

COMMENT

CONGRESS AND THE PRESIDENCY AND THE IMPEACHMENT POWER

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The current political conflict between Congress and the Presidency, and in particular the attempt of various groups in Congress to invoke the constitutional impeachment power¹ against the President, have a general scientific-legal interest that quite transcends the United States. Constitutional specialists of Great Britain and the Commonwealth, from whose Cromwellian constitutional era and its then dominant Puritan thinking on government so much of late eighteenth-century American colonial folklore on government stemmed, may well be intrigued by the public yearnings of a number of academic critics of the contemporary Presidency in favour of an "English"-style parliamentary executive for the United States in place of the present presidential executive system. Among other items for speculation or query on the part of British and Commonwealth constitutional lawyers may be why the founding fathers of the American Constitution deliberately wrote in to their new constitutional charter the British parliamentary institution of impeachment just as it was falling into practical disuse (and one might say, also, into public disgrace) in the country that gave birth to it; and why, in particular, the American constitutional founding fathers included the British parliamentary institution of impeachment, but specifically excluded the companion British par-

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¹U.S. CONST. Art. II, § 4:

The President, Vice President and all civil officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

See also id. art 1, § 2 (the House of Representatives shall have the sole power of impeachment); art. I, § 3 (defining the Senate's role in cases of impeachment); art. II, § 2 (denial of presidential power to grant reprieves and pardons in impeachment cases); art. III, § 2 (denial of right to trial by jury).

liamentary institution of the bill of attainder,² though the two had tended to be used largely interchangeably in British constitutional history.

I. COMPARATIVE LAW EXCURSES ON THE CONSTITUTIONAL SEPARATION OF POWERS

Comparisons between one constitutional system and another are too often illusory, since they tend to focus too exclusively upon the verbal prescriptions in the constitutional charters-as-written, without regard to the leavening effects of actual constitutional practice. To ignore or underplay the *rôle* of developing constitutional custom or convention is to mistake the abstract constitutional law as written, or law-in-books, for the constitutional law-in-action—in Ehrlich's well-known term the constitutional "living law."³ The atavistic longings by some American senators and their supporting publicists today for an "English"-style parliamentary executive reveal themselves to be the pursuit too often of a dream that has no present-day, concrete reality—the English constitutional law-in-books of yesterday, or the day-before-yesterday, as elevated to the status of constitutional folklore by the rightly celebrated A. V. Dicey, high priest of late nineteenth-century English constitutionalism.⁴ Dicey's lipidarian constitutional maxim of the sovereignty of Parliament,⁵ taken beyond the stage of being a purely abstract juridical proposition—a legal philosopher's ideal-construct designed to provide a governmental-institutional framework and rationalisation for John Austin's early nineteenth-century definition of law⁶—is clearly untrue as a purported factual description of the constitutional law-in-action in the England even of Dicey's own special time-era. The evolution of the cabinet

²*Id.* art. I, § 9: "No Bill of Attainder or ex post facto Law shall be passed."

³E. ERLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Mill trans. 1936).

⁴A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1st ed. 1885), ran through eight editions in the first thirty years after its original publication. The eighth edition, the last to be printed in Dicey's own lifetime, had seven further printings before a ninth, posthumous edition (edited by E.C.S. Wade) was published in 1939, to remain the standard constitutional law text-book for British, British Empire, and Commonwealth law schools at the time of World War II.

⁵A.V. DICEY, *THE LAW OF THE CONSTITUTION* 39 (9th ed. 1939); E. McWHINNEY, *JUDICIAL REVIEW* 32 (4th ed. 1969).

⁶J. AUSTIN, *JURISPRUDENCE* (4th ed. 1879), is consistently cited by Dicey when he seeks to elaborate on his own concept of the sovereignty of Parliament.

system, so amply charted by Bagehot,⁷ Dicey's illustrious predecessor, had made of modern British government an executive-weighted system, even by the time Dicey was writing his first edition. This process of augmenting executive power, at the expense necessarily of legislative and even judicial power, was reinforced, strengthened, and ultimately consummated by the parallel growth and centralization of the English party system dominated by the party executive, which, in the case of the Government party, ensured domination by the Prime Minister of the day. It is the factor—not adverted to in the various accepted elaborations of the constitutional law-in-books of today—that explains in considerable measure the plebiscitarian character of British and Commonwealth elections today, and that effectively makes the British and Commonwealth Prime Minister of today, far more than the American President, a constitutional autocrat whose main limits are his own constitutional sense of self-restraint and not much more. These American constitutionalists today who perceive, in the British and Commonwealth-style parliamentary executive, a model for a weak executive in contradistinction to an American presidential executive which they see as overly strong, are, it may be suggested, merely deluding themselves. For the British and Commonwealth parliamentary executive, as law-in-action today, seems very much stronger than the American presidential executive, and there are very obvious external, objective institutional reasons for this. The most notable explanation lies in the Prime Minister's right of dissolution of the Parliament at any time⁸ and his power, thereby, to compel members of the legislature to submit themselves to fresh elections at a politically opportune time of his own choosing. The dissolution power was once merely a privilege, for whose actual invocation the Prime Minister once had to shew constitutional cause;⁹ but now it has ripened, through developing constitutional custom and convention, into a right the occasion and manner of whose use rests within the sole discretion of the Prime Minister.¹⁰

⁷W. BAGEHOT, *THE ENGLISH CONSTITUTION* (1867).

⁸Concerning the power of dissolution, see generally A.V. DICEY, *THE LAW OF THE CONSTITUTION* 432, 598 (9th ed. 1939); W. JENNINGS, *THE LAW AND THE CONSTITUTION* 82-83, 165 (3d ed. 1933); W. JENNINGS, *CABINET GOVERNMENT* 382-437 (2d ed. 1951).

⁹A.V. DICEY, *THE LAW OF THE CONSTITUTION* (9th ed. 1939); W. JENNINGS, *THE LAW AND THE CONSTITUTION* (3d ed. 1933); W. JENNINGS, *CABINET GOVERNMENT* (2d ed. 1951).

¹⁰See H. EVATT, *THE KING AND HIS DOMINION GOVERNORS* (1936). This work deals with the then Mr. Justice H.V. Evatt's pioneer study in British Empire and British Commonwealth constitutional development.

It is a salutary weapon with which a powerful executive can curb and control a recalcitrant legislature, and though it is normally only invoked in the rare political case of a minority government depending for its survival in the Parliament on the support of splinter parties, its threat is always available to the Prime Minister for use, if need be, to discipline rebels or intransigents within the Government's own party. In the unusual Commonwealth example (though not in Great Britain itself) of a genuinely operational bicameral legislative system, the Prime Minister's right of dissolution may extend, under certain circumstances, to compel fresh elections for both houses of the legislature.¹¹ For an exact American constitutional equivalent, one would have to envisage the American President as being armed with the unilateral constitutional power to dissolve both Houses of Congress and to compel all members of the House of Representatives and of the Senate to submit themselves to fresh elections at a time of the President's own choosing. Beyond that, the detailed point-by-point examination and comparison of the respective ambits of the powers of a British and Commonwealth-style Prime Minister and the American President suggest that the balance is tilted very decisively against American presidential power. Powers that a Prime Minister exercises without constitutional constraint—nomination of Cabinet Ministers, appointment of senior civil servants, Ambassadors, judges of the highest and the lowest courts, conclusion and ratification of treaties, declarations of war—are, in the case of the American Presidency, subjected to the elaborate system of built-in constitutional checks and balances, involving the interposition of countervailing legislative power, usually in the form of a requirement of legislative ratification of executive nominations¹² and sometimes legislative ratification by special, and not merely ordinary, majority.¹³

II. IMPEACHMENT: YESTERDAY, TODAY, AND TOMORROW

There are two striking paradoxes in the American Constitutional Convention's borrowing of the institution of presidential impeachment from English constitutional history. *First*, impeachment was definitely on the way out of the British constitution just as the American founding fathers were deliberating. Indeed, if the Constitutional Convention had sat only a decade later and

¹¹For an example in this regard, see COMMONWEALTH OF AUSTRALIA CONST. art. 57 (1900).

¹²See U.S. CONST. art. II, § 2.

¹³*E.g.*, the requirement of a two-thirds majority in the Senate to ratify treaties entered into by the Executive. *Id.* art. II, § 2.

its members thus been able to view at first hand the personal envy and malice directed by Warren Hastings' enemies into his impeachment trial before the British Parliament over the long wearying years from 1788 to 1795, it is possible that the Convention members might have had some sober second thoughts on the merits of impeachment as a constitutional weapon.¹⁴ Although

¹⁴Rather surprisingly, the House Judiciary Committee, in its recent appraisal of the historical contribution of the English constitutional experience to the American Constitution's impeachment provisions, has given great weight to the impeachment of Warren Hastings:

The impeachment of Warren Hastings, first attempted in 1786 and concluded in 1795, is particularly important because contemporaneous with the American Convention debates. Hastings was the first Governor-General of India. The articles indicate that Hastings was being charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India.

STAFF OF HOUSE COMM. ON THE JUDICIARY, 93RD CONG., 2D SESS., REPORT ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 7 (Comm. Print 1974) [hereinafter cited as REPORT ON GROUNDS FOR IMPEACHMENT].

It is difficult to see any positive influence that the Warren Hastings impeachment could have had on the American Constitution, concluded and adopted before the Hastings impeachment trial itself had even begun. No doubt, the House Judiciary Committee was basing its conclusions here on the sustained public campaign mounted against Warren Hastings by his implacable political enemies and notably by his long-time associate and bitter rival from the Indian colonial administration days, Philip Francis. Francis, the probable author of the vitriolic "Letters of Junius," a series of polemical attacks on late 18th-century English public figures which rank among the masterpieces of partisan political invective, had served under Hastings when the latter was Governor-General of Bengal, and seems to have occupied himself in constant political intrigues against his superior, probably in part because of frustrated personal ambition himself to be named as Governor-General. Reproached by Hastings as being "void of truth and honour," Francis demanded, and lost, a duel with pistols against Hastings and then returned to England where he managed to secure nomination to a "rotten borough," and entered Parliament in 1784. Francis then launched his impeachment campaign against Hastings, culminating in Parliament's impeachment resolution of 1787 from which the seven-year trial, from 1788 to 1795, resulted. The accusations against Hastings, however, were all rejected with the House of Lords' verdict of not guilty, rendered in 1795. Hastings himself, though financially ruined by his successful impeachment defence, received some degree of public atonement and recognition before his death, as evidenced in various honours: for example, his being invited to give expert evidence on Indian affairs before the two Houses of Parliament, and his being made a member of the Privy Council. See generally G. GLEIG, MEMOIRS OF THE LIFE OF WARREN HASTINGS (1841); A. LYALL, WARREN HASTINGS (1889); G. MALLESON, LIFE OF WARREN HASTINGS (1894); L. TROTTER, WARREN HASTINGS (1894); S. WEITZMAN, WARREN HASTINGS AND PHILLIP FRANCIS (1929). Lord Macaulay's celebrated essay on Warren Hastings, written originally as

it is usual to say that impeachment disappeared from English constitutional law because it became logically obsolete with the emergence of responsible government, it is also a fact that the informed public and governmental reaction against Warren Hastings' ordeal was so great that impeachment was only used once again in England, and that shortly thereafter, against Viscount Melville in 1806,¹⁵ though the suggestion of an impeachment was raised, briefly and ridiculously, in the case of the Foreign Secretary, Lord Palmerston, in 1848.

The second paradox in the American Constitutional Convention's borrowing of impeachment from English constitutional history for direct insertion into the American constitution is that the Constitutional Convention at the same time rejected impeachment's English constitutional analogue, the bill of attainder, with which, for all practical purposes at the significant periods in English development, it was virtually interchangeable. Thus Pym had preferred the judicial aura of impeachment proceedings against both Strafford and Laud, but he was easily persuaded to drop impeachment in favour of the more expeditious procedure (and one certainly less irksome to those carrying the burden of proof) of attainder.¹⁶ The somewhat casual and arbitrary character of

a review of Gleig's book, is to be found in T. MACAULAY, *CRITICAL AND HISTORICAL ESSAYS CONTRIBUTED TO THE EDINBURGH REVIEW* (1850).

¹⁵Raoul Berger in his study, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. CAL. L. REV. 395, 405 (1971), was surely justified in noting the purely ludicrous aspects of Lord Melville's impeachment. The alleged offence that was the subject of the impeachment was already twenty-four years old at the time of trial, and Lord Melville himself had already resigned from his Cabinet post at the time that the process was initiated against him in the House of Commons. Lord Melville was a very skillful politician who had achieved a sufficiently dominant position in regional Scottish politics to have earned the nickname "King Harry the Ninth." His impeachment probably stemmed from partisan political opposition rather than from constitutional-legal considerations as such. After his acquittal in the impeachment trial, Lord Melville was offered, but declined, advancement in nobility to the rank of Earl. See generally H. FURBER, *HENRY DUNDAS, FIRST VISCOUNT MELVILLE* (1931); C. MATHESON, *LIFE OF HENRY DUNDAS, FIRST VISCOUNT MELVILLE* (1933).

¹⁶The House Judiciary Committee, in its recent review of the English constitutional experience with impeachment, suggests that the switch by the Puritan opponents of Strafford to attainder instead of impeachment was dictated by respect for Strafford's possible eloquence in his own defence in an impeachment trial. Rather archly, the House Judiciary Committee thus chooses to pass over, sub silentio, the more obvious explanation that an attainder, if anything, could be even more open-ended and deliberately vacuous in its specifications than an impeachment count, *REPORT ON GROUNDS FOR IMPEACHMENT* 5 & n.3. Berger's study, republished by the House Judiciary

this procedural switch was salvaged by acceding to the condemned's petition to be executed by the axe and not by the ordinary brutal punishments of the time. The American Constitutional Convention, in any case, sitting a century and a half later, expressly wrote the one institution, impeachment, into the American Constitution and expressly wrote the other, the bill of attainder, out.¹⁷

However romantic it may seem to American constitutional students today, the institution of impeachment has a rather mixed history in English constitutional law. At the time of its earliest apparent origins, in the thirteenth century, it was a simpler and less honorific alternative to the ordinary method of trial for treason, namely trial by battle.¹⁸ Maitland estimated that there had been less than seventy cases of impeachment in the whole of English constitutional history, and that a full quarter of these belonged to the period 1640 to 1642.¹⁹ The judicial trappings of the whole impeachment process and the somewhat self-serving rationalizations of subsequent Puritan historians need not conceal the fact that impeachments were, in too large measure, purely vengeful acts against defeated political office-holders, and that they were too often achieved by arbitrary or colourable legal procedures that would hardly stand up against contemporary tests as to valid constitutional acts. The original impeachment counts against Strafford had, perforce, to make an ally of vagueness and reach out for formulae like "endeavouring to subvert the fundamental laws of the kingdom." But even cloudy concepts such as these

Committee, seems more straight-forward in its approach to the issue of the crucial procedural switch from impeachment to attainder in Strafford's case than that of the Committee's own staff, even though Berger himself may be perhaps unnecessarily periphrastic in his own criticisms of that switch.

Both studies published by the House Judiciary Committee, it may be suggested, suffer from the defect of being overly formalistic, or even deferential, in their approach to old English constitutional precedents, and do not sufficiently examine the legal claims and rationalizations advanced by the rival political factions—the legal superstructure—in the context of the underlying interests-conflicts from which those legal claims actually stemmed—the socio-economic infrastructure.

¹⁷U.S. CONST. art. I, § 9.

¹⁸D. MEDLEY, *ENGLISH CONSTITUTIONAL HISTORY* 164 (4th ed. 1907).

¹⁹F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 317 (1909). The House Judiciary Committee, by contrast, puts the figure somewhat higher, suggesting over 100 impeachments as having been voted by the House of Commons during the period 1620 to 1649 alone. The House Judiciary Committee concedes, however, that its statistics have been drawn largely from secondary sources, and this on account of the "paucity and ambiguity of the records" of English cases of impeachment. *REPORT ON GROUNDS FOR IMPEACHMENT* 5-6.

could not sustain public scrutiny in the case of Archbishop Laud, and on strictly pragmatic grounds the parliamentary leaders, as we have noted, therefore abruptly switched course to utilize bills of attainders in both cases.

If we follow the historical course of impeachment proceedings in England from the earliest examples in the reigns of Edward II and Richard II to the last real "modern" exercise (against Warren Hastings) near the close of the eighteenth century, we see a rather sorry succession of acts of political vengeance, not merely in the Stuart times but as late as the death of Queen Anne in 1714 when the triumphant Whig party proceeded to impeach the late Queen's Tory ministers, Oxford, Bolingbroke, and Ormond.²⁰ It is not surprising that, on the record of its application even in more modern times, the nineteenth-century historian, Medley, concluded that impeachment was "the chief means of getting rid of political opponents . . . this method of attacking [one's] enemies."²¹ Reacting to the clear fact that, in its English constitutional development and application, impeachment had become a high political act that was only colourably judicial or legal, the great English historian, Maitland, sagely concluded:

It seems highly improbable that recourse will again be had to this ancient weapon [impeachment] unless we have a time of revolution before us. If a statesman has really committed a crime then he can be tried like any other criminal: if he has been guilty of some misdoing that is not a

²⁰Berger cites the cases of the Earl of Oxford and Viscount Bolingbroke, whose impeachments were based on "giving pernicious advice to the Crown," as serving to "outline the boundaries of the phrase 'high crimes and misdemeanors' at the time the [American] Constitution was adopted." 44 S. CAL. L. REV. at 413. To say this without at the same time noting the additional fact, (well-known to British and Commonwealth constitutionalists) that the indictments and their counts against Oxford and Bolingbroke were framed by the Whig Ministers of the successor German (Hanoverian) dynasty against the former Tory Ministers of the recently dead Queen Anne, is surely to veil the casuistry and special pleading on which retroactive constitutional processes such as these rested. Even the earliest precedents cited in the Berger study—the two de la Poles, Michael in 1388 and William in 1450, *id.* at 408-09, reveal themselves, on examination, as being, rather, examples of historical bad luck—being on the wrong political side at the wrong time in the difficult century of the Yorkist-Lancastarian "War of the Roses" struggles—than scientific legal categories that can usefully serve as precedents for contemporary constitutional systems. On the de la Pole Cases, see 2 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 497 (4th ed. 1896); 3 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 149 (5th ed. 1896).

²¹D. MEDLEY, ENGLISH CONSTITUTIONAL HISTORY 167 (4th ed. 1907).

crime, it seems far better that it should go unpunished than that new law should be invented for the occasion; and that by a tribunal of politicians and partisans.²²

Looking to the incorporation of the old English institution of impeachment into the American Constitution at the end of the eighteenth century, it is difficult to avoid the conclusion that the American founding fathers either had only passing or superficial acquaintance with its detailed English constitutional record or else were overly impressed or misled by the English Puritan apologists' special pleadings in behalf of their own side of the seventeenth-century English constitutional contest between executive and legislature and, to get down to bed-rock, in behalf of their own side in the underlying economic struggle between the entrenched hereditary aristocracy and the emerging landed proprietor class.

The task of the constitutionalist is always, of course, to try to give new meaning to old constitutional forms and institutions in ways that attempt to harmonize them with contemporary general national constitutional practice and received traditions. There are obviously two main courses open in regard to the impeachment institution in American constitutional law today. First, it can be argued on the basis of its original English historical development over the five centuries of its actual use in English constitutional law, that the impeachment process is a high political act, a decisional framework turning upon political considerations and not on law. But the consequence of recognizing the essentially political aspects of an impeachment process would seem to be an obligation of public candour, involving the dropping of any implication that it is a "judicial" process or that the actual decision in the process would turn on "legal" considerations, involving, for example, the proper discharge of the normal burden of proof resting on the prosecution in a criminal case. Logically, this would seem to suggest also the transfer of jurisdiction as to impeachment processes from the House Judiciary Committee to some more frankly and avowedly political Committee of the House. No doubt, under these circumstances, impeachment would become politically easier to bring about; but it would be achieved openly and through the political processes, and without any vicarious prestige coming from a false invocation of the judicial mystique, as happened, for example, in the English political impeachments of the seventeenth and eighteenth centuries.

²²F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 477 (1909).

The second main course open in regard to impeachment, in its post-1787 *rôle* as a received-English element in the American Constitution, is to insist upon justicializing it more than ever, and in a way that tries honestly to eliminate the casual arbitrariness that pervaded its high political use in old English constitutional history. On this view, while the House Judiciary Committee would certainly be the only appropriate organ to initiate and carry forward the preliminary examination of impeachment grounds, the definition that the House Judiciary Committee itself has just released as to the legal basis for impeachment seems unacceptable in the light of continuing, post-1787 American constitutional traditions and practice. To say that a President is open to impeachment for "constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself"²³ is to offer an essentially self-defining test, quite as open-ended as any of the high political indictments offered up by the temporarily successful English constitutional factions in the great partisan battles of the fourteenth and seventeenth centuries. In American constitutional terms, it might be suggested that you could drive a horse and cart through the House Judiciary Committee's current essay at definition of impeachment, and that that definition would normally offend against even fifth amendment due process ("vagueness") standards as defined by the United States Supreme Court in recent decisions.²⁴ Why not, for example, try to reach acts that are "deserving of punishment according to the healthy public sentiment of the people," to cite the celebrated amendment to the German Criminal Code, inserted by the Nazi regime in 1935;²⁵ or why not, for that matter, adopt the even more comprehensive and all-embracing category of Stalinist-era Soviet criminal law, which proscribed all "socially dangerous acts or omissions?"²⁶ Rather than try to write into American constitutional law formless categories that one might come to regret in other, politically calmer times, or that could return to haunt later Presidents, the solution, in present-day

²³REPORT ON GROUNDS FOR IMPEACHMENT 26.

²⁴The elements of the due process doctrine of vagueness have been developed in a large body of Supreme Court precedent. The cases are categorized in, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). See also Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

²⁵Gesetz zur Änderung des Strafgesetzbuchs vom, (Law of June 28, 1935), [1935] RGBI. I 839.

²⁶RSFSR art. VI (1926). See also J. HAZARD, *LAW AND SOCIAL CHANGE IN THE U.S.S.R.* ch. 4 (1953); J. HAZARD, I. SHAPIRO & P. MAGGS, *THE SOVIET LEGAL SYSTEM* ch. 9 (1969).

terms, would seem to be to have the matter returned to the House Judiciary Committee with instructions to develop some more precisely and rigorously defined counts, rooted in strictly juridical terms and, thus, more in keeping with the precedents of American constitutional law as developed and interpreted by the United States Supreme Court in modern times.

III. INSTITUTIONAL REFORM:

THE PRESIDENCY, CONGRESS, AND THE SUPREME COURT

The separation of powers under the American Constitution has never been a static thing, with the relationship between the three main institutions—the Presidency, Congress, and the Supreme Court—jelled once and for all in some bygone age. Instead, these three institutions show a shifting pattern of relationships *inter se*, with sometimes one institution being dominant in its relation to the other institutions, and sometimes the others in their turn. Thus, we see the movement from strong Supreme Court to strong President to strong Congress in the progression from a dominant, conservative “Old Court” majority, to a strong Presidential authority under President Franklin Roosevelt, particularly after his reelection to a second term and the resultant “Court Revolution” of 1937; and then the further progression from a strong Presidency to a strong Congress with the beginnings of a resurgence of Congress under the Truman Presidency and with Congress’ assumption of a paramount decision-making *rôle* under the Eisenhower Presidency. Perhaps we can see a similar cyclical swing in operation in the period of renewed strong presidential authority under the Kennedy, Johnson, and first Nixon administrations, followed by a newly revived and aggressive Congress in the second Nixon administration.

Suggestions for constitutional change in the direction of permanently tilting the balance of governmental powers in favour of one or other main institution—whether the Presidency, Congress, or the Court—have to be viewed in terms of their long-range, as well as their immediate and short-range, constitutional implications. There is a danger in ad hoc responses to particular political problems of the day, that seek to postulate general or universal constitutional principles as the solvents for those short-range problems. The twenty-second amendment to the American Constitution looks, in historical retrospect, too much like an act of retroactive political vengeance against President Roosevelt, and bad constitutional law in the process—very much like closing the barn door after the horse has bolted. Those who railed against a strong Supreme Court when it was dominated by the con-

servative-leaning "Old Court" majority perhaps changed their constitutional-institutional principles too easily when they espoused the cause of judicial policy-making in the subsequent period of the liberal, activist Court majority of the Roosevelt-Truman eras. The current, once again seemingly conservative-leaning majority has brought a further reshuffling of ranks among constitutionalists as to the merits of judicial policy-making and of a strong, activist Supreme Court, whether liberal activist or conservative activist. It may be suggested that constitutional-institutional positions that are subject to such a remarkable *volte face* in so short a period of time begin to look suspiciously like constitutional special pleading.²⁷

There is little doubt that any revival of the presidential impeachment power in the United States, a century after its one great and unfortunate use against President Andrew Johnson, would, whatever its result, seriously weaken the institution of the Presidency and tilt the balance of governmental powers under the Constitution decisively, and perhaps permanently, in favour of Congress. The actual decision whether or not to invoke the presidential impeachment power should be viewed not merely in relation to the potential role of the impeachment process as a remedy—one remedy among a number of remedies—for correcting current claimed evils in the office of the Presidency, but also in terms of the future orientation and direction that one wishes to give to the system of government as a whole. The decision to impeach or not to impeach must therefore be approached soberly, and not rhetorically. A reduced or diminished Presidency with the inter-institutional balance shifted substantially in the direction of Congress, could be approached by other means, for example, by strengthening the countervailing institution, Congress, through extending the term of Congressmen, the two-year term for members of the House of Representatives being, by all comparative law counts, unnecessarily, even absurdly, short. Another method, clearly, is to expand even further the Congressional investigatory *rôle*,²⁸ and perhaps to develop an independent, permanent govern-

²⁷By contrast, however, Arthur M. Schlesinger's current *mea culpa* in regard to his earlier publicist role in support of strong presidential executives—Jackson, Franklin Roosevelt, and Kennedy—seems a genuine latter-day expression of regret for earlier partisan enthusiasm, though it may be submitted that Professor Schlesinger's compensating reaction today, against the Presidency and in favour of congressional power, is itself an overreaction. See generally A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 377 *et seq.* (1973).

²⁸Note here the enormous expansion of the congressional investigatory power, as constitutional law-in-action, since the original narrow judicial

mental investigatory function based in the Department of Justice itself, somewhat along the lines of the Soviet and East European Procuracy.²⁹ The more direct approaches to reducing the Presidency by reducing the powers and privileges of the office—for example, by limiting Presidents to a single term³⁰—seem, from a distance, to be institutional overreactions to the particular problems of a particular Presidency. “English”-style solutions, such as introducing into the Constitution a formal motion of no-confidence in the President, to be initiated by Congress, seem, at best, superficial and unscientific, since based on a misunderstanding, on the part of their sponsors, of the nature and character of no-confidence motions in British and Commonwealth constitutional law-in-action. Long-range, and in the light of the very real legal disabilities inhering in the office of the American President in comparison to other Western executives, and having regard to the far greater political, military, and economic responsibilities of the American Presidency in comparison to those other executives, it is difficult to avoid the conclusion that the more persuasive constitutional argument today is for a further strengthening of the American Presidency rather than for a weakening of it. Perhaps the question of a presidential power of dissolution of both houses of Congress should be examined at the same time as current proposals for the attenuation of presidential prerogatives.³¹ In any case, it should never be forgotten that the foremost victims of any reduction in the office of the Presidency are likely to be the “strong” Presidents of the future who will, like Presidents Roosevelt, Truman, and Kennedy before them, seek to fill any gaps in constitutional authority by legislating boldly in cases of urgent national need hardly envisaged by the original founding fathers of the Constitution.

IV. POSTSCRIPT: “THE BATTLE OF THE BOOKS”

In a study published in February, 1974, James D. St. Clair and his associates, as attorneys for the President, contended that the United States constitutional power as to impeachment extends only to indictable crimes and cannot be applied to purely “political” acts of the President:

definitions of its limits in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), and *McGrain v. Daugherty*, 273 U.S. 135 (1927).

²⁹H. BERMAN, *JUSTICE IN THE U.S.S.R.* 238 *et seq.* (rev. ed. 1963); G. MORGAN, *SOVIET ADMINISTRATIVE LEGALITY* (1962).

³⁰See A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 386-89 (1973).

³¹*Id.* at 413.

It is clear from the context of the constitutional commitment to due process that the Framers [of the United States Constitution] rejected the political impeachments. They included in the impeachment provisions the very safeguards that had not been present in the English practices. They narrowly defined the grounds for impeachment, required various procedural safeguards and eliminated the non-legal processes like bills of attainder and address that had worked hand-in-hand with the English political impeachments. . . .

The English precedents clearly demonstrate the criminal nature and origin of the impeachment process. The Framers adopted the general criminal meaning and language of those impeachments, while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain absolute political supremacy at the expense of the rule of law. . . . Thus the evidence is conclusive on all points; a President may only be impeached for indictable crimes. That is the lesson of history, logic, and experience on the phrase "Treason, Bribery and other high Crimes and Misdemeanors."³²

In an article published in the *Yale Law Journal*,³³ highlighted by a plethora of homely, if not always relevant-seeming aphorisms, and by a prodigal recourse to Bartlett's *Familiar Quotations*,³⁴ as well as by the author's penchant for pejorative, *ad hominem*-

³²J. ST. CLAIR, J. CHESTER, M. STERLACCI, J. MURPHY, & L. SMITH, AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT (SUMMARY) 1-2, 6 (1974) [hereinafter cited as ST. CLAIR].

³³Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111 (1974).

³⁴*E.g.*, "When the client proclaims that he will 'fight like hell' to balk impeachment it may be expected that his lawyer will follow suit." *Id.* at 1137. "[D]efense lawyers are notoriously not the best source of constitutional history . . ." *Id.* "[A]s J. R. Wiggins said, . . . 'History thereafter may become what lawyers mistakenly said it was therefore.' 'Legal history,' said Justice Frankfurter, 'still has its claim.'" *Id.* at 1137-38 (footnotes omitted). "Constitutional analysis need not depart from common sense . . ." *Id.* at 1143 (footnote omitted). "Shades of the dissolute Duke of Buckingham!" *Id.* at 1152. "Mr. St. Clair's reading of history underlines anew the wisdom of Pope's injunction—'Drink deep, or taste not the Pierian spring.'" *Id.* at 1153. "'Historical reconstruction,' said a distinguished English historian, Sir Herbert Butterfield, 'must at least account for the evidence that is discrepant, and must explain how the rejected testimony came to exist.'" *Id.* at 1155 (footnote omitted). "Judges too require lawyers to meet the arguments of opposing counsel." *Id.* "An 'acquittal so obtained,' said Macaulay, 'cannot be pleaded in bar of the judgment of history.'" *Id.* (footnote omitted).

style argumentation,³⁵ Raoul Berger attacked what he characterises as "Mr. St. Clair's 'Instant History.'" ³⁶ And so we have a fresh joinder of issue as to the meaning today of the power of impeachment in the United States Constitution.

The St. Clair thesis, which seems to essay to apply contemporary American legal realist techniques to seventeenth century English constitutional history—the most used, or abused, historical source for the late eighteenth century American constitutional drafters—would see a two-way distinction between *criminal im-*

³⁵*E.g.*, "[T]he [St. Clair] memorandum is but 'lawyer's history,' a pastiche of selected snippets and half-truths, exhibiting a resolute disregard of adverse facts, and simply designed to serve the best interests of a client rather than faithfully to represent history as it actually was." *Id.* at 1137. "The value of such 'history' is illuminated . . ." *Id.* at 1137 n.142. "Mr. St. Clair muddies the waters . . ." *Id.* at 1148. "This is a hair raising description [by Mr. St. Clair] . . ." *Id.* at 1152. "Mr. St. Clair's conclusion . . . reveals unfamiliarity . . ." *Id.* "Let me close with a few additional examples of discriminatory selectivity . . ." *Id.* at 1153. "Throughout, Mr. St. Clair plays a tattoo . . ." *Id.* "To ignore these statements while concentrating attention on 'bribery' is to deal in halftruths and to stray from candor." *Id.* at 1154.

Enough has been set out to expose Mr. St. Clair's cavalier treatment of history; and though it is tempting to invoke the Latin maxim, so often applied by the courts—false in one thing, false in everything—I prefer rather to forego analysis of the rest of the 61-page St. Clair memorandum in order to spare the reader a needlessly wearisome and tedious journey. Against this background it is sheer effrontery to say, as does Mr. St. Clair

Id. "In conclusion, Mr. St. Clair has resolutely closed his eyes to adverse facts throughout . . ." *Id.* "When Mr. St. Clair . . . wraps himself in the cloak of pseudo-history, he lays himself open to the suspicion that he is not so much engaged in honest reconstruction of history as in propaganda . . ." *Id.* at 1155.

What is perhaps surprising in all this is not Mr. Berger's resort to Swiftian-style invective, but that the student editors of the *Yale Law Journal* should regard the time of the present constitutional "Great Debate" as ripe for a departure from their usual strict practice of excluding editorializing or recourse to personalities in scientific-legal publications.

³⁶*Id.* at 1137. Mr. Berger may be, perhaps, a little arch in his protestations as to the scholarly detachment of his own writings and published opinions from the exigent here-and-now of current Watergate-era partisanship when he describes his own works as "[c]omposed in the quiet of a university, uninfluenced by fees or hopes of preferment . . ." *Id.* at 1138. His first study, *supra* note 15, was certainly prepared before the Watergate affair, being directed towards an earlier American-conservative-liberal skirmish over Mr. Justice Douglas of the Supreme Court; the later public statements by Mr. Berger on the impeachment issue can hardly claim the benefit of any a priori absolution from "partisan bias." Berger, *supra* note 33, at 1138.

peachments directed essentially against criminal misfeasance in public office and *political* impeachments in which the criminal processes as to impeachment, as developed from mediaeval times, were applied by one partisan group of the two rival groups in the great English political struggles of the seventeenth century to get rid as expeditiously and as finally as possible of their political enemies—in effect, and in ultra-realist fashion, a sort of seventeenth century English-style “lynch law.” By contrast, Mr. Berger’s interpretation of the same seventeenth century English constitutional history is somewhat more romantic and tends to see those events in rather more categorical, black and white terms. It accepts, essentially, the Parliamentary forces and their historical apologists’ version of what was, after all, a complex struggle between rival socio-economic forces in a rapidly changing England, already on the threshold of Empire.

Neither historical approach, it may be suggested—the American legal realist competing interests-based mode of analysis, nor the neoromantic “children of light *versus* children of darkness” conception—is fully accurate, a fact perhaps explained in part by the two main protagonists’ evident lack of full familiarity with that alien (English) constitutional history of an earlier century that they are, as contemporary American scholars, attempting to interpret to guide the solution of contemporary American problems. Thus, for example, Mr. St. Clair argues: “The pardon power is explicitly excluded for [United States] impeachment convictions. These extensive limits can only be understood as a reaction to and rejection of the English political impeachments.”³⁷ Mr. Berger, however, joins issue with Mr. St. Clair, on this point:

The exclusion proves exactly the contrary: The fact that a pardon *can not* save one convicted on impeachment shows an intention to *preserve* impeachments of whatever nature. The exception for pardons derived from English history and practice, when the pardon of the Earl of Danby by Charles II, after his impeachment, blew up a storm. As a result, the Act of Settlement fashioned a partial bar to such pardons; and a remark by George Nicholas in the Virginia Ratification Convention shows that the Founders were aware of this history: “Few ministers will ever run the risk of being impeached, when they know the King cannot protect them by a pardon.”³⁸

³⁷ST. CLAIR, *supra* note 31, at 16.

³⁸Berger, *supra* note 33, at 1151 n.221.

In fact both Mr. St. Clair and Mr. Berger appear a little wide of the mark on this point,³⁹ no doubt because of over-hasty delving into seventeenth-century English constitutional history imposed by the time imperatives of their comparative legal research. The English kings could always legally pardon *after* conviction on impeachment or adoption of a bill of attainder; however, for political reasons, they might choose not to do so. Charles I had promised Strafford, "upon the word of a King," that he would not let him suffer; but the public pressures against the King, after the House of Commons and the House of Lords had passed the bill of attainder, were so intense that Strafford, in a gesture that, even three centuries later, seems of extraordinary nobility and grace, wrote to Charles, releasing him from that promise. Charles, nevertheless, hesitated for two days to sign Strafford's death warrant. Only quite extraordinary pressures such as the threat by the Constable of the Tower that if the King continued to be obstinate and refused to sign the death warrant, he would personally kill his prisoner, Strafford, and threats reaching Whitehall that the lives of the Queen and even of the royal children were in danger, persuaded Charles to give way and to assent to what, eight years later on the day of his own execution, he regretted as an "unjust sentence."⁴⁰ Cardinal Richelieu, the King of France's chief minister, on hearing of the execution of Strafford, his arch political and diplomatic foe, decided that the English were mad—"they have killed their wisest man."⁴¹ Charles I's failure to act to pardon Strafford *after* his attainder should not disguise the fact that royal pardon *after* attainder or impeachment was always perfectly legal and was in fact employed as late as 1715 when three of the Lords involved in the Stuart "Old Pretender's" unsuccessful, Jacobite restoration rebellion were granted royal pardons after they had been impeached, found guilty, and sentenced.⁴²

The whole point in the English constitutional-historical debate as to the effect of a royal pardon on impeachment relates to the legal effect, if any, of a pardon granted *before* impeachment. In

³⁹See U.S. CONST. art. II, § 2, which states: "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

⁴⁰C. HIBBERT, CHARLES I 156-57, 279 (1968). See also S. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF CIVIL WAR, 1603-42 (1883); R. BROWNING, LIFE OF STRAFFORD (1892); PAPERS RELATING TO THOMAS WENTWORTH (C. Firth ed. 1890).

⁴¹C. HIBBERT, *supra* note 40, at 157.

⁴²F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 318, 480 (1909).

the Earl of Danby's case in 1679,⁴³ a *prior* royal pardon was pleaded in bar of an impeachment. The constitutional-legal question as to the effect of the pardon was raised but not decided, for Danby, though committed to the Tower, remained there untried until his release five years later in 1684. The question of law was, as Maitland observed,

a very new point, and on general principles I am far from being satisfied that the [House of] Commons had the best of the argument. The question would seem to be whether an impeachment was more analogous to an indictment, which could always be stopped by the King's pardon, or to an appeal of felony which being regarded as a private suit, was beyond the royal power.⁴⁴

Maitland's own conclusion was that, as the law stood at the time of, and after, Danby's case, an impeachment could be prevented by a pardon.⁴⁵ The Act of Settlement of 1700 changed the law but, again, it changed the law as to the effect of pardons *before* or *during* impeachment.⁴⁶ The Act of Settlement left unchanged the royal power to pardon *after* conviction or impeachment.⁴⁷

In reaching into seventeenth century English constitutional history, as a guide to the implications of the United States constitution's stipulation as to the President's "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,"⁴⁸ Mr. St. Clair and Mr. Berger illustrate

⁴³*Id.* at 310; D. MEDLEY, ENGLISH CONSTITUTIONAL HISTORY 167 (4th ed. 1907); MEMOIRS RELATING TO THE IMPEACHMENT OF THOMAS EARL OF DANBY IN THE YEAR 1678 (1710).

⁴⁴F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 318 (1909).

⁴⁵*Id.* at 480; D. MEDLEY, ENGLISH CONSTITUTIONAL HISTORY 108 (4th ed. 1907).

⁴⁶"That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament." The Act of Settlement, 12 & 13 Will. 3, c.3 (1700).

⁴⁷Incidentally, Danby, after his release, untried, from the Tower in 1684, lived in political retirement for the last of Charles II's reign, but then took an active part in the conspiracy against Charles' younger brother and successor, James II, and thereby returned to power after the "Glorious Revolution" of 1688, under James' successors, William and Mary, surviving to face yet another impeachment in 1695 for alleged corruption in the affairs of the East India Company. The impeachment process was voted but never brought to trial. See generally A. BROWNING, THOMAS OSBORNE, EARL OF DANBY AND DUKE OF LEEDS (3 vols. 1944, 19— & 1951).

⁴⁸U.S. CONST. art. II, § 2.

once again the pitfalls that can be inherent in the comparative approach to law when the recourse to the comparative method is based on partial or incomplete study of the foreign law system selected as a guide to one's own, and, in particular, when that study is limited to the abstract positive law categories, unaccompanied by any canvassing, in depth, of the underlying complex of social interests from which the formal legal claims of the contending parties stemmed.⁴⁹ The lesson would seem to be that contemporary American legislative majorities must give their own contemporary meaning to the constitutional impeachment power, basing their interpretations on American precedents and on American constitutional traditions as they have evolved over the years since 1787. Just as the old mediaeval impeachment power had effectively lapsed into constitutional desuetude in English law by the opening of the nineteenth century, with the emergence of responsible, democratic government in England and with the informed English reaction against the wholly "political" impeachments operating under the guise of legal process, so the constitutional ambit of the American impeachment power today and, in particular, the question whether it can be construed broadly so as to permit "political" trials or whether, by contrast, it is to be construed narrowly and with proper regard to due process and the prosecution's discharge of a burden of legal proof, must be determined according to the received meaning today of a government operating under the rule of law, and in the light of the distinctively American principle that it is to be a "Government of Laws and not of Men." The notion that a temporary legislative majority or coalition in Congress could write its own, and no doubt temporary, "political" standards into the impeachment power—however much historical support it may seem to claim from long-abandoned English Parliamentary precedents of a pre-democratic era in English political development—would seem, in this regard, to be inconsonant with that principle.

⁴⁹See McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 *YALE L.J.* 915 (1952); Rozmaryn, *La règle de la légalité*, 10 *REVUE INTERNATIONALE DE DROIT COMPARE* 70 (1958); Yntema, *Comparative Legal Studies and the Mission of the American Law School*, 17 *LA. L. REV.* 538 (1957).