

THE TRIAL OF CHARLES I: A SESQUICENTENNIAL REFLECTION

*Louis J. Sirico, Jr.**

I. INTRODUCTION

On July 20, 1787, deputies to the Constitutional Convention debated whether the national executive should be "removeable on impeachment and conviction for malpractice or neglect of duty."¹ Some, like Gouverneur Morris of Pennsylvania, argued against impeachment: "Besides, who is to impeach? Is the impeachment to suspend his function. [sic] If it is not the mischief will go on. If it is the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach."²

Benjamin Franklin argued that impeachment benefited the executive: "History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out [against] this as unconstitutional."³ Franklin pointed out that the alternative had a drawback: "What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character."⁴ Impeachment thus would benefit both the citizen and the executive: "It [would] be the best way there-

* Professor, Villanova University, School of Law.

1. See James Madison, *Notes of Debates in the Federal Convention of 1787*, reprinted in Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* at 64 (Yale U. Press, 1911) ("Notes"). The deputies to the Convention had yet to settle on the final language or even on the title of "President." The Constitution makes the chief executive impeachable for "treason, bribery, or other high crimes and misdemeanors." U.S. Const., Art. II, § 4. The Framers did not discuss lesser penalties such as censure.

2. *Notes* at 64-65 (cited in note 1).

3. *Id.* at 65.

4. *Id.*

fore 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.”⁵

In referring to “the only first Magistrate brought to public justice,” Franklin alluded to Charles I of England, the second Stuart king, who, in 1649, was tried and sentenced to beheading.⁶ Franklin could not have supported his argument with a more inappropriate illustration. Charles confronted a High Court of Justice that the House of Commons had created to issue a predetermined verdict. When the King appeared before the High Court, he could not present his defense. By Franklin’s time, English legal authorities had long since agreed that Charles was the victim of murder.⁷

The hindsight of three hundred fifty years inevitably leads us to reflect on the subsequent reign of Oliver Cromwell, the Restoration of Charles II, and the Glorious Revolution of 1688, which ended the Stuart line and established parliamentary supremacy. However, a narrower focus on Charles’s trial and beheading is sufficient to teach us lessons on two subjects: first, how lawlessness seeks to impersonate the rule of law, and, second, as Gouverneur Morris recognized, how excessive power in one branch of government can destabilize a political system and even destroy it.

II. THE HISTORICAL BACKGROUND

A friend once described Charles as a very bad king, but a very good martyr.⁸ Like his father, James I, he believed

5. *Id.*

6. Because England had yet to adopt the Gregorian calendar, the English would have dated Charles’s execution January 30, 1648. Under the Gregorian calendar, which enjoyed wide use in Europe, the date was February 9, 1649. Today, the English date the event as January 30, 1649. See C.V. Wedgwood, *A Coffin for King Charles* 264 (Macmillan Co., 1964) (published in Great Britain with minor revisions and different pagination as *The Trial of Charles I* (Penguin Books, 1983)). Despite the unfortunate title, Dame Veronica Wedgwood’s book offers the best detailed narrative on Charles’s latter days.

7. See F.W. Maitland, *The Constitutional History of England* 282 (Cambridge U. Press, 1908).

8. The brief history that I recount is uncontroversial. Recent historical narratives include Charles Carlton, *Charles I: The Personal Monarch* (Routledge & Kegan Paul, 1983); Kevin Sharpe, *The Personal Rule of Charles I* (Yale U. Press, 1992); and Michael

in the divine right of kings. This position aggravated his continuing conflicts with parliaments increasingly dominated by the Puritans. After four disastrous parliaments, Charles ruled for eleven years without calling another. During this interim, he managed to heighten his unpopularity. Not only did he support Archbishop Laud in imposing high church uniformity on religious observances, he also raised revenues by exacting duties and dues without calling Parliament.

The cost of Charles's war against Scotland finally forced him to summon Parliament. The House of Commons was uncooperative, and Charles quickly dissolved it. The increasing financial demands of the war soon compelled him to call another Parliament and make numerous concessions concerning his prerogatives and methods of governance. Nonetheless, conflict continued and reached a climax when Charles sent armed men into the House of Commons to arrest the five members most hostile to him.

By 1642, Charles and Parliament had begun a civil war, which ended in Charles's defeat. Numerous attempts to reach a negotiated settlement failed. The army now controlled Parliament and successfully insisted on trying the King for treason. As planned, Charles was convicted. On the scaffold, he delivered a stirring speech declaring that his loyalty to the rule of law made him the martyr of the people. This oft-quoted excerpt sums up his position and demonstrates his appeal to his supporters:

For the people—and truly I desire their liberty and freedom as much as anybody whomsoever—but I must tell you that their liberty and their freedom consists in having of government those laws by which their life and their goods may be most their own. It is not for having share in government, sirs;

B. Young, *Charles I* (St. Martin's Press, 1997). A recent documentary history of Charles's last days is David Iagomarsino and Charles J. Wood, eds., *The Trial of Charles I: A Documentary History* (U. Press of New England, 1989). For a review of modern scholarship on Charles's reign, see Young, *Charles I* at 1-13.

Some historians blame Charles's character defects for his failure as king. See, e.g., Sharpe, *The Personal Rule of Charles I* at 954; Young, *Charles I* at 180. Others blame the English Civil War on socio-economic transformations in English society that resulted in a class war. See, e.g., Christopher Hill, *The English Revolution: 1640* at 11, 65-67 (Lawrence & Wishart, 3d ed. 1985). Still others blame it on an institutional breakdown of administration by both the Crown and Parliament. See, e.g., Conrad Russell, *Parliaments and English Politics: 1621-1629* at 423 (Clarendon Press, 1979). Others place the blame on factional and irresponsible parliaments. See, e.g., J.P. Kenyon, *Stuart England* 44-46, 84-85, 97, 107 (Allen Lane, 1978).

that is nothing pertaining to them. A subject and a sovereign are clean different things. And therefore until they do that—I mean, that you do put the people in that liberty as I say—certainly they will never enjoy themselves. Sirs, it was for this that now I am come here. If I would have given way to an arbitrary way for to have all laws changed according to the power of the sword, I needed not to have come here. And therefore I tell you—and I pray God it be not laid to your charge—that I am the martyr of the people.⁹

Charles's death marked the beginning of the eleven-year Interregnum in which Oliver Cromwell ruled as Lord Protector. After Cromwell's death, England turned to Charles's son and acknowledged him as Charles II. The exhumed heads of Cromwell, his son-in law, and the High Court's President were placed on public display atop Westminster Hall. The anniversary of Charles's execution became a date of commemoration on the liturgical calendar of the Anglican Church.¹⁰

III. LAW AND LAWLESSNESS

For the period surrounding the trial, the most powerful theme is the exaltation of form over substance: The army and its Puritan allies believed they could not execute Charles without appearing to follow acceptable legal procedure.

The very idea of trying a king must have appalled English citizens. The concerns that Gouverneur Morris raised in 1787 about impeaching an American executive also plagued them—and with a far greater intensity. They

9. Iagomarsino and Wood, *The Trial of Charles I* at 142 (cited in note 8).

10. Charles was the only post-Reformation figure that the Book of Common Prayer recognized as a saint. It is not surprising that John Keble, a founder of the Anglo-Catholic Oxford Movement, would agree that Charles was a martyr who sacrificed his life rather than compromise the faith and order of the Anglican Church. See Geoffrey Rowell, *The Vision Glorious: Themes and Personalities of the Catholic Revival in Anglicanism* 22 (Oxford U. Press, 1983). In 1831 he commemorated Charles's death by preaching that "it must ever seem quite as natural, that the Church of England should keep this day, as it is that Christ's universal Church should keep the day of St. Stephen's martyrdom." *Id.* (quoting John Keble, *Sermons, Academic and Occasional* (J.H. Parker, 1847)).

Queen Victoria, who did not care for Charles, removed the commemoration day from the Calendar of the Book of Common Prayer. See O.C. Edwards, Jr., *Anglican Pastoral Tradition*, in Stephen Sykes and John Booty, eds., *The Study of Anglicanism* 343 (Fortress Press, 1988). Her action prompted the founding of the Society of King Charles the Martyr, which promotes the commemoration of the date of his death.

were contemplating impeaching not just the constitutional head of government,¹¹ but also a hereditary monarch, who, some believed, could heal with his touch.¹² The Cromwellians tried to overcome objections by disposing of the King through the formal legal process of a trial.

In putting Charles on trial, the Cromwellians knew that, at the least, they were exploring the outer limits of the established legal system. Thus, a great many of those appointed to the High Court were unwilling to serve.¹³ Even before the trial, the Cromwellians were uncertain what course to take if Charles challenged the High Court's jurisdiction over him, as he did.¹⁴

The importance of the appearance of legality is, in itself, remarkable. At the time of these events, the House of Commons contained no Royalists, and the Presbyterian members declined to go along with the Cromwellians in bringing Charles to trial. The army responded by purging the Presbyterians from Parliament and imprisoning forty-one of them. Now Commons could legally pass the ordinance ordering the trial.¹⁵

When the House of Lords refused to consent to a trial, Commons decided that it could act unilaterally. It unanimously declared that as representative of the people, it had

11. Britain, of course, has an unwritten constitution, that is, an accepted political order, which like other constitutions, changes over time. As Kermit Hall has written, "the British constitution was a collection of documents—Magna Carta, the Bill of Rights, and the Act of Supremacy, for example—as well as customary practices that had historically limited the government's exercise of arbitrary power." Kermit L. Hall, *The Magic Mirror: Law in American History* 51 (Oxford U. Press, 1989). As Russell Kirk has intimated, a successful written constitution and an unwritten one enjoy more similarities than differences:

Constitutions are something more than lines written upon parchment. When a written constitution endures, and most of them don't endure very long, that document has been derived successfully from long established customs, beliefs, statutes, and interests, and has reflected a political order already accepted, tacitly at least, by the dominant element among the people. Constitutions, in short, are not invented; they grow. . . . A constitution without deep roots is no true constitution at all, and it will not endure.

Russell A. Kirk, *The Conservative Tradition*, in Kenneth W. Thompson, ed., *The Political Theory of the Constitution* 40 (U. Press of America, 1990).

12. See Wedgwood, *A Coffin for King Charles* at 10, 68 (cited in note 6).

13. See Iagomarsino and Wood, *The Trial of Charles I* at 42 (cited in note 8) (the High Court issued warrants summoning absent court commissioners); Wedgwood, *A Coffin for King Charles* at 104-13 (cited in note 6) (noting poor attendance and the defection of several prominent individuals).

14. See Wedgwood, *A Coffin for King Charles* at 105, 139, 150-51 (cited in note 6).

15. See Iagomarsino and Wood, *The Trial of Charles I* at 14-15 (cited in note 8); Wedgwood, *A Coffin for King Charles* at 38-43 (cited in note 6).

the supreme power and could make law without the consent or concurrence of the King or House of Lords.¹⁶ Trying Charles required that Commons create and staff a special High Court. Initially, the highest ranking judicial figures in England were to preside over the High Court: the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.¹⁷ When they declined, the position went to John Bradshaw, an undistinguished jurist sitting in Chester and Wales.¹⁸ When the Attorney General pleaded illness, the job of prosecution fell to John Cook, an obscure lawyer.¹⁹ The High Court's key positions were thus staffed by relatively unknown lawyers, but lawyers nonetheless.

The High Court even tried to create an aura of legitimacy by the way it designed its trappings. A committee of the Court took care in selecting gowns for the court officers, determining the ceremonial protocol, and arranging for a mace and a sword to precede the Lord President into court.²⁰ On the clerks's table lay a copy of the charge and the mace and sword crossing one another.²¹

What make the story more than the tale of a kangaroo court are the sincerity of the regicides and the personality of the King. Charles played to the ultimate jury of history and emerged victorious. The King challenged the High Court's jurisdiction and refused to plead. The High Court could not cope with this anticipated claim other than to insist repeatedly that it had jurisdiction and that Charles should answer the substantive charge. On three occasions,

16. See Iagomarsino and Wood, *The Trial of Charles I* at 22-23 (cited in note 8).

17. *Id.* at 36.

18. See *id.* at 37. For a portrait and thumbnail biography, see *id.* at 36.

19. For a portrait and thumbnail biography, see *id.* at 88.

20. See *id.* at 43. Here is a description of the beginning of the first day of trial (January 20, 1649):

On Saturday . . . the Lord President of the High Court of Justice with near four score of the members of the said court, having sixteen gentlemen with partizans and a Sword and a Mace with their and other officers of the said court marching before them, came to the place ordered to be prepared for their sitting at the west end of the Great Hall at Westminster, where the Lord President in a crimson velvet chair fixed in the midst of the court placed himself, having a desk with a crimson velvet cushion before him, the rest of the members placing themselves on each side of him upon the several seats or benches prepared and hung with scarlet for that purpose, and the partizans dividing themselves on each side of the court before them.

Id. at 58-60.

21. See *id.* at 60. For an engraving showing the High Court in session, see *id.* at 59.

Bradshaw responded by ordering the King's removal from the courtroom.²² Charles's dignity and restrained eloquence contrasted favorably with the excessively zealous prosecution and the Court's refusal to let him speak his piece.

Charles tied his jurisdictional defense to a far larger theme: protecting the people's liberties. He stood for law against lawlessness, even lawlessness dressed in the garb of legitimacy. Charles thus showed that when lawless conduct seeks acceptance by mimicking lawful conduct, it fails to reach its goal.

IV. UNCONSTITUTIONAL CONDUCT AND CONSTITUTIONAL STABILITY

According to Charles's argument, a rump Parliament created a court to try a king and thus wrongfully claimed the power to alter the kingdom's constitutional structure of government. Such illegitimate institutions and lawless conduct, Charles maintained, threatened all English citizens.²³ The King thus laid the groundwork for his claim, later widely accepted, that he was the martyr of the people.

Seven years earlier, Charles had also challenged a reallocation of power as threatening the stability of the English Constitution. In 1642, the King issued "His Majesty's Answer to the Nineteen Propositions of Both Houses of Parliament," a polemic declaring that England had a mixed government consisting of three estates: the King, the Lords, and the Commons.²⁴ He argued the importance of keeping a balance among them. According to his argument, Commons was upsetting the equipoise by demanding too much power.

According to Charles's argument, England was governed by a shared sovereignty of the King, Lords, and Commons, as opposed to a condescending monarchy.²⁵

22. See Wedgwood, *A Coffin for King Charles* at 168 (cited in note 6).

23. See, e.g., Iagomarsino and Wood, *The Trial of Charles I* at 86, 112, 142 (cited in note 8).

24. See Douglas W. Kmiec and Stephen B. Presser, *The American Constitutional Order* 51-53 (Anderson Publishing, 1998); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 361-66 (Princeton U. Press, 1975).

25. See Pocock, *The Machiavellian Moment* at 361 (cited in note 24); Gordon S. Wood, *The Creation of the American Republic 1776-1787* at 199, 347 (U. of North Caro-

Given the King's political ideology, he could not have believed the argument.²⁶ Nonetheless, the notion of mixed government quickly became the paradigm for the political system.²⁷ American revolutionaries would later argue that the British government had upset the balance in mixed government by encroaching on the colonial assemblies and interfering with the internal affairs of the colonies.²⁸

During the American Constitutional Convention, the delegates faced the question of how to maintain a balance of power between the departments of government and still create a stable government. Their problem differed from that of seventeenth century English constitutionalists, whose notion of mixed government was of a unified polity of monarchy, aristocracy, and the people, that is, government by "Crown-in-Parliament."²⁹ American thinkers had dispensed with the idea of a unified government and adopted Montesquieu's notion of separation of powers, which allocated separate functions to the executive, legislative, and judicial departments of government.³⁰ Despite the difference, the American deliberations were reminiscent of the controversies of 1649. In both the English and American situations, the deliberators had to determine the power relationships within the polity and the functions of the political powers. For example, in defining the function of the executive, Gouverneur Morris seemed to echo Charles in asserting that the executive should be the "guardian of the people" against legislative tyranny.³¹ In contrast, Roger

lina Press, 1969).

26. See Pocock, *The Machiavellian Moment* at 361-66 (cited in note 24).

27. See *id.*

28. See Wood, *Creation of the American Republic* at 200-02 (cited in note 25).

29. See, e.g., Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 80-83 (U. Press of Kansas, 1985); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 245-50 (Alfred A. Knopf, 1996).

30. See Rakove, *Original Meanings* at 248-50 (cited in note 29). The idea of a separation and balance of equal tripartite political entities harks back at least to the Roman stoic Polybius. See Susan Ford Wiltshire, *Greece, Rome, and the Bill of Rights* 127 (U. of Oklahoma Press, 1992).

31. One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize [and] perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, [against] Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose—the Legislative body.

Notes at 52 (cited in note 1). The notion is also reminiscent of Viscount Bolinbroke's idea of a patriot king who rises above politics to champion the public good. See Rakove,

Sherman of Connecticut stated that he “considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”³²

Underlying three issues faced by the Constitution’s drafters was the intractable question of how to guarantee the executive’s independence from the legislative branch while still placing checks on the executive. The issues were how to select the executive, whether and how to impeach and convict the executive, and whether and how the executive could veto acts of the legislative branch. In each case, the debates were extensive, and in at least two cases, the difficulty of the issue resulted in an awkward compromise: the electoral college with close contests referred to Congress and a cumbersome impeachment process involving impeachment by the House and a trial by the Senate. Both issues continue to be subjects of modern public debate. The continuing controversy demonstrates the great difficulty in allocating authority within a political system. Separation of powers and checks and balances are not always harmonious doctrines.

The Cromwellians also faced the question of how to check the executive, but in a more challenging setting. While America’s Framers were engaged in creating a new political order, the Cromwellians had to stand an existing one on its head. They sincerely believed that removing the King from office was essential to the nation’s survival and that executing him was essential to prevent him from reclaiming the throne. The method they chose had to be credible to English citizens and to themselves. The laws of England, however, offered no mechanism for removing and executing a king. Therefore, they had to create such a mechanism.

A credible mechanism would have to parallel mechanisms that the culture already accepted. It also would have to enjoy the sanction of either a traditional political authority or a new one with some claim to legitimacy. The Cromwellians therefore had Parliament manufacture a trial court. The Parliament, however, was a rump, and the trial

Original Meanings at 247-48 (cited in note 29).

32. *Notes* at 65 (cited in note 1). Of course, the notion of the Executive developed over the course of the Constitutional Convention. For a brief summary of the competing visions and the Convention’s resolution, see Fred Barbash, *The Founding: A Dramatic Account of the Writing of the Constitution* 175-83 (Linden Press, 1987).

was rigged. By seeking consistency with the existing political order and paradoxically claiming its illegitimacy, the Cromwellians placed themselves in an impossible predicament. Removing the king necessarily altered the political system by allocating extensive authority to Parliament, and an illegitimate Parliament at that. The inevitable consequence was a disastrous interregnum.³³

V. CONCLUSION

In his only recorded speech at the Virginia convention to ratify the Constitution, Zechariah Johnson referred to Charles's execution and its aftermath.³⁴ Though Johnson had no difficulty with the decision to execute Charles, he was deeply troubled by the ensuing events:

For the want of an efficient and judicious system of republican government, confusion and anarchy took place. Men became so lawless, so destitute of principle, and so utterly ungovernable, that, to avoid greater calamities, they were driven to the expedient of sending for the son of that monarch whom they had beheaded, that he might become their master.³⁵

He feared that unless America followed up on its revolution with a constitution, liberty would also be in danger: "This is like our situation in some degree. It will completely resemble it, should we lose our liberty as they did. It warns and cautions us to shun their fate, by avoiding the causes which produced it."³⁶

To avoid such confusion and anarchy, Johnson argued for the safeguard of the proposed constitution. His historical analogy may have overstated the point; the United States enjoyed the stability of state governments and the imperfect Articles of Confederation. However, Johnson discerned the dangers that arise from disrupting the political order as the Cromwellians had done. No matter how strenuously they tried, they could not disguise the radical nature of that conduct.

33. See Rakove, *Original Meanings* at 246 (cited in note 29).

34. See Jonathan Elliot, ed., 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 648-49 (J.B. Lippincott & Co., 1866).

35. *Id.* at 649.

36. *Id.*

I leave open the question whether we can distinguish between Charles's execution and such other upheavals as the Glorious Revolution of 1688, the American Revolution of 1776, and the French Revolution of 1789. As Edmund Burke, the prominent Whig statesman observed: "The speculative line of demarcation, where obedience ought to end and resistance must begin, is faint, obscure, and not easily definable."³⁷ Whatever one's assessment of Charles, Burke's line of demarcation was plainly crossed in the way the king was tried and executed.

Three hundred fifty years later, we continue to see events reminiscent of Charles's trial. Both corrupt governments and terrorists mimic the forms of legal proceedings without regard to the purpose of the rule of law. When an accepted governmental structure of a society becomes inconvenient, they reconstruct or destroy it.

Charles's trial suggests two lessons and a moral. The first lesson: People can amend and manipulate law to justify even the most radical conduct. The second lesson: The rule of law is so ingrained, at least in Anglo-American culture, that it compels us to conduct ourselves so that our actions arguably conform to it.

37. Edmund Burke, *Reflections on the Revolution in France*, in 3 *The Writings and Speeches of Edmund Burke* 270-71 (Little, Brown and Co., 1901) ("Burke's Speeches"). Burke continued:

It is not a single act or a single event which determines it. Governments must be abused and deranged indeed, before it can be thought of; and the prospect of the future must be as bad as the experience of the past. When things are in that lamentable condition, the nature of the disease is to indicate the remedy to those whom Nature has qualified to administer in extremities this critical, ambiguous, bitter potion to a distempered state. . . . [A] revolution will be the very last resource of the thinking and the good.

Id. at 271. Burke favored the Glorious Revolution: "The Revolution was made to preserve our *ancient*, indisputable laws and liberties and that *ancient* constitution of government which is our only security for law and liberty." Id. (emphasis in original). Here, he reflected general British sentiment. See Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress* 28 & n.18 (Pennsylvania State U. Press, 1993). Burke also sympathized with American discontent as evidenced by his *Speech on Moving His Resolutions for Conciliation with the Colonies* (1775) in 2 *Burke's Speeches* at 99 and his *Letter to John Farr and John Harris, Esqrs., the Sheriffs of the City of Bristol* (1777), in id. at 187. After the American Revolution began, Burke urged a peaceful settlement. See Carl B. Cone, 1 *Burke and the Nature of Politics: The Age of the American Revolution* 302-03 (U. of Kentucky Press, 1957). Perhaps his most famous work is his denunciation of the French Revolution, *Reflections on the Revolution in France* (1790), in 3 *Burke's Speeches* 231. Burke was distressed by the actions of the Cromwellians and execution of Charles. See Letter from Edmund Burke to Sir Gilbert Elliott (Sept. 22, 1793), in P.J. Marshall and John A. Woods, eds., 7 *The Correspondence of Edmund Burke* 431-32 (Cambridge U. Press, 1968). For an excellent summary of Burkean political philosophy, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 642-59 (1994).

The moral: When we manipulate the law to suit our needs, truth and class nevertheless sometimes win out, at least in the long run.