, American impeachment never can.<sup>22</sup> Impeachment is, instead, a *political* death—a president who is impeached and convicted is deprived of his continued existence *as a political officeholder*. And, like death, impeachment and conviction may be permanent.<sup>23</sup>

These heretofore unexplored connections suggest that assassability may appropriately provide the substantive criteria for impeachability. But assassination as a means of executive removal has significant drawbacks. It is politically disruptive; it carries a high risk of irreversible error; and it is, of course, violent. American impeachment tames assassination by, in Franklin's word, "regular[izing]"<sup>24</sup> it—that is, by proceduralizing it. The Constitution's impeachment procedures make the removal of the chief magistrate less violent, less disruptive, and less error-prone than assassination. Impeachment in the American Constitution is thus a domestication of assassination—both in the literal sense that it takes a substantive standard from elsewhere and imports it into domestic law, and in the fig-

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(2000); Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 704 n.244 (1999); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 138–39 (1999); Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 121 (1998).

22. See U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.").

23. See *id.* (allowing disqualification to future officeholding as a punishment in cases of impeachment).

The language of political death is, of course, metaphorical—and, like all metaphors, the vehicle does not perfectly fit the tenor. An impeached, convicted, and disqualified officeholder can still hold state office. See *id.* (limiting disqualification to "any Office of honor, Trust or Profit *under the United States*" (emphasis added)). Indeed, an impeached, convicted, and disqualified officeholder can be elected to Congress. See CHAFETZ, *supra* note 4, at 280 n.68 (arguing that Senators and Representatives do not hold "Office[s] of honor, Trust or Profit under the United States"). Still, it is the central contention of this Article that the vehicle (assassination, death) can shed significant light on the tenor (impeachment).

24. See *supra* text accompanying note 1.

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urative sense that it takes executive removal out of the realm of the brutish and brings it into the realm of the civilized.

These claims, of course, require significantly more elaboration, and that is what the rest of this Article will provide. In the following pages, I shall attempt to unpack Franklin's association of impeachment with assassination, using two paradigm cases<sup>25</sup> that Franklin would have had in mind when he uttered those lines in the Philadelphia Convention, as well as two subsequent cases that shed light on the impeachment-assassination nexus.

The first two Parts argue that Franklin had the assassination of Julius Caesar and the trial and execution of Charles I centrally in mind when discussing the removal of obnoxious chief magistrates. Both Caesar and Charles were tyrants who had subverted their countries' constitutions in ways that undermined republican liberty, and both had prosecuted bloody civil wars in the process. Franklin and his compatriots therefore believed that Brutus and his coconspirators were justified in killing Caesar and that the English regicides were justified in killing Charles. But substantive justification is not the end of the story; the lack of procedural regularity attendant upon both of these political murders posed difficulties for the Founding generation. These Parts, therefore, not only derive a substantive standard for impeachability from the factors justifying assassination, they also point to the ways in which American impeachment practice rectifies the procedural flaws evident in the Roman and English examples.

The third and fourth Parts of this Article trace the interaction of these substantive and procedural criteria at two key moments in the history of the American presidency. The first moment, discussed in Part III, includes the assassination of President Lincoln in 1865 and the impeachment and acquittal of President Johnson a mere three years later. This Part argues that both John Wilkes Booth and Johnson's Radical Republican opponents in Congress were using the correct substantive standard for removal, but both made mistaken judgments on the merits: neither Lincoln nor Johnson was, in fact, behaving tyrannically. But while Booth's unilateral action led to tragic results, the Radical Republicans' compliance with the proper constitutional procedures led to the correct outcome.

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25. On the importance of paradigm cases for constitutional interpretation, see JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 178–95 (2001).

The second significant moment, examined in Part IV, is the impeachment and acquittal of President Clinton in 1998–1999. This Article argues that those favoring impeachment and conviction in this case applied the wrong substantive standard. They criticized Clinton for “debas[ing]”<sup>26</sup> or “defil[ing]”<sup>27</sup> the office of the presidency—in effect, for making it too small. But, the focus on assassinability as the substantive standard for impeachability allows us to see that impeachment is meant to combat precisely the opposite problem. The paradigmatically assassinateable—and therefore impeachable—chief magistrate is one who, like Caesar or Charles, seeks to make the office too big, one who seeks to aggrandize his own power. The Senate was therefore right to acquit Clinton, and once again, the procedural mechanisms of impeachment worked to produce the correct result.

The conclusion includes a brief discussion of one American president who would have met the standard for impeachment laid out in this Article: Richard Nixon.

## I. CAESAR AND BRUTUS

### A. FRANKLIN AND CAESAR

When Franklin spoke of executive assassinations, there can be little doubt that he had the tumultuous world of Roman politics in mind. After all, Rome loomed large in the minds of the Founding generation generally,<sup>28</sup> as evinced by the pen-names chosen by both Anti-Federalists (including Brutus,<sup>29</sup> Cato,<sup>30</sup> and Agrippa<sup>31</sup>) and Federalists (including Marcus,<sup>32</sup> Mark

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26. 145 CONG. REC. 2565 (1999) (statement of Sen. Charles Hagel).

27. WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE* 5 (1998).

28. *See, e.g.*, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 53 (rev. ed. 1998) (“The nostalgic image of the Roman Republic became a symbol of all [the patriots’] dissatisfactions with the present and their hopes for the future.”).

29. *See* *Essays of Brutus*, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 358, 358–452 (Herbert J. Storing ed., 1981) [hereinafter *ANTI-FEDERALIST*].

30. *See* *Letters of Cato*, reprinted in 2 *ANTI-FEDERALIST*, *supra* note 29, at 101, 101–29.

31. *See* *Letters of Agrippa*, reprinted in 4 *ANTI-FEDERALIST*, *supra* note 29, at 68, 68–116.

32. *See* Marcus, *The Interests of this State*, reprinted in 1 *THE DEBATE ON THE CONSTITUTION* 127, 127–28 (Bernard Bailyn ed., 1993) [hereinafter *BAILYN’S DEBATE*].



Antony,<sup>33</sup> and, most famously, Publius<sup>34</sup>). And although the Founders were familiar with any number of sources on Roman history, the most influential was unquestionably the first-century A.D. biographer Plutarch.<sup>35</sup> Franklin himself was certainly a devotee of Plutarch. In his *Autobiography*, he mentions that, as a young child, he “read abundantly” in Plutarch’s *Lives*, “and I still think that time spent to great Advantage.”<sup>36</sup> And when Franklin founded the Library Company of Philadelphia in 1731,<sup>37</sup> one of the first books he ordered was the *Lives*.<sup>38</sup> Franklin was also intimately familiar with two prominent dramatic adaptors of stories from Plutarch: Shakespeare<sup>39</sup>—a 1744 notice in Franklin’s *Pennsylvania Gazette* advertised “SHAKESPEAR’S PLAYS in 8 Vol. neatly bound. Sold by the Printer hereof”<sup>40</sup>—and Joseph Addison,<sup>41</sup> whose 1713 play *Cato* was hugely influential in the colonies generally<sup>42</sup> and for Franklin in particular.<sup>43</sup>

33. See Mark Antony, *Slavery “Ought to Be Regretted . . . But It Is Evidently Beyond Our Controul”: A Defense of the Three-Fifths Clause*, reprinted in 1 BAILYN’S DEBATE, *supra* note 32, at 737, 737–43.

34. See THE FEDERALIST, *supra* note 12.

35. See DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION 15 (2008) (“[T]he Framing generation particularly prized the works of Plato, Aristotle, Thucydides, Polybius, and Plutarch, in that rising order of esteem.” (emphasis added)); *id.* at 16 (“Unquestionably the most influential Greek work in colonial America and the early republic was Plutarch’s *Lives* and *Morals*.”); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 67 (1985) (“Doubtless the most widely read ancient work [in the early republic] . . . was Plutarch’s *Lives*.”).

36. BENJAMIN FRANKLIN, *The Autobiography of Benjamin Franklin*, in THE AUTOBIOGRAPHY AND OTHER WRITINGS 3, 13 (Kenneth Silverman ed., 1986).

37. See WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 103–04 (2003) (describing the founding of the Library Company of Philadelphia).

38. See Albert J. Edmunds, *The First Books Imported by America’s First Great Library: 1732*, 30 PA. MAG. HIST. & BIOGRAPHY 300, 300 (1906) (listing “Plutarch’s *Lives* in Small Vol.” among the first set of books ordered for the library).

39. On the importance of Plutarch to Shakespeare, see, for example, Vivian Thomas, *Shakespeare’s Sources: Translations, Transformations, and Intertextuality in Julius Caesar*, in JULIUS CAESAR: NEW CRITICAL ESSAYS 91, 93 (Horst Zander ed., 2005) (“However many tributaries flowed into Shakespeare’s consciousness, the overriding significance of Plutarch is beyond question.”).

40. Advertisement, PA. GAZETTE, Feb. 16, 1744, at 3.

41. See Fredric M. Litto, *Addison’s Cato in the Colonies*, 23 WM. & MARY Q. 431, 432 n.2 (1966) (“Addison had modeled his Marcus Cato and Julius Caesar quite clearly after Plutarch’s biographies of them.”).

42. See BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 54 (1968) (referring to “Addison’s universally popular play *Cato*”); *id.* at 80 (referring to “that universally popular paean to liberty, Addison’s *Cato*”); Litto, *supra* note

And central to Plutarch's *Lives*—and to Shakespeare's and Addison's *oeuvres*, as well<sup>44</sup>—is the assassination of Julius Caesar. Of course, Caesar is hardly the only of Plutarch's subjects to be assassinated,<sup>45</sup> but he is certainly the most *frequently* assassinated subject: he meets his death in no fewer than four *Lives*.<sup>46</sup> (His life, but not his death, also receives extensive treatment in three other *Lives* whose subjects predeceased him.)<sup>47</sup> Given the centrality of Plutarch to Franklin and his contemporaries, and given the centrality of Caesar to Plutarch, it is inconceivable that Franklin did not have Caesar in mind when he spoke of the assassination of a “chief Magistrate [who had] rendered himself obnoxious.”<sup>48</sup> It is, therefore, to an examination of the circumstances surrounding that assassination that we must turn if we are better to understand Franklin's meaning. More precisely, it is to an examination of Plutarch's presentation of those circumstances, supplemented by their treatment by Addison and Shakespeare, that this Article now turns, not because those are the most historically accurate accounts of the relevant events,<sup>49</sup> but rather because, as we have

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41, at 440–49 (noting the influence of Addison on American patriots in the late-colonial period, including Franklin).

43. See FRANKLIN, *supra* note 36, at 93–94 (noting that Franklin used a quote from Addison's *Cato* as an epigraph to the famous journal in which he kept track of his attempt to achieve moral perfection); BENJAMIN FRANKLIN, PROPOSALS RELATING TO THE EDUCATION OF YOUTH IN PENNSYLVANIA (1749), reprinted in 3 THE PAPERS OF BENJAMIN FRANKLIN 397, 405–06 (Leonard W. Labaree ed., 1961) [hereinafter FRANKLIN PAPERS] (listing Addison among the “Classicks” that should be used to teach English to Pennsylvania youths).

44. See generally JOSEPH ADDISON, *Cato: A Tragedy*, in CATO: A TRAGEDY, AND SELECTED ESSAYS 1 (Christine Dunn Henderson & Mark E. Yellin eds., 2004) (dramatizing Cato's opposition to Caesar); WILLIAM SHAKESPEARE, JULIUS CAESAR (Yale Univ. Press ann. ed. 2006) (dramatizing the life and death of Caesar).

45. See James Atlas, *Introduction* to 1 PLUTARCH, PLUTARCH'S LIVES, at ix, xiv (Arthur Hugh Clough ed., John Dryden trans., Modern Library 2001) (“Few of [Plutarch's] subjects died in their beds; murder . . . was the order of the day.”). For just a sampling of the Roman assassinations in Plutarch, see *id.* at 43 (assassination of Tattius); *id.* at 321, 324 (assassination of Coriolanus); 2 *id.* at 21 (assassination of Sertorius); *id.* at 368–69 (assassination of Tiberius Gracchus); *id.* at 440–41 (assassination of Cicero).

46. See 2 *id.* at 239–42 (life of Caesar); *id.* at 436 (life of Cicero); *id.* at 488–89 (life of Antony); *id.* at 577–83 (life of Brutus).

47. See 1 *id.* at 734–35 (life of Crassus); 2 *id.* at 106–35 (life of Pompey); *id.* at 303–17 (life of Cato).

48. See *supra* text accompanying note 1.

49. They, of course, are not. Addison and Shakespeare (understandably) took dramatic liberties, and it would be anachronistic to expect Plutarch to

seen above, those were the sources on Caesar that most shaped Franklin and his contemporaries.

#### B. CAESAR AND BRUTUS

It is unnecessary to recount here Gaius Julius Caesar's early years or his rise to power. It suffices to note that his ascension was swift, rising to the consulship<sup>50</sup>—Rome's chief magistracy—in 59 B.C.,<sup>51</sup> at roughly the age of 41.<sup>52</sup> He was aided in his rise by his alliance with Crassus and Pompey<sup>53</sup> (in what historians would later call the “First Triumvirate”<sup>54</sup>) and he was strenuously opposed by Cato the Younger,<sup>55</sup> who repeatedly warned his countrymen that Caesar aimed at tyranny.<sup>56</sup> As consul, he proposed measures meant not only to win popular support for himself, but also to alienate popular support from the patricians, who generally opposed him.<sup>57</sup>

After his year of consulship was over, Caesar left Rome to become Proconsul of Gaul.<sup>58</sup> There, he successfully prosecuted the wars which were to gain him the reputation as one of the foremost military strategists in history, conquering much of Europe for the Republic.<sup>59</sup> Caesar's generalship and generosity won him a devoted following among his soldiers<sup>60</sup> and Caesar used the spoils of war to “purchas[e] himself numerous friends.”<sup>61</sup> In 56 B.C., the Triumvirate agreed that Pompey and Crassus were to become consuls and that they were to use their consular power to extend Caesar's governorship of Gaul for another five years.<sup>62</sup> As Plutarch notes, “[t]his seemed a plain conspiracy to subvert the constitution and parcel out the empire” amongst the three of them.<sup>63</sup> All other contenders for the

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have adhered to twenty-first century historiographical standards. *See* Atlas, *supra* note 45, at xii (“How accurate are these details? Not very.”).

50. *See* 2 PLUTARCH, *supra* note 45, at 207.

51. ADRIAN GOLDSWORTHY, CAESAR: LIFE OF A COLOSSUS 163–64 (2006).

52. *See id.* at 30 (giving Caesar's birthdate as July 13, 100 B.C.).

53. *See* 2 PLUTARCH, *supra* note 45, at 107, 207.

54. *See, e.g.*, GOLDSWORTHY, *supra* note 51, at 164.

55. *See* 2 PLUTARCH, *supra* note 45, at 207.

56. *See id.* at 204, 207, 214–15, 284–85, 290–91, 298, 303.

57. *See id.* at 207–08.

58. *See id.* at 208.

59. *See id.* at 209–18.

60. *See id.* at 209.

61. *Id.* at 111.

62. *Id.* at 111, 295.

63. *Id.* at 296.

consulship withdrew out of fear, but Cato persuaded his brother-in-law, Lucius Domitius, to contest the consular elections, telling him that “the contest now is not for office, but for liberty against tyrants and usurpers.”<sup>64</sup> As Domitius was proceeding to the forum, Pompey’s forces attacked, slaying some of his party and wounding others (including Cato) and forcing Domitius to withdraw.<sup>65</sup> The Triumvirate thus consolidated its power.

In 54 B.C., Caesar’s daughter Julia, who had married Pompey as part of the process of cementing the Triumvirate, died in childbirth.<sup>66</sup> The next year, Crassus, who, as soon as his consulship was over, had departed Rome for a governorship in Parthia (present-day northeastern Iran), was killed in battle.<sup>67</sup> These two deaths irrevocably rent the bonds holding the Triumvirate together—as Plutarch noted, only the fear of Crassus “had hitherto kept [Caesar and Pompey] in peace.”<sup>68</sup> With Crassus’s death, “if the one of them wished to make himself the greatest man in Rome, he had only to overthrow the other; and if he again wished to prevent his own fall, he had nothing for it but to be beforehand with him whom he feared.”<sup>69</sup>

In 50 B.C., the patrician consul Marcellus, with Pompey’s support, moved to deprive Caesar of his command in Gaul.<sup>70</sup> When Caesar resisted, Marcellus ordered Pompey to defend Rome against Caesar.<sup>71</sup> Upon receiving word of this, Caesar led part of his army across the Rubicon, the border between Gaul and Italy, thus instigating a civil war.<sup>72</sup>

As the Roman statesmen chose sides, Cato sided with Pompey as the lesser of two evils.<sup>73</sup> Marcus Brutus, Cato’s nephew and son-in-law,<sup>74</sup> was expected to side with Caesar, as Pompey had put his father to death.<sup>75</sup> But Brutus, “thinking it his duty to prefer the interest of the public to his own private feelings, and judging Pompey’s to be the better cause, took part

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64. *Id.* at 111–12 (internal quotation marks omitted).

65. *Id.* at 112.

66. *Id.* at 215.

67. *Id.* at 113, 218.

68. *Id.* at 218.

69. *Id.*

70. *Id.* at 219.

71. *Id.* at 118.

72. *Id.* at 119, 221.

73. *Id.* at 303–05.

74. *Id.* at 573.

75. *See id.* at 574.

with him.”<sup>76</sup> Pompey and his followers left Rome before Caesar’s arrival, in order to regroup elsewhere.<sup>77</sup> When Caesar entered Rome, he was made dictator by a rump Senate,<sup>78</sup> consisting of those few senators who had not fled.<sup>79</sup> He shortly thereafter resigned the dictatorship and “declared himself consul.”<sup>80</sup> When the tribune Mettellus tried to prevent him from illegally taking money from the public treasury for his own purposes, Caesar “replied that arms and laws had each their own time; ‘If what I do displeases you, leave the place; war allows no free talking.’”<sup>81</sup> When Mettellus again insisted, Caesar “in a louder tone, told him he would put him to death if he gave him any further disturbance.”<sup>82</sup> Mettellus gave in.<sup>83</sup>

The next year, Caesar defeated Pompey’s forces at Pharsalia, in central Greece.<sup>84</sup> Pompey himself escaped to Egypt, where he was murdered by courtiers eager to curry favor with Caesar.<sup>85</sup> With Pompey’s death, Cato became the commander of his remaining forces.<sup>86</sup> Cato chose to make his last stand at Utica.<sup>87</sup> When it was clear that Caesar would overrun the city and his compatriots suggested that Cato seek Caesar’s mercy, Cato replied, “I would not be beholden to a tyrant for his acts of tyranny. For it is but usurpation in him to save, as their rightful lord, the lives of men over whom he has no title to reign.”<sup>88</sup> Or, in Addison’s telling, when Caesar’s emissary Decius entered Utica to assure Cato that Caesar would not harm him, Cato replied:

*Cato:* My life is grafted on the fate of Rome:  
Would he save Cato? Bid him spare his country.  
Tell your dictator this: and tell him Cato  
Disdains a life which he has power to offer.

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76. *Id.*

77. *Id.* at 303–04.

78. *Id.* at 224.

79. *See id.* at 222 (noting that, before Caesar arrived, “most of the senators” fled Rome).

80. *Id.* at 224.

81. *Id.* at 223.

82. *Id.*

83. *Id.*

84. *Id.* at 227–29.

85. *Id.* at 132–34.

86. *Id.* at 306.

87. *Id.* at 307–16.

88. *Id.* at 313.

*Decius*: Rome and her senators submit to Caesar;  
 Her generals and her consuls are no more,  
 Who checked his conquests and denied his triumphs.  
 Why will not Cato be this Caesar's friend?

*Cato*: Those very reasons thou has urged forbid it.

\* \* \*

*Decius*: Let [Caesar] but know the price of Cato's friendship,  
 And name your terms.

*Cato*: Bid him disband his legions,  
 Restore the commonwealth to liberty,  
 Submit his actions to the public censure,  
 And stand the judgment of a Roman senate:  
 Bid him do this, and Cato is his friend.<sup>89</sup>

Caesar declined Cato's offer, and, after allowing those of his compatriots who so desired to flee or surrender,<sup>90</sup> Cato fell on his sword.<sup>91</sup>

Plutarch reports that over half of all Roman citizens perished in the civil war.<sup>92</sup> Caesar offered a full pardon to all Romans who had fought against him, including Brutus and Cassius.<sup>93</sup> At the end of the war, Caesar was made dictator-for-life, which Plutarch calls "indeed a tyranny avowed, since his power was not only absolute, but perpetual too."<sup>94</sup> Moreover, it was no secret that Caesar desired to be king.<sup>95</sup> Although he declined Antony's attempt to crown him, it was clear he did so only because accepting the crown would occasion great public discontent.<sup>96</sup> Shakespeare's Casca tells us that, when first offered the crown, Caesar refused, though "he would fain have had it."<sup>97</sup> When Antony offered the crown a second time, Caesar again refused, but "to my / thinking, he was very loath to lay his fingers

89. ADDISON, *supra* note 44, at 34–36.

90. 2 PLUTARCH, *supra* note 45, at 312–13.

91. *Id.* at 315–16.

92. *Id.* at 234.

93. *Id.* at 575.

94. *Id.* at 235.

95. *Id.* at 237; *see also* SHAKESPEARE, *supra* note 44, act 1, sc. 2, ll. 79–80 (Brutus: "What means this shouting? I do fear the people / Choose Caesar for their king."); *id.* act 1, sc. 3, ll. 86–87 ("[T]hey say the senators tomorrow / Mean to establish Caesar as a king . . .").

96. 2 PLUTARCH, *supra* note 45, at 238.

97. SHAKESPEARE, *supra* note 44, act 1, sc. 2, l. 239.

off it.”<sup>98</sup> And when offered a third time, Caesar collapsed in an epileptic fit.<sup>99</sup> When statues of Caesar were later “found with royal diadems on their heads” and the tribunes pulled those diadems off and imprisoned those who had saluted Caesar as “king,” Caesar turned the tribunes out of office.<sup>100</sup>

Indeed, it was Caesar’s desire to be king that ultimately convinced Brutus to join the conspirators in assassinating him. Shakespeare’s Brutus is clear: “I know no personal cause to spurn at him, / But for the general. He would be crowned.”<sup>101</sup> Brutus traced his lineage to Lucius Junius Brutus, the leader of the revolt against the Tarquin monarchy in the fourth century B.C. and therefore the founder of the Roman Republic.<sup>102</sup> (It should, perhaps, not pass without mention that Junius Brutus’s partner in this endeavor was Publius Valerius,<sup>103</sup> under whose name Hamilton, Madison, and Jay wrote *The Federalist Papers*.)<sup>104</sup> Plutarch reports that Roman citizens took to writing anonymous notes to Brutus reminding him of his familial history and prodding him to take up the tyrannicidal mantle.<sup>105</sup> Shakespeare shows the notes firming Brutus’s resolve to act:

“Brutus, thou sleep’st. Awake, and see thyself.  
 Shall Rome, etcetera. Speak, strike, redress!  
 Brutus, thou sleep’st: awake!”  
 Such instigations have been often dropped  
 Where I have took them up.  
 “Shall Rome, etcetera.” Thus must I piece it out:  
 Shall Rome stand under one man’s awe? What, Rome?  
 My ancestors did from the streets of Rome  
 The Tarquin drive, when he was called a king.  
 “Speak, strike, redress!” Am I entreated  
 To speak and strike? O Rome, I make thee promise:  
 If the redress will follow, thou receivest  
 Thy full petition at the hand of Brutus!<sup>106</sup>

98. *Id.* ll. 240–41.

99. *Id.* ll. 241–55.

100. 2 PLUTARCH, *supra* note 45, at 238.

101. SHAKESPEARE, *supra* note 44, act 2, sc. 1, ll. 11–12.

102. 2 PLUTARCH, *supra* note 45, at 572.

103. 1 *id.* at 129

104. See CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 41 (1994).

105. See 2 PLUTARCH, *supra* note 45, at 578 (noting that letters reading “You are asleep, Brutus,” and “You are not a true Brutus” were left for him).

106. SHAKESPEARE, *supra* note 44, act 2, sc. 1, ll. 46–58.

And Plutarch reports that Cassius told Brutus that, from him, the Romans expected “as an hereditary debt, the extirpation of tyranny.”<sup>107</sup> It was such considerations that won Brutus over to the conspirators’ cause, and it was Brutus’s participation that won others over.<sup>108</sup>

Immediately after the deed was done on the Ides of March, 44 B.C., Brutus and his co-conspirators “marched up to the capitol, in their way showing their hands all bloody, and their naked swords, and proclaiming liberty to the people.”<sup>109</sup> The Senate quickly passed an act of oblivion, providing a legal amnesty for Caesar’s friends and assassins alike, in the hopes of avoiding any further bloodshed.<sup>110</sup> But, of course, the concord was not to last: Octavius Caesar—Julius Caesar’s nephew and adopted son—joined with Antony and Lepidus (in what would come to be called the “Second Triumvirate”<sup>111</sup>), and they pursued and made war on the conspirators.<sup>112</sup> At Philippi, they won a decisive victory over Brutus and Cassius, and Brutus, imitating Cato, fell on his sword.<sup>113</sup> In time, Octavius overpowered Antony and Lepidus and became the emperor Augustus.<sup>114</sup> The Roman Republic was over.

#### C. THE MEANING OF CAESAR FOR FRANKLIN

Immediately after the death of Caesar, Shakespeare’s Cassius and Brutus offer a self-referential bit of metacommentary:

*Cassius:* How many ages hence  
Shall this our lofty scene be acted over  
In states unborn and accents yet unknown!

*Brutus:* How many times shall Caesar bleed in sport,  
That now on Pompey’s basis lies along  
No worthier than the dust!

107. 2 PLUTARCH, *supra* note 45, at 578.

108. *See id.* at 579–80 (noting that “the most and best” Romans were won over to the conspiracy “by the name of Brutus”).

109. *Id.* at 584.

110. *Id.*

111. GOLDSWORTHY, *supra* note 51, at 164–65.

112. 2 PLUTARCH, *supra* note 45, at 586–609.

113. *Id.* at 596–608.

114. *See* WERNER ECK, *THE AGE OF AUGUSTUS* 39, 49–50 (Deborah Lucas Schneider trans., Blackwell Publishing 2003).



*Cassius*: So oft as that shall be,  
 So often shall the knot of us be called  
 The men that gave their country liberty.<sup>115</sup>

Cassius is wrong, of course, that posterity would see the assassins as bringers of liberty, for Roman republican liberty was never to be restored. But subsequent political thought has indeed reenacted, reinterpreted, and reimagined the assassination of Caesar in states unborn and accents unknown to first-century B.C. Romans. And while some subsequent interpreters have seen Caesar as a victim and Brutus as the paradigmatic traitor,<sup>116</sup> Franklin and his compatriots clearly thought that it was Caesar himself, rather than Brutus and his co-conspirators, who was responsible for the end of the Roman Republic. As Bernard Bailyn has noted, American colonists in the 1760s and 1770s “found their ideal selves, and to some extent their voices, in Brutus, in Cassius, and in Cicero.”<sup>117</sup> And Carl Richard has written that “[t]he founders’ principal Roman heroes were Cato the Younger, Brutus, Cassius, and Cicero, statesmen who had sacrificed their lives in unsuccessful attempts to save the republic in its expiring moments.”<sup>118</sup> Franklin, a self-avowed lifelong foe of tyranny,<sup>119</sup> noted that Caesar “undid his Country,”<sup>120</sup> and, in verse, compared him unfavorably to Codrus, the eleventh-century B.C. Athenian king who sacrificed his life for his country:

115. SHAKESPEARE, *supra* note 44, act 3, sc. 1, ll. 111–18.

116. See, e.g., DANTE ALIGHIERI, *INFERNO*, Canto 34, ll. 64–68, at 537 (Robert M. Durling ed. & trans., 1996) (portraying Brutus and Cassius as receiving the second-worst punishments in hell, after only Judas); 2 BERNARD SHAW, *DRAMATIC OPINIONS AND ESSAYS WITH AN APOLOGY* 398 (1907) (describing Caesar as a “great man” and his assassins as a “pitiful gang of mischief-makers”); LAURYN HILL, *Forgive Them Father, on THE MISEDUCATION OF LAURYN HILL* (Ruffhouse Records 1998) (“Like Cain and Abel, Caesar and Brutus, Jesus and Judas, / Backstabbers do this.”).

117. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26 (enlarged ed. 1992).

118. RICHARD, *supra* note 104, at 57; see also *id.* at 91 (“The founders’ greatest villain was Julius Caesar.”).

119. See, e.g., FRANKLIN, *supra* note 36, at 21 n.\* (“I fancy [my brother’s] harsh & tyrannical Treatment of me, might be a means of impressing me with that Aversion to arbitrary Power that has stuck to me thro’ my whole Life.”); Benjamin Franklin, *Silence Dogood, No. 2*, *THE NEW-ENGLAND COURANT*, Apr. 16, 1722, at 1, reprinted in 1 FRANKLIN PAPERS (1959), *supra* note 43, at 11, 13 (writing, as “Silence Dogood,” that “I am . . . a mortal Enemy to arbitrary Government and unlimited Power”).

120. BENJAMIN FRANKLIN, *POOR RICHARD IMPROVED* (1750), reprinted in 3 FRANKLIN PAPERS, *supra* note 43, at 437, 453 (emphasis omitted).

For's Country Codrus suffer'd by the Sword,  
 And, by his Death, his Country's Fame restor'd;  
 Caesar into his Mother's Bosom bare  
 Fire, Sword, and all the Ills of civil War:  
 Codrus confirm'd his Country's wholesome Laws;  
 Caesar in Blood still justify'd his Cause.<sup>121</sup>

And Franklin made clear his admiration for Caesar's opponents when he rhetorically asked, "who is greater than Cato?"<sup>122</sup> The answer, for him, was no one.

But if the Founders, including Franklin, "revered Caesar's assassins Brutus and Cassius,"<sup>123</sup> then it remains to be asked what, precisely, were Caesar's crimes that justified the assassination. Broadly, they can be broken down into two categories: the instigation of civil war and the destruction of republican institutions. As noted above, Plutarch reports that more than half of Rome's citizenry died in the war begun by Caesar's crossing of the Rubicon.<sup>124</sup> Addison has Portius, Cato's son, remark:

Already Caesar  
 Has ravaged more than half the globe, and sees  
 Mankind grown thin by his destructive sword:  
 Should he go further, numbers would be wanting  
 To form new battles, and support his crimes.  
 Ye gods, what havoc does ambition make  
 Among your works!<sup>125</sup>

Addison's Cato himself notes that the deaths have not merely been casualties of war, but political killings, as well: "'Tis Caesar's sword has made Rome's senate little, / And thinned its ranks."<sup>126</sup>

And this points to the second, and perhaps greater, of Caesar's crimes: his subversion of the Roman constitution, and thereby of Roman liberty. Plutarch's Brutus made clear his understanding of republican liberty when he criticized Cicero for adhering to Octavius. Brutus said that,

in writing and speaking so well of [Octavius] Caesar, he showed that his aim was to have an easy slavery. "But our forefathers," said Brutus, "could not brook even gentle masters." Further he added, that for

121. BENJAMIN FRANKLIN, POOR RICHARD (1739), *reprinted in* 2 FRANKLIN PAPERS (1960), *supra* note 43, at 217, 220.

122. Benjamin Franklin, *The Busy-Body*, No. 3, AM. WKLY. MERCURY, Feb. 18, 1729, at 1, *reprinted in* 1 FRANKLIN PAPERS (1959), *supra* note 43, at 118, 119.

123. RICHARD, *supra* note 104, at 65.

124. *See supra* text accompanying note 92.

125. ADDISON, *supra* note 44, at 8.

126. *Id.* at 37.

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his own part he had not as yet fully resolved whether he should make war or peace; but as to one point he was fixed and settled, which was, never to be a slave.<sup>127</sup>

In this, Brutus expresses what later political theorists would call “liberty as non-domination”<sup>128</sup>—that is, the idea that one is unfree if another has the *capacity* to interfere arbitrarily in that person’s range of choices.<sup>129</sup> What is unique about this republican conception of liberty is that one who lives under an arbitrary power is unfree *even if that arbitrary power is never actually exercised*.<sup>130</sup> For the republican, “liberty is always cast in terms of the opposition between *liber* and *servus*, citizen and slave,”<sup>131</sup> and “slavery is essentially characterized by domination, not by actual interference.”<sup>132</sup> This means that “no matter how permissive the lord is, the fact of depending on his grace and favour, the fact of living under his domination, entails an absence of freedom.”<sup>133</sup> In Brutus’s words, freedom entails a refusal to brook even gentle masters.

Because those who operate the levers of power must have the authority to interfere in the choices of others,<sup>134</sup> republican liberty can be established only where that interference cannot be *arbitrary*. That is, the rulers themselves must be constrained by law. To put it differently, republican government must be *constitutional* government. Where law no longer constrains the rulers, republicanism degenerates into tyranny, regardless of how the tyrant actually behaves.

To his opponents, Caesar’s behavior from an early period demonstrated that tyranny was his goal. From using his political power and the spoils of war to secure patronage benefits for

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127. 2 PLUTARCH, *supra* note 45, at 587.

128. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 21 (1997). For a full discussion of this conception of liberty, see generally *id.* at 17–79.

129. *See id.* at 52 (listing the criteria for domination).

130. *See id.* at 22 (“[I]t is possible to have domination without interference and interference without domination.”).

131. *Id.* at 31.

132. *Id.* at 32.

133. *Id.* at 33.

134. This is implicit in Weber’s definition of the state as “the form of human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory.” MAX WEBER, *Politics as a Vocation*, in THE VOCATION LECTURES 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett 2004); *cf.* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610 n.22 (1986) (“The violence of judges and officials of a posited constitutional order is generally understood to be implicit in the practice of law and government.”).

his supporters,<sup>135</sup> to agreeing with Pompey and Crassus to divide the empire amongst themselves,<sup>136</sup> to using intimidation and open violence to carry elections,<sup>137</sup> Caesar gave every indication of seeking expansive power even before the civil war, as Cato frequently pointed out.<sup>138</sup> During the war, Caesar had a rump Senate, consisting entirely of those who had not fled upon his armed entrance to the city—and therefore presumably were his friends and supporters—proclaim him dictator,<sup>139</sup> a title that he then exchanged on his own authority for consul.<sup>140</sup> When Mettellus, the tribune, objected to certain illegalities, Caesar threatened his life.<sup>141</sup> After the war, Caesar became dictator-for-life, and sought to become king.<sup>142</sup> It was these facts that convinced Brutus and his co-conspirators that Caesar aimed at becoming—and, by the end, had become—a tyrant. Thus, when Lucius urged Addison's Cato to surrender, Cato replied, "Would Lucius have me live to swell the number / Of Caesar's slaves, or by a base submission / Give up the cause of Rome, and own a tyrant?"<sup>143</sup> Or, as Shakespeare's Brutus tells the assembled crowd after the deed is done:

Had you rather Caesar were living and die all  
slaves, than that Caesar were dead, to live all free men?

\* \* \*

Who is here  
so base that would be a bondman?<sup>144</sup>

The repetition of the language of slavery is not coincidental. By discarding the Roman constitution—by casting off all legal constraints on his own action—Caesar had destroyed Roman liberty. Under Caesar's tyranny, all Romans were reduced to the status of slaves, without regard to the harshness or mildness of Caesar's actual rule.

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135. See *supra* text accompanying notes 57, 60–61.

136. See *supra* text accompanying notes 62–63.

137. See *supra* text accompanying notes 64–65.

138. See sources cited *supra* note 56.

139. See *supra* text accompanying notes 77–79.

140. See *supra* text accompanying note 80.

141. See *supra* text accompanying notes 81–83.

142. See *supra* text accompanying notes 94–100.

143. ADDISON, *supra* note 44, at 81. Addison made the same point in an essay a few years later. He justified the assassination on the grounds that "Caesar, from the condition of a fellow-citizen, had risen by the most indirect methods, and broken through all the laws of the community, to place himself at the head of the government, and enslave his country." JOSEPH ADDISON, *Freeholder, No. 51*, in ADDISON, *supra* note 44, at 249, 250.

144. SHAKESPEARE, *supra* note 44, act 3, sc. 2, ll. 22–23, 27–28.

Franklin and his compatriots' lionization of the assassins, then, made it clear that they agreed that tyranny—that is, the subversion of the republican constitution and the exercise of power unconstrained by law—as well as the initiation of a bloody civil war for personal gain, justified an assassination. And adding to the credibility of the assassins was that they acted openly. Rather than assassinate Caesar in the night, or poison him, they assaulted him in the Senate. Immediately afterward, they marched through the streets, with his blood still on their clothes, declaring and justifying their actions.<sup>145</sup> Much as Franklin and his colleagues had recently done with regard to another radical political act, Caesar's assassins showed "a decent respect to the opinions of mankind" by submitting their "Facts . . . to a candid world."<sup>146</sup> By acting openly, the conspirators asserted that they acted in the public interest, and they invited the polity to debate whether their judgment of the public interest was correct.<sup>147</sup> For American patriots of Franklin's generation, it was.

But, of course, the fact that these were assassinateable offenses under the circumstances does not mean that the institutional arrangement necessitating assassination was ideal. For Franklin, Caesar deserved to be removed, and assassination was the only way open to Brutus to remove him; but this does not make assassination a good political tool, for several reasons. First, the assassination was ineffective in restoring liberty—after another bloody civil war, the Second Triumvirate came to power. Octavius gradually overpowered his colleagues, until he was able to go further than Caesar ever did in the direction of tyranny, becoming the emperor Augustus. The assassination of Caesar did not bring back republican Rome. Second is what might be called the *epistemic humility* point: not every assassin will be a Brutus; indeed, as we shall see, some will be John Wilkes Booths.<sup>148</sup> If someone *mistakenly* thinks that a ruler has crossed the line into tyranny and therefore assassinates that ruler, then the assassin has committed both a terrible in-

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145. See *supra* text accompanying note 109.

146. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

147. Cf. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 265–66 (Penguin Books rev. & enlarged ed. 1994) (1963) (arguing that, under certain circumstances, assassination can be justified, so long as the assassin immediately surrenders to the police and "use[s] his trial to show the world . . . what crimes against his people had been committed and gone unpunished").

148. See *infra* Part III.

justice and a highly disruptive political act. Franklin made clear his concern with this aspect of assassination when he noted that it deprives its object not only of his life, but also “of the opportunity of vindicating his character,”<sup>149</sup> and that it provides no opportunity “for his honorable acquittal when he should be unjustly accused.”<sup>150</sup>

What Franklin sought was a mechanism with both the substantive reach of assassination and the procedural mechanisms to satisfy these concerns. He sought to “regular[ize]”<sup>151</sup> assassination—that is, to tame it—by proceduralizing it. Like assassination, impeachment would remove “chief Magistrate[s] who had] rendered [themselves] obnoxious”<sup>152</sup> by doing things like starting civil wars or subverting the constitution. But unlike assassination, impeachment would be epistemically humble—it would allow for the acquittal and vindication of the innocent—and it would be less disruptive to the polity, making it less likely to provoke the kind of backlash that led to the rise of Augustus.

However, the one example of proceduralized justice for a chief magistrate available to Franklin was not without its own problems, as we shall see in the next Part.

## II. CHARLES I AND THE REGICIDES; BUCKINGHAM AND FELTON

### A. FRANKLIN AND CHARLES

When Franklin referred to “one example only of a first Magistrate being formally brought to public Justice” which “[e]very body cried out agst . . . as unconstitutional,”<sup>153</sup> he undoubtedly had in mind the trial and execution of Charles I in 1649.<sup>154</sup> The reign of the Stuarts was a well-recognized cautionary tale for those who, like Franklin, were active in colonial politics. Indeed, as Jack Greene has shown, eighteenth-century colonial legislative behavior was “deeply rooted” in seven-

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149. 2 FARRAND’S RECORDS, *supra* note 1, at 65.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. I am not the first to have made this connection. See Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 CONST. COMMENT. 51, 52 (1999).

teenth-century parliamentary opposition to the Stuarts.<sup>155</sup> Colonial familiarity with the Stuart reign was so “vivid” that “colonial legislators had a strong predisposition to look at each governor as a potential Charles I or James II, to assume a hostile posture toward the executive, and to define with the broadest possible latitude the role of the lower house as ‘the main barrier of all those rights and privileges which British subjects enjoy.’”<sup>156</sup> As a man who was both unusually well-read and unusually active in colonial politics, Franklin would of course have been deeply familiar with the history of conflict between the Stuarts and Parliament. Franklin’s lifelong and oft-stated hatred of tyranny<sup>157</sup> would almost certainly have taken Charles I and James II as paradigm cases of tyranny writ large.

Franklin had no shortage of reading matter to familiarize himself with the reign of the Stuarts. Like others active in colonial politics, Franklin would have been familiar with John Rushworth’s eight-volume *Historical Collections*, which was largely devoted to Charles’s reign,<sup>158</sup> as well as with the collection of *State Trials*, first published in 1719, which included the trial of Charles I.<sup>159</sup> In his *Autobiography*, Franklin notes that he acquired his uncle’s collection of “all the principal Pamphlets relating to Public Affairs from 1641 to 1717;”<sup>160</sup> clearly the Civil War and the trial and execution of Charles I would have been the principal focus of the earlier pamphlets in this collection. In addition to these primary sources, Franklin was also familiar with any number of historians of the period, including both Whig historians, like Paul de Rapin-Thoyras<sup>161</sup> and Catherine

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155. See JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 189–90* (1994).

156. *Id.* at 199 (quoting LAWRENCE H. LEDER, *LIBERTY AND AUTHORITY: EARLY AMERICAN POLITICAL IDEOLOGY, 1689–1763*, at 87 (1968) (quoting a 1728 address of the Pennsylvania Assembly to the Lieutenant Governor)).

157. See *supra* note 119.

158. See GREENE, *supra* note 155, at 194 (noting the familiarity of colonial legislators with the *Historical Collections*).

159. See *Trial of Charles I*, in 1 *A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANORS; FROM THE REIGN OF KING HENRY THE FOURTH, TO THE END OF THE REIGN OF QUEEN ANNE* 510 (Thomas Salmon ed., London, Goodwin et al. 1719). For ease of reference, I shall hereinafter refer to the version published in *Howell’s State Trials* in the early-nineteenth century. See *infra* notes 240, 286–305.

160. FRANKLIN, *supra* note 36, at 6.

161. Among the first books ordered for Franklin’s Library Company of Philadelphia was Rapin’s *History of England*. See Edmunds, *supra* note 38, at 300 (noting the order placed for “Rapin’s History of England. 12 Vol.’” in octavo).

Macaulay,<sup>162</sup> and Tory historians, like David Hume<sup>163</sup> and Lord Clarendon.<sup>164</sup>

Thus, when Franklin thought about the removal of an obnoxious executive, his mind naturally turned to Charles I, and the “formal[]” way in which he was “brought to public Justice.”<sup>165</sup> In order to understand what Franklin found both appealing and upsetting about the proceedings against Charles, it will help to examine those proceedings, and certain political controversies surrounding them, in detail. As in the previous Part, this Part will rely primarily on sources, like those discussed above, that were available to Franklin and his contemporaries.

#### B. CHARLES, BUCKINGHAM, AND FELTON

It is unnecessary to rehearse here the litany of complaints that began accumulating against Charles I even before he assumed the throne in 1625. After first unsuccessfully attempting a deeply unpopular marriage match with the (Catholic) Spanish Infanta,<sup>166</sup> he ultimately concluded an only slightly less unpopular marriage with the (Catholic) Princess Henrietta Maria

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162. Franklin listed Macaulay among the writers of “true History.” See Benjamin Franklin, “A Traveller”: *News-Writers’ Nonsense*, PUB. ADVERTISER, May 22, 1765, reprinted in 12 FRANKLIN PAPERS (1968), *supra* note 43, at 132, 135. Macaulay and Franklin socialized in Paris in the 1770s. See Letter from Catherine Macaulay to Benjamin Franklin (Dec. 8, 1777), in 25 FRANKLIN PAPERS (William B. Wilcox ed., 1986), *supra* note 43, at 264, 264–65 (apologizing for not having seen Franklin recently, but noting, “[y]ou are very sensible that the suspension of the Habeas Corpus Act subjects me to an immediate imprisonment on any suspicion of my having held a correspondence with your Countrymen on this side the Water . . . I am now nursing my constitution to enable me to treat largely on our fatal civil wars in the History I am now about”).

163. When Franklin lived in London in the late 1750s and early 1760s, he cultivated a friendship with Hume, who was at the time completing his *History of England*. See ISAACSON, *supra* note 37, at 196–97 (describing Franklin’s friendship with Hume); see also Franklin, “A Traveller,” *supra* note 162, at 135 (listing Hume among the writers of “true History”).

164. In 1738, Franklin placed an ad in his *Pennsylvania Gazette* which read, “Lent and Lost, the Earl of Clarendon’s History of the Rebellion and Civil Wars, Vol. I. . . . Whoever brings it to the Printer hereof, shall be handsomely rewarded.” Advertisement, PA. GAZETTE, Dec. 6, 1738, reprinted in 2 FRANKLIN PAPERS (1960), *supra* note 43, at 216, 216.

165. 2 FARRAND’S RECORDS, *supra* note 1, at 65.

166. See JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE. WEIGHTY MATTERS IN LAW. REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS. BEGINNING THE SIXTEENTH YEAR OF KING JAMES, ANNO 1618. AND ENDING THE FIFTH YEAR OF KING CHARLS, ANNO 1629, at 76–103 (London, Newcomb 1659) (describing the trip to Spain); *id.* at 119–26 (reprinting Buckingham’s narrative of the trip).



of France.<sup>167</sup> The new Anglo-French alliance went to war against the Habsburg rulers of Spain and Austria, a war that went badly from the beginning.<sup>168</sup> And the alliance with the French, beset with mutual jealousy and suspicion from its inception,<sup>169</sup> became intolerable to many Englishmen when borrowed English ships were used to attack fellow Protestants, the Huguenots at La Rochelle.<sup>170</sup> Of course, these expeditions were costly, and when Parliament demanded the redress of certain grievances as a condition for granting supply to the Crown, Charles dissolved Parliament and unconstitutionally relied on prerogative taxation.<sup>171</sup> This naturally generated further discontent. And at the center of public and parliamentary unhappiness was the Duke of Buckingham.

George Villiers, the first Duke of Buckingham, had risen from obscurity to become the court favorite of James I.<sup>172</sup> In what can only be described as a remarkable feat of political dexterity, he managed to retain and further consolidate his status as favorite when Charles came to the throne.<sup>173</sup> It was, therefore, inevitable that popular dissatisfaction with the course of royal government would fall on Buckingham's shoulders, especially given the legal maxim that "the king can do no wrong."<sup>174</sup> Moreover, Buckingham's position as Lord Admiral

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167. See 5 DAVID HUME, *THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 159–60 (LibertyClassics 1983) (1778) (noting that the increasingly powerful "puritanical party" disliked the match with France and the promise to tolerate Catholicism that Charles had agreed to as part of the marriage treaty); RUSHWORTH, *supra* note 166, at 168–69 (noting the marriage).

168. See 5 HUME, *supra* note 167, at 166 (noting the disaster of the Cadiz expedition); 10 M. DE RAPIN THOYRAS, *THE HISTORY OF ENGLAND* 33–34 (N. Tindal trans., London, Knapton 1730) (same); RUSHWORTH, *supra* note 166, at 196 (same); *id.* at 152–54 (noting the disaster of the Austrian expedition under the command of Count Mansfield).

169. 5 HUME, *supra* note 167, at 163.

170. 10 RAPIN THOYRAS, *supra* note 168, at 15; RUSHWORTH, *supra* note 166, at 174–76.

171. Charles's relationship with his Parliaments is discussed in depth in Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1100–16 (2009).

172. See 5 HUME, *supra* note 167, at 61 (noting that Villiers, "a youth of one-and-twenty, younger brother of a good family" first came to James's attention); *id.* at 63–64 (recounting Villiers's rapid rise through the hierarchy of honors under James).

173. See 10 RAPIN THOYRAS, *supra* note 168, at 1–2 (noting the continuity of Buckingham's influence).

174. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*254–55 ("That the king can do no wrong, is a necessary and fundamental principal of the English con-

gave him command responsibility for the fate of the English fleet.<sup>175</sup> In the very first year of Charles's reign, the House of Commons "loudly complained" about Buckingham's part in allowing the French to use English ships at La Rochelle.<sup>176</sup> Hume speculates that "spleen and ill-will against the duke of Buckingham" were largely responsible for the failure of Charles's first Parliament to vote him the funds he sought.<sup>177</sup>

But the rising costs of Charles's military plans forced him to call a new Parliament in 1626 in the hopes that it would be more generous than its predecessor.<sup>178</sup> The new House of Commons "fell upon the Duke, as the chief cause of all publick Miscarriages,"<sup>179</sup> and soon reported thirteen articles of impeachment against Buckingham, accusing him of everything from procuring too many offices for himself and for others in the development of a large patronage network, to failing, in his capacity as Lord Admiral, to defend the seas adequately, to delivering ships to the French to be used against La Rochelle, to embezzling Crown money and lands, to playing a role in James's death by keeping medicine from him on his sickbed.<sup>180</sup> The truth of any particular of these accusations is immaterial; what matters for the purposes of the present discussion is that Buckingham's enemies—a class which included an increasingly large percentage of the English population<sup>181</sup>—believed them. Charles immediately had the Commons's two impeachment managers, Sir Dudley Digges and Sir John Elliott, imprisoned in the Tower.<sup>182</sup> This served only to enrage the House further, and Charles was forced to back down and release them.<sup>183</sup>

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stitution: meaning only . . . [that] whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people . . ."); 5 HUME, *supra* note 167, at 291 ("The king, by the maxims of law, could do no wrong: His ministers and servants, of whatever degree, in case of any violation of the constitution, were alone culpable.").

175. See RUSHWORTH, *supra* note 166, at 308.

176. 10 RAPIN THOYRAS, *supra* note 168, at 15–16.

177. 5 HUME, *supra* note 167, at 158. For more on Charles's struggles with the 1625 Parliament over money, see Chafetz, *supra* note 171, at 1101–02.

178. See RUSHWORTH, *supra* note 166, at 198.

179. *Id.* at 217.

180. See 10 RAPIN THOYRAS, *supra* note 168, at 71–72 (giving an "abstract" of the charges); RUSHWORTH, *supra* note 166, at 302–53 (laying out and elaborating upon the articles of impeachment).

181. See 5 HUME, *supra* note 167, at 168 (noting that Buckingham "became every day more unpopular").

182. *Id.* at 171.

183. 10 RAPIN THOYRAS, *supra* note 168, at 74–75.

Charles then sent a letter to the House, reminding it that he was still in need of funds, and demanding an immediate grant of supply. Any further delay, he wrote, would be regarded as tantamount to an outright denial of funds.<sup>184</sup> As Rapin notes, this was obviously “an Artifice to evade” Buckingham’s trial—by demanding an immediate vote of funds, Charles could dissolve or prorogue Parliament as soon as they were granted and before the Lords could try Buckingham.<sup>185</sup> The House did not cooperate; instead, it prepared a remonstrance against Buckingham, demanding his removal and attacking Charles’s reliance on prerogative taxation, particularly the customs duties of tonnage and poundage.<sup>186</sup> Before the remonstrance could be presented, the King dissolved Parliament, accusing the House of Commons of neglecting public business in its drive to punish Buckingham.<sup>187</sup> If they were not going to give the King the money he sought, he certainly had no intention of waiting around for them to convict his royal favorite. As Rapin puts it, “[n]o body doubted but the Duke of *Buckingham’s* Interest was the sole Cause of this Dissolution.”<sup>188</sup>

After the dissolution of this Parliament, Charles relied even more heavily on unconstitutional prerogative taxation.<sup>189</sup> Even Hume, an historian otherwise relatively sympathetic to Charles, describes this taxation as “a violation of liberty [which] must, by necessary consequence, render all parliaments superfluous.”<sup>190</sup> As a result, “[i]t may safely be affirmed, that, except a few courtiers or ecclesiastics, all men were displeased with this high exertion of prerogative, and this new spirit of administration.”<sup>191</sup> Rather than rein in his spending, Charles chose this moment to begin a war with France by sending an

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184. RUSHWORTH, *supra* note 166, at 390–91.

185. 10 RAPIN THOYRAS, *supra* note 168, at 79. The Lords were in the midst of their own battle with the King, over the imprisonment of the Earl of Arundel, and there was every likelihood that they would visit their displeasure at the state of royal government on Buckingham’s head. See Chafetz, *supra* note 171, at 1104–06 (discussing the dispute over Arundel’s imprisonment).

186. RUSHWORTH, *supra* note 166, at 398, 400–06. On the long-running battle between Charles and his Parliaments over tonnage and poundage, see Chafetz, *supra* note 171, at 1101–02, 1106–12.

187. RUSHWORTH, *supra* note 166, at 398, 410.

188. 10 RAPIN THOYRAS, *supra* note 168, at 84.

189. See 5 HUME, *supra* note 167, at 176–80 (describing the levying of ship money and forced loans).

190. *Id.* at 177.

191. *Id.* at 181.

expedition in relief of the Huguenots at La Rochelle.<sup>192</sup> Hume notes that “[a]ll authentic memoirs, both foreign and domestic, ascribe to Buckingham’s counsels this war with France,”<sup>193</sup> and he asserts that Buckingham’s motive was his passion for the French Queen.<sup>194</sup> Buckingham was commissioned to lead the expedition himself.<sup>195</sup> When the fleet arrived at La Rochelle, the Huguenot inhabitants refused to admit the soldiers into the city.<sup>196</sup> Buckingham withdrew to the nearby Île de Ré. The ineptitude of Buckingham’s siege of the French fort on Ré allowed the French to land reinforcements.<sup>197</sup> The result was a “total rout” in which Buckingham lost two-thirds of his forces,<sup>198</sup> and he returned home to “a world of Complaints and Murmurs against” him.<sup>199</sup> Moreover, the expense of the Rochelle expedition exceeded what could be raised even through unconstitutional prerogative taxation, leaving Charles under the necessity of calling a new Parliament, his third, in 1628.<sup>200</sup>

This Parliament assembled in a confrontational mood, refusing to act on Charles’s demands for funds until its grievances were redressed.<sup>201</sup> These grievances took the form of the Petition of Right,<sup>202</sup> to which Charles was forced to assent early in the new Parliament.<sup>203</sup> The Petition complained of the exaction of forced loans and prerogative taxation, of imprisonments without due process, of the forced quartering of soldiers and sailors, and of the imposition of martial law.<sup>204</sup> In debating the Petition, Sir Francis Seymour expressed the sentiments of the House when he thundered that “he is not a good subject, he is a slave, who will allow his goods to be taken from him against his

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192. *See id.* at 181–82, 184–85.

193. *Id.* at 182.

194. *Id.* at 182–84.

195. *Id.* at 185.

196. 10 RAPIN THOYRAS, *supra* note 168, at 122–23.

197. *Id.* at 123; 5 HUME, *supra* note 167, at 185.

198. 5 HUME, *supra* note 167, at 185; *see also* 10 RAPIN THOYRAS, *supra* note 168, at 124.

199. 10 RAPIN THOYRAS, *supra* note 168, at 125.

200. 5 HUME, *supra* note 167, at 187.

201. *See* RUSHWORTH, *supra* note 166, at 499 (noting that the first day of the new Parliament “was spent in opening the grievances and state of the Kingdom”).

202. Petition of Right, 1628, 3 Car., c. 1, §§ 1–11 (Eng.).

203. On the slightly complicated history of precisely how Charles signified his assent to the Petition, *see* 5 HUME, *supra* note 167, at 197–200.

204. Petition of Right §§ 1–9.

will, and his liberty against the laws of the kingdom.”<sup>205</sup> And the House had no doubts about who was to blame—in the words of the venerable Sir Edward Coke, “the Duke of *Buckingham* is the cause of all our miseries[,] . . . that man is the Grievance of Grievances: let us set down the causes of our disasters, and all will reflect upon him.”<sup>206</sup> In assenting to the Petition, Charles agreed to cease the complained of activities; he expected that, in return, he would be granted the supply he sought to carry out his foreign adventures.<sup>207</sup>

But the House was in no mood to be so agreeable. Immediately after Charles’s assent to the Petition, the House passed a resolution declaring that “the excessive Power of the Duke of *Buckingham*, is the cause of the Evils and Dangers to the King and Kingdom,”<sup>208</sup> and began preparing a remonstrance spelling out Buckingham’s sins in great detail.<sup>209</sup> That remonstrance was followed in short order by another decrying the King’s collection of tonnage and poundage without parliamentary authorization and warning him not to do so again.<sup>210</sup> Charles immediately prorogued Parliament, citing the remonstrances as the cause, even though he had not yet received most of the funds he sought.<sup>211</sup>

As soon as Parliament was prorogued, Buckingham went to Portsmouth, where he was overseeing the outfitting of a new fleet to attack the French forces besieging La Rochelle.<sup>212</sup> While there, on August 23, 1628, he was assassinated by an army veteran named John Felton.<sup>213</sup> Felton had served under Buckingham as a lieutenant; when his captain died in 1626, he hoped for the promotion.<sup>214</sup> Instead, the promotion went to Henry Hunckes, the nephew of Sir Edward Conway, a secretary of state and ally of Buckingham.<sup>215</sup> In 1627, when another cap-

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205. 5 HUME, *supra* note 167, at 189; *see also id.* at 190 (quoting Sir Robert Philips using the language of enslavement to describe Charles’s actions).

206. RUSHWORTH, *supra* note 166, at 607.

207. *See id.* at 614–15 (reprinting Charles’s demand for funds, immediately after his (second) assent to the Petition of Right).

208. *Id.* at 617.

209. *See id.* at 619–26 (reprinting the remonstrance).

210. *See id.* at 628–30 (reprinting the second remonstrance).

211. *Id.* at 631.

212. 5 HUME, *supra* note 167, at 202–03.

213. *Id.* at 203.

214. *Id.*

215. Thomas Cogswell, *John Felton, Popular Political Culture, and the Assassination of the Duke of Buckingham*, 49 HIST. J. 357, 362 (2006).

tain died at Ré (where Felton was wounded), he again lost out on the promotion to someone better connected.<sup>216</sup> Thus Felton twice “fell afoul of Buckingham’s formidable patronage network.”<sup>217</sup> Of course, Buckingham’s near monopoly on state offices and his use of them to further entrench himself and his friends in power was not merely an obstacle to Felton’s career advancement; it was also one of the chief heads of complaint against Buckingham throughout the nation.<sup>218</sup> Felton and his fellow veterans were also owed a substantial amount of back pay, and they were increasingly dissatisfied with the delay in disbursing that pay.<sup>219</sup> But this, too, was merely the private side of one of the pervasive public complaints against Buckingham—that he was, both by the expense of the policies he advocated and the lavishness of the gifts he received, bankrupting the Crown.<sup>220</sup>

Felton was intimately aware of these heads of public complaint against Buckingham. After leaving the army, he immersed himself in the underground world of London opposition pamphleteering.<sup>221</sup> These pamphlets—and poems and ballads—not only attacked Buckingham, they increasingly called for his assassination.<sup>222</sup> One of the most prominent opposition pamphlets was written by William Fleetwood, a fellow veteran of the Île de Ré. In his account, after the rout he and his comrades had decided to assassinate Buckingham, but then changed their minds, resolving that “it was only ‘fitt to let him die, by the unquestionable hand of Parliament’.”<sup>223</sup> Fleetwood therefore calls on Parliament “to deliver ‘a revenge upon the Instrument’” of his (and the nation’s) misfortune.<sup>224</sup> That is, although they first contemplated assassination, they decided instead to advocate the domesticated version: impeachment.

But the problem with impeachment in the British context was that the King could prorogue or dissolve Parliament when-

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216. *Id.* at 364–65.

217. *Id.* at 362.

218. *See supra* text accompanying note 180.

219. *See* Cogswell, *supra* note 215, at 369–70, 377–78.

220. *See supra* text accompanying note 180; *see also* Cogswell, *supra* note 215, at 377 (“Charles and Buckingham, however, had decided to concentrate their limited cash reserves on mounting the next military effort; this meant that Felton and thousands of other officers and men would have to wait for payment.”).

221. *See* Cogswell, *supra* note 215, at 365–69, 374–77.

222. *Id.* at 364, 366, 369, 374–77.

223. *Id.* at 364 (quoting Fleetwood’s pamphlet).

224. *Id.*

ever he saw fit, thereby preventing the impeachment of anyone he wished to protect. After the 1628 parliamentary attack on Buckingham—like the 1626 attack—was cut short by the King, it became clear to Felton that “there was no legislative solution to Buckingham.”<sup>225</sup> Indeed, the 1628 parliamentary remonstrance against Buckingham was hugely influential to Felton; he later acknowledged that it was by “reading the remonstrance of the House of Parliament [that] it came into his mind [that] by . . . killing the Duke he should do his country great service.”<sup>226</sup> In fact, before killing Buckingham, he had sewn into his hat several lines from the remonstrance, intending them to serve as explanation and justification in the event that he was killed during the attempt.<sup>227</sup>

Felton’s single and singular act thus plays out the connections between impeachment and assassination. Felton felt he had been personally injured by the Duke, but he also saw that injury to be a personal manifestation of the injuries that Buckingham was perpetrating on the nation. After all, Felton’s injuries were caused by Buckingham’s military ineptitude, his privileging of patronage connections over merit in doling out state offices, and his bankrupting of the nation. And those were three of the general heads of complaint against Buckingham, as spelled out not only in opposition pamphlets and street ballads, but also in frustrated parliamentary impeachment attempts and remonstrances. But impeachment, although a more regularized form of assassination, was not regularized *enough*—it could always be frustrated by the will of the King. That is what Felton saw and Fleetwood could not. It was at this junction of private wrongs, public wrongs, and parliamentary impotence that Felton acted. And although he likely acted alone, he was widely celebrated as a hero.<sup>228</sup>

### C. CHARLES AFTER BUCKINGHAM

For present purposes, it suffices to note that the removal of Buckingham from the scene did not, in fact, usher in a new spirit of harmony between Charles and his subjects. During the 1628 prorogation, Charles continued to collect tonnage and

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225. *Id.* at 373.

226. ROGER LOCKYER, BUCKINGHAM: THE LIFE AND POLITICAL CAREER OF GEORGE VILLIERS, FIRST DUKE OF BUCKINGHAM, 1592–1628, at 458 (1981) (alterations in original) (internal quotation marks omitted) (quoting Felton).

227. 5 HUME, *supra* note 167, at 204–05.

228. See Cogswell, *supra* note 215, at 358, 380–85.

poundage without parliamentary approval, leading to a merchant revolt.<sup>229</sup> When Parliament reconvened, the Commons refused to grant any further funds, leading Charles to dissolve Parliament and resolve to govern without it.<sup>230</sup> Meanwhile, La Rochelle fell to the besieging French troops,<sup>231</sup> and Charles, without money and despairing of success, signed peace treaties with France in 1629<sup>232</sup> and Spain in 1630.<sup>233</sup> As Hume notes, “[t]he influence of these two wars on domestic affairs, and on the dispositions of king and people, was of the utmost consequence: But no alteration was made by them on the foreign interests of the kingdom.”<sup>234</sup> In other words, Charles squandered huge amounts of blood and treasure—much of it raised unconstitutionally—and utterly alienated the affections of his parliaments and his people for no gain whatsoever.

During Charles’s rule without Parliament, he continued to antagonize the increasingly powerful and restive Puritan party, particularly in his advancement of William Laud, the Bishop of London, whom Charles raised to Archbishop of Canterbury, and who was a staunch advocate of high-church Arminianism.<sup>235</sup> In addition to the religious strife, there was growing political resistance to Charles’s “violations, some more open, some more disguised, of the privileges of the nation.”<sup>236</sup> These included the unconstitutional levying of tonnage and poundage and ship money without the consent of Parliament<sup>237</sup> and the expansion of the jurisdiction of Star Chamber.<sup>238</sup> What these had in common was their extension of royal prerogative at the expense of institutions meant to check it. As Hume notes, if Charles could levy some taxes without parliamentary consent, then “[b]y the same right any other tax might be imposed,”<sup>239</sup> and any need for calling Parliaments would be obviated. Like-

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229. 10 RAPIN THOYRAS, *supra* note 168, at 205–06.

230. 5 HUME, *supra* note 167, at 207–17.

231. *Id.* at 205.

232. *See* 1 JOHN RUSHWORTH, *HISTORICAL COLLECTIONS. THE SECOND PART, CONTAINING THE PRINCIPAL MATTERS WHICH HAPPENED FROM THE DISSOLUTION OF THE PARLIAMENT, ON THE 10TH OF MARCH, 4. CAR. I. 1628/9. UNTIL THE SUMMONING OF ANOTHER PARLIAMENT 23–25* (London, Wright & Chiswell 1680) (reprinting the peace treaty with France).

233. *See id.* at 75–76 (noting the peace treaty with Spain).

234. 5 HUME, *supra* note 167, at 218.

235. 10 RAPIN THOYRAS, *supra* note 168, at 208–13, 250–51, 273–74.

236. 5 HUME, *supra* note 167, at 229.

237. *Id.* at 229, 235.

238. *Id.* at 232.

239. *Id.* at 235.



wise, by allowing prerogative courts like Star Chamber to poach the jurisdiction of the common-law courts, the traditional role of the latter as protectors of English liberty was diminished. And even the common-law courts were subject to royal interference, as the infamous verdict in favor of the Crown in the 1637 *Ship Money Case* showed.<sup>240</sup> Hume notes that this decision “rouzed [the people] from their lethargy” and convinced them “that liberty was totally subverted, and an unusual and arbitrary authority exercised over the kingdom. Slavish principles, they said, concur with illegal practices; ecclesiastical tyranny gives aid to civil usurpation; iniquitous taxes are supported by arbitrary punishments.”<sup>241</sup>

In the same year as the *Ship Money Case*, Charles decided to introduce a new high-church liturgy into predominantly Presbyterian Scotland.<sup>242</sup> The Scots rioted, and, as Charles refused to back down, the riots turned into an insurrection, and the insurrection turned into a war in 1639.<sup>243</sup> With the financial necessity brought on by the war, Charles could no longer avoid calling a Parliament, and the new Parliament assembled in April 1640.<sup>244</sup> But the new Parliament—which had more sympathy for the Scots’ religious scruples than for the King’s high-church policies—turned to its grievances before giving any thought to supplying the war effort.<sup>245</sup> Their grievances fell broadly under three heads: “those with regard to privileges of parliament, to the property of the subject, and to religion.”<sup>246</sup> Enraged, Charles dissolved this Parliament—known to history as the “Short Parliament”—less than a month after it assembled and (in clear violation of parliamentary privilege<sup>247</sup>) imprisoned some of the opposition figures.<sup>248</sup> In Rapin’s words, “twas known by Experience, that [Charles] would draw from the least Precedent, Consequences destructive of the Liberty of

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240. *Ship Money Case*, 3 Howell’s State Trials 825 (Exch. 1637) (finding that financial necessity justified the Crown in levying otherwise unconstitutional taxes and that the Crown was the sole judge of necessity); see also 5 HUME, *supra* note 167, at 245–48 (summarizing the *Ship Money Case*); 10 RAPIN THOYRAS, *supra* note 168, at 304–07 (same).

241. 5 HUME, *supra* note 167, at 248.

242. *Id.* at 254–55.

243. *Id.* at 255–65.

244. *Id.* at 269.

245. *Id.* at 271–72; 10 RAPIN THOYRAS, *supra* note 168, at 411, 416–17.

246. 5 HUME, *supra* note 167, at 272.

247. See generally CHAFETZ, *supra* note 4 (discussing parliamentary privilege).

248. 5 HUME, *supra* note 167, at 276; 10 RAPIN THOYRAS, *supra* note 168, at 420.

Parliaments, and in fine, the Number of Male-contents was infinite.”<sup>249</sup> Charles’s coffers, however, were quite finite, and his attempts to force a new loan from his subjects were “repelled by the spirit of liberty, which was now become unconquerable.”<sup>250</sup> Moreover, the Scottish army had not only defeated Charles’s forces in Scotland, it had crossed the English border and taken Newcastle.<sup>251</sup> Charles quickly negotiated a treaty with the Scots that obliged him to pay for the Scottish army’s expenses, as well as those of his own army.<sup>252</sup> He had no choice but to call another Parliament—his last—to raise the necessary funds.<sup>253</sup>

In order to placate this new Parliament—later known as the “Long Parliament”—Charles sacrificed his new royal favorite, the Earl of Strafford.<sup>254</sup> Despite promising Strafford that he would support him, Charles assented to the bill of attainder passed by both houses of Parliament and allowed Strafford to be executed in May 1641.<sup>255</sup> Charles must have hoped that by allowing Strafford, unlike Buckingham, to feel the wrath of parliamentary justice, he would repair his relationship with Parliament and the public. As further efforts in that direction, Charles consented to abolish Star Chamber and to commission common-law judges during good behavior, rather than at the pleasure of the Crown.<sup>256</sup> But these gestures were in vain. When a Catholic rebellion erupted in Ireland, leading to a massacre of English Protestants,<sup>257</sup> the rebels claimed to act under Charles’s authority, and Parliament believed them.<sup>258</sup> Soon thereafter, the House of Commons passed the so-called Grand Remonstrance, reciting every grievance from the entirety of Charles’s reign—206 enumerated grievances in all.<sup>259</sup> In

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249. 10 RAPIN THOYRAS, *supra* note 168, at 435.

250. 5 HUME, *supra* note 167, at 278.

251. *Id.* at 279.

252. 10 RAPIN THOYRAS, *supra* note 168, at 452–53.

253. 5 HUME, *supra* note 167, at 282.

254. *See id.* at 309–10.

255. *See id.* at 309–26 (describing the history of Strafford’s trial and execution). Upon learning that Charles had assented to the bill of attainder, Strafford quoted *Psalms* 146:3: “Put not your trust in princes, nor in the sons of men: For in them there is no salvation.” *Id.* at 326 (italicization removed).

256. *Id.* at 328–30.

257. *See id.* at 341, 345.

258. *Id.* at 346, 349.

259. *See* 1 JOHN RUSHWORTH, HISTORICAL COLLECTIONS. THE THIRD PART; IN TWO VOLUMES. CONTAINING THE PRINCIPAL MATTERS WHICH HAPPENED FROM THE MEETING OF THE PARLIAMENT, NOVEMBER THE 3D. 1640 TO THE

Hume's apt summary, the House concluded that Charles's actions amounted to "a total subversion of the constitution."<sup>260</sup> With this, the House provoked Charles into a fatal misstep: on January 3, 1642, he accused five members of the House of Commons and one member of the House of Lords—all of whom were leaders of the opposition to the Crown—of treason and sought to have them tried before the Lords.<sup>261</sup> This led to an escalating series of confrontations, the most salient moment of which involved Charles's arrival at the House of Commons with an armed guard, demanding that the accused members be turned over to him. The public outrage was so extreme that Charles was forced to flee London, and the Civil War commenced.<sup>262</sup>

In March 1642, Parliament passed the Militia Act, taking upon itself command authority over the militia.<sup>263</sup> Several months later, Charles raised his standard at Nottingham,<sup>264</sup> and the Battle of Edgehill followed in October.<sup>265</sup> Almost four years of bloody fighting ensued, as parliamentary forces gradually gained the upper hand.<sup>266</sup> In May 1646, Charles surrendered to Parliament's Scottish allies; in January 1647, the Scots handed him over to the parliamentary forces.<sup>267</sup>

Predictably, with the King in custody, tensions between Parliament and the army came to the fore. After the army forcibly took custody of the King away from those who were holding him pursuant to parliamentary orders,<sup>268</sup> the officers, led by Oliver Cromwell, debated the question of what to do with Charles. Clarendon reports that there were three schools of thought:

Some were for an actual deposing him; which could not but be easily brought to pass, since the parliament would vote any thing they should be directed: others were for the taking away his life by poison; which would make the least noise; or, if that could not be so easily contrived, by assassination; for which there were hands enough ready

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END OF THE YEAR 1644, at 437–51 (London, Chiswell & Cockerill 1692) [hereinafter RUSHWORTH, THIRD PART] (reprinting the remonstrance).

260. 5 HUME, *supra* note 167, at 352.

261. *Id.* at 364–65; 11 RAPIN THOYRAS, *supra* note 168, at 308–10.

262. *See* Chafetz, *supra* note 171, at 1112–15 (describing the incident in detail).

263. 1 RUSHWORTH, THIRD PART, *supra* note 259, at 526–28.

264. 5 HUME, *supra* note 167, at 385.

265. *Id.* at 396–97.

266. *See generally id.* at 397–489 (describing the course of the war).

267. *Id.* at 489–91.

268. *Id.* at 497.

to be employed. There was a third sort, as violent as either of the other, who pressed to have him brought to a public trial as a malefactor; which, they said, would be most for the honour of the parliament, and would teach all kings to know, that they were accountable and punishable for the wickedness of their lives.<sup>269</sup>

Hume explains why they settled on the third option:

To murder him privately was exposed to the imputation of injustice and cruelty, aggravated by the baseness of such a crime; and every odious epithet of *Traitor* and *Assassin* would, by the general voice of mankind, be undisputably ascribed to the actors in such a villany. Some unexpected procedure must be attempted, which would astonish the world by its novelty, would bear the semblance of justice, and would cover its barbarity by the audaciousness of the enterprize.<sup>270</sup>

On November 20, 1648, the army presented a remonstrance to Parliament, the first article of which demanded “[t]hat the *King* be brought to Justice, as the capital Cause of all the Evils in the Kingdom, and of so much Blood being shed.”<sup>271</sup> But the House of Commons decided against giving the army’s remonstrance “speedy consideration,”<sup>272</sup> and instead voted to enter into peace negotiations with the King, based on terms that he had proposed to it.<sup>273</sup>

This was a concession too far for the army. On December 6, 1648, Colonel Pride surrounded the House of Commons with two regiments and prevented approximately 200 members from entering Parliament.<sup>274</sup> The event, which came to be known as “Pride’s Purge,” left the House dominated by supporters of the army.<sup>275</sup> The purged House, known to history as the “Rump Parliament,” immediately reversed the vote to enter into negotiations with the King, declaring his proposals unacceptable.<sup>276</sup> And on December 23, the House appointed a committee to “receive all Informations and Examinations of all Witnesses for

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269. EDWARD EARL OF CLARENDON, *THE HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND* 694 (Oxford, Oxford Univ. Press new ed. 1843) (internal quotation marks omitted).

270. 5 HUME, *supra* note 167, at 514.

271. 12 RAPIN THOYRAS, *supra* note 168, at 549.

272. 2 JOHN RUSHWORTH, *HISTORICAL COLLECTIONS, THE FOURTH AND LAST PART. CONTAINING THE PRINCIPAL MATTERS WHICH HAPPENED FROM THE BEGINNING OF THE YEAR 1645, TO THE DEATH OF KING CHARLES THE FIRST 1648*, at 1341 (London, Chiswell & Cockerill 1701) [hereinafter RUSHWORTH, *FOURTH PART*].

273. *Id.* at 1352.

274. 5 HUME, *supra* note 167, at 531.

275. *Id.*

276. *Id.*

the matters of Fact against the King, and all other Delinquents.”<sup>277</sup>

Five days later, the committee reported an ordinance calling for the appointment of commissioners to try Charles for high treason.<sup>278</sup> On January 1, 1649, the House of Commons passed the ordinance, the prologue of which accused Charles of having

had a wicked Design totally to subvert the antient and fundamental Laws and Liberties of this Nation, and in their Trade to introduce an Arbitrary and Tyrannical Government; and that besides all other evil Ways and Means to bring this Design to pass, he hath prosecuted it with Fire and Sword, levied and maintained a cruel War in the Land against the Parliament and Kingdom[,] whereby the Country has been miserably wasted, the publick Treasure exhausted, Trade decayed, Thousands of People murdered, and infinite other Mischiefs committed; for all which high and Treasonable Offenses the said *Charles Stuart* might long since justly have been brought to exemplary and condign Punishment.<sup>279</sup>

The ordinance also named 150 commissioners—all of them staunch antiroyalists, including Oliver Cromwell and Colonel Pride—who were to serve as the judges in the “High Court of Justice,” which was to try the King.<sup>280</sup> The House simultaneously resolved that “by the Fundamental Laws of this Realm it is Treason in the King of *England* for the time to come to levy War against the Parliament and Kingdom of *England*.”<sup>281</sup> This was novel, indeed—the law of treason had theretofore been definitively established by the Treason Act of 1351, which listed seven heads of treasonable conduct, none of which included the King’s levying war against the Parliament.<sup>282</sup>

When the House of Lords refused to consent to these actions of the Rump House of Commons,<sup>283</sup> the Commons unanimously resolved that “whatsoever is enacted and declared Law by the Commons of *England* assembled in Parliament, hath the

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277. 2 RUSHWORTH, FOURTH PART, *supra* note 272, at 1370.

278. *Id.* at 1376.

279. *Id.* at 1379.

280. *Id.* at 1379–80.

281. *Id.* at 1380.

282. The seven heads were as follows: (1) compassing or imagining the death of the King, Queen, or Crown Prince; (2) “violat[ing]” the Queen, the wife of the Crown Prince, or the King’s eldest daughter; (3) levying war against the King in his realm; (4) adhering to the King’s enemies in his realm; (5) counterfeiting; (6) killing certain royal officials; and (7) petty treason—the slaying of a master by his servant, a husband by his wife, or a prelate by one who owes him obedience. Treason Act, 1351, 25 Edw. 3, c. 2 (Eng.).

283. 2 RUSHWORTH, FOURTH PART, *supra* note 272, at 1382.

force of Law, and all the People of this Nation are included thereby, although the consent and concurrence of the King and House of Peers be not had thereunto.”<sup>284</sup> This was, of course, a radical alteration of the English constitution—whereas laws had previously needed the consent of Commons, Lords, and Crown, now the Commons, on its own authority, was dispensing with the other two. On January 6, the newly supreme House of Commons gave its final assent to the ordinance for trying the King.<sup>285</sup>

#### D. THE TRIAL OF CHARLES I

On January 20, 1649, the High Court of Justice assembled in Westminster Hall, with John Bradshaw presiding as Lord President of the Court.<sup>286</sup> In fact, what the Court was to experience in the coming days was not a trial at all, but rather a series of arguments about jurisdiction, followed by a default judgment against the defendant. First, the Court’s clerk read the charge, which accused Charles of making war against Parliament and the people

out of wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people; yea, to take away and make void the foundations thereof and of all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people’s behalf, in the right and power of frequent and successive parliaments.<sup>287</sup>

The charge ended by “impeach[ing] the said Charles Stuart, as a Tyrant, Traitor, Murderer, and a public and implacable Enemy to the Commonwealth of England.”<sup>288</sup> Bradshaw asked Charles how he pled.<sup>289</sup> Instead of answering, Charles demanded to “know by what power I am called hither. . . . I would like to know by what authority, I mean lawful; there are many unlawful authorities in the world, thieves and robbers by the highways; but I would know by what authority I was brought [here].”<sup>290</sup> He made clear that his appearance could not be construed as consent to the Court’s jurisdiction, as he was brought

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284. *Id.* at 1383.

285. *Id.* at 1384.

286. Trial of Charles I, 4 Howell’s State Trials 989, 1068 (1649).

287. *Id.* at 1070–71.

288. *Id.* at 1072.

289. *Id.* at 995.

290. *Id.* at 995–96.

there by force.<sup>291</sup> And he was certain that the jurisdiction could not have been vested in the Court by law, as “I see no house of lords here that may constitute a parliament; and the king too should have been [here].”<sup>292</sup> He thus reiterated, “[l]et me see a legal authority warranted by the Word of God, the Scriptures, or warranted by the Constitutions of the kingdom, and I will answer.”<sup>293</sup> Bradshaw replied, “we are satisfied with our authority” and told Charles that, when the Court reconvened in two days, he would be expected to answer the charge.<sup>294</sup> On Monday, January 22, the Court reconvened, and the prosecution demanded that Charles be made to answer or, if he continued to refuse, that the charge be taken *pro confesso*.<sup>295</sup> Still the King refused, insisting on being shown a legal basis for the Court’s jurisdiction,<sup>296</sup> and the proceedings were again adjourned.<sup>297</sup>

The next day, the prosecutor renewed his motion for a judgment *pro confesso*.<sup>298</sup> Bradshaw again turned to Charles:

You were told, over and over again, That the Court did affirm their own jurisdiction; that it was not for you, nor any other man, to dispute the jurisdiction of the supreme and highest Authority of England, from which there is no appeal . . . . I do require you, that you make a positive Answer unto this Charge . . . .<sup>299</sup>

Charles again refused,<sup>300</sup> and Bradshaw at last ordered a default judgment against him.<sup>301</sup> Oddly, the commissioners then assembled in private to hear the witnesses on the merits who would have testified had the trial proceeded.<sup>302</sup> On January 27, the Court reconvened in public for sentencing, and, after Bradshaw made a long speech laying out Charles’s crimes,<sup>303</sup> he announced that the sentence was death by beheading.<sup>304</sup> Charles I was executed on January 30, 1649.<sup>305</sup>

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291. *Id.* at 996.

292. *Id.*

293. *Id.*

294. *Id.* at 997.

295. *Id.* at 998.

296. *Id.* at 998–99.

297. *Id.* at 1000–01.

298. *Id.* at 1001–02.

299. *Id.* at 1002.

300. *Id.* at 1003.

301. *Id.* at 1004.

302. *Id.* at 1099–113.

303. *Id.* at 1008–17.

304. *Id.* at 1017.

305. *Id.* at 1141.

## E. THE MEANING OF CHARLES FOR FRANKLIN

Franklin was clearly of two minds about the execution of Charles I. On the one hand, Charles was a tyrant, as all good American patriots of the Founding era knew.<sup>306</sup> As early as the debate over the Petition of Right, members of Parliament referred to Charles's (and Buckingham's) actions as tending to enslave the theretofore free English people.<sup>307</sup> Even Hume uses the language of slavery, tyranny, and usurpation in describing Charles's reliance on unconstitutional prerogative taxation.<sup>308</sup> The Grand Remonstrance accused Charles of subverting the constitution,<sup>309</sup> and both the ordinance for trying Charles<sup>310</sup> and the charge against him<sup>311</sup> amplified this accusation. No less than the charges against Caesar, the charges against Charles were of subverting the constitution and thereby of converting free citizens into slavish subjects—that is, of destroying republican liberty. And, like Caesar, Charles had attempted to maintain this tyranny through a bloody civil war. There is no doubt that Franklin and his compatriots saw Charles this way; indeed, in December 1775, as the Revolutionary War was already underway, Franklin penned an anonymous “epitaph” for John Bradshaw, the presiding judge at Charles's trial.<sup>312</sup> The epitaph ends with the exhortation, “And never—never forget / THAT REBELLION TO TYRANTS IS OBEDIENCE TO GOD.”<sup>313</sup> On the merits, Charles was a tyrant, and tyrants ought to be deposed.

But, as we have seen, Charles's “trial” was not on the merits; it was, rather, a jurisdictional hearing. When Franklin noted that “[e]very body cried out agst [the trial] as unconstitu-

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306. See *supra* text accompanying notes 155–57.

307. See *supra* note 205 and accompanying text.

308. See *supra* text accompanying note 241.

309. See *supra* text accompanying notes 259–60.

310. See *supra* text accompanying note 279.

311. See *supra* text accompanying notes 287–88.

312. Benjamin Franklin, “Bradshaw's Epitaph: A Hoax Attributed to Franklin,” PA. EVENING POST, Dec. 14, 1775, reprinted in 22 FRANKLIN PAPERS (William B. Wilcox ed., 1982), *supra* note 43, at 303, 303–04.

313. *Id.* So successful was this “epitaph” that the phrase “Rebellion to tyrants is obedience to God” is even today routinely attributed to Bradshaw himself. See, e.g., THE YALE BOOK OF QUOTATIONS 99 (Fred R. Shapiro ed., 2006). But Franklin appears to be the originator of this line. See *Rebellion to Tyrants Is Obedience to God*, 14 WM. & MARY C.Q. HIST. MAG. 37, 37–38 (1905) (quoting a response to a 1905 letter to the editor of the New York *Sun* finding no source earlier than Franklin for the quotation).



tional,”<sup>314</sup> he was acknowledging the simple fact that Charles had the better of the jurisdictional arguments. The English constitution demanded the assent of Commons, Lords, and Crown to a bill before it became law, yet the House of Commons dispensed with that requirement and passed the ordinance establishing the High Court of Justice on its own.<sup>315</sup> The Commons also redefined treason and applied the new definition to Charles, *ex post facto*, on its own authority.<sup>316</sup> And, of course, the House of Commons that did all of these things was not the duly elected House of the Long Parliament, but rather the purged House of the Rump Parliament.<sup>317</sup> Moreover, the ordinance establishing the Court itself announced the defendant’s guilt,<sup>318</sup> and the commissioners were chosen by name, specifically to sit in judgment in this one case.<sup>319</sup> None of this was constitutional.<sup>320</sup>

Indeed, the only honest answer to Charles’s demand to know by what *legal* authority he was tried would have been to admit that there was no legal authority, that this was a revolutionary act. After all, Charles himself acknowledged that “there are many unlawful authorities in the world, thieves and robbers by the highways,”<sup>321</sup> and to this list he might have added revolutionaries. Revolutionary acts are, by definition, *ultra vires*—this does not make them substantively unjust (certainly, Franklin and his fellow revolutionaries were in no position to declare revolution unjust *tout court*), but it does make them procedurally irregular. Charles’s refusal to plead—that is, his refusal to pretend as if the normal legal forms applied—laid bare the revolutionary nature of the regicides’ act.<sup>322</sup>

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314. 2 FARRAND’S RECORDS, *supra* note 1, at 65.

315. *See supra* text accompanying notes 283–85.

316. *See supra* text accompanying notes 281–82.

317. *See supra* text accompanying notes 274–77.

318. *See supra* text accompanying note 279.

319. *See supra* text accompanying note 280.

320. Geoffrey Robertson has recently attempted to make the case that Charles’s trial was “an oasis of justice and fairness.” GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF: THE STORY OF THE MAN WHO SENT CHARLES I TO THE SCAFFOLD 3 (2005); *see also id.* at 163, 189, 202 (claiming that the trial was both legitimate and legal). Robertson’s case is built entirely on his disdain for Charles and his contention that Charles received more procedural rights at trial than other defendants of the time. But, of course, this is wholly unresponsive to the criticisms that the court had no jurisdiction to try Charles in the first place and that he broke no existing law.

321. *See supra* text accompanying note 290.

322. *See Cover, supra* note 134, at 1607 & n.17 (noting the legitimating

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In short, the regicides of Charles I were little different than the assassins of Caesar. In both cases, political actors asserted an alternative constitutional vision in the medium of blood. In both cases, support for that bloody act can only be based on the substantive validity of their justifications, for in neither case can the killers make a plausible claim to have followed the forms of procedural justice. As we have seen, in both cases, Franklin and his colleagues accepted the substantive justice of their revolutionary forebearers' actions.

Moreover, in both cases, the killers' claims of substantive justice are bolstered by several other factors. First, there was no procedurally regular way of achieving the same ends: much as Caesar had, through violence and intimidation, neutralized all legal opposition, and much as Charles had, by dissolution and prorogation, prevented the impeachment of Buckingham, so too did the existing constitutional structures make the removal of the King illegal. And second, in both cases, the killers acted openly: just as Brutus and his compatriots marched through the streets in their bloody clothes proclaiming the return of liberty, so too the regicides did their deed in public, with an audience, and under their own names. Even Felton chose to act in public and carried on him a written justification, in case he died in the attempt. Franklin and his contemporaries, then, accepted not only that Caesar, Buckingham, and Charles all aimed at the destruction of republican liberty, but also that, under the circumstances, this tyranny justified the resort to extra-legal violence.

But successful revolutionaries are rarely permanent revolutionaries. Franklin and his colleagues, having won their independence, now sought to create a constitution which would both instantiate substantive republican justice and create procedures allowing for a nonrevolutionary response to substantive injustices. An American Caesar or Charles would deserve to be deposed, just as the Roman and English versions did—this is why Franklin drew a substantive link between impeachment and assassination. But America would have in place procedures for deposing obnoxious magistrates, up to and including the chief magistrate. And American legislatures would not be prorogueable or dissolvable by the president, except in

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function played by defendants' seeming acquiescence in their trials, and the disruptive potential of a defendant who refuses to play along).

rare cases<sup>323</sup>—indeed, the Constitution, by explicitly exempting impeachments from the pardon power,<sup>324</sup> makes it clear that the chief magistrate may not override the impeachment process. Thus, the Constitution makes it very clear that the American chief magistrate *can* do wrong, and it provides measures for calling him to account.<sup>325</sup> Charles's jurisdictional objections would thus have no purchase in America. Moreover, an American Charles would not be able to protect himself or his favorite by dismissing Congress. An American Buckingham would be impeached, and no president could prevent this through parliamentary maneuvering. Assassination thus provides the substantive law of presidential impeachability, while the Constitution's procedural innovations domesticate the process, making it less violent, less disruptive, and less error-prone.

Subsequent events would demonstrate the wisdom of the Constitution's innovations. The procedural improvements of impeachment over assassination can perhaps best be observed by looking at a historical moment in which the two occurred in short order: the assassination of President Lincoln and the impeachment of President Johnson.

### III. LINCOLN AND BOOTH; JOHNSON AND THE RADICAL REPUBLICANS

#### A. LINCOLN AND BOOTH

In November 1864, shortly after the reelection of Abraham Lincoln and in the midst of General Sherman's march to the sea, a production of Shakespeare's *Julius Caesar* was staged at the Winter Garden theater on Broadway to raise money for a statue of the Bard to be placed in Central Park.<sup>326</sup> The leading

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323. See U.S. CONST. art. II, § 3, cl. 1 (providing that the President may adjourn the houses of Congress "to such Time as he shall think proper" *only* "in Case of Disagreement between them, with Respect to the Time of Adjournment"). Even in such a case, the adjournment could not last indefinitely. See *id.* art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year . . ."); *id.* amend. XX, § 2 (same).

324. *Id.* art. II, § 2, cl. 1 (providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

325. See *id.* art. II, § 4 (providing for presidential impeachment).

326. See GORDON SAMPLES, LUST FOR FAME: THE STAGE CAREER OF JOHN WILKES BOOTH 162-65 (1982) (describing the production). The evening raised nearly \$4000, *id.* at 162, and the statue, by sculptor John Quincy Adams Ward,

roles were played by three brothers, sons of one of the greatest tragedians of the nineteenth century.<sup>327</sup> Edwin Booth played Brutus; Junius Brutus Booth, Jr., played Cassius; and John Wilkes Booth played Mark Antony.<sup>328</sup> This was not the first time that John Wilkes Booth had played in Shakespeare's tyrannicidal tragedy: he had first performed in *Julius Caesar* in 1857 at the age of nineteen,<sup>329</sup> and it was a staple of his repertoire thereafter.<sup>330</sup> Booth had literally "acted over" Caesar's death in a "state[] unborn and accent[] yet unknown" when Caesar was assassinated, and he had internalized the nobility of the act that Cassius boasted would lead the assassins to be called "[t]he men that gave their country liberty."<sup>331</sup>

The nobility of tyrannicide was hardly a stretch for Booth. As one commentator has noted, he was born into a family with a "reverence for libertarian heroes."<sup>332</sup> Indeed, one need look no further than the family's names for this to become apparent. Booth's father and eldest brother were both named Junius Brutus Booth, an homage to the assassin of the last Tarquin monarch, founder of the Roman Republic, and ancestor of Marcus Brutus.<sup>333</sup> John Wilkes Booth was himself named after John Wilkes, a British member of Parliament and political agitator who, in the 1760s and 1770s, became a champion for individual rights in the face of a hostile Crown and parliamentary majority.<sup>334</sup> Booth, who received a strong classical education, was in a good position to appreciate the resonance of these names.<sup>335</sup>

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still stands in the Park's "Literary Walk" on the east side of the Park at 66th Street.

327. Years after seeing Junius Brutus Booth, Sr. play Richard III, Whitman would recall that "his genius was to me one of the grandest revelations of my life, a lesson of artistic expression. The words fire, energy, *abandon*, found in him unprecedented meanings." WALT WHITMAN, *The Old Bowery*, in 2 PROSE WORKS 1892, at 591, 597 (Floyd Stovall ed., 1964); see also ALBERT FURTWANGLER, ASSASSIN ON STAGE: BRUTUS, HAMLET, AND THE DEATH OF LINCOLN 54 (1991) (referring to the elder Booth as "an international star" who "was the leading American tragedian" for three decades).

328. SAMPLES, *supra* note 326, at 162.

329. See *id.* at 197 (noting performances in *Caesar* on October 28 and 31, 1857, in Philadelphia).

330. See, e.g., *id.* at 211, 214, 223–24 (noting subsequent performances in *Caesar*).

331. SHAKESPEARE, *supra* note 44, act 3, sc. 1, ll. 111–18; see also *supra* text accompanying note 115.

332. FURTWANGLER, *supra* note 327, at 57.

333. See *supra* text accompanying notes 102–07.

334. After Wilkes published a pamphlet attacking the Crown, Lord Halifax, the Secretary of State, issued a general warrant for the arrest and seizure of

But if Booth inherited a family tradition which lionized resistance to arbitrary rule (and a family penchant for the dramatic), he was also imbued with the values of the place of his birth: rural Maryland.<sup>336</sup> Maryland was a slave state with significant Confederate sympathies—Lincoln received only about 2200 of the 90,000 or so presidential votes cast in the state in 1860.<sup>337</sup> On the advice of Pinkerton detectives, the D.C. militia, and his Secretary of State-designate—all of whom had specific fears about his safety—Lincoln travelled through Maryland secretly in the middle of the night on the way to his inauguration.<sup>338</sup> After Fort Sumter, when Lincoln sent out his first call for military volunteers, Maryland provided none; hundreds of Marylanders, instead, enlisted in Virginia regiments.<sup>339</sup> And when Union volunteers from Massachusetts passed through Baltimore on their way to Washington, they were attacked by a mob and forced to fight their way out, killing twelve civilians in the process.<sup>340</sup> In retaliation, the governor of Maryland ordered that several railroad bridges be burned to prevent more Union troops from coming through Baltimore.<sup>341</sup>

As that last example makes clear, Maryland was not only a state with deeply ambivalent feelings toward the Union; it was

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the papers of the author of the pamphlet. Wilkes successfully sued both the searching officer and Lord Halifax for trespass on the grounds that the warrant was illegal. *Wilkes v. Halifax*, 19 Howell's State Trials 1406 (1769); *Wilkes v. Wood*, 19 Howell's State Trials 1153 (1763); see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 11–14, 16–17, 21, 29 (1997) (describing Wilkes's impact on the development of the right to be free of unreasonable searches and seizures). Both houses of Parliament later declared Wilkes guilty of contempt, and, although the voters continued electing Wilkes to his seat in the House of Commons, the Commons refused to seat him between 1768 and 1774. In 1774, however, the House bowed to overwhelming public pressure and seated him. See CHAFETZ, *supra* note 4, at 155–58 (discussing Wilkes's conflicts with Parliament). For an account of Wilkes's life, see generally ARTHUR H. CASH, *JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY* (2006). For a description of the American lionization of Wilkes, see generally Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 WM. & MARY Q. 373 (1963).

335. See MICHAEL W. KAUFFMAN, *AMERICAN BRUTUS: JOHN WILKES BOOTH AND THE LINCOLN CONSPIRACIES* 86–87, 92–93, 200 (2004) (discussing Booth's education and his familiarity with the names).

336. *Id.* at 81–82.

337. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 7 (1998).

338. *Id.* at 6–7.

339. KAUFFMAN, *supra* note 335, at 116.

340. REHNQUIST, *supra* note 337, at 20–21.

341. *Id.* at 21.

also a state of special strategic importance. With Virginia serving as capital of the Confederacy, Maryland was all that connected Washington, D.C., to the rest of the Union. Secession by Maryland would leave the Union capital surrounded and isolated. It is therefore not surprising that some of Lincoln's war policies fell hardest on Maryland. In April 1861, he authorized General Scott to suspend habeas corpus at any point on or near rail lines used by the military between Philadelphia and Washington.<sup>342</sup> Within a month, John Merryman was arrested by Union troops in a Baltimore suburb for participating in the destruction of the railroad bridges.<sup>343</sup> Chief Justice Taney, riding circuit, granted Merryman's habeas petition on the grounds that Lincoln had no authority to suspend the writ;<sup>344</sup> as Taney himself noted, though, he was "resisted by a force too strong for [him] to overcome,"<sup>345</sup> and Merryman was held by the military for several more months.<sup>346</sup> Nor was Merryman the only Marylander held without charges by military authorities: a number of Confederate-supporting Maryland legislators were arrested to keep them from introducing a secession resolution,<sup>347</sup> as were disloyal newspaper publishers,<sup>348</sup> and plenty of others.<sup>349</sup>

The constitutionality of Lincoln's various wartime measures has been extensively debated,<sup>350</sup> and it is not my purpose to enter into such debates here. What is hard to dispute, however, is that, in the words of two recent commentators, "Lincoln . . . wielded more raw, unilateral power than any president in

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342. *Id.* at 25 (reprinting the order to General Scott).

343. *Id.* at 26.

344. *Ex parte Merryman*, 17 F. Cas. 144, 144–45, 152–53 (C.C.D. Md. 1861) (No. 9487).

345. *Id.* at 153.

346. REHNQUIST, *supra* note 337, at 38–39.

347. *Id.* at 45.

348. *Id.* at 46.

349. See Mark E. Neely, Jr., *The Lincoln Administration and Arbitrary Arrests: A Reconsideration*, 5 J. ABRAHAM LINCOLN ASS'N 6, 8 (1983) (noting the large number of civilian arrests); *id.* at 13 (noting that Marylanders were disproportionately among those arrested).

350. See generally DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003); JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1964); REHNQUIST, *supra* note 337, at 3–169; see also Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1120–26 (defending Lincoln's constitutional vision of the indissolubility of the Union); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1853–61 (2008) (defending Lincoln's suspension of habeas and his disregard of Taney's *Merryman* opinion).

American history, before or since.”<sup>351</sup> Especially to those who doubted the constitutionality of preserving the Union by force<sup>352</sup> or of freeing the South’s slaves,<sup>353</sup> Lincoln’s vigorous actions were bound to seem particularly objectionable. And object many did.

The Southern press was, of course, vitriolic,<sup>354</sup> and residents of the border states might well have had access to newspapers like the *Richmond Dispatch*, which compared the Emancipation Proclamation to Caesar’s defiance of the tribune Mettellus<sup>355</sup> and thundered that the rule of law was no safer in the North “than it had [been] in Rome when the whole republic was writhing in the iron grasp of the great Dictator. . . . Those who were once [Lincoln’s] fellow citizens, are now his timid and abject slaves.”<sup>356</sup> But one need not look to the Confederate press to find such forceful denunciations of Lincoln; the Copperhead

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351. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 173 (2008).

352. Louisiana Senator Judah Benjamin (later to serve in a number of cabinet positions in the Confederacy) told his colleagues in December of 1860 that “[t]hese States, parties to the compact [i.e., the Constitution], have a right to withdraw from it, by virtue of its own provisions, when those provisions are violated by the other parties to the compact, when either powers not granted are usurped, or rights are refused that are especially granted to the States.” CONG. GLOBE, 36TH CONG., 2D SESS. 215 (1860). And it was not simply Southerners who took the position that the federal government had no authority to prevent secession—President Buchanan, a Pennsylvanian, made the same argument in his final State of the Union message to Congress. James Buchanan, Fourth Annual Message (Dec. 3, 1860), in 5 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897*, at 626, 635–36 (James D. Richardson ed., 1897) [hereinafter *MESSAGES AND PAPERS*] (arguing that the federal government has no power “to coerce a State into submission which is attempting to withdraw or has actually withdrawn” from the Union). For the Lincoln-esque rejoinder to Benjamin and Buchanan, see Amar, *supra* note 350, at 1120–26.

353. See FARBER, *supra* note 350, at 152–57 (discussing the constitutional debates attendant on the Emancipation Proclamation).

354. See generally Don E. Fehrenbacher, *The Anti-Lincoln Tradition*, 4 J. ABRAHAM LINCOLN ASS’N 6, 8–10 (1982) (noting that the image of Lincoln in the Southern press in the 1860s “bears a striking resemblance to the American image of Adolf Hitler in the 1940s”).

355. Editorial, *The Twin Proclamations*, RICHMOND DISPATCH, Oct. 2, 1862, reprinted in ABRAHAM LINCOLN: A PRESS PORTRAIT 315, 315 (Herbert Mitgang ed., 2000) [hereinafter *PRESS PORTRAIT*] (stating that Northerners “are learning, in its full force, the meaning of Julius Caesar’s terrible saying, ‘inter arma silent leges’”). On Caesar and Mettellus, see *supra* text accompanying notes 81–83.

356. *The Twin Proclamations*, *supra* note 355, at 315.

press in the North was every bit as strident.<sup>357</sup> A New York newspaper asserted in 1861 that “Mr. Lincoln is evidently a believer in the savageries of old Europe, and thinks that the only way to ‘save the Union’ is to resort to the bayonet.”<sup>358</sup> At a Democratic meeting in New York in 1863, one speaker declared that “[s]tep by step had Abe Lincoln departed from his promises until by gradations of infamy he sat on a kingly throne and aspired to a regal crown,” to which the crowd responded, “Hang him.”<sup>359</sup> Another speaker declared that “[l]oyalty to Abraham Lincoln was treason to the Constitution” and threatened that, in time, Lincoln “would see how treason in reality would be punished.”<sup>360</sup> A third speaker was even more explicit, echoing Patrick Henry’s speech on the eve of the American Revolution: “Caesar had his Brutus, . . . Charles I had his Cromwell, and the George III. of the present day might profit by their example.”<sup>361</sup> By 1864, a New York paper declared that “the masses of the North are witnessing the transformation of their Government to absolutism. Their liberties vanish, their rights are ignored.”<sup>362</sup> Weeks later, the same paper asked, simply, “By whom and when was Abraham Lincoln made dictator in this country?”<sup>363</sup>

In Wisconsin, Marcus Mills Pomeroy repeatedly used his La Crosse *Democrat* to attack Lincoln as a “tyrant” and “despot” who had instituted a “reign of terror” and had “warred against the Constitution.”<sup>364</sup> In an 1863 editorial, Pomeroy

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357. Lincoln also took heated criticism from Republicans who thought he was prepared to make too many concessions to the South and was too dismissive of congressional power. For example, the 1864 Wade-Davis Manifesto, published in Horace Greeley’s *New-York Daily Tribune*, accused Lincoln of exercising “*plenary dictatorial power*” in contravention of congressional authority. B.F. Wade & H. Winter Davis, *To the Supporters of the Government*, N.Y. DAILY TRIB., Aug. 5, 1864, at 5. See generally Fehrenbacher, *supra* note 354, at 12–13 (describing the Radical Republicans’ attacks on Lincoln).

358. Editorial, *How Mr. Lincoln May Restore Peace to the Country*, N.Y. EVENING DAY-BOOK, Apr. 18, 1861, reprinted in PRESS PORTRAIT, *supra* note 355, at 261, 261.

359. *Fernando Wood’s Peace Meeting*, N.Y. HERALD TRIB., May 19, 1863, at 8.

360. *Id.*

361. *Id.*

362. Editorial, *Mr. Lincoln’s Treachery*, N.Y. DAILY NEWS, Jan. 10, 1864, reprinted in PRESS PORTRAIT, *supra* note 355, at 369, 371.

363. Editorial, *He Can’t Do It*, N.Y. DAILY NEWS, Feb. 15, 1864, reprinted in PRESS PORTRAIT, *supra* note 355, at 379, 379.

364. See Frank Klement, *A Small-Town Editor Criticizes Lincoln: A Study in Editorial Abuse*, 54 LINCOLN HERALD 27, 28, 30 (1952) (quoting Pomeroy’s editorials in the *Democrat*).



prayed for Lincoln's death,<sup>365</sup> and after Lincoln was reelected, Pomeroy wrote of his willingness to assassinate him.<sup>366</sup> In Lincoln's home state, the *Chicago Times* called the Emancipation Proclamation "a monstrous usurpation, a criminal wrong, and an act of national suicide."<sup>367</sup> The *Illinois State Register* responded to Lincoln's 1864 reelection campaign by declaring that Lincoln's administration had

tricked the country into a war, which it has proved itself incapable of prosecuting successfully or concluding honorably. It has violated the rights of the people, in a manner, which, in any other country, would have provoked a revolution. The most powerful monarchy in Europe would not dare commit the outrages which have been put upon us by the Lincoln administration. . . . The surrender of personal rights, and the establishment of an erratic, irresponsible despotism, does not help the cause of the Union a particle . . . . The doom of Lincoln and black republicanism is sealed . . . [a]nd the would be despots at Washington must succumb to their fate.<sup>368</sup>

The *Indianapolis Daily Sentinel* reprinted an editorial from the *Times* of London<sup>369</sup> that declared that Lincoln "governed . . . with a revolutionary freedom from the trammels of law" and "carried on a war with a barbarity at which the world has stood amazed, destroying harbors, burning river side towns, putting the inhabitants of captured places to hard labor, contrary to all the laws of war, and even wreaking a shameless

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365. *Id.* at 28.

366. *Id.* at 32.

367. Editorial, *The Emancipation Proclamation*, CHI. TIMES, Sept. 24, 1862, reprinted in PRESS PORTRAIT, *supra* note 355, at 303, 304.

368. Editorial, *The End of Lincoln*, ILL. ST. REG., Aug. 7, 1864, reprinted in PRESS PORTRAIT, *supra* note 355, at 406, 406-07.

369. The British newspapers were especially vicious toward Lincoln. See, e.g., Editorial, TIMES (London), Nov. 22, 1864, at 6 (declaring Lincoln's reelection "an avowed step towards the foundation of a military despotism, towards the subversion of a popular Government, which may still exist in form, but which in substance is gone"); Editorial, TIMES (London), Oct. 21, 1862, at 8 (declaring Lincoln to be "among that catalogue of monsters, the wholesale assassins and butchers of their kind"); see also Fehrenbacher, *supra* note 354, at 14 (noting that London's *Evening Standard* referred to Lincoln as the "most despicable tyrant of modern days").

The hostility of the London newspapers was but one manifestation of broader hostility in London society toward Lincoln and the Union cause. As Henry Adams, who spent the War in London as private secretary to his father, Charles Francis Adams, the United States Minister to the Court of St. James, noted, "[t]he copperhead was at home in Pall Mall." HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 117 (Library of America 1990) (1907); see also *id.* at 124-25 (describing the "demented" belief in London society of the "brutality" and "ferocity" of Lincoln and Seward).

vengeance on women.”<sup>370</sup> The editorial went on to refer to the Lincoln Administration as “Washington terrorists” and declared that, although “[a] brilliant despotism may blind a nation for a time, . . . a Government that is at once tyrannical and stupid cannot long avert its overthrow.”<sup>371</sup> In Booth’s home state, the aptly named newspaper *The South* responded to Lincoln’s 1861 request to Congress for troops and supply by declaring him to be “the equal, in despotic wickedness, of Nero or any of the other tyrants who have polluted this earth.”<sup>372</sup>

By the time of Lincoln’s 1864 reelection campaign, the *New York Times* had ample evidence of

the unexampled abuse which has been poured upon the Administration for the last two years. No living man was ever charged with political crimes of such multiplicity and such enormity as ABRAHAM LINCOLN. He has been denounced without end as a perjurer, a usurper, a tyrant, a subverter of the Constitution, a destroyer of the liberties of his country, a reckless desperado, a heartless trifler over the last agonies of an expiring nation. Had that which has been said of him been true there is no circle in DANTE’S *Inferno* full enough of torment to expiate his iniquities.<sup>373</sup>

Although the *Times* went on to conclude that the charges were false and that “the guilt rests not with ABRAHAM LINCOLN, but with his railers,”<sup>374</sup> it was the “railers” who had the ear of John Wilkes Booth.

In a draft of a speech (which he never delivered) written shortly after Lincoln’s election, Booth made clear both his views on slavery—“[I]nstead of looking upon slavery as a sin[,] . . . I hold it to be a happiness for themselves and a social & political blessing for us. . . . I have been through the whole South and have marked the happiness of master & of man”<sup>375</sup>—and on the “trators [sic]” who “preach the Abolition doctrine.”<sup>376</sup> His brother Edwin reported Booth’s belief that “Lincoln would be made

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370. Editorial, *President Lincoln’s Arbitrary Arrests. Opinion of the London Times*, INDIANAPOLIS DAILY SENTINEL, Nov. 29, 1862, at 2.

371. *Id.*

372. Editorial, *Lincoln and His Wants*, THE SOUTH (Baltimore), July 8, 1861, reprinted in PRESS PORTRAIT, *supra* note 355, at 267, 268.

373. *The Recent State Conventions—Movements for President Lincoln*, N.Y. TIMES, May 28, 1864, at 4.

374. *Id.*

375. John Wilkes Booth, Draft of a Speech (Dec. 1860), in “RIGHT OR WRONG, GOD JUDGE ME”: THE WRITINGS OF JOHN WILKES BOOTH 55, 62 (John Rhodehamel & Louise Taper eds., 1997).

376. *Id.* at 56.

king of America,"<sup>377</sup> and his sister Asia reported a more extended outburst:

[Lincoln] is made the tool of the North, to crush out, or try to crush out slavery, by robbery, rapine, slaughter and bought armies. . . . *He* is Bonaparte in one great move, that is, by overturning this blind Republic and making himself a king. This man's re-election which will follow his success, I tell you, will be a reign! . . . You'll see, you'll see that *re-election* means *succession*.<sup>378</sup>

Lincoln, like Caesar before him, wanted to be king. Republican liberty required a savior. And, like Brutus, Booth saw himself as having a hereditary obligation to stamp out tyranny. After all, was he not also the heir of a Junius Brutus?<sup>379</sup> Was he not also named for a hero in the cause of liberty?<sup>380</sup> Was Booth himself not the rightful heir of the tyrannicides and regicides he had studied and acted?

Booth made a point of playing up his connections to Brutus. He intended to kill Lincoln on April 13, 1865<sup>381</sup>—the Ides of April.<sup>382</sup> (In one of the great symbolic ironies of American history, Lincoln stayed home with a headache on April 13.<sup>383</sup> The assassination was thus postponed to the next day—Good Friday—thereby linking Lincoln not with Caesar, but with Christ.)<sup>384</sup> The act was consciously done in public, in front of an audience.<sup>385</sup> And Booth followed his shot by leaping to the stage and yelling, "*Sic semper tyrannis!*"<sup>386</sup>—the use of Latin, if not the actual words, calling upon Roman republicanism.<sup>387</sup> Booth

377. Letter from Edwin Booth to Nahum Capen (July 28, 1881), in EDWINA BOOTH GROSSMAN, EDWIN BOOTH: RECOLLECTION BY HIS DAUGHTER (reprint 1969) (1894), quoted in FURTWANGLER, *supra* note 327, at 49.

378. ASIA BOOTH CLARKE, JOHN WILKES BOOTH: A SISTER'S MEMOIR 88 (Terry Alford ed., 1996).

379. See *supra* text accompanying notes 101–08 (noting the importance of Brutus's descent from Junius Brutus); *supra* text accompanying note 333 (noting that Booth's father was named for Junius Brutus).

380. See *supra* note 334 and accompanying text (noting that Booth was named for John Wilkes).

381. KAUFFMAN, *supra* note 335, at 212.

382. In the Roman calendar, the ides are the fifteenth of March, May, July, and October, and the thirteenth of every other month. See 7 OXFORD ENGLISH DICTIONARY 622 (2d ed. 1989).

383. KAUFFMAN, *supra* note 335, at 215.

384. See *id.* at 217.

385. *Id.* at 212.

386. *Id.* at 7.

387. The phrase does not occur in any of the Roman sources on the assassination of Caesar, but there is a "pseudo-classical tradition" that Brutus uttered it while stabbing Caesar. Francois Jost, *John Wilkes Booth and Abraham Lincoln: The Re-enactment of a Murder*, 93 MLN 503, 504 (1978). Since

also sought to learn from Brutus's mistake: by allowing Antony and Octavius to live, Brutus ultimately undercut his aim of restoring republican liberty. Booth would make no such mistake. At the same time he was assassinating Lincoln, his colleagues were dispatched to kill Vice President Andrew Johnson and Secretary of State William Seward.<sup>388</sup> (Seward would survive the vicious attack,<sup>389</sup> while the conspirator tasked with killing Johnson lost his nerve and spent the evening drinking instead.)<sup>390</sup>

After Booth's dramatic leap to the stage, he ran out the back door of Ford's Theater, grabbed his waiting horse, and took flight.<sup>391</sup> Like Felton before him,<sup>392</sup> Booth took steps to ensure that written justification of his actions would be circulated. As news of the assassination spread, a friend of Booth's remembered that Booth had handed him a letter the previous day and asked him to see that it was published in the *National Intelligencer*.<sup>393</sup> The letter asserted that, "Many will blame me for what I am about to do, but posterity, I am sure, will justify me."<sup>394</sup> Booth's sister also recalled that he had left a package with her; inside was a letter to Booth's mother, in which he insisted that

[f]or four years I have lived (I may say) a slave in the north (a favored slave its [*sic*] true, but no less hateful to me on that account.) . . . I cannot longer resist the inclination to go and share the sufferings of my brave countrymen, holding an unequal strife (for every right human & divine) against the most ruthless enemy, the world has ever known.<sup>395</sup>

Also in the package was another letter, this one meant to be published as a justification of the assassination.<sup>396</sup> Here, he asserted that "[t]he very nomination of Abraham Lincoln [in 1860], spoke plainly, war—war upon Southern rights and insti-

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1776, "*Sic semper tyrannis*" has been Virginia's state motto and appears at the bottom of its seal. See generally W. Edwin Hemphill, *The Symbolism of Our Seal*, 2 VA. CAVALCADE, Winter 1952, at 27.

388. See KAUFFMAN, *supra* note 335, at 214–15.

389. *Id.* at 22–27.

390. *Id.* at 225, 228.

391. *Id.* at 226–27.

392. See *supra* text accompanying note 227.

393. See KAUFFMAN, *supra* note 335, at 230.

394. Letter from John Wilkes Booth to John Mathews, in KAUFFMAN, *supra* note 335, at 230.

395. Letter from John Wilkes Booth to Mary Ann Holmes Booth, in KAUFFMAN, *supra* note 335, at 252–53.

396. Letter from John Wilkes Booth (1864), in CLARKE, *supra* note 378, at 106–10.

tutions.”<sup>397</sup> He went on to describe slavery as “one of the greatest blessings (both for themselves and us) that God ever bestowed upon a favored nation”<sup>398</sup> and abolitionists as “*the only traitors* in the land.”<sup>399</sup>

Booth continued to write *apologia* even as he was on the run. In a journal entry, he lamented his hunted status:

And why; For doing what Brutus was honored for, what made Tell a Hero. And yet I for striking down a greater tyrant than they ever knew am looked upon as a common cutthroat. My action was purer than either of theirs. . . . A country groaned beneath this tyranny and prayed for this end. Yet now behold the cold hand they extend to me.<sup>400</sup>

Booth, in his own mind, was just like Brutus—only better, for he struck down a greater tyrant, and with purer motives. Booth was certain that Lincoln sought to become king; he was certain that Lincoln had no right to go to war and no right to free the South’s slaves; and he was certain that Lincoln had no right to suspend habeas corpus, arrest Southern partisans, and try them before military commissions. Like the opponents of Caesar and Charles before him, Booth believed that Lincoln’s innovations in government had reduced himself and his compatriots to the status of bondsmen.<sup>401</sup> In short, to Booth it was pellucidly clear that Lincoln had subverted the Constitution, exercised tyrannical power unconstrained by law, and prosecuted a bloody civil war in which more than 600,000 soldiers perished.<sup>402</sup> And Booth was not alone in these views—as we have seen, editorial writers and orators from New York to Illinois to Indiana, not to mention those of the Confederacy, shared these views. But were these not the very crimes for which Caesar and Charles died? Booth, who had played Antony the previous year at the Winter Garden, was certain that this time he had “acted over” Brutus’s “lofty scene”—and he was hurt that his countrymen were not lining up to celebrate him as “[t]he m[a]n that gave [his] country liberty.”<sup>403</sup>

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397. *Id.* at 107.

398. *Id.*

399. *Id.* at 108.

400. John Wilkes Booth, Diary Entry (April 13–14, 1865), in KAUFFMAN, *supra* note 335, at 400.

401. *See supra* text accompanying note 395.

402. *See* JAMES M. MCPHERSON, DRAWN WITH THE SWORD: REFLECTIONS ON THE AMERICAN CIVIL WAR 56 (1996) (putting the total number of combatant deaths at 620,000).

403. *See* SHAKESPEARE, *supra* note 44, act 3, sc. 1, ll. 111–18.

Booth was, in fact, using the correct standard. A chief magistrate who subverted the Constitution, aggrandized his own power, reduced his fellow citizens to the status of slaves, and prosecuted a devastating and unnecessary civil war was a tyrant and deserved to be removed from power. This was the lesson that not only Booth, but the American Founding generation as well, took from Caesar and Charles. To Franklin and his colleagues, not only was this the correct standard for the removal of a chief magistrate, but it was also the case that the Roman tyrannicides and the English regicides had properly *applied* this standard—Caesar and Charles were, on the merits, tyrants. Still, Franklin and his compatriots knew well the fallibility of human judgment and decided therefore to append a procedural mechanism—impeachment—to this substantive standard. It was this procedural mechanism that John Wilkes Booth, in his epistemic hubris, circumvented.

And Booth, of course, was substantively mistaken.<sup>404</sup> Whatever one's judgment on the constitutional merits of any particular action of Lincoln's, he was no tyrant—if nothing else, his insistence on submitting his actions to Congress<sup>405</sup> and on

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404. To call this a “mistake” may be to give Booth too much credit. Unlike Brutus or the regicides, Booth did not present his actions to the polity for their judgment; rather, he immediately went on the lam. This may indicate that he did not believe that his claim to have acted for the public good could withstand public scrutiny.

405. Within days of the Battle of Fort Sumter, Lincoln summoned a special session of Congress to meet on July 4, 1861. See Abraham Lincoln, A Proclamation (Apr. 15, 1861), in 6 MESSAGES AND PAPERS, *supra* note 352, at 13, 13. As James McPherson has noted, July was the earliest that Congress could realistically be assembled. See JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF 23–24 (2008). He explained,

Th[e] delay [between the beginning of the war and the meeting of the special session] was not the result of Lincoln's desire to prosecute the war without congressional interference, as several historians have suggested. Rather, it was a consequence of the electoral calendar at that time. . . . [S]everal states held their congressional elections in the spring of odd-numbered years. In 1861 seven states remaining in the Union held their congressional elections from March to June. Thus the special session could not meet until all representatives had been elected.

*Id.*

When Congress had assembled, Lincoln explained the state of the war and his actions in the months since he took office. Although he argued for the constitutionality of all of his actions, he also insisted that he acted, “trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.” Abraham Lincoln, Special Session Message (July 4, 1861), in 6 MESSAGES AND PAPERS, *supra* note 352, at 20, 24.

holding the 1864 election demonstrates that.<sup>406</sup> Booth's substantive mistake highlights the wisdom of the Constitution's proceduralized alternative to assassination. Booth and his Copperhead fellow travelers not only had the opportunity to defeat Lincoln at the ballot box, they also had the opportunity to impeach him. If Lincoln truly was a tyrant bent on waging a cruel war in order to solidify his power and enslave the nation, then why not present these facts to Congress, a forum in which Lincoln would have the "opportunity of vindicating his character"?<sup>407</sup> If Booth and his compatriots could convince the House and Senate that they were right, then Lincoln would be removed and the specter of tyranny would have passed. Unlike Caesar, Lincoln had not disbanded the institutions meant to check him; unlike Charles, he had no power to dismiss the legislature and thereby foil its intentions. Of course, the simple answer is that Congress had no intention of impeaching and removing President Lincoln—that is to say, Congress did not believe that the Copperhead charge of tyranny was correct. Indeed, we can go further: the conduct of the war was *the* issue in the 1862 and 1864 congressional elections. The fact that the Copperheads did not control more seats in Congress was therefore evidence that the American people—those remaining in the Union, at least—did not regard Lincoln as a tyrant. In this judgment, the American people, and their representatives in Congress, were correct.<sup>408</sup>

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As one historian has summarized,

Lincoln was asking Congress to validate what he had done; he did not claim authority to act arbitrarily in cases where the Constitution spoke delphically. His request for congressional endorsement offered to share authority, to involve both branches of government in meeting the crisis. Lincoln wanted a constitutional process in dialogue, not in conflict.

PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN 80–81* (1994). This eagerness to engage in constitutional dialogue is the antithesis of tyranny.

406. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 146 (2005) ("[I]n the middle of a great civil war, Lincoln presided over a fair election on schedule in 1864, even though for much of the campaign he had expected to lose this contest, and its result threatened to unravel everything that he had done in office.").

407. 2 FARRAND'S RECORDS, *supra* note 1, at 65.

408. It should not be entirely surprising that the deliberate judgment of a large group is superior to the judgment of a lone individual. Cf. Josh Chafetz, Book Note, *It's the Aggregation, Stupid!*, 23 YALE L. & POL'Y REV. 577 (2005) (reviewing JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004), and discussing the literature on crowd wisdom).

The combination of Booth's mistake in judgment and his lack of epistemic humility led to the political tragedy and personal injustice that was America's first presidential assassination. The controversy surrounding Lincoln's successor in office would further point to the wisdom of a *procedural* mechanism for executive removal.

#### B. JOHNSON AND THE RADICAL REPUBLICANS

Although Lincoln has been widely applauded for putting together a cabinet consisting of a "Team of Rivals" to shepherd the nation through the Civil War,<sup>409</sup> it was his choice in 1864 of a War Democrat, Andrew Johnson, as his vice president that was to lead to the next crisis over executive removal.<sup>410</sup> In the midst of a grave national crisis, Johnson came into the presidency with no independent electoral mandate and with both houses of Congress controlled by the Republicans. This was a tricky situation, to say the least, and tact was never one of Johnson's strong suits.<sup>411</sup> And so it was that less than three years after the Lincoln assassination, Booth's surviving co-conspirators were asked if they had any incriminating evidence against Johnson that would aid the House of Representatives in its drive to impeach him.<sup>412</sup> They had no evidence to give—Johnson had nothing to do with the assassination<sup>413</sup>—but it is indicative of how much Radical Republicans in Congress despised Johnson that they sought to make common cause with the assassins of Lincoln against him.

What had Johnson done to cause this animus? There is no doubt that, from early in his presidency, he was at loggerheads with Congress over fundamental questions about Reconstruction. As early as the summer of 1865, congressional Republicans were unhappy that Johnson was not more aggressive in

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409. See generally DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005).

410. Although there is some debate as to how involved Lincoln was in the choice of his running mate in 1864, at a minimum it is clear that he was not opposed to Johnson. See HANS L. TREFOUSSE, *ANDREW JOHNSON: A BIOGRAPHY* 177–79 (1989).

411. See *id.* at 54 ("A pronounced streak of stubbornness was characteristic of Johnson in politics as well as in personal relations.").

412. Four of Booth's co-conspirators were sentenced to prison terms in the Dry Tortugas, a remote island chain at the end of the Florida Keys. See KAUFFMAN, *supra* note 335, at 376. In 1867, they were contacted there and asked if they had any incriminating evidence on Johnson. See *id.* at 380.

413. *Id.*



confiscating the land of former Confederates.<sup>414</sup> Early the next year, Johnson vetoed both the Freedman's Bureau Bill and the Civil Rights Act;<sup>415</sup> the latter veto was subsequently overridden by Congress.<sup>416</sup> In the message accompanying his veto of the Freedman's Bureau Bill, Johnson did not limit himself to disputing the Bill's wisdom and constitutionality;<sup>417</sup> he went on to suggest that no legislation affecting the South should pass until the Southern states were readmitted to Congress.<sup>418</sup> The Republican response to Johnson's vetoes was furious. The Rochester, New York, *Democrat* editorialized that Johnson's "objections are captious and pettifogging, and exhibit no sincere desire to cooperate in the work which Congress has undertaken. He assumes the attitude and repeats the arguments of the Democratic leaders."<sup>419</sup> *The Delaware State Journal* somberly noted that "[s]ince the assassination of Abraham Lincoln, no public event has more deeply saddened the hearts and called forth the condemnation of the Union men of the State of Delaware" than Johnson's vetoes.<sup>420</sup> *The Washington Chronicle* declared that the Freedman's Bureau Bill veto message "will fall like the cold hand of death upon the warm impulses of the American people."<sup>421</sup> And the *Chicago Tribune* called upon "the masses of the loyal people [to] rise against this veto of a measure intended as a bulwark against Slavery and treason, as they rose in their might when the flag of the Union was first hauled down from Fort Sumter."<sup>422</sup> Members of Congress, too, reacted harshly to the vetoes.<sup>423</sup>

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414. See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 203 (1992).

415. ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 287–90, 314–15 (1960).

416. *Id.* at 323–24.

417. Although he certainly did question them. See Andrew Johnson, Veto Message (Feb. 19, 1866), in 6 *MESSAGES AND PAPERS*, *supra* note 352, at 398, 398–403.

418. See *id.* at 403–05.

419. Quoted in *The Republican Press on the Veto Message*, N.Y. TRIB., Mar. 3, 1866, at 9.

420. Quoted in *id.*

421. Quoted in *id.*

422. Quoted in *id.*

423. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 931–32 (1866) (statement of Sen. Benjamin Wade on the veto of the Freedman's Bureau Bill); *id.* at 936–43 (statement of Sen. Lyman Trumbull on same); *id.* at 1832–37 (statement of Rep. William Lawrence on the Civil Rights Bill).

Johnson, characteristically, responded to the criticism by lashing out. In an hour-long speech outside the White House to a cheering Democratic crowd, he equated the Radical Republicans in Congress with the Southern secessionists:

I look upon them . . . as being as much opposed to the fundamental principles of this government, and believe they are as much laboring to prevent or destroy them as were the men who fought against us. (A Voice—"What are the names?") *I say Thaddeus Stevens, of Pennsylvania*—(tremendous applause)—*I say Charles Sumner*—(great applause). *I say Wendell Phillips and others of the same stripe are among them.*<sup>424</sup>

With such heated rhetoric on both sides, it was almost inevitable that the clash would continue to escalate.

Emboldened by the 1866 election in which the Republicans achieved veto-proof majorities in both houses of Congress,<sup>425</sup> Radical Republicans first moved in January 1867 to impeach Johnson. Congressman James Ashley of Ohio offered a resolution authorizing the Judiciary Committee to inquire into Johnson's conduct, and specifically whether he "has been guilty of acts which are designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any department or office thereof," which would justify impeachment.<sup>426</sup> The Judiciary Committee took testimony throughout the month of February, but was unable to bring its investigation to a conclusion by the time the Thirty-Ninth Congress expired on March 4.<sup>427</sup>

Meanwhile, the lame duck Congress passed three significant pieces of legislation. On February 18, Congress passed the Tenure of Office Act, which substantially limited the president's power to remove executive branch officers. The Act provided that most Senate-confirmed officers were entitled to remain in office until a replacement was confirmed by the Senate.<sup>428</sup> Certain important officers, however—including the Secretaries of State, Treasury, and War—were entitled to remain in office "during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Sen-

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424. *The Veto*, N.Y. HERALD, Feb. 23, 1866, at 1.

425. REHNQUIST, *supra* note 414, at 208.

426. CONG. GLOBE, 39TH CONG., 2D SESS. 320 (1867).

427. *See* REHNQUIST, *supra* note 414, at 211.

428. Tenure of Office Act, ch. 154, § 1, 14 Stat. 430, 430 (1867) (repealed 1887).

ate.”<sup>429</sup> During a Senate recess, an officer who was “guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties” could be suspended by the president.<sup>430</sup> Once the Senate reconvened, it would have to ratify this suspension and appoint a replacement; if it refused to ratify the suspension, then the suspended officer must be immediately reinstated.<sup>431</sup> Violations of the Act were made a criminal offense.<sup>432</sup>

Two days after sending the Tenure of Office Act to the president, both houses passed the Reconstruction Act. This Act divided the states of the former Confederacy into five “military districts,” each to be commanded by an army officer of the rank of brigadier-general or above.<sup>433</sup> Existing state governments were deemed to be “provisional only,” with the commanding general having the authority to “abolish, modify, control, or supersede” them when he saw fit.<sup>434</sup> The Act also specified the conditions, including ratification of the Fourteenth Amendment, on which the rebellious states would be allowed to return to Congress.<sup>435</sup>

Finally, on March 2, Congress passed the Army Appropriations Act, which contained two provisions that went beyond appropriations. First, it required that the headquarters of the General of the Army be located in Washington—where Congress could keep an eye on it—and that all orders from the president to the military be issued via the General of the Army, who could not be dismissed without the consent of the Senate.<sup>436</sup> This was meant to transfer power from Johnson to General Grant, who was much preferred by the Republicans in Congress. Second, the Act disbanded the militias of a number of former Confederate states.<sup>437</sup>

On March 2, President Johnson vetoed the Tenure of Office Act on the unanimous advice of his Cabinet;<sup>438</sup> vetoed the Re-

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429. *Id.*

430. *Id.* § 2.

431. *Id.*

432. *Id.* §§ 5–6, 9.

433. Reconstruction Act, ch. 153, §§ 1–2, 14 Stat. 428, 428 (1867).

434. *Id.* § 6.

435. *Id.* § 5.

436. Army Appropriations Act, ch. 170, § 2, 14 Stat. 485, 486–87 (1867).

437. *Id.* § 6.

438. DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF PRESIDENT ANDREW JOHNSON, SEVENTEENTH PRESIDENT OF THE UNITED STATES* 202–03 (1967).

construction Act, which only his Secretary of War, Edwin Stanton, urged him to sign;<sup>439</sup> and signed the Army Appropriations Act, while protesting that it both “virtually deprives the President of his constitutional functions as Commander in Chief” and “denies to ten States of this Union their constitutional right to protect themselves in any emergency by means of their own militia.”<sup>440</sup> Both of Johnson’s vetoes were overridden that same day.<sup>441</sup>

The Fortieth Congress was even more combative, quickly passing two Supplementary Reconstruction Acts over Johnson’s veto.<sup>442</sup> It was clear by this point that the Republican-dominated Congress and the Democratic president were irredeemably at loggerheads, and the pattern of their interaction was relatively fixed. Congress would pass laws providing for relatively strict Reconstruction measures; President Johnson would veto them; and Congress would then re-pass the laws over his veto. Meanwhile, Johnson would use his executive discretion in an attempt to pursue a more lenient Reconstruction, aimed at fully readmitting the rebellious states as quickly as possible.

On August 5, 1867, Johnson informed Stanton—the Cabinet member most in line with the congressional vision of Reconstruction—that “[p]ublic considerations of a high character constrain me to say that your resignation as Secretary of War will be accepted.”<sup>443</sup> Stanton immediately wrote back that “public considerations of a high character . . . constrain me not to resign the office of Secretary of War before the next meeting of Congress.”<sup>444</sup> One week later, Johnson informed Stanton that, “[b]y virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are

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439. REHNQUIST, *supra* note 414, at 209.

440. Andrew Johnson, Special Message to the House of Representatives (Mar. 2, 1867), in 6 MESSAGES AND PAPERS, *supra* note 352, at 472, 472.

441. See Tenure of Office Act, ch. 154, 14 Stat. 430, 432 (1867) (reprinting both the House’s and the Senate’s resolutions overriding the veto); Reconstruction Act, ch. 153, 14 Stat. 428, 429–30 (1867) (same).

442. Supplementary Reconstruction Act, ch. 30, 15 Stat. 14 (1867); Supplementary Reconstruction Act, ch. 6, 15 Stat. 2 (1867).

443. 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 149 (Washington, D.C., Gov’t Printing Office 1868) [hereinafter TRIAL].

444. *Id.*

hereby suspended from office as Secretary of War.”<sup>445</sup> Johnson appointed Grant as Secretary of War ad interim.<sup>446</sup> Because Congress was in recess at the time, this was arguably consistent with the terms of the Tenure of Office Act, so long as Johnson sought the Senate’s approval when it reconvened.<sup>447</sup> Nevertheless, the *Chicago Tribune* thundered that

[t]he country has endured Andrew Johnson as long as endurance can be counted a virtue. . . . [H]e should be impeached, and ejected from office, and rendered incapable of holding office hereafter, [and] we hope that Congress will resolutely take hold of the work at the coming session, and put him out.<sup>448</sup>

A Boston newspaper declared that Johnson’s aim was “to throw the work of reconstruction into the hands of his own friends and sympathizers at the South and thus to defeat the purpose of the reconstruction acts in the very process of execution.”<sup>449</sup> The paper ominously noted that Johnson “is an obstacle, and he is in danger of suffering the fate of all obstacles in the way of the advancement of a nation.”<sup>450</sup>

Before Congress could reconvene and vent its spleen, however, Republicans were dealt a setback. In the twenty states holding elections for state offices in November 1867, Republicans “lost significant ground” in eighteen.<sup>451</sup> It was a decidedly dispirited Republican majority that returned to Congress the next month.<sup>452</sup> Nevertheless, the Radicals determined to push ahead with the impeachment inquiry that the Thirty-Ninth Congress had begun.<sup>453</sup> In late November, the House Judiciary Committee reported by a one-vote margin in favor of impeaching the president.<sup>454</sup> The Committee’s majority report was “injudicious in language, even violent in spirit. Conservatives pointed to it as evidence that the impeachers were motivated more out of hatred for Andrew Johnson than concern for the country’s well-being.”<sup>455</sup> In contrast, the report filed by the two

445. Letter from Andrew Johnson to Edwin Stanton (Aug. 12, 1867), in 6 MESSAGES AND PAPERS, *supra* note 352, at 583, 583.

446. *Id.*

447. *See supra* text accompanying notes 430–31.

448. Editorial, *Impeachment*, CHI. TRIB., Aug. 21, 1867, at 2.

449. Editorial, BOS. DAILY ADVERTISER, Sept. 2, 1867, at 2.

450. Editorial, BOS. DAILY ADVERTISER, Sept. 3, 1867, at 2.

451. MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 69 (1973).

452. *Id.* at 70.

453. *Id.*

454. *Id.* at 73.

455. *Id.* at 74.

Republicans who voted against impeachment “assumed an air of moderation.”<sup>456</sup> The combination of the electoral repudiation of the Radicals’ program with the extreme tone of the Radicals’ impeachment report led to a decisive defeat for the impeachment attempt on the House floor on December 7. The Radicals were unable to muster even a majority of Republican votes, and the final tally was 57 in favor of impeachment to 108 opposed.<sup>457</sup> An editorial in the New York *Independent* expressed the Radical reaction:

If the great culprit had robbed a till; if he had fired a barn; if he had forged a check; he would have been indicted, prosecuted, condemned, sentenced, and punished. But, as the evidence shows that he only oppressed the negro; that he only conspired with the rebel; that he only betrayed the Union party; that he only attempted to overthrow the Republic—of course, he goes unwhipped of justice.<sup>458</sup>

The editorial went on to lament that “[s]upreme guilt, like innocence itself, is beyond the law’s ax.”<sup>459</sup>

On January 13, 1868, the Senate refused to concur in Johnson’s removal of Stanton.<sup>460</sup> By the terms of the Tenure of Office Act, Stanton was immediately reinstated as Secretary of War.<sup>461</sup> Instead, on February 21, Johnson sent Stanton another note, informing him that he was “hereby removed from office as Secretary for the Department of War.”<sup>462</sup> Johnson appointed General Lorenzo Thomas as Secretary of War ad interim.<sup>463</sup> Congress erupted. By the end of the next day, the Committee on Reconstruction reported an impeachment resolution to the House of Representatives.<sup>464</sup> The only offenses mentioned in the resolution were the removal of Stanton and the appointment of Thomas.<sup>465</sup> Unlike the previous impeachment attempt, this time the Republican Party was united in support of impeachment.<sup>466</sup> Three days after Johnson removed Stanton from

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456. *Id.* at 75.

457. *Id.* at 81.

458. Editorial, *Impeachment*, INDEP. (N.Y.), Dec. 12, 1867, at 4.

459. *Id.*

460. MCKITRICK, *supra* note 415, at 501.

461. *See supra* text accompanying note 431.

462. Letter from Andrew Johnson to Edwin Stanton (Feb. 21, 1868), in 6 MESSAGES AND PAPERS, *supra* note 352, at 663, 663.

463. Letter from Andrew Johnson to Lorenzo Thomas (Feb. 21, 1868), in 6 MESSAGES AND PAPERS, *supra* note 352, at 663, 663.

464. CONG. GLOBE, 40TH CONG., 2D SESS. 1336 (1868).

465. *Id.*

466. *See* BENEDICT, *supra* note 451, at 104.

office, the House voted 126 to 47 in favor of impeachment.<sup>467</sup> On March 4, the House presented eleven articles of impeachment to the Senate.<sup>468</sup> The first eight articles all, in varying language, dealt with the firing of Stanton and his replacement by Thomas.<sup>469</sup> The ninth article charged that Johnson told General Emory that he believed that the provision of the Army Appropriations Act requiring all orders from the president to the military to be issued via the General of the Army was unconstitutional and that Johnson's intent in doing so was "to induce said Emory . . . to violate the provisions of said act, and to take and receive, act upon, and obey such orders as [Johnson] might make and give."<sup>470</sup> The tenth article alleged that Johnson, in various "intemperate, inflammatory, and scandalous harangues" attempted "to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States."<sup>471</sup> The eleventh and final article charged Johnson with disparaging Congress's legitimacy because it refused to seat representatives of the Southern states, "thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him," as evinced by his failure to obey the Tenure of Office Act and by his attempt to thwart the Reconstruction Act and provisions of the Army Appropriations Act.<sup>472</sup>

In his opening argument to the Senate, Representative Benjamin Franklin Butler of Massachusetts, one of the House impeachment managers, thundered:

By murder most foul he succeeded to the Presidency, and is the elect of an assassin to that high office, and not of the people. . . . [O]ur frame of government gives us a remedy for such a misfortune . . . . We can remove him—as we are about to do—from the office he has disgraced by the sure, safe, and constitutional method of impeachment . . . .<sup>473</sup>

Representative John Logan of Illinois, another impeachment manager, also drew upon Lincoln's legacy to Johnson's detriment:

[T]he heathen philosophers . . . defined a good prince as "one who endeavors to render his subjects happy;" "and a tyrant," on the contrary, "one who only aims at his own private advantage." An example of the

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467. CONG. GLOBE, 40TH CONG., 2D SESS. 1400 (1868).

468. 1 TRIAL, *supra* note 443, at 6–10.

469. *Id.* at 6–8.

470. *Id.* at 8.

471. *Id.*

472. *Id.* at 10.

473. *Id.* at 119.

first we had in the lamented Lincoln, and of the latter in Mr. Johnson.<sup>474</sup>

His audience could have been expected to know how the “heathens” dealt with tyrants.

The Senate trial dragged on for several months before the issue came to a vote on May 16, 1868. Republican Senator George Williams of Oregon moved that the eleventh article be voted upon first, presumably because it encompassed many of the charges contained in the others and therefore “was thought to be the one that would command the most support for conviction.”<sup>475</sup> When the tally was in, thirty-five Senators voted guilty, nineteen voted not guilty. As this was one guilty vote shy of the necessary two-thirds supermajority, Johnson was acquitted on this article.<sup>476</sup> Williams, obviously flustered, moved that the Senate, sitting as a court of impeachment, adjourn for ten days,<sup>477</sup> and this motion passed.<sup>478</sup> When the impeachment court reconvened on May 26, Johnson was acquitted on the second and third articles, both on identical thirty-five to nineteen votes.<sup>479</sup> Upon Williams’s motion, the impeachment court then adjourned *sine die*.<sup>480</sup> The impeachment court never reconvened, never entered judgment on the remaining eight articles, and never removed Andrew Johnson from office.

Seven Republicans voted to acquit,<sup>481</sup> and John F. Kennedy famously celebrated their courage for doing so.<sup>482</sup> In explaining their votes, these senators argued that Johnson had not violated the Tenure of Office Act,<sup>483</sup> but perhaps more important was a principle expressed by Senator Fessenden of Maine:

The office of President is one of the great co-ordinate branches of the government, having its defined powers, privileges, and duties; as es-

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474. 2 *id.* at 63.

475. REHNQUIST, *supra* note 414, at 233.

476. 2 TRIAL, *supra* note 443, at 486–87.

477. *Id.* at 487.

478. *Id.* at 489.

479. *Id.* at 496–97.

480. *Id.* at 497–98.

481. BENEDICT, *supra* note 451, at 173.

482. JOHN F. KENNEDY, PROFILES IN COURAGE 126–51 (1956). It is possible that Kennedy’s celebration was misguided. See DAVID O. STEWART, IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN’S LEGACY 294–99 (2009) (arguing that it is “more likely than not” that at least some Republican Senators were bribed to vote for acquittal).

483. See, e.g., 3 TRIAL, *supra* note 443, at 195–98 (Senator Fowler explaining why the removal of Stanton did not violate the Act); *id.* at 301–02 (Senator Henderson explaining same); *id.* at 331–33 (Senator Grimes explaining same).



sential to the very framework of the government as any other. . . . It is evident, then, as it seems to me, that the offence for which a Chief Magistrate is removed from office, and the power intrusted to him by the people transferred to other hands . . . should be of such a character as to commend itself at once to the minds of all right thinking men as, beyond all question, an adequate cause. It should be free from the taint of party; leave no reasonable ground of suspicion upon the motives of those who inflict the penalty, and address itself to the country and the civilized world as a measure justly called for by the gravity of the crime, and the necessity for its punishment.<sup>484</sup>

In contrast, Senator Sumner of Massachusetts, one of the most influential of the Radicals, declared the impeachment fight “one of the last great battles with slavery,”<sup>485</sup> and insisted that

Andrew Johnson is the impersonation of the tyrannical slave power. In him it lives again. He is the lineal successor of John C. Calhoun and Jefferson Davis . . . . Not to dislodge [Johnson and his supporters] is to leave the country a prey to one of the most hateful tyrannies of history.<sup>486</sup>

Sumner’s colleague Jacob Howard of Michigan declared that “[m]en and women all over the land hung their heads in shame, and the wise and reflecting saw in [Johnson] a coarse, designing, and dangerous tyrant.”<sup>487</sup>

Sumner and many of his colleagues—like Booth and his confederates—saw their political opponents as tyrants and therefore saw removing those opponents from the presidency as a morally justified act. Indeed, as we have seen, Republican newspapers compared Johnson’s vetoes of Reconstruction legislation to the assassination of Lincoln,<sup>488</sup> insisted that he aimed at overthrowing the Republic,<sup>489</sup> and warned darkly that he was an obstacle to the advancement of a nation.<sup>490</sup> And both the House impeachment managers<sup>491</sup> and some of the Senate Radicals who voted for conviction<sup>492</sup> used the language of tyranny to describe Johnson’s actions in office. That is, many of the Radical Republicans saw Johnson in the same terms in which Brutus saw Caesar, in which Felton saw Buckingham, in which the regicides saw Charles, and in which Booth saw Lincoln.

484. *Id.* at 30; *see also id.* at 328 (Senator Trumbull making a similar point).

485. *Id.* at 247.

486. *Id.*

487. *Id.* at 49.

488. *See supra* text accompanying note 420.

489. *See supra* text accompanying notes 458–59.

490. *See supra* text accompanying note 450.

491. *See supra* text accompanying notes 473–74.

492. *See supra* text accompanying notes 485–87.

But like Booth, the Radicals were mistaken. The first eight articles of impeachment dealt with Johnson's alleged violations of the Tenure of Office Act by firing Stanton and appointing Thomas, and the ninth article dealt with Johnson's assertions that the Army Appropriations Act was unconstitutional insofar as it required Johnson to issue all military orders via the General of the Army, who could only be removed with Senate consent. But these two provisions were almost certainly unconstitutional attempts by Congress to interfere in the internal workings of the executive branch.<sup>493</sup> The president has no obligation to obey an unconstitutional law<sup>494</sup>—indeed, his oath would seem to suggest an obligation to defy such a law<sup>495</sup>—and therefore violating such a law cannot be an impeachable offense. The tenth article merely accused the president of saying unpleasant things about Congress. But surely—whether we want to see this through the lens of the First Amendment or that of separation of powers—this cannot be an impeachable offense. And the eleventh article was “a potpourri which . . . lump[ed] together several of the charges contained in the earlier separate articles.”<sup>496</sup> If those earlier articles did not state an impeachable offense, then neither could the eleventh. And even if Johnson were wrong about any of these constitutional points, his arguments would still seem to be well within the bounds of good faith, reasonable disagreement. As Senator

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493. In the twentieth century, the Supreme Court concluded that “the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid.” *Myers v. United States*, 272 U.S. 52, 176 (1926). The Court's reasoning extends to the relevant provisions of the Army Appropriations Act, as well, and the Court said as much. *See id.* at 165–66. Subsequent literature has largely concurred. *See, e.g.*, BERGER, *supra* note 4, at 292–98; David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 414–19 (2008); Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1815–45 (2006); Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 295 (1998); *see also* Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 149–54 (2010) (arguing that one piece of evidence relied upon by supporters of the Tenure of Office Act does not actually address the removal power at all).

494. *See* Baude, *supra* note 350, at 1810 & n.13 (noting “the increasingly conventional wisdom that the President can or must disregard some or all laws that he independently believes to be unconstitutional,” and citing expressions of this conventional wisdom).

495. *See* U.S. CONST. art. II, § 1, cl. 8 (requiring the President to swear or affirm to “preserve, protect and defend the Constitution of the United States”).

496. REHNQUIST, *supra* note 414, at 227.

Fessenden suggested, it is hard to characterize a good faith disagreement as a high crime or misdemeanor.<sup>497</sup>

Of course, the debates over the Tenure of Office Act, the Army Appropriations Act, and the president's intemperate language were not the *real* sore spots between the president and his congressional critics. The allegations in the impeachment articles were merely the epiphenomenal manifestations of the deeper dispute over the proper course of Reconstruction and the aftermath of the Civil War. As Representative James Blaine, who voted for impeachment, put it years later in his autobiography:

The sober reflection of later years has persuaded many who favored Impeachment that it was not justifiable on the charges made, and that its success would have resulted in greater injury to free institutions than Andrew Johnson in his utmost endeavor was able to inflict. No impartial reader can examine the record of the pleadings and arguments of the Managers who appeared on behalf of the House, without feeling that the President was impeached for one set of misdemeanors, and tried for another series.<sup>498</sup>

In short, it was Johnson's and the Radical Republicans' "deep commitment to opposing, honestly held views which set them on a collision course."<sup>499</sup> But if policy disagreements—even deep disagreements over crucially important issues—were to be grounds for impeachment, then the United States would have moved a long way towards a parliamentary, rather than a presidential, system.<sup>500</sup> The president is not meant to be a "mere creature of the Legislature," as George Mason insisted at the Philadelphia Convention.<sup>501</sup> Indeed, as we have seen, it was precisely such a concern that led the Convention to reject "mal-administration" as a category of impeachable offenses.<sup>502</sup> In short, in David Currie's words: "[N]o one should be impeached because he disagrees with the congressional will."<sup>503</sup>

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497. See *supra* text accompanying note 484.

498. 2 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 376 (Norwich, Conn., Henry Bill 1886).

499. BERGER, *supra* note 4, at 264.

500. Even those commentators who would prefer a more parliamentary style of governance do not think that the Constitution actually creates such a system. See, e.g., SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 114–21 (2006) (lamenting the fact that the Constitution does not allow for the removal of "merely" incompetent presidents).

501. 1 FARRAND'S RECORDS, *supra* note 1, at 86.

502. See *supra* text accompanying notes 8–10.

503. Currie, *supra* note 493, at 452.

But if Sumner and his colleagues were like Booth in that they made a substantive mistake, they were decidedly unlike him in their avoidance of epistemic hubris. Booth's mistake led to tragedy because he acted on it in an irreversible way. The Radical Republicans' mistake had no such dire consequences, for they allowed the Constitution's proceduralized alternative to assassination to run its course. And their epistemically humble appeal to procedure allowed for the triumph of substantive justice, despite their mistake. Johnson may not have been a very good president, but neither had he committed an assassinateable offense. Under the American constitutional scheme, he did not deserve to be removed—and the impeachment procedures laid out in that scheme, by demanding a supermajority for conviction and by impressing on Senators the grave nature of their task, enabled the Senate to get the Johnson impeachment trial substantively right.

As we shall see in the next Part, the same procedures also allowed the Senate to reach the right outcome in the only other presidential impeachment trial in American history.

#### IV. BILL CLINTON AND ANN COULTER

In 1998, the conservative provocateur Ann Coulter made waves when she wrote that, once it was established that President Clinton did, in fact, lie under oath, the only debate should be “about whether to impeach or assassinate.”<sup>504</sup> After expressing outrage in 2006 over a faux documentary portraying the fictional assassination of then-President George W. Bush, Coulter was asked on a television news show to reconcile her outrage with her earlier statement about Clinton. She explained her earlier statement thus:

[I]n my [1998] book, *High Crimes and Misdemeanors* [sic], [I was] describing the entire history of impeachment, which we got from the British. I explained how we changed it here in America. In Britain, it was a criminal punishment. You would be—one of the punishments was hanging. Here it was purely losing your office. At the end of this, I said . . . I said the only question, if we were a decent country or something to that effect, would be whether to impeach or assassinate, not whether to impeach or not . . .<sup>505</sup>

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504. ANN H. COULTER, *HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON* 107 (1998).

505. *Hannity and Colmes: Interview with Ann Coulter, Doug Schoen* (Fox News television broadcast Aug. 31, 2006), transcript available at 2006 WLNR 15140850.

Coulter was not entirely wrong. There is, as we have seen, an intimate relationship between impeachment and assassination. Coulter seems to take this to mean that any offense she considers impeachable in the present day would have been assassina-ble in a former time. But this gets the causality backwards. Rather, if we are to take the link between impeachment and assassination seriously, we should use assassinability as a benchmark for impeachability. On this view, it is precisely the fact that it was unimaginable to justify Clinton's assassination, given his conduct, that made it unsuitable for impeachment.

The facts, in brief, are these:<sup>506</sup> In November 1995, President Clinton began a sexual affair with Monica Lewinsky, then a White House intern.<sup>507</sup> The relationship continued through May 1997.<sup>508</sup> During the course of the relationship, Lewinsky confided in her friend Linda Tripp, who, in mid-1997, began keeping detailed notes and tape recordings of her phone conversations with Lewinsky.<sup>509</sup> Tripp disclosed the affair to attorneys for Paula Jones, who was suing Clinton for sexual harassment; on December 5, 1997, Lewinsky's name was added to Jones's witness list.<sup>510</sup> On December 17, Clinton informed Lewinsky that she was on the witness list; the president suggested that she offer to sign an affidavit in lieu of a deposition.<sup>511</sup> He also reviewed with her their "cover story"—that Lewinsky's West Wing visits were to the president's secretary, Betty Currie, not to the president.<sup>512</sup> On December 19, Jones's lawyers subpoenaed Lewinsky to appear for a deposition in late-January; the subpoena also directed her to produce any gifts that Clinton had given her.<sup>513</sup> Lewinsky informed the president of the subpoena and suggested that she arrange to have Currie hold on to the gifts that Clinton had given her.<sup>514</sup> Later that

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506. For the purposes of this section, I rely on the facts as laid out by Independent Counsel Kenneth Starr. *See generally* KENNETH W. STARR, REFERRAL FROM INDEPENDENT COUNSEL, H.R. DOC. NO. 105-310 (1998) [hereinafter STARR REPORT]. As Judge Posner has noted, President Clinton's attorneys "made relatively little effort to rebut the strictly factual allegations" made by Starr. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 16 n.1 (1999).

507. STARR REPORT, *supra* note 506, at 27–28.

508. *Id.* at 62.

509. *Id.* at 13; POSNER, *supra* note 506, at 22–24.

510. STARR REPORT, *supra* note 506, at 88.

511. *Id.* at 94.

512. *Id.* at 95.

513. *Id.* at 96.

514. *Id.* at 101.

day, Currie picked up a box containing the gifts that Clinton had given Lewinsky.<sup>515</sup>

On January 7, 1998, Lewinsky signed an affidavit stating that she had never had a sexual relationship with the president.<sup>516</sup> On January 17, President Clinton was deposed by Jones's lawyers. Much of the questioning involved Lewinsky, and Clinton claimed that he was unable to remember many of the details of his interactions with her. He "emphatically denied" having a sexual relationship with her.<sup>517</sup> The next day, he spoke with Currie and asked her a number of leading questions, including, "You were always there when [Lewinsky] was there, right?" and, "Monica came on to me, and I never touched her, right?"<sup>518</sup>

Unbeknownst to Clinton, Tripp had earlier in January turned over her notes and tapes to Kenneth Starr, the independent counsel investigating allegations that the Clintons had committed crimes in conjunction with their investment in the Whitewater real estate development in the early 1980s.<sup>519</sup> The day before Jones's lawyers deposed Clinton, Starr obtained authorization to expand his investigation to cover possible obstruction of justice in the *Jones* case.<sup>520</sup> In late-July, shortly after Clinton's motion for summary judgment in the *Jones* case was granted,<sup>521</sup> Lewinsky signed an immunity agreement with the Independent Counsel's Office and began cooperating with its investigation, including making statements and turning over physical evidence.<sup>522</sup> The next month, Clinton testified before the grand jury convened by the Independent Counsel. He acknowledged having an affair with Lewinsky but claimed that he had not lied in his deposition in the *Jones* case because the acts he admitted to were not, in his view, covered by the definition of "sexual relations" he was given.<sup>523</sup> He denied having encouraged Lewinsky to lie in the *Jones* case; he denied having sent Currie to retrieve the gifts he had given Lewinsky; and he denied having tried to convince Currie to lie for him.<sup>524</sup>

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515. *Id.* at 102.

516. *Id.* at 107–10.

517. *Id.* at 116–18.

518. *Id.* at 118.

519. POSNER, *supra* note 506, at 24–25.

520. *Id.* at 25–26.

521. *Jones v. Clinton*, 990 F. Supp. 657, 679 (E.D. Ark. 1998).

522. STARR REPORT, *supra* note 506, at 11–13.

523. POSNER, *supra* note 506, at 28–29.

524. *Id.* at 29.

In September 1998, Starr reported to the House of Representatives that he found “substantial and credible information supporting . . . eleven possible grounds for impeachment.”<sup>525</sup> The first ten grounds involved lying under oath, obstructing justice, and witness tampering in the *Jones* case and before the Independent Counsel’s grand jury.<sup>526</sup> The final ground alleged that Clinton had abused his constitutional power by lying to the public, the grand jury, and Congress; by promising to cooperate with the grand jury investigation and then breaking that promise; and by invoking executive privilege.<sup>527</sup> On October 8, 1998, the House authorized the Judiciary Committee to begin an impeachment inquiry.<sup>528</sup> The Committee put eighty-one questions to Clinton, which he answered in writing, under oath.<sup>529</sup> The Committee majority determined that his answers to those questions “follow[ed] the pattern of selective memory, reference to other testimony, blatant untruths, artful distortions, outright lies and half truths he had already used.”<sup>530</sup>

In December 1998, the Judiciary Committee reported out four articles of impeachment.<sup>531</sup> The first accused Clinton of perjury before the Independent Counsel’s grand jury, and the second accused him of perjury in the *Jones* civil case.<sup>532</sup> The third accused him of obstructing justice by suborning perjury and tampering with witnesses in both the *Jones* case and the Independent Counsel investigation.<sup>533</sup> And the fourth article alleged that Clinton abused his power by perjuring himself in his answers to the Judiciary Committee’s questions.<sup>534</sup> Less than two weeks later, the House of Representatives approved the first and third articles (alleging perjury before the grand jury and obstruction of justice), but rejected the other two.<sup>535</sup> On

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525. STARR REPORT, *supra* note 506, at 129.

526. *Id.* at 131–203.

527. *Id.* at 204–10.

528. H.R. Res. 581, 105th Cong. (1998).

529. The questions and answers are reprinted in H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 105-830, at 400–40 (Comm. Print 1998) [hereinafter JUDICIARY COMMITTEE REPORT].

530. *Id.* at 32; *see also* POSNER, *supra* note 506, at 30 (concluding that Clinton told a number of lies in his answers to the Judiciary Committee).

531. The Committee’s recommended impeachment articles are reprinted in JUDICIARY COMMITTEE REPORT, *supra* note 529, at 1–5.

532. *Id.*

533. *Id.*

534. *Id.*

535. H.R. Res. 611, 105th Cong. (1998).

February 12, 1999, the Senate acquitted Clinton on both articles, with forty-five members voting guilty on the article alleging perjury before the grand jury and fifty members voting guilty on the article alleging obstruction of justice,<sup>536</sup> both well shy of the sixty-seven votes necessary for conviction.

After reviewing the evidence compiled by the Independent Counsel, Judge Posner concluded that it was “clear beyond a reasonable doubt” that Clinton had committed federal crimes that would normally yield a sentence of thirty to thirty-seven months.<sup>537</sup> But, of course, whether Clinton committed a *criminal* offense is wholly different from whether he committed an *impeachable* offense. Obviously, Coulter<sup>538</sup>—and indeed, many others—thought he did, and their reasons are telling. House Republican Whip Tom Delay, for example, declared that the impeachment proceedings presented

a debate about relativism versus absolute truth. The President’s defenders have said that the President is morally reprehensible, that he is reckless, that he has violated the trust of the American people, lessened their esteem for the office of President and dishonored the office which they have entrusted him, but that it does not rise to the level of impeachment . . . . I cannot in good conscience [agree].<sup>539</sup>

Proponent after proponent of impeachment and conviction echoed the claim that the president had diminished the office. Representative Christopher Cox insisted that impeachment was necessary so that the nation could “once again respect the institution of the presidency.”<sup>540</sup> In the Senate, Richard Lugar insisted that

[o]ur President must be strong because a President personifies the rule of law that he is sworn to uphold and protect. We must believe him and trust him if we are to follow him. His influence on domestic and foreign policies comes from that trust, which a lifetime of words, deeds, and achievements has built. President Clinton has betrayed that trust.<sup>541</sup>

His colleagues echoed these sentiments, insisting that the president ought to have good character<sup>542</sup> and worrying about what effect Clinton’s conduct would have on “the moral health

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536. 145 CONG. REC. 2376–77 (1999).

537. POSNER, *supra* note 506, at 54–55.

538. *See supra* text accompanying note 504.

539. 144 CONG. REC. 28,041 n.2 (1998).

540. *Id.* at 28,043.

541. 145 CONG. REC. 2395 (1999).

542. *See id.* at 2421–22 (statement of Sen. Pete Domenici); *id.* at 2541 (statement of Sen. Sam Brownback); *id.* at 2543 (remarks of Sen. John Ashcroft); *id.* at 2561 (statement of Sen. Jesse Helms).



of the Nation.”<sup>543</sup> Senator Frist was concerned that Clinton’s conduct would “corrode the respect we all have for the Office of President,”<sup>544</sup> and Senator Grassley lamented “the collapse of the President’s moral authority.”<sup>545</sup> And Senator Hagel insisted that “President Clinton’s conduct has debased his office and violated the soul of justice—truth. He has thereby debased and violated the American people.”<sup>546</sup>

Impeachment supporters in the press made similar arguments. Conservative commentator William Bennett declared, “Bill Clinton is a reproach. He has defiled the office of the presidency . . . .”<sup>547</sup> The *New York Post* declared that Clinton “has debased his office,”<sup>548</sup> and the *Las Vegas Review Journal* suggested that the president’s “whimper[ing]” during the whole affair suggested that “one more article should be added to that referral. The Constitution allows the office of the presidency to be occupied only by an adult.”<sup>549</sup> The *Columbus Dispatch* insisted that Clinton “has soiled the honorable office to which he was elected by the people.”<sup>550</sup> And the *Daily Oklahoman* solemnly intoned, “More than ever, America needs leaders who will stand for righteousness.”<sup>551</sup>

There is a certain irony in the arguments marshaled by the advocates of impeachment and conviction. They were concerned that Clinton made the office *too small*—that he lessened the esteem in which it was held, that he destroyed public respect for and trust in the presidency, that he “debased” and “defiled” it. But a focus on impeachability as assassinability allows us to see that this concern was precisely backwards. Caesar and Charles were assassinated because they attempted to make their offices *too big*. They assumed to themselves despotic powers inconsistent with the constitutional order. They were ty-

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543. *Id.* at 2443 (statement of Sen. James Inhofe).

544. *Id.* at 2450.

545. *Id.* at 2524.

546. *Id.* at 2565.

547. BENNETT, *supra* note 27, at 5.

548. Editorial, *Forget Censure: Impeachment is Censure*, N.Y. POST, Dec. 11, 1998, at 42, available at 1998 WLNR 6585684.

549. Editorial, *Carefully Crafted*, LAS VEGAS REV. J., Dec. 13, 1998, at 2D, available at 1998 WLNR 518008, quoted in *Impeachment: The Editorials; Excerpts from Opinions by U.S. Newspapers*, N.Y. TIMES, Dec. 14, 1998, at A28, available at 1998 WLNR 2805414.

550. Editorial, *To Impeach? House Vote Will Test Nation’s Character*, COLUMBUS DISPATCH, Dec. 13, 1998, at 2B, available at 1998 WLNR 7571258.

551. Editorial, *Impeach Bill Clinton*, DAILY OKLAHOMAN, Dec. 15, 1998, at 4.

rants, which is to say that they reduced their formerly free countrymen to the status of slaves. They waged wars—and not just “culture wars”—against their own people. Even the arguments against Lincoln and Johnson—though mistaken—were that they usurped authority not properly belonging to them. Clinton was not properly impeachable because there was no credible allegation that he did any such thing. Diminishment or debasement of the office may render one a bad president, unworthy of reelection or of the approbation of history. But it is not assassinateable, and therefore not impeachable—and, once again, the procedural safeguards of the Constitution led to the correct result.<sup>552</sup>

This is, however, not to suggest that “purely private” conduct by the president (if it is even truly possible for a sitting president to engage in “purely private” conduct) could never form the basis for an impeachable offense. Judge Posner offers the following hypothetical: suppose that President Clinton, “using none of the resources of his office and so being innocent of any misuse of Presidential power, had killed Monica Lewinsky with his bare hands in order to prevent her from cooperating with the Independent Counsel.”<sup>553</sup> Surely, Posner concludes, this would be impeachable, for “Americans will not be ruled by a Nero or a Caligula.”<sup>554</sup> Indeed, and it bears noting that Caligula was assassinated,<sup>555</sup> and Nero committed suicide facing assassination<sup>556</sup>—history of which the Founding generation was well aware.<sup>557</sup> In fact, even sexual misconduct could rise to the level of the assassinateable. It was the rape of Lucretia by Sextus Tarquinius, the son of the king Tarquinius Superbus, that convinced Junius Brutus and Publius Valerius to lead the revolt against the Tarquin monarchy and establish the Roman Republic,<sup>558</sup> a story that, as we have seen, was well known to

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552. See GERHARDT, *supra* note 13, at 175 (“Of those thirty-eight senators who published statements on their reasons for voting not guilty on both articles, more than half—twenty-seven—explained that they did not regard the misconduct alleged in either article of impeachment approved by the House as constituting an impeachable offense.”).

553. POSNER, *supra* note 506, at 105.

554. *Id.*

555. See GAIUS SUETONIUS TRANQUILLUS, *THE TWELVE CAESARS* 180–82 (Michael Grant ed., Robert Graves trans., Penguin Classics 2003).

556. See *id.* at 242–45.

557. See RICHARD, *supra* note 104, at 88–90 (citing numerous examples from the Founding era of references to Nero and Caligula).

558. See LIVY, *THE HISTORY OF ROME: BOOKS 1–5*, at 79–83 (Valerie M. Warrior trans., Hackett Publ’g Co. 2006).

the Founding generation.<sup>559</sup> The unbridled pursuit of personal interest by those in power is a hallmark of tyranny.<sup>560</sup> Franklin and his compatriots believed in the justness of the assassinations of Caligula and the Tarquins (and the attempted assassination of Nero), as much as they believed in the justness of the killing of Caesar and Charles. All of those cases involved aggrandizement of the office, whether for political or personal reasons. There is simply no reason to believe that Clinton's behavior did, and that is why—with the exception of a few people like Ann Coulter—it seems grossly disproportionate to even think of justifying assassination in Clinton's case. And for that reason, the Senate was right to acquit him.

### CONCLUSION

Ann Coulter was correct<sup>561</sup> that, in British law, impeachment could—and not infrequently did—carry the death penalty.<sup>562</sup> The American Constitution consciously broke with this tradition<sup>563</sup> by declaring that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”<sup>564</sup> But this change did not wholly sever the connection between impeachment and death. Under the American Constitution, impeachment is political

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559. See *supra* text accompanying notes 102–04.

560. Indeed, this helps to explain the Constitution's pairing of “Bribery” along with “Treason” and “other high Crimes and Misdemeanors” as impeachable offenses. U.S. CONST. art. II, § 4. The public official *paying* a bribe (either to voters or to other public officials) is looking to extend his influence via extra-constitutional mechanisms—much as Caesar and Buckingham had used patronage to consolidate their offices. See *supra* text accompanying notes 57, 60–61, 135, 180, 214–18. And the public official *receiving* a bribe is, in effect, announcing that the state apparatus exists to serve his personal ends. That is, he is announcing some version of, *L'état, c'est moi*. Corruption and tyranny are thus tightly linked, as republican thinkers well understood. See BAILYN, *supra* note 117, at 330 (“[I]t was obvious that the ideological origins of the American Revolution had been rooted not merely in a general fear of power but specifically in the belief that liberty could not survive where *corruptible* men wielded the apparatus of a powerful national state.” (emphasis added)); Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 182–83, 230–33 (2008) (noting that republican theory requires political actors to pursue the public good, rather than private interest).

561. See *supra* text accompanying note 505.

562. See BERGER, *supra* note 4, at 70, 82.

563. See *id.* at 58.

564. U.S. CONST. art. I, § 3, cl. 7.

death.<sup>565</sup> Indeed, it can even be political death without possibility of resurrection, should the Senate choose to exercise its authority to make disqualification to future office a penalty upon conviction. Benjamin Franklin drew attention to this link in the Philadelphia Convention, when he highlighted the role of presidential impeachability as a means of avoiding presidential assassination.<sup>566</sup>

This Article has attempted to unpack Franklin's enigmatic and provocative statement. It suggests that the Constitution maintains the link between impeachment and death insofar as assassability provides the substantive criterion for presidential impeachability. The link is severed, however, insofar as the Constitution attempts to preclude actual assassination by proceduralizing the removal of the chief magistrate. Impeachment and conviction lead to political death, *but no more*—procedure tames blood lust.

This Article looked to Caesar and Charles I to understand both the substantive criteria for, and the procedural problems with, the assassination of an “obnoxious” (to use Franklin's word) chief magistrate. It then used this analysis to develop substantive criteria for impeachment and to explain the procedural virtues of the Constitution's impeachment process, virtues that were highlighted in the correct results of the only two presidential impeachment trials in American history, and virtues that were obviously and sorely lacking in John Wilkes Booth's decision to circumvent impeachment procedures.<sup>567</sup>

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565. *But see supra* note 23 (providing a caveat).

566. *See supra* text accompanying note 1.

567. A proper appreciation for the virtues of American impeachment procedure might also lead us to be suspicious of other legal rules that have the effect of incentivizing assassination. The current presidential succession regime, in which the Speaker of the House and the President pro tempore of the Senate are third and fourth in line to the presidency, 3 U.S.C. § 19 (2006), does create such perverse incentives when the Speaker or President pro tempore is from a different party than the President. Cabinet officer succession, which would ensure party continuity, would thus both eliminate constitutional problems with the succession regime, *see generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) (answering the question posed in their title in the negative because members of Congress are not “Officer[s]” as required by Article II, Section 1, Clause 6 of the U.S. Constitution), and decrease the incentive for presidential assassination.

Of course, the current presidential succession regime *also* increases the incentives for impeachment—after all, the leaders of the impeaching and adjudicating houses move closer to the presidency if the President is removed—but the supermajority requirement for conviction makes such an impeachment

But it may perhaps be objected that the analysis presented here proves too much. Having argued that the two presidential impeachment trials rightly ended in acquittal, the question naturally arises: Would any American president have been properly impeachable on this view? Although a full analysis is beyond the scope of this Article, I submit that Richard Nixon was. The three articles of impeachment adopted by the House Judiciary Committee charged him with obstruction of justice with regard to the Watergate break-in; using federal agencies (including the FBI and the IRS) to spy on, harass, and intimidate his political enemies; and defying congressional subpoenas in the course of the impeachment inquiry.<sup>568</sup> The Watergate break-in was not some piece of petty burglary—it was a raid on the offices of the Democratic National Committee “for the purpose of securing political intelligence,” in the words of the impeachment articles.<sup>569</sup> By participating in the cover-up, Nixon made himself party to an attempt by his allies to use the levers of power to keep him in power. Likewise, the allegation that Nixon used federal agencies to go after his political enemies involved the use of power in an attempt to entrench power. Viewed this way, Nixon’s behavior has less in common with Clinton’s—despite the superficial similarity of both being charged with obstruction of justice—and more in common with the First Triumvirate’s attempts to consolidate its power<sup>570</sup> and Charles’s attempts to circumvent institutions meant to check royal power.<sup>571</sup> Nixon, like Caesar and Charles, sought to aggrandize his office, arrogating to himself new powers and using them to entrench himself in office. His vision of the presidency was too big, not too small.<sup>572</sup> Nixon’s behavior was constitution-subversive—and therefore tyrannical—in a way that neither Johnson’s nor Clinton’s was.

As we have seen, it is this conception of tyranny, arising out of the subversion of the constitution and the accompanying destruction of republican liberty, that the Founding generation

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unlikely. It would be quite difficult to muster two-thirds of the Senate for purely partisan purposes.

568. IMPEACHMENT OF RICHARD NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305 (1974).

569. *Id.* at 2.

570. *See supra* text accompanying notes 62–65.

571. *See supra* text accompanying notes 236–41.

572. Especially telling in this vein is his claim that “when the President does it, that means that it is not illegal.” *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

regarded as substantively justifying assassination. But assassination was disruptive at best and counterproductive at worst. Moreover, the Founders were deeply aware of individuals' cognitive limitations. They sought a less disruptive, more epistemically humble means of removing obnoxious chief executives than assassination, and they created one in the constitutional process of impeachment.