

KING MOB AND CONTEMPT OF CONGRESS

Joshua T. Carback*

ABSTRACT

The aftershocks of the riot at the United States Capitol on January 6, 2021, continue to ripple through the American public square. The United States Department of Justice brought over 750 criminal charges against the assailants. The United States House of Representatives appointed a Select Committee to investigate the riot. And the public continues to discuss the meaning of January 6 as these criminal prosecutions continue and the House's investigation concludes. Although this is the first time in American history that a mob actually breached the Capitol, riots and insurrections attempting to overawe parliamentary bodies on their own grounds are well preceded in the Anglo-American legal tradition.

The purpose of this article is to provide historical context for affrays like the Trump Riot of January 6 and provide a framework for how legislatures should respond. Parliamentary precedents on both sides of the Atlantic prove that anyone who riots at the legislature is in contempt of parliamentary privilege. The legislature can refer such contempt to the executive for criminal prosecution. In egregious cases, however, the legislature should not hesitate to vindicate itself by using its own contempt power. The legislature should appoint a joint select committee or independent commission to investigate and hold those politically responsible to account.

There may be cases when an officer or an agent of the executive provokes or incites a riot at the Capitol. The legislature must prevail in its efforts to bring them in for a hearing and compel them to produce discovery. Of the three coordinate branches of the federal government the legislature is first among equals. Parliamentary privilege must therefore trump executive privilege during an investigation of an assault on the national assembly. Any member of the executive who contemptuously incites a mob at the seat of government is liable for discipline under the inherent power of Congress.

KEYWORDS

Congress, Parliament, Parliamentary Privilege, Contempt, Impeachment, Riot, Insurrection, Sedition, Treason, Populism, Nationalism

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I. INTRODUCTION

The crier of Parliament shall stand without the door of the Parliament, and the doorkeeper shall announce to him what he shall proclaim. The King used to send his serjeant at arms to stand amid the great space without the door of Parliament to keep the door, so that none should make assaults or tumults about the doors by which the Parliament might be disturbed under the pain of caption of their bodies, because by right the door of Parliament ought not to be shut but guarded by the doorkeepers and king's serjeants at arms.

Modus Tenendi Parliamentum (c. 1294 – 1327)

January 6, 2021, was the first day in American history that a riot penetrated the United States Capitol while the national legislature was in session. The United States Congress assembled that day to debate the certification of the Electoral College vote in the 2020 Presidential Election.¹ After a bruising race tarnished by heated rhetoric, partisan rivalry, and false allegations of voter fraud—“The Great Lie”—the worst was thought to be over.² President-elect Joseph Biden emerged as the apparent victor. Incumbent President Donald Trump insisted that the election was stolen despite the lack of any substantial corroborating evidence. “[I]f you don’t fight like hell you’re not going to have a country anymore,” he trumpeted to his supporters on social media as thousands of them gathered in person to protest on his behalf at the “Save America” rally in Washington, D.C.³ “Be there, will be wild.”⁴ His personal lawyer, Rudolph W. Giuliani, attended the rally and roared to the masses, “Let’s have trial by combat.”⁵

Inflamed by this splash of vitriol, thousands of Trump supporters formed a mob and marched on the Capitol. Some intended to riot for weeks. Others joined the fray on impulse. The assailants hurled themselves over the walls, stormed the halls, and overwhelmed security. Members of Congress fled their floors and hid for their lives. The certification stalled. The authorities eventually restored order, but not before the rabble committed gross indignities against the honor of the national assembly. Two rioters died during the assault. Five Capitol police officers later perished from health complications or suicide. The disturbance shook the nation. The United States Department of Justice brought criminal charges against over 750 rioters across 45 states. The legislature attempted to impeach Trump for

¹ See generally U.S. CONST. art. 2, § 12; U.S. NAT’L ARCHIVES & RECORD ADMIN, OFF. OF THE FED. REG., THE 2020 PRESIDENTIAL ELECTION PROVISIONS OF THE CONSTITUTION AND U.S. CODE 1 (2020).

² Compare, e.g., *Donald J. Trump for President, Inc v. Sec’y of the Com. of Pa.*, Case No. 20-3371, at **1, 1 (3d Cir. Nov. 27, 2020), and NAT’L INTEL. COUNCIL, FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS i (Mar. 10, 2021), with REP. ZOE LOFGREN, SOCIAL MEDIA REVIEW: MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES WHO VOTED TO OVERTURN THE 2020 PRESIDENTIAL ELECTION 791 (2021).

³ H.R. 24 (Jan. 11, 2021); U.S. H.R., TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP 2 (2021).

⁴ *Id.* at 12.

⁵ *Id.* at 20–21.

incitement but failed due to partisan gridlock.⁶ Its investigation of the riot remains unfulfilled.

Elements of populism and nationalism are often at the heart of political disturbances like the Trump Riot. In my view, these elements are not dichotomous, but rather akin to a choral counterpoint in music: harmonically interdependent yet melodically independent. You can visualize them singing along in the same march or broadsiding back and forth against each other across a picket line. These elements frequented the steps of the Palace of Westminster long before they did so at the Capitol. Eighteenth century English demagogues like John Wilkes and Lord George Gordon stood at the helm of mass movements motivated by class-based grievances against propertied elites. Although not every riot at the doors of Parliament was necessarily “populist” or “nationalist,” for those terms are anachronistic, the rhythm of larger eighteenth century metropolitan disturbances once manifested at least aspects of what those terms mean today. Those disturbances often coincided with popular causes, including the petitioning movement, resistance to general warrants, anti-papery, etc. Parliamentary precedents for responding to riots and insurrections at the seat of government in Great Britain provide not only institutional best practices for handling them in the United States today, but also yield insights into the social, economic, and political factors that motivate them in the first place.

On June 30, 2021, the United States House of Representatives approved House Resolution 503, creating the Select Committee to Investigate the January 6 Attack on the United States Capitol (the “Select Committee”). The Select Committee held hearings, conducted discovery, and published a final report.⁷ The purpose of this article is to put the Select Committee’s work into historical perspective and edify its conclusions. My focus is strictly on best practices for managing a particular flavor of direct contempt of Congress—riot or insurrection directly targeting the Capitol itself. The balance of parliamentary precedents confirms that the affray at the seat of government on January 6 constituted a high contempt of the United States Congress and the United States Constitution as well as a high crime and misdemeanor. Those who incited, conspired, and actually participated in the riot are therefore all technically liable for contempt and subject to impeachment.

The mission of the Select Committee was justified. Congress must develop policies for responding to riots on Capitol grounds and preventing them in the future. Although contempt and impeachment proceedings are rare devices, they are indispensable to the legislative power the Select Committee represented. To know that power, we must return to its origins. As we trace the footsteps of King Mob—a famed personification of urban riots well known in the eighteenth century—we shall see that his followers marched to a tempo eerily reminiscent of populist and nationalist rhythms animating contemporary politics. That similarity suggests that far from being exceptional, the Trump Riot was only the most recent explosion

⁶ U.S. Dep’t of Justice, *Capitol Breach Cases*, U.S. ATTORNEY’S OFF. D.C., <https://www.justice.gov/usao-dc/capitol-breach-cases> (last visited January 22, 2022; 11:31 a.m.).

⁷ U.S. H.R. Res. 503 (June 30, 2021); cf. Chairman Bennie G. Thompson, Thompson Statement on Senate Judiciary Committee Report, U.S. H.R. (Oct. 7, 2021); U.S. SEN., COMM. ON HOMELAND SEC. & GOV. AFFAIRS & COMM. ON R. & ADMIN., EXAMINING THE U.S. CAPITOL ATTACK; A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, 1–13 (June 8, 2021).

of tumultuous elements percolating at the core of the Anglo-American political tradition.⁸

II. CONTEMPT OF THE PARLIAMENT OF GREAT BRITAIN

The British Constitution is not a written instrument crafted at a particular point in time. It was induced over a thousand years from both written and unwritten sources of law: natural law, customary law, and positive law. Anglo-Norman custom ripened into more mature forms of law by the thirteenth century. Two are of particular importance here. The first was the common law (*ius commune*), which consisted of reasoned, systematically applied judicial precedents (*corpus iuris*) interpreting the law of the land (*lex terrae*). The second was the law of parliament (*lex parliamentaria*), which consisted of customs, usages, traditions, and precedents governing parliamentary assemblies.⁹ Contempt power persisted as a tool for defending the prerogatives of the courts of common law and the Parliament of the United Kingdom and Great Britain, even against riot and insurrection at its doorstep, at the time of the American Revolution.¹⁰

A. THE BRITISH CONSTITUTION AND CONTEMPT POWER

The origin of “contempt power” is traditionally ascribed to two thirteenth century instruments at the core of the English constitutional canon—the Great Charter of 1215 (Magna Carta) and the Statute of Westminster Second of 1285. These instruments prohibited disobedience of the law of the land.¹¹ Disobedience or disrespect of the law could be generically characterized as “contempt.” But the word “contempt” also carried a special sense intertwined with the principle of inherent power, the notion that any delegation of sovereignty bestowed, at bare minimum, the sufficient amount of authority necessary to fulfill a prescribed duty.¹² There is a famous maxim—*cuicunque aliquis quid concedit concedere videtur*

⁸ See *infra*, Parts II–V.

⁹ See generally JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 47 (2007).

¹⁰ See generally J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 232–23 (4th ed. 2002); MARJORIE CHIBNALL, *ANGLO-NORMAN ENGLAND: 1066–1166*, 105–07, 166–70 (1986); ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 12–18 (Liberty Fund 1915); ERSKINE MAY, *LAW AND THE USAGE OF PARLIAMENT* 1 (10th ed. Reginald F.D. Palgrave & Alfred Bonham-Carter eds. 1893) [hereinafter, “ERSKINE MAY’S 1893 MANUAL”]; JEAN LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 23–54, 72–80, 84–88 (David Lieberman ed, Liberty Fund 2007) (1784); GEORGE PETYT, *LEX PARLIAMENTARIA: OR, A TREATISE OF THE LAW AND CUSTOM OF THE PARLIAMENTS OF ENGLAND* 235–36 (1689).

¹¹ Magna Carta, art. 39; Second Statute of Westminster of 1285, 13 Edw. I c. 39; WILLIAM BLACKSTONE, *V COMMENTARIES ON THE LAWS OF ENGLAND* 285–86 (St. George Tucker ed. 1803) (1765–1770); Linton D. Landrum, *Contempt: Origin and History of the Doctrine of Contempt*, 58 ALBANY L. J. 396, 396 (1898).

¹² WILLIAM HAWKINS, *I TREATISE OF THE PLEAS OF THE CROWN* cap. 22, § 5 (John Curwood ed. 1824) (1716) [hereinafter, “HAWKINS, I PLEAS OF THE CROWN”].

et id sine quo res ipsa esse non potuit—“Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect.”¹³ Under this maxim, “contempt power” meant power incident or inherent to a grant of authority ultimately derived from the King to punish disobedience of the law.¹⁴

B. THE LAW OF PARLIAMENT AND CONTEMPT POWER

Parliament operated under its own law, the *lex parliamentaria*, from at least the time of Richard II. Both Houses possess the inherent power to punish contempt under that law.¹⁵ Contempt can either be direct or constructive—within Parliament’s proximity or beyond. The earliest reference to contempt of Parliament I am aware of appears in the *Modus Tenendi Parliamentum*, a manual on parliamentary procedure probably written during the reign of Edward II. In that ancient treatise, the anonymous author notes that communities were collectively responsible for the appearance of members sent on their behalf. If the burgesses, knights of shires, or barons defaulted, their respective boroughs, cities, or baronies were liable to be amerced.¹⁶

The experience of Parliament crystalized the contours of its contempt power gradually over time as usages became precedents, precedents became customs, and customs became tradition. Contempt liability extended to members of the public as well as sitting Members of Parliament (“MPs”). Contemptuous conduct encompassed a range of disruptive behavior including any misconduct in the presence of either House or their committees, misconduct committed by members or officers, obstruction of members or officers in their execution of their duties, obstruction of witnesses or other persons involved in parliamentary matters, disobedience of rules or orders, premature or fraudulent publication of parliamentary proceedings, violations of the privileges of either House, etc.¹⁷ Penalties for contempt of Parliament committed by lay people included fine, imprisonment, and corporal punishment; penalties for MPs included suspension, expulsion, and impeachment.¹⁸

¹³ HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 314 (10th ed. 1931).

¹⁴ HENRY FINCH, A DESCRIPTION OF THE COMMON LAWS OF ENGLAND 72–76 (1759) (1619).

¹⁵ See generally ERSKINE MAY, PARLIAMENTARY PRACTICE c. 15 (25th ed. 2019) [hereinafter, “ERSKINE MAY’S 2019 MANUAL”]; see also, e.g., *Burdett v. Abbott* [1812], 128 Eng. Rep. 384, 4 Taunt 401 (Eng.).

¹⁶ MODUS TENENDI PARLIAMENTUM 28–30 (c. 1294 – 1327); Dorothy K. Hodnett & Winifred P. White, *The Manuscripts of the Modus Tenendi Parliamentum*, 34 ENG. HIST. REV. 209, 215 (1919); cf. V.H. Galbraith, *Modus Tenendi Parliamentum*, 16 J. WARBURG & COURTAULD INST., 81, 85–87, 95 (1953).

¹⁷ See generally ERSKINE MAY’S 2019 MANUAL, *supra* note 15, at §§ 15.3–15.40; ERSKINE MAY’S 1893 MANUAL, *supra* note 10, at §§ 57–90, 330.

¹⁸ E.g., PETYT, *supra* note 10, at 264–289 (1690); *Mohun’s Case*, 15 H.L. Jo. 211–219 (Feb. 1, 1693) (acquitting Charles Mohun, 4th Baron Mohun of Okehampton, of the charge of aiding in the murder of a friend’s romantic rival in an impeachment trial concluding on December 9, 1692); *Lord Thomas Savile’s Case* (1642), *reprinted in* WILLIAM COBBETT, 2 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1241 (1808) (punishing Thomas Savile, First Earl of Sussex, for failure to attend the House when summoned and accordingly suspending his privilege to sit and vote for the remainder of the session); *Walter Long’s Case* (1629), *reprinted in id.* at 518 (punishing Walter Long, sheriff for the County of Wilts, for contempt in attempting to serve as an MP despite his obligation to remain within his bailiwick with

No court of law stood above either House of Parliament in adjudicating contempts of those Houses respective privileges. There was no such thing as judicial review. The judgment of Parliament on any breach of its privileges was final.¹⁹

The contempts of interest here are direct assaults on Parliament itself by riotous mobs.²⁰ The security of Parliament and the enforcement of its prerogatives historically belonged to the Serjeant at Arms of the House of Commons and the Usher of the Black Rod of the House of Lords. In the Middle Ages it was the Serjeant at Arms' responsibility to stand by the door of Parliament to guard it from assault. The experience of history teaches us that sometimes one serjeant is not enough.²¹

C. DIRECT CONTEMPT BY RIOT AND INSURRECTION

Eric Hobsbawm defined the mob as “the movement of all classes of the urban poor for the achievement of economic or political changes by direction action.”²² Hobsbawm conceived the mob as a pre-political movement lacking any particular political program or ideology but characterized by traditionalist sentiments, patriotic fervor, and a contempt for the political establishment, the elite. If we tinker with this definition by expanding the demographics of the mob to include the lower and middling orders and accentuating the role of demagogic rhetoric about threats to constitutionally enshrined liberties, I believe we fairly describe the populist phenomenon.²³

Although the contemporary scholarship of Ronald P. Formisano and Michael Kazin defining populism is impressive, neither sufficiently examines the connection between modern populism and the politics of the urban masses in eighteenth century Britain.²⁴ It is my position that the primitive roots of modern populism trace back to seeds of English Radicalism and the colorful antics of John Wilkes. This position challenges, of course, the idea that populism is historically a more liberal phenomenon and that it only recently endeared itself to conservative politics. “In its beginnings, at least,” remarked Lewis Namier, “urban radicalism saw itself as a conservative movement.”²⁵ Therefore, to the extent that urban radicalism is the seedbed of modern populism, I believe the case can be made that populism, if not objectively conservative, originally at least saw itself as such.

a 2000 mark fine and imprisonment in the Tower of London).

¹⁹ See ERSKINE MAY'S 1893 MANUAL, *supra* note 10, at 50–53, 128–30; PETYT, *supra* note 10, at 247–48 (“It doth not belong to the Judges to judge of any Law, Custom, or Privilege of Parliament.”).

²⁰ See generally ERSKINE MAY'S 2019 MANUAL, *supra* note 15, at §§ 15.4 & n.1; 15.11 & n.2; 15.8 & nn.1–4; 15.38.

²¹ MODUS TENENDI PARLIAMENTUM, *supra* note 16, at 38–39.

²² ERIC HOBSBAWM, PRIMITIVE REBELS 145–46 (2017).

²³ See *id.* at 145–48.

²⁴ See MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 1–14 (rev. ed. 2017); RONALD P. FORMISANO, FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION TO THE 1850s 1–14 (2008).

²⁵ See LEWIS NAMIER & JOHN BROOKE, THE HOUSE OF COMMONS: 1754–1790, 16–18 (1964); cf. E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 21–22, 69–70 (1966).

The clamoring of metropolitan mobs over issues of labor, dogma, and creed, whether one characterizes them as populist or nationalist by today's standards, were politically significant but often tainted by violence. The depredations of King Mob during the eighteenth century, especially in the vicinity of Westminster Palace, created a distinct body of precedent supporting the notion that a riot or affray in the presence of the legislature is contempt of the legislature as such. Parliament found that riots or insurrections that threatened the political process were especially dangerous to the national welfare and therefore constituted contempt of the British Constitution itself as well as high crimes and misdemeanors subject to impeachment.²⁶

An incident in early April 1733 is exemplary. A mob assembled in different parts of the House of Commons, including the lobby and the Court of Requests, for the purpose of expressing political grievances. On April 12, 1733, the House responded by issuing a resolution condemning the mob's behavior as contemptuous of parliamentary privilege and an assault on the rule of law.

Resolved and declared, Nemine contradicente, That the assaulting, insulting, or menacing, any Member of this House, in his coming to, or going from the House or upon the account of his Behaviour in Parliament, is an high Infringement of the Privilege of this House, a most outrageous and dangerous Violation of the Rights of Parliament, and an high Crime and Misdemeanour.

Resolved and declared, Nemine contradicente, That the Assembling and Coming of any Number of Persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the Passing of any Bill, or other Matter, depending before the House, is an high Infringement of the Privilege of this House, is destructive of the Freedom and Constitution of Parliament, and an high Crime and Misdemeanour.

Resolved and declared, Nemine contradicente, That the Assembling and Coming of any Number of Persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or

²⁶ Piratin's and Lucy's Case, 202 H.C. Jo. 91 (Feb. 10, 1947); Carlisle's Case, 41 H.L. Deb. 1024, 1026, 1237–39 (Aug. 9, 1920); Stranger's Case, 86 H.C. Jo. 323, 325 (Feb. 28, 1831); Clifford's Case, 85 H.C. Jo. 461 (May 24, 1830); King v. Lord George Gordon [1781], 99 Eng. Rep. 372, 2 Dougl. 590, 592 (Eng.); Ratcliffe v. Eden [1776], 98 Eng. Rep. 1200, 2 Cowp. 485 (Eng.); Rowe's and Atkinson's Case, 20 H.C. Jo. 185 (Apr. 2, 1723); Purser Rioters' Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699); Silk Rioters' Case, 11 H.C. Jo. 667–68 (Jan. 21, 1697); Proceedings Related to the Silk Riot of 1697, reprinted in WILLIAM COBBETT, 5 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 1163 (1808); Theauro's Case, 7 H.C. Jo. 410 (Dec. 30, 1654); Carye's and Percy's Case, 1 H.C. Jo. 259–260 (Jan. 25, 1606); Goodwyn's Case, 5 H.C. Jo. 232–33 (July 5, 1647); Case 13: Memorandum re: Puritans [1604], 79 Eng. Rep. 30, 31, Cro. Jac. 37 (Eng.); Hall v. Fettiplace [1604], 72 Eng. Rep. 887, Moore K.B. 758 (Eng.); Bellew v. Bullocke [1604], 74 Eng. Rep. 1067, Noy 101 (Eng.); ERSKINE MAY'S 2019 MANUAL, *supra* note 15, at § 15.3; HAWKINS, I PLEAS OF THE CROWN, *supra* note 12, at 92, 309, 310, 354.

promote the Passing of any Bill, or other Matter, depending before the House, is an High Infringement of the Privilege of this House, is destructive of the Freedom and Constitution of Parliament, and an high Crime and Misdemeanour.

*Resolved and declared, Nemine contradicente, That the inciting and encouraging any Number of Persons to come, in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the Passing of any Bill, or other Matter, depending before this House, is an High Infringement of the Privilege of this House, is destructive of the Freedom and Constitution of Parliament, and an high Crime and Misdemeanour.*²⁷

These resolutions are representative of the kind of resolutions Parliament promulgated in wake of tumultuous assemblies at its gates throughout the seventeenth and eighteenth centuries.²⁸ Parliamentary resolutions in the aftermath of riots were often followed by an order designating a committee with the responsibility to investigate and inquire how to prevent similar affrays in the future.²⁹

During the Hanoverian period, defeated parties commonly contested the outcome of elections through petitions to Parliament on allegations of election interference or bribery. Petitions, however, could catalyze violent interference with the political process.³⁰ Parliament passed legislation designed to preclude or at least mitigate riots circumscribing petitioning rights. The Vexatious Arrests and Delays at Law Act of 1661, for example, prohibited more than ten people from accompanying a petition to Parliament. Parliament went so far as to enact a law in 1817 providing that any gathering of more than fifty people within a mile of Westminster for the purpose of supporting a petition was a seditious assembly. By the by, Parliament deemed petition riots to be contemptuous high crimes and misdemeanors. Three examples shall illustrate.³¹

²⁷ Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733).

²⁸ See, e.g., *id.*

²⁹ Lord George Gordon's Case, 37 H.C. Jo. 902 (June 6, 1780); Case of the Tumultuous Crowd, 31 H.L. 209 (May 17, 1765); Case of Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733); Silk Rioters' Case, 11 H.C. Jo. 667–68 (January 21, 1697).

³⁰ See, e.g., Case 13: memorandum re; Puritans [1604], 79 Eng. Rep. 30, 31, Cro. Jac. 37 (Eng.); William Craig, *Hampton Court Again: The Millenary Petition and the Calling of the Conference* 77 *ANGLICAN & EPISCOPAL HIST.* 46, 68–69 (2008); cf. DON L. SMITH, *THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES: CONSTITUTIONAL DEVELOPMENT AND INTERPRETATIONS, A DISSERTATION IN GOVERNMENT* 11 (Tex. Tech. Univ., 1971); RICHARD CHANDLER, *I THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS* 127–132 (1742).

³¹ FRANK O'GORMAN, *VOTERS, PATRONS, AND PARTIES: THE UNREFORMED ELECTORAL SYSTEM OF HANOVERIAN ENGLAND 1734–1832*, 12–13 (1989); CARL WITTKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 22, 33 (1970); ERSKINE MAY'S 2019 *MANUAL*, *supra* note 15, at §§ 24.2, 24.7; ERSKINE MAY'S 1893 *MANUAL* *supra* note 10, at 493 & n.1–500; Seditious Meetings Act of 1817, 57 Geo. 3, c. 19, s. 23; Vexatious Arrests and Delays at Law Act of 1661, 13 Car. 2, c. 5; Michael Lobban, *From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c. 1770–1820*, 10 *OXFORD J. OF L. STUDIES*, 307, 334 (1990).

1. The Purser Riot of 1699

On March 27, 1699, the House of Commons considered a petition of Royal Navy pursers—warrant officers responsible for handling money onboard naval vessels. The pursers complained of physical abuse by their commanders while they served at sea. An angry mob consisting of seamen and their wives gathered outside the House during session. The House summoned the justices of the peace for Middlesex and Westminster to attend the House, bring constables with them, and disperse the mob. The authorities took one James Gardener into custody for inciting a riot by uttering insolent words. Gardener was promptly convicted and committed to the Gatehouse for his contempt. This is the earliest precedent I found confirming contempt liability lies for inciting a disturbance at the seat of government.³²

Angry sailors would find their way back to Westminster in the course of the following century. They faced difficulties with unemployment and wage rates following the end of the Seven Years War. In May 1768, for example, somewhere between five and fifteen thousand of them presented a petition to Parliament conveying their grievances. After they did so, however, they simply gave three cheers and dispersed. I am not aware of any historian who would label these disturbances as incidents of “populism” per se. In fact, most petition movements in the eighteenth century, whether they involved riots or not, appear to be simply trade lobbying by other means. The next two disturbances, in my view, however, did savor of populism and nationalism, were of a much greater magnitude, and left an indelible mark on the political landscape.³³

2. The Wilkes’ Riots of 1763 & 1768

There was no figure in the annals of Hanoverian London whose personality was more flamboyant or whose politics were more electrifying than John Wilkes. Wilkes was born to a wealthy distiller in London on October 17, 1725. He married well, served as High Sheriff of Buckinghamshire in 1754, and was elected as MP for Aylesbury in 1757. He was a notorious libertine with an earthly appetite. He was, for example, a member of the Hellfire Club, a secret society that carried out orgiastic rituals at Medmenham Abbey, and filled his belly at the Sublime Society of Beefsteaks in Covent Garden. Edmund Burke characterized him as a “lively agreeable man, but of no prudence and no principle.” Benjamin Franklin called him “an outlaw and exile of bad personal character, not worth a farthing.” In 1762, he cofounded an opposition paper, *The North Briton*, to rival Tobias Smollett’s pro-government publication, *The Briton*. The title of Wilkes’ publication winked at North-South relations, which, as in the United States today, remain an important political axis. Wilkes’ publication was dark and satirical, but managed to kick off without any legal reprisals.³⁴

³² Purser Rioters’ Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699).

³³ GEORGE RUDÉ, *WILKES AND LIBERTY: A SOCIAL STUDY OF 1763 TO 1774*, 91–92, 103 (1962) [hereinafter, “RUDÉ, WILKES AND LIBERTY”]; JOHN STEVENSON, *POPULAR DISTURBANCES: 1700–1832*, 89–92, 155–56 (2d ed. 1992).

³⁴ RUDÉ, *WILKES AND LIBERTY*, *supra* note 33, at xiii–xiv, 18–21.

Controversy did not hold off for long. On April 23, 1763, *The North Briton* printed issue No. 45, which included a scathing critique of George III's speech in favor of the Peace of Paris. No. 45 ignited a political chain reaction that distinguished Wilkes as the demagogue of the decade. Officers of the Crown concluded that No. 45 went too far and constituted seditious libel. They discovered that Wilkes personally edited No. 45 but were impeded from prosecuting him initially because of the privilege of freedom from arrest Wilkes enjoyed as a sitting MP. MPs were generally immune from arrest under the *lex parlamentaria*. The authorities justified their decision to arrest Wilkes anyway on the theory that Wilkes' libel constituted a breach of peace and therefore could not be shielded by parliamentary privilege. A general warrant was issued. The Sergeant at Arms of the House of Commons executed the warrant on April 30, apprehended Wilkes, and committed him to the Tower of London.³⁵

The Court of Common Pleas granted a writ of habeas corpus and called Wilkes to the bar on May 3. Wilkes played to the crowd in court, declaring that "the liberty of an Englishman should 'not be sported away with impunity.'"³⁶ His audience loved his performance so much that the whole affair converted from an inquisition into the propriety of his writing into a referendum on the propriety of general warrants. "As Wilkes left the court-room he was greeted with thunderous shouts of 'Liberty! Liberty! Wilkes forever!'"³⁷ Three days later, the Court upheld the propriety of the warrant but discharged Wilkes on the basis that parliamentary privilege shielded him from liability for a misdemeanor. Chief Justice Charles Pratt, 1st Earl Camden, in writing for the Court, held that seditious libel, even if it tended to breach the peace, was still protected by parliamentary privilege. "Whereupon there was a loud huzza in Westminster-hall. [Wilkes] was discharged accordingly."³⁸

"Wilkes and Liberty" was a genius slogan and a populist one by today's standards. It evoked patriotic tropes expressed in songs like "The Roast Beef of Old England." It embodied popular political totems like Magna Charta, Alfred the Great, "the true born Englishman," etc. It reflected Wilkes' rhetoric of liberty that addressed the people's passion for English constitutionalism, fervor for fundamental freedoms, and resistance to arbitrary power. It played upon a resentment and suspicion against propertied elites harbored by the working classes during the eighteenth century that fueled the force of opposition to the government. Wilkes' wit and charisma won him a large following as a favored Radical in those demographics. He manipulated them with the help of external interests of wealthier merchants, manufacturers, and tradesmen to fulfill his own political ambitions much like the demagogues of today.³⁹

³⁵ John Wilkes' Case [1763], 19 Howell's St. Tr. 981, 990, 993 (1816); RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 23–24.

³⁶ RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 26.

³⁷ *Id.*

³⁸ Definitive Treaty of Peace Between Great Britain, France and Spain (1763), reprinted in WILLIAM COBBETT, 15 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 1291, 1291–1307 (1808); Proceedings in the Commons on the Expulsion of Mr. Wilkes (Dec. 9, 16, 1763; Jan. 19, 1764), reprinted in *id.* at 1386–87.

³⁹ See HORACE WILLIAM BLEACKLEY, LIFE OF JOHN WILKES 5–6, 47–48, (1917); Lucy Sutherland, *The City of London in Eighteenth-Century Politics*, in ESSAYS PRESENTED TO SIR LEWIS NAMIER 49, 60 (Richard Pares & A.J.P. Taylor ed. 1956); THOMPSON, *supra* note 25, at 69–71 & n.1, 79–81, 83; NAMIER & BROOKE, *supra* note 25, at 331–35.

Wilkes also owed his success to his penchant for political playfulness, and attracted complimentary slogans like “Beef and Liberty,” no doubt inspired by the “sublime society” of which he was a member. That he was an ugly, witty, devious rake made him even more glamorous. He refused to play the lamb and struck back hard against the government for subjecting him to effectively what constituted a political trial by ordeal. He filed a civil suit and recouped £2,900 in damages for false imprisonment. Despite the technicality of the Court’s reasoning, the mob believed that the judgment vindicated their disapproval of general warrants. Wilkes was their man, a mirror for both reflecting and projecting their contempt for the government.⁴⁰

Wilkes did not surrender his pen. He helped to publish an obscene poem parodying Alexander Pope’s “Essay on Man,” entitled “Essay on Woman,” later that year. Both Houses of Parliament balked at the judgment of the Court of Common Pleas. Incensed by Wilkes’ continuing insolence, they debated a resolution to exclude libelous conduct from the protection of the parliamentary privilege from arrest when they resumed session on November 15, 1763. Members of the House of Lords found the “Essay on Woman,” in particular, to be a “most scandalous, obscene, and impious libel,” and possibly grounds for expulsion. John Montagu, 4th Earl of Sandwich, delivered the complaint to the House of Lords seeking Wilkes’ expulsion on November 16, 1763. As a fellow member of the Hellfire Club, Montagu was by no means disinterested. He sought retaliation for a prank Wilkes played on him during a séance at one of their meetings.⁴¹

On November 24, the House of Commons approved the following resolution by a vote of 258 to 133: “That Privilege of Parliament does not extend to the case of writing and publishing seditious Libels, nor ought to be allowed to obstruct the ordinary course of the laws, in the speedy and effectual prosecution of so heinous and dangerous an offence.” William Pitt the Elder, 1st Earl of Chatham, spoke out strongly against this retreat of privilege. “This proposed sacrifice of privilege,” he said, “was putting every member of parliament, who did not vote with the minister, under a perpetual terror of imprisonment.” Lord Richard Grenville-Temple, 2nd Earl Temple, led a similar resistance in the upper chamber. But all was for naught. The House of Lords did not agree with the Great Commoner or Grenville-Temple. It passed a concurring resolution on November 29 supporting the Commons instead. Expulsion proceedings began on December 9. Wilkes fled to Paris, so he was tried *in absentia*. On January 19, 1764, the House of Commons found Wilkes in contempt of its privileges, expelled him for seditious libel, and declared him an outlaw for absconding.⁴²

⁴⁰ RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 28.

⁴¹ Proceedings in the Lords Against Mr. Wilkes for Publishing the Essay on Woman (Nov. 15, 17, 1763; Dec. 14, 1763; Jan. 24, 1764), *reprinted in* WILLIAM COBBETT, 15 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 1346, 1346–1352 (1808); Proceedings in the Commons Against Mr. Wilkes for Writing the North Briton, Number Forty-Five (Nov. 15, 23–24, 1763), *reprinted in id.* at 1354–1364; Donald Goddard, *The Hell-Fire Club: Visions of Debauchery Danced in Their Heads*, N.Y. TIMES (Feb. 27, 1972).

⁴² The Lords’ Report of Precedents and Punishments for Breaches of Privilege and Contempts of Their House (Mar. 8, 1764), *reprinted in* WILLIAM COBBETT, 15 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 1352, 1352–1354 (1808); John Wilke’s Case, 29 H.C. Jo. 843 (Feb. 14,

Pressured by his debts, Wilkes was forced to return to England in 1768. He stood for election to Parliament in Middlesex and won. In the interim, Sir John Pratt, Lord Chief Justice of the Court of King's Bench, ruled that general warrants were illegal.⁴³ Whatever else one thinks about John Wilkes, moving the political needle towards the abolition of general warrants is an achievement for which he deserves credit. Chief Justice Pratt's judgment was not made in a vacuum. The government's position on Wilkes' arrival was that he should be arrested on account of his outlawry. Wilkes saw a political opportunity and voluntarily surrendered himself to the King's Bench on May 9. In doing so, he waived his parliamentary privilege from arrest. In return, the House of Lords revoked his status as an outlaw. Wilkes was a martyr to the cause of liberty once again. And he amplified his momentum by playing upon the Court's unwillingness to grant bail, a decision that enraged everyone who supported him.⁴⁴

The next day, Parliament opened session. The thirteenth assembly was inaugurated by a demonstration at King's Bench prison and later at St. George's Fields by as many as forty thousand people. The Wilkites grew restless as the day went on. Justice Samuel Gillam, a magistrate of Surrey, eventually read the Riot Act. The feverish mass, undeterred, eventually compelled the soldiers to open fire. Five or six people in the crowd were killed and fifteen were wounded, casualties for whom the whole ordeal was later named "The St. George's Field Massacre." Disorder spread to other parts of the capital, including the seat of government itself. A riot formed in Old Palace Yard and outside of the House of Lords. One John Biggs was later found criminally liable for disturbing the peace.⁴⁵

Though the riots were violent and ugly, Wilkes gained even greater political momentum from the power asymmetry between the military and the mob. The troops who fired on the crowd belonged to a Scottish regiment, doubly detested by Londoners both as soldiers and as foreigners (Celts). The coroner returned a guilty verdict for intentional homicide against a soldier who shot a boy named Allen. On May 16, both Houses of Parliament gave thanks to the Lord Mayor for suppressing the riots notwithstanding the civilian casualties sustained. A standing order enacted during the previous Parliament refusing admission to any spectators in the gallery

1764); Proceedings in the Commons Concerning General Warrants and the Seizure of Papers (1764), *reprinted in id.* at 1393, 1399; Proceedings in the Lords Against Mr. Wilkes for Publishing the Essay on Woman (Nov. 15, 17, 1763; Dec. 14, 1763; Jan. 24, 1764), *reprinted in id.* at 1346–1352; Proceedings in the Commons on the Expulsion of Mr. Wilkes (Dec. 9, 16, 1763; Jan. 19, 1764), *reprinted in id.* at 1386–1388; Proceedings in Both Houses Respecting the Riot at the Burning the North Briton Number 45 (Dec. 6–7, 1763), *reprinted in id.* at 1380, 1380–86; Address of Both Houses to the King Concerning the North Briton, Number Forty-Five (Dec. 1, 1763), *reprinted in id.* at 1378–1380; Protest Against the Resolution, "That Privilege of Parliament Does Not Extend to the Case of Libels" (Nov. 29, 1763), *reprinted in id.* at 1371–1378; Proceedings in the Lords Against Mr. Wilkes for Writing the North Briton Number Forty-Five (Nov. 29, 1763), *reprinted in id.*, at 1365–1371.

⁴³ *Entick v. Carrington* [1765], 19 Howell's St. Tr. 1029 (1816).

⁴⁴ See RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 42–44, 46–47; *Entick* at 1029.

⁴⁵ RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 53; Meeting of the New Parliament (May 10, 1768), *reprinted in* WILLIAM COBBETT, 16 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 424, 424–28 (1808); Riot Act of 1715, 1 Geo. 1 stat. 2. c. 5.

of the House of Commons continued in force.⁴⁶ None of the Wilkites were ever held in contempt for rioting at Parliament. But in view of the precedent established by the Purser Riot of 1699, I think Parliament certainly could have punished the rioters through contempt proceedings. On June 18, 1768, the King's Bench finally sentenced Wilkes to twenty-two months incarceration and a fine.⁴⁷

On November 14, 1768, the House of Commons initiated expulsion proceedings against Wilkes for the second time and eventually succeeded in removing him on February 3 of the following year. Undaunted, Wilkes stood for reelection three more times—in February, March, and April—the so-called “Middlesex Election Affair of 1769.” Each time, the “working classes” of Middlesex championed their hero. Each time his enemies sought to void the result. Wilkes' position was that since he submitted to criminal judgment, he should not be doubly punished for his prior conduct by losing his (new) seats as well. Those who took Wilkes' side in the House also emphasized that expulsion for seditious libel was unprecedented. “Let him who has not sinned cast the first stone” was another sentiment presented in favor of Wilkes. If this new precedent was allowed, so the argument went, Parliament would slide down a slippery slope of constant dissolution on account of the improprieties of its members. “The arguments for his expulsion were founded on the badness of the man, and the impropriety of suffering such a one to be part of the legislature.”⁴⁸ The latter view prevailed and Wilkes was expelled. Technically, the Commons voided these elections on the theory that Wilkes' prior expulsion disqualified him from running in the first place. On December 21, 1769, the House of Lords heard Wilkes' appeal in his criminal case and quickly upheld the ruling of the King's Bench.⁴⁹

Wilkes' supporters rioted once again, and on April 29, in response to the judgment of the House of Lords, submitted a petition for him to be readmitted to the Commons. Parliament considered the petition on May 8 but nevertheless resolved by a vote of 221 to 152 that Colonel Luttrell, Wilkes' latest opponent, was duly elected. Though Wilkes' gambit to sit in Parliament was initially frustrated, his political career survived. He sat in the House of Commons from 1774 to 1790, served as Lord Mayor of London from 1774 to 1775, and held the position of

⁴⁶ See RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 49–56; The Thanks of the Commons Given to the Lord Mayor of London for His Conduct During the Late Disturbances (May 16, 18, 1768), *reprinted in* WILLIAM COBBETT, 16 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 462–466 & n.* (1808); Joint Address of Thanks (May 10, 1768), *reprinted in id.* at 460, 461; Meeting of the New Parliament (May 10, 1768), *reprinted in id.* at 424, 424–28; Riot Act of 1715, 1 Geo. 1 stat. 2. c. 5.

⁴⁷ King v. Wilkes [1770], 98 Eng. Rep. 327, 353, 4 Burr. 2527, 2574.

⁴⁸ Proceedings in the Commons on the Expulsion of Mr. Wilkes (Feb. 2, 1769), *reprinted in* WILLIAM COBBETT, 16 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 531, 545 (1808).

⁴⁹ RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 57, 59, 65–69, 88–89, 133–34; Proceedings in the Commons on Mr. Wilkes's Re-Election for Middlesex (Feb. 10, 17, 1769; Mar. 17, 1769; Apr. 7, 14–15, 1769), *reprinted in* WILLIAM COBBETT, 16 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 575–587 (1808); Proceedings in the Commons on the Expulsion of Mr. Wilkes (Nov. 14, 1768; Jan. 23, 27, 31, 1769; Feb. 1–3, 1769), *reprinted in id.* at 531–575; Proceedings in the Lords on Mr. Wilkes's Appeal Upon a Writ of Error (Dec. 21, 1769), *reprinted in id.* at 511, 518 (1808); George Rudé, *The Middlesex Electors of 1768–1769*, 75 ENG. HIST. REV. 601, 601–02 (1960).

Chamberlain of the City of London from 1779 until his death in 1797. His crusade against general warrants, campaign for free speech, and rhetoric of liberty, confirm his place as one of the greatest demagogues of all time. He is, in my estimation, the first father of modern populism.⁵⁰

3. *The Gordon Riots of 1780*

Akin to an old adage about the American Civil War, one could rightly ask whether the Gordon Riots were the last carnivalesque revolt, or the first industrial insurrection. The Gordon Riots are in fact the closest analogy to the Trump Riot and therefore require a more extensive discussion. The ostensible cause of the Gordon Riots was contempt for papal supremacy. The coals of religious tension between protestant and Catholic smoldered long after the fires of the English Civil War burned out. During the years when Protestants were in power, Parliament passed two statutes to thwart the spread of “Popery.” The Jesuits Act of 1584 dictated that any Roman Catholic priest that did not leave the Kingdom within forty days would be punished for high treason unless he swore an oath to obey Queen Elizabeth I.⁵¹ The Popery Act of 1698 prohibited Roman Catholics from organizing their own schools and from inheriting and purchasing lands.⁵²

The Papists Act of 1778 accomplished greater toleration by allowing Roman Catholics to serve in the military and purchase land if they swore an oath of allegiance. That legislation, however, unleashed widespread disapproval. The land was rife with anti-popery. A popular conspiracy even touted that there were twenty-thousand Jesuits hidden in underground tunnels by the Thames waiting for an order from the Holy See to flood the city of London in a manner reminiscent of the tactic used by Cyrus the Great to seize Babylon.⁵³ The stage was set for a bout of demagogic destruction of unprecedented proportions. Lord George Gordon, scion of Scottish noble Cosmo George, 3d Duke of Gordon, was in my view a paragon of populism. He had a large ego, a loud mouth, and loose morals. He was high born, and a Mason at that. But he failed to advance in his naval career, so he moved on to enjoy the best luxuries that civilian life had to offer. He got into a spat with the Church after a lusty visit to Paris. Rather than confessing his sins, he indignantly called the Archbishop of Canterbury the “Whore of Babylon.” Lady Mary Wortley Montagu humorously reflected that this “was very uncivil, as it is the only whore his Lordship dislikes.” Gordon’s hypocrisy typified populist demagoguery: pious creeds, debauched deeds.

⁵⁰ See RUDÉ, *WILKES AND LIBERTY*, *supra* note 33, at 103; Proceedings in the Commons on Mr. Wilkes’s Re-Election for Middlesex (Apr. 29, 1769; May 8, 1769), *reprinted in* WILLIAM COBBETT, 16 *PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803*, 575, 588–89 (1808).

⁵¹ An Act Against Jesuits, Seminary Priests, and Such Other Like Disobedient Persons of 1584, 27 Eliz. 1, c. 2.

⁵² An Act for the Further Preventing the Growth of Popery of 1698, 11 Will. III c. 4.

⁵³ See Roman Catholic Relief Act of 1778, 18 Geo. III c. 60; CHRISTOPHER HIBBERT, *KING MOB: THE STORY OF LORD GEORGE GORDON AND THE RIOTS OF 1780*, 20–21 (2004); Dana Rabin, *Imperial Disruptions: City, Nation and Empire in the Gordon Riots*, in *THE GORDON RIOTS: POLITICS, CULTURE AND INSURRECTION IN LATE EIGHTEENTH-CENTURY BRITAIN* 93, 96 (Ian Haywood & John Seed eds., 2014); *cf.* HERODOTUS, *THE HISTORIES* 3.150–160 (Robert H. Strassler ed., Andrea L. Purvis trans. 2009) (484 – 425 B.C.).

He was a fanatic for the constitution and saw toleration as an existential threat to its existence. The Catholic question became his favorite cause, and so he formed the Protestant Association, an ecumenical arrangement of Anglican and dissenting middle class subjects, for the purposes of seeking the repeal of the Papists Act of 1778. He was brash and base. He insulted the King while pleading his aversion to Catholic toleration in a private audience. He insulted the courts. "The Judges," he said, "are the mirrors by which the King's image is reflected." His character was a foul portent of the degradations to come in a more decadent age.⁵⁴

On June 2, 1780, Gordon marched at the head of a crowd 60,000 strong to Parliament to submit a formal petition to repeal the Papists Act of 1778. Philip Jennings Clerke, a bystander, later remarked that the crowd was composed of "*The better sort of tradesmen; they were all well-dressed decent sort of people*; I stopped in the fields and conversed with a great number of them; I asked them what was the occasion of their assembling? There was a great number of different parties, for I rode close by the side of the foot-path."⁵⁵ These words were neither ironic nor inaccurate. The historical record corroborates this testimony: the crowd initially consisted of people from the working classes, not simply unemployed vagabonds and career criminals. Like an army on parade, the demonstrators marched eight abreast, carried banners emblazoned with the phrase "No Popery," and wore blue cockades in their caps as a symbol of their cause, a grim omen of insurrectionary doom. In a matter of hours, the crowd of "well-dressed decent sort of people" devolved into a riotous mob.

The Commons considered Gordon's petition but divided; when it came to a vote, the "Yeas" could not be counted because some of the mob gathered in the lobby to disturb the proceedings. The Serjeant-at-Arms informed the House that he could not lift the siege. Field Marshal Henry Seymour Conway grew irate with the ordeal and talked of drawing swords with the horde outside like the three hundred Spartans at Thermopylae. "I am a military man and I shall protect the freedom of debate with my sword," he said in a loud voice, "Do not imagine that we will be intimidated by a rabble. The entry into the House is a narrow one. Reflect that men of honour may defend this pass."⁵⁶ Fortunately, reinforcements relieved the Commons of its predicament. The Speaker summoned the magistrates of Middlesex and the city of Westminster. Several Justices of the Peace arrived with the Foot Guards and Horse Guards. The Commons adjourned. The Mob did not. Although MPs were able to escape after some guards cleared a path, they were verbally abused and physically attacked along the way. The mob moved on and began attacking Roman Catholic neighborhoods and other places of political importance.⁵⁷

⁵⁴ HIBBERT, *supra* note 53, at 20–21, 38; Dominic Green, *George Gordon: A Biographical Reassessment*, in *THE GORDON RIOTS: POLITICS, CULTURE AND INSURRECTION IN LATE EIGHTEENTH-CENTURY BRITAIN* 245, 247–49, 256–57 (Ian Haywood & John Seed eds., 2014).

⁵⁵ *King v. Lord George Gordon* (1781), 21 Howell's St. Tr. 485, 578 (T.B. Howell ed. 1816) (emphasis added).

⁵⁶ As quoted in HIBBERT, *supra* note 53, at 55–57.

⁵⁷ See *Lord George Gordon's Case*, 37 H.C. Jo. 900 (June 2, 1780); *King v. Lord George Gordon*, (1781), 21 Howell's St. Tr. 485, 578; HIBBERT, *supra* note 53, at 41, 48–57, 100–106; Robert B. Shoemaker, *The London "Mob" in the Early Eighteenth Century*, 26 J. OF BRIT. STUDIES 273, 284–85 (1987); George Rudé, *The London "Mob" of the Eighteenth Century*, 2 HIST. J. 1, 3, 5–7 (1959).

On June 6, 1780, the Commons briefly reassembled and appointed a committee to inquire into the causes of the riot that penetrated the lobby. But the mob descended on Parliament once again and compelled the Commons to adjourn. “The phrase Read the Riot Act” originates from the requirement that magistrates in these times read the Riot Act of 1714 out loud. If the mob did not disperse within the hour its members were guilty of a felony punishable by death. The Riot Act was read in this instance but to no avail. The mob moved on to assault Newgate, Old Bailey, Clerkenwell, Bridewell, and the New Prison, and set their captives free. It sacked the home of William Murray, 1st Earl of Mansfield, Lord Chief Justice of the King’s Bench. The following day—“Black Wednesday”—the mob continued to destroy Roman Catholic businesses and residences, Fleet Prison, King’s Bench Prison, the New Gaol, the Southwark and the Surrey Houses of Correction, and the Marshalsea debtor’s prison. It was finally repulsed when it attempted to storm the Bank of England. To their credit, both Lord George Gordon and John Wilkes took up arms in defense of the Old Lady.⁵⁸

On June 8, 1780, George III issued a proclamation that called in the army. Ten thousand troops swept clean the streets of London. Martial power restored civil order. The most common crimes committed by the rioters were destruction of movable objects and setting bonfires in the streets, not looting or theft. That is not to say that there was not a great loss of property. The damage inflicted on public buildings is estimated at £30,000. The cost to human life was even more tragic. The death toll stood at 458 civilians and 210 soldiers, with scores more maimed and wounded. There was a righteous demand for a reckoning. Yet some urged caution. The dialogue between Edmund Burke and Frederick North, 2nd Earl of Guilford, resembled the tension between George Washington and Alexander Hamilton in handling the Whiskey Rebellion fourteen years later: the former feared inciting more violence by over-playing the government’s hand; the latter desired to stamp out the fire of insurrection so that it should never light again.⁵⁹

The Gordon Riots proceedings in the Old Bailey expressed a conservative reflex to purge disorder through discipline and punishment. Out of the 450 people who were arrested for riot-related crimes, 160 appeared for trial. Of those that appeared, sixty-two were given death sentences (though only twenty-five were ultimately hanged), twelve were given terms of imprisonment ranging from one month to five years, and one was privately whipped. Another eighty-five arrestees were found not guilty. The executions were cathartic. *Carnaval revolte* atoned through *carnaval macabre*—liturgical inhale and exhale for the masses.⁶⁰

⁵⁸ An Act for Preventing Tumults and Riotous Assemblies, and for the More Speedy and Effectual Punishing the Rioters of 1714, 1 Geo. 1, c. 5; Lord Gordon’s Case, 37 H.C. Jo. 902–03 (June 6, 1780); George Rudé, *The Gordon Riots: A Study of the Rioters and Their Victims: The Alexander Prize Essay*, 6 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 93, 96–98, 104–06 (1956).

⁵⁹ See Lord George Gordon’s Case, 37 H.C. Jo. 903–993 (June 8, 1780); Lord George Gordon’s Case, 37 H.C. Jo. 903–910 (June 19, 1780); Matthew White, *For the Safety of the City: The Geography and Social Politics of Public Execution After the Gordon Riots*, in THE GORDON RIOTS: POLITICS, CULTURE AND INSURRECTION IN LATE EIGHTEENTH-CENTURY BRITAIN 204, 218 (Ian Haywood & John Seed eds., 2014); The National Archives of the U.K., WO 34/103, f. 100 (June 7, 1780).

⁶⁰ See White, *supra* note 59, at 204, 208–10, 218; RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 98–100, 105–111.

On June 19, 1780, the Commons convened and was informed that the King would prosecute the Mad Scotchman for high treason. After being summoned to hear a royal address in the House of Lords, the Commons made a resolution in thanks. The Commons also drew up a formal response to King, thanking him again for the measures he implemented as “the Guardian of the Public Safety, [...] in the Hour of extreme and imminent Necessity, for the immediate and effectual Suppression of those rebellious Insurrections.” Lord George Gordon’s petition was overwhelmingly voted down. His jury ultimately found him *not guilty* of high treason, however, because the Crown could not satisfy its burden to prove beyond a reasonable doubt, in light of his speech and conduct, that he deliberately *planned or intended* the riots. Lord George Gordon’s conduct, at any rate, was certainly contemptuous, though no contempt charges were brought against him or used as a predicate for impeachment or expulsion proceedings. One wonders if those were better remedies. The decision not to elect them was arguably more a political determination more than anything else.⁶¹

The Gordon Riots were a powerful inflection point in British history. The real impetus, in my view, was not so much puritanical bigotry as plebeian *ressentiment*—it was the native lower and middling classes groping desire to settle accounts with cosmopolitan elites, to salve the sting of foreign-born workers, to protest imperial conflicts, to achieve, if only for a little while, social justice on their terms. The claim of John Stuart, 1st Marquess of Bute that the riots destroyed 35,000 Roman Catholic homes, however, is a myth. The Roman Catholic neighborhoods that suffered the most, Moorfields and Spitalfields, were Irish migrant enclaves to be sure. But Irish day-laborers competed with natives for work by accepting lower wages. These neighborhoods were derided as “Dens of Popery,” but that derision was arguably another example of trade lobbying by other means. An Irish-Catholic merchant named Malo, for example, employed over a thousand men in workshops in a part of Moorfields near Finsbury yard, was a Roman Catholic, and was always eager to employ fellows from the Emerald Isle. The rioters plausibly targeted him more for his payroll than his rosary beads.⁶²

Sometimes a pinch of humor could dispel a rioter’s rage. A mob raised its fists, cried the refrain of “No Popery,” and prepared to assault the home of an Italian entertainer named Grimaldi for refusing to respond in kind. But the performer cleverly put his head out of the second story window, made comical grimaces, and screamed “Genteelmen in dis hose dere be no religion at all!” The mob laughed, gave him three cheers, and moved on to the next victim. That episode nearly says it all so far as the true religious “convictions” of the rioters were concerned.⁶³

King Mob exploited other tribal differences, but often for similarly base motives that had nothing to do with theology. Jews scrawled “This house is a true

⁶¹ Lord George Gordon’s Case, 37 H.C. Jo. 903–910 (June 19, 1780); King v. Lord George Gordon, 21 St. Tr. 485, 647–48; Rudé, WILKES AND LIBERTY, *supra* note 33, at 102.

⁶² Cf. HIBBERT, *supra* note 53, at 66–68; RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 108–113. But see M. DOROTHY GEORGE, LONDON LIFE IN THE 18TH CENTURY 118–19 (1965) (indicating that anti-Catholic prejudice was still an important factor).

⁶³ See HIBBERT, *supra* note 53, at 66–68, 97–98, 106, 135, 122, 139–40; Rabin, *supra* note 53, at 106–07; Lord George Gordon’s Case, 37 H.C. Jo. 903–910 (June 19, 1780); Rudé, *supra* note 58, at 98–100, 105–111; Rudé, WILKES AND LIBERTY, *supra* note 33, at, at 12.

Protestant” on their doors so that the Spirit of Democracy would pass overhead without inflicting punishment. King Mob made his rounds through the city with the efficiency of a slum lord well versed in the art of calling to collect. Christopher Hibbert recounts that rioters left notes on the doors of each home he visited for future reference: O—meant the “contribution” was poor; Ö—meant a “contribution” was refused so the house should be destroyed; ✓—meant the “contribution” was so generous a second loot might be worthwhile; and ⊙⊙ meant that there was a woman in the house. King Mob was therefore apparently rapacious in more ways than one.⁶⁴

The Protestant Association was, by and large, a body made up of people belonging to the working classes, and, like so many associations similarly composed, suffered from bad leadership, lost sight of its core values, and allowed baser elements to corrupt its energy into a maelstrom of destruction. E.P. Thompson broke down the petition march into three phases encompassing a process of cascading degradation from a revolutionary crowd consisting of well-behaved tradesmen—to a mob reminiscent of the Wilkite era engaged in “licensed spontaneity”—to an unprecedented and unlicensed insurrection beyond the pale of even what eighteenth century standards would tolerate in terms of “activism by other means.”⁶⁵

There is a difference of opinion among the historians of the period about the extent to which the insurrectionary phase of the petition was the fault of members of the working classes vis-à-vis members of the London criminal underbelly. E.P. Thompson correctly characterizes that difference as depending upon the source of information given primacy. George Rudé gives priority to criminal records yielding statistical evidence that the rioters were indeed members of the working classes, therefore, this was an insurrection of “sober workmen.” Christopher Hibbert and J. Paul Castro emphasize eyewitness accounts and anecdotal evidence indicating that the insurrectionaries were lowlifes, thugs, criminals, and prostitutes. Both sources are imperfect. The criminal data from that time is limited, incomplete, and not necessarily representative. Anecdotal evidence and eyewitness accounts notoriously have their own problems: prejudice, issues with recollection, etc. The exact composition of the rioters is impossible to tell, but from my viewpoint, the evidence of their criminal character is overwhelming—to the extent tradesmen were involved, it seems that they were the converse of the kind observed in the initial march of the Protestant Association—tradesmen of the “lesser sort.”⁶⁶

The disaffection of the rioters for the British Empire put symbols of nationalism like the Bank of England right in their crosshairs. Just as the Irish day-laborers of Moorfields and Spitalfields were not necessarily targeted for their Roman Catholicism as such, but as a symbol of economic competition, the Roman Catholic Church itself was an institutional target not simply on its own terms, but for its association with the wild exploits of John Bull. The motives for tolerance bills were not pure; they were designed to swell the ranks of armies engaged in conflicts in North America and elsewhere, wars that the middling and lower classes simply

⁶⁴ See HIBBERT, *supra* note 53, at 122.

⁶⁵ See THOMPSON, *supra* note 25, at 71–72.

⁶⁶ See generally, e.g., J. PAUL DE CASTRO, THE GORDON RIOTS 144–46, 178, 242–43 (1926); THOMPSON, *supra* note 25, at 71–72 & n.2; HIBBERT, *supra* note 53, at 45–46, 106; Rudé, WILKES AND LIBERTY, *supra* note 33, at 93, 95–96, 104–06; Rudé, *supra* note 58, at 118–19.

did not want. Many detested Britain's services as a "nurse of liberty throughout the world" and the cultural feedback that colonial émigrés and colonized peoples returned to the homeland.⁶⁷

I take the view that the Gordon Riots manifested populist and nationalist elements simultaneously. The sentiments of "Don't tread on me" and "My nation first" often run together. This is because populism and nationalism are, in my view, paradoxically intertwined, not dichotomous. As Dana Rabin persuasively demonstrated in her work on the Gordon Riots, nationalism and imperialism are cosmopolitan forces. Empire was made by the elite, for the elite. Yet the incidental effect of empire was to introduce demographic change through conquest, colonization, and commerce. Cosmopolitan chauvinism was, ironically, a force for diversity and inclusion. The law of nature is that great nations, like great heat, expand. Populists wanted their nation to be great; yet they desired to conserve its identity by consolidating its culture and retracting its foreign entanglements. Horace Walpole recognized the costs of empire were not merely economic or martial, but also cultural and constitutional.⁶⁸ Papism was the faith of absolutism in Europe. Papal supremacy was unconstitutional. But in addressing the complicated issue of how to balance demographic pluralism with national creed, Walpole never contemplated burning down Mansfield's house, no matter how much he hated that man. He believed in government, even if he did not believe in *that* government.⁶⁹

In the final analysis, neither the Protestant Association nor Protestantism as a whole can be blamed. The riot was not the work of the nucleus of the petition movement. Perhaps the most striking fact of this whole episode is that out of the 44,000 signatories to Lord George Gordon petition, not a single one was arrested, let alone tried and convicted, for any crime related to the riots. There is no evidence of a coordinated plan of action from any source, George Rudé concluded, such as that imagined by Charles Dickens in *Barnaby Rudge*. What the rioters had in common was not that they *were* of one faith or one color, but that they *were not* elite. The shepherds in the ranks occupied "pulpits of the lower sort;" the sheep of a Protestant persuasion were "chiefly Methodists and bigoted Calvinists of the lower ranks of life."⁷⁰ Naturally, there were conspiracy theories that the riots were instigated by foreign agents from France and the United States. But none of them were accurate. In truth, King Mob was less a bigot and a supremacist than he was a blundering bully and a fool. The demagogue was received unto his own in Scotland as a hero after the trial was over and serenaded with a familiar refrain: "Gordon and Liberty."⁷¹

⁶⁷ See Rabin, *supra* note 53, at 94–97.

⁶⁸ As discussed in *id.* at 97.

⁶⁹ See *id.* at 93, 93–97, 105–06, 108–09.

⁷⁰ See Mark Knights, *The 1780 Protestant Petitions and the Culture of Petitioning*, in *THE GORDON RIOTS: POLITICS, CULTURE AND INSURRECTION IN LATE EIGHTEENTH-CENTURY BRITAIN* 46, 52, 55 (Ian Haywood & John Seed eds., 2014); John Seed, *The Fall of Romish Babylon Anticipated: Plebeian Dissenters and Anti-Popery in the Gordon Riots*, in *THE GORDON RIOTS: POLITICS, CULTURE AND INSURRECTION IN LATE EIGHTEENTH-CENTURY BRITAIN* 69, 69–70 (Ian Haywood & John Seed eds., 2014); Rudé, *supra* note 58, at 102.

⁷¹ See Rabin, *supra* note 53, at 93, 102–04; Nicholas Rogers, *The Gordon Riots and the Politics of War*, in *THE GORDON RIOTS: POLITICS, CULTURE AND INSURRECTION IN LATE EIGHTEENTH-CENTURY BRITAIN* 21, 22–23 (Ian Haywood & John Seed eds. 2014); cf. HIBBERT, *supra* note 53, at 66–68, 97–98, 106, 122, 163–169.

Let it not be supposed that what transpired was squarely the fault of the Tories or the Whigs. Neither the leaders of the government nor the opposition were swayed by Lord George Gordon. Consider the example of Edmund Burke, that venerable champion of conservatism, who put an end to his own friendly relations with the “Mad Scotchman.” Lord Gordon himself wrote that Burke “never once shewed the smallest sign of that acquaintance or familiarity which had formerly subsisted between us for some years.” Like any decent student of the classical tradition, Burke recognized that the end of friendship was *virtue*, not loyalty. When it became apparent that the word “virtue” could never again be associated with Lord Gordon or his legacy, Burke terminated the relationship, and in doing so gave posterity a marvelous lesson in character: Do not indulge the pretender, the pied piper, or the petty tyrant, even for an instant, no matter the temporal gain.⁷²

We might wonder why the Gordon Riots did not send St. James’s Palace into a death spiral as the French Revolution did for Versailles. Britain supposedly had a proletariat too, after all, didn’t it? The answer, funnily enough, might be that Britain had better elites. The dexterity of the British Constitution and the character of its best men, though far from perfect, navigated the crisis to a swift resolution. The casualties inflicted by the army could have been far higher if the troops had not been so hesitant to fire on civilians. Even in the heat of the greatest terror to antagonize London since the Great Fire of 1666, leading statesmen kept an ever-watchful eye on the civil liberties of their fellow subjects. Burke urged against “establishing a military on the ruins of the civil government,” for the London he saw filled with troops looked more like “Paris, Berlin or Petersburg then the capital of government by law.” The Anglo-Saxon political sensibility suffered neither the stamping Prussian jackboot nor the Napoleonic whiff of grapeshot. In insurrections as in government, Great Britain was more moderate than Europe.⁷³

D. PARLIAMENTARY CONTEMPT POLICY

Over the centuries the scope, mode, and policy of the *lex parliamentaria* sustained considerable debate. It was long a subject of contention, for example, whether the law of Parliament was completely untouchable or could be circumscribed by common law courts.⁷⁴ There now exists a state of comity between Parliament and the judiciary on that issue. The judiciary can dispose of legal questions relating

⁷² See HIBBERT, *supra* note 53, at 51; cf. FREDERICH NIETZSCHE, BEYOND GOOD AND EVIL: ON THE PREJUDICES OF PHILOSOPHERS 30 (1989) (1886); MARCUS TULLIUS CICERO, LAELIUS: ON FRIENDSHIP 5.19, 187 (Michael Grant trans., 1971) (44 B.C.); ARISTOTLE, NICOMACHEAN ETHICS 1101b13–20, 1165b10–20 (David Ross trans., Lesley Brown ed., 2009) (c. 340 B.C.).

⁷³ See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 45, 87, 105 (2009) (1790); HIBBERT, *supra* note 53, at 55–57, 74, 97–98, 100–05.

⁷⁴ E.g., Baron Mereworth v. Ministry of Justice [2011] EWHC 1589 (Ch), [2012] Ch 325, [2012] 2 WLR 192 (Eng.); Bradlaugh v. Gosset (1884), 12 Q.B.D. 271; Howard v. Gosset (1845), 116 Eng. Rep. 139, 10 Q.B. 359 (Eng.); Stockdale v. Hansard (1840), 113 Eng. Rep. 428, 11 Ad. & E. 297 (Eng.); Stockdale v. Hansard (1839), 113 Eng. Rep. 411, 11 Ad. & E. 251 (Eng.); Stockdale v. Hansard (1830), 112 Eng. Rep. 1112, 9 Ad. & E. 1 (Eng.); Burdett v. Abbot (1810), 128 Eng. Rep. 384, 4 Taunt. 398 (Eng.); Ashby v. White (1704), 91 Eng. Rep. 19, 1 Salk 20 (Eng.); Ashby v. White (1703) 90 Eng. Rep. Holt, K.B. 524 (Eng.); ERSKINE MAY’S 2019 MANUAL, *supra* note 15, at §§ 16.2 & nn. 1, 10, 16.3, 16.4, 16.27.

to parliamentary privilege. There is a lack of consensus on whether Parliament should define the boundaries of its contempt power through positive law. A bill doing so would be roughly analogous to declaratory acts that Parliament passed for centuries to clarify or amend other common law doctrines. The Contempt of Court Act of 1981 does this for the contempt power of the English judiciary. Parliament, however, has no analogue legislation for its own contempt power.⁷⁵

The House of Commons resolved in 1978 that, going forward, it would exercise its contempt power as sparingly as possible and only when satisfied that doing so is necessary to provide reasonable protection for its members, officers, and processes.⁷⁶ Parliament's power to punish criminal contempt is now selective and mild. In fact, no one has been imprisoned for contempt since 1880. The Joint Committee on Parliamentary Privilege recommended that Parliament pass a bill codifying contempt procedures and eliminating imprisonment as a penalty. That recommendation, however, did not pass into force. There is no contempt policy in place for riots and insurrections that threaten Parliament.⁷⁷ Parliament's principal weapons against mob violence—election related or otherwise—are the Metropolitan Police Act of 1839, the Civil Contingencies Act of 2004, and the Police Reform and Social Responsibility Act of 2011. If the police cannot protect Parliament from a large-scale insurrection or riot, the military can help as a last resort under the Civil Contingencies Act.⁷⁸

No Act of Parliament, resolution of either House, or judicial decision of any court of common law explicitly abrogated Parliament's power to punish riotous mobs interfering with its proceedings or elections through contempt proceedings.⁷⁹ The traditional rights of the House of Commons to commit a contemnor for the duration of the session and of the House of Lords to commit indefinitely persist to this day. Given Parliament's more relaxed posture since 1978, however, both Houses are more likely to refer contempt in the form of large-scale election interferences or rioting to the Attorney General than initiate contempt proceedings against the assailants or their leaders themselves. Participation in a modern "tumult" is liable to be prosecuted under statutory offenses, including treason under the Treason Act of 1351, or violent disorder under the Public Order Act of 1986. Basic common law crimes are punishable as well, including assault, battery, arson, etc.⁸⁰ With this comparative standpoint in place, we can now turn to the American framework of government and episodes of disorder at American seats of government.

⁷⁵ See Contempt of Court Act of 1981, c. 49; U.K. PARLIAMENT, HOUSE OF COMMONS, COMM. ON ISSUE OF PRIVILEGE, POLICE SEARCHES ON THE PARLIAMENTARY ESTATE: FIRST REPORT, TOGETHER WITH FORMAL MINUTES, ORAL AND WRITTEN EVIDENCE 60, 66 (2010); ERSKINE MAY'S 2019 MANUAL, *supra* note 15, at §§ 16.1, 16.25; English Bill of Rights art. IX (1689).

⁷⁶ ERSKINE MAY'S 2019 MANUAL *supra* note 15, at §§ 15.2; 15.32 & n.1.

⁷⁷ See U.K. PARLIAMENT, JOINT COMM. ON PARLIAMENTARY PRIVILEGE, FIRST REPORT §§ 271–73, 324 (Mar. 30, 1999).

⁷⁸ Police Reform and Social Responsibility Act of 2011, Part 3, ss 142–149; Civil Contingencies Act of 2004, c. 36; Representation of the People Act of 1983, c. 2, ss 65–67; Metropolitan Police Act of 1839, 2 & 3 Vict. c. 47, s. 52.

⁷⁹ ERSKINE MAY'S 2019 MANUAL, *supra* note 15, at § 15.14.

⁸⁰ Public Order Act of 1986, c. 64; Treason Act of 1351, 25 Edw. 3, c. 2, s. 5.

III. CONTEMPT OF THE UNITED STATES CONGRESS

The United States Constitution establishes a republican system of government in seven concise articles. A portion of it is yet unwritten, for as the pre-Socratic philosophers well observed in the *nomos/physis* debates over two and a half millennia ago, positive law can never be totally severed from natural law because human language constructing legal meaning can never be completely separated from right reason. The universe of all possible meanings can seldom be exhausted through the written word, though careful draftsmanship can restrict the compass of plausible meanings to the conceptual horizon perceived by its author. To navigate with that compass justly and equitably requires not only an understanding of the text but also the reason and tradition it imbibes. Tradition is indeed the great custodian of reason, for it disciplines reason with the test of time. The black letter of the United States Constitution takes precedence in its construction but tradition fills its interstices and balances its ingredients with the wisdom of the ages. The contempt power of Congress falls within the four corners of this brilliant text and stands upon an impressive historical tradition.⁸¹

A. THE UNITED STATES CONSTITUTION AND CONTEMPT POWER

Article I establishes the legislative branch of government. Several sections relate to the contempt power of Congress. Article I, Sections 2 and 3, in conjunction with Article II, Section 4, outline the congressional impeachment process: the House of Representatives investigates and charges impeachable offenses; the Senate then sits as a Court of Impeachment and tries those charges. Article I, Section 5 provides that each House is to be the judge of its own elections, returns, and qualifications of its own members; moreover, each House can punish its own members and expel them by a two-thirds majority. Article I, Section 6 notes that both Houses enjoy parliamentary privileges. Two are explicitly enumerated: freedom from arrest while attending session and freedom of speech and debate. There are many privileges incidental to Section 6 as well.⁸² The privileges of each House are not necessarily coextensive, moreover, the privileges of each House belong to them institutionally rather than to their constituent members individually.⁸³

Since the Founding, the national legislature relied on the *lex parlamentaria* to construe the contours of its own law—the *lex parlamentaria americana*—under Article I.⁸⁴ In 1817, the House of Representatives held a non-member, one

⁸¹ See U.S. CONST. arts. I–III; Pseudo-Demosthenes, *Against Aristogeiton* 15.1–16.8, 17.4–17.7, 20.1–20.2, 35.1–35.4, 91.3–93.3, reprinted in *THE FIRST PHILOSOPHERS: THE PRESOCRATICS AND THE SOPHISTS* 303, 311–12 (Robin Waterfield trans. & ed., 2009) (c. 580 – 400 B.C.); PLATO, *LAWS* 4.713c–4.714a & n.33 (Malcolm Schofield ed., Tom Griffith trans., 2016) (428–328 B.C.).

⁸² E.g., *Annals of the 15th Congress, H.R.*, 1st Session 631–36 (Jan. 9, 1818).

⁸³ See *Cong. Globe*, 27th Cong., H.R., 2nd Session 209 (Feb. 3, 1842).

⁸⁴ See generally, e.g., THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE* 17–19 (1871) (1801) (discussing the scope of the contempt power towards enforcing congressional privileges); LUTHER STEARNS CUSHING, *LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* §§ 655–691, at 259–270 (1866) (1845) (discussing congressional procedures

Colonel John Anderson, in contempt for attempting to bribe one of its members, notwithstanding the fact that the bribery occurred outside of Capitol grounds. In 1821, the Supreme Court of the United States affirmed the conviction in *Anderson v. Dunn*. Colonel Anderson's Case constitutes a double precedent—legislative and judicial—that governs the law of the land and the law of Congress simultaneously. It unequivocally establishes the power of both Houses of Congress to punish both direct and constructive contempts with imprisonment. That power is inherent to the constitutional prerogatives of each House and implied in Article I.⁸⁵ Indeed, the two provisions of the Constitution where the Founding Fathers incorporated the common law principle underlying contempt power are the Privileges Clause of Section 5 and the Necessary and Proper Clause of Section 8.⁸⁶

B. THE LAW OF CONGRESS AND THE CONTEMPT POWER

Contempt proceedings are *sui generis*; therefore, they are not circumscribed by the Bill of Rights to the same degree as judicial proceedings. An allegation of contempt is traditionally investigated by an ad hoc select committee and then tried before a Committee of the Whole House sitting as a Court of Contempt. A conviction requires a two-thirds majority. The precise burdens of proof and persuasion for a House to convict an alleged contemnor are not definitively established. The Supreme Court only has limited judicial review of the law of Congress, such as in the case of habeas petitions arising from contempt proceedings. The Supreme Court decided in *Marshall v. Gordon* in 1917 that contempt power exists for the sake of Congress's self-preservation, not punishment as such. Members of both Houses, congressional officers, and members of the public at large are subject to contempt proceedings. The available penalties for contempt tried by both Houses include reprimand and incarceration. The maximum period of incarceration for contempt of the House of Representatives is the duration of the session per the Supreme Court's decision in *Anderson*. That decision was silent, however, on what period is appropriate for the Senate, leaving open the possibility that the Senate can impose a longer period of imprisonment. There is no statute of limitations. Contempts can be tried and punished a year or more year after they occur.⁸⁷

for judicial functions, including contempt proceedings); JOSEPH STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 845 (4th ed. Thomas M. Cooley ed. 1873) [hereinafter, "STORY, I COMMENTARIES ON THE CONSTITUTION"]; see also 66 H.R. Jo. 194–96 (Jan. 15, 1868); Cong. Globe, 34th Congress, H.R., 1st Session 179–81 (Mar. 17, 1856); Cong. Globe, 28th Cong., HR. 578 (May 6, 1844); Cong. Globe, 27th Cong., H.R. 178 (Jan. 27, 1842); Cong. Globe, 26th Cong., H.R. 394–95 (May 14, 1840); 32 H.R. Jo. 1012–15 (June 4, 1838); Register of Debates, H.R., 22nd Cong. 3895–3899 (July 11, 1832); Register of Debates, H.R., 22nd Cong., 1st Session 3888–3908 (July 10, 1832); Register of Debates, H.R., 22nd Cong., 1st Session 3867–69, 3876–3877, 3887 (July 9, 1832).

⁸⁵ See U.S. CONST. I, §§ 5–6, 8; *Anderson v. Dunn*, 19 U.S. 204, 230–33, 235 (1821); Register of Debates, H.R., 22nd Cong. 3890 (July 10, 1832); Annals of the 15th Congress, 1st Session 595–99, 603, 624, 631–42, 695–700, 742–46, 89–90 (1818); 2 H.R. Jo. 413 (Jan. 13, 1796); STORY, I COMMENTARIES ON THE CONSTITUTION, *supra* note 84, at § 847.

⁸⁶ See James Madison, Federalist No. XLIV; see also Alexander Hamilton, Federalist No. XXXIII; Alexander Hamilton, Federalist No. LIX.

⁸⁷ See U.S. CONST. I, §§ 5–6, 8; *Marshall v. Gordon*, 243 U.S. 521, 542 (1917); *Anderson*, 19 U.S. at 204, 230–33, 235; Register of Debates, H.R., 22nd Cong. 3890 (July 10,

A congressional committee has a variety of tools for enforcing its prerogatives. The Senate has authority, by rule, to pursue the enforcement of its orders and subpoenas through a civil action in federal court. Though the House of Representatives lacks a comparable rule, it presumably has the same authority under its inherent power.⁸⁸ A man who violates the injunction of a federal court may be liable for civil or even criminal contempt of court.⁸⁹ The contemnor may be criminally prosecuted and held in contempt of Congress for the same conduct without violating the Double Jeopardy Clause.⁹⁰ Congress can certify contempt of a congressional investigation to the executive for criminal prosecution under a particular statute codifying contempt of congress in that particular domain: 2 U.S.C. § 192. This is the only specie of congressional contempt that is truly “criminal” in the proper sense of the word. All other species of contempt remain *sui generis*.⁹¹ The contempts of interest here are riots and insurrections on Capitol grounds. No scholarly work to my knowledge ever directly addressed this class of contempt. I will do so now

C. DIRECT CONTEMPT BY RIOT AND INSURRECTION

The danger of politically motivated riots directly assaulting the coordinate branches of government is well precedented. In 1689, for example, a demagogue by the name of John Coode spread a rumor in the Province of Maryland that Catholic elites were conspiring with the Indians to exterminate the Protestant majority. He led an insurrection to the doors of the State House and overthrew the provincial government.⁹² This is just one example illustrating the precarious exposure of colonial governments to extortion by mass intimidation. The possibility of tumult interfering with official proceedings is the very reason why the nation’s capital is a federal district. The next three precedents from the time of American Revolution onward inform the scope of congressional contempt power in the realm of protecting

1832); Annals of the 15th Congress, 1st Session 595–99, 603, 624, 631–42, 695–700, 742–46, 89–90 (1818); 2 H.R. Jo. 413 (Jan. 13, 1796); STORY, I COMMENTARIES ON THE CONSTITUTION, *supra* note 84, at §§ 848–49.

⁸⁸ Sen. R. XXIX.5.

⁸⁹ See generally CONG. RES. SERV., A SURVEY OF THE HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS 1 (Jan. 29, 2018); TODD GARVEY, CONG. RES. SERV., CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 1–2 (May 12, 2017).

⁹⁰ Cf. *United States v. Houston*, 26 F. Cas. 379, 380–83 (C.C. D.C. 1832) (holding Samuel Houston criminally liable for conduct also constituting contempt of the House of Representatives and breach of privilege), with 8 Register of Debates 2822–3021, 3017–18 (1832) (holding Samuel Houston in contempt of the House of Representatives); see also B.F. Butler, Punishment by the House of Representatives No Bar to an Indictment, 2 U.S. Op. Att’y Gen. 655 (U.S.A.G.), 1834 WL 1131 (June 25, 1834).

⁹¹ U.S. CONST. amend. V.

⁹² The Narrative of Colonel Henry Darnall, 8 Md. Arch. 155, 156 (Dec. 31, 1689); cf. WILLIAM E. NELSON, E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607 – 1776, 234–35 (2019); HERBERT L. OSGOOD, III THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 562–63 (1958); HERBERT L. OSGOOD, II THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 378–79 (1958); HERBERT L. OSGOOD, III THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 491–504 (1907).

its own grounds: a riot on the Congress of Confederation, a riot in the proximity of the United States Congress, and a riot on a state legislature.

1. *The Philadelphia Mutiny of 1783*

The Trump Riot provides an excellent illustration of the fact that even distinguished veterans are capable of perfidious behavior. The same was true at the birth of the Republic. On December 14, 1782, George Washington informed Joseph Jones by letter that “the temper of the Army is much soured, and has become more irritable than at any period since the commencement of the War.”⁹³ The 3rd Continental Light Dragoons, a regiment of cavalry led by Lieutenant Colonel George Baylor, was raised on January 1, 1777, and fought bravely in several major actions during Revolutionary War. In June 1783, however, they grew dissatisfied with their pay and elected to mutiny. Robert Morris, Superintendent of Finance, and Benjamin Lincoln, Secretary of War, reported the mutiny to Congress by letter dated June 17. They requested permission to issue an ultimatum: Surrender and be pardoned or resist and be executed.⁹⁴

The mutineers bivouacked in Lancaster, Pennsylvania. Both Congress and the Supreme Executive Council of the Commonwealth of Pennsylvania were located in Philadelphia at the Pennsylvania State House, a building that later came to be known as Independence Hall. The serpent of disorder slithered their way, but Congress was helpless because it had no direct control over the military under the Articles of Confederation. It was entirely dependent on state militias for protection. No militia was on call to quickly suppress the threat. Delegate John Dickinson (Pennsylvania) explained that “without some outrages on persons or property, the militia could not be relied on.”⁹⁵

Eighty armed mutineers arrived in Philadelphia on the night of June 20 and merged with local soldiers stationed at the city barracks. The mob, now totaling around 500 men, surrounded the State House the next day, and blocked the door, preventing the members of the Congress of Confederation from leaving. The situation brought a new meaning to the term “House arrest.” Although they demonstrated no initial willingness to engage in violence, the mob uttered offensive language, recklessly pointed their muskets at the windows, and drank to “hasty excesses” from nearby “tippling houses.” Bayonets were fixed. Moods were hot. The mob sent a note to the session, demanding that Congress appoint officers to represent their grievances since the mutineers’ own officers had strong enough mettle to avoid the ruckus.⁹⁶

Constance McLaughlin Green downplays the danger of the mutiny in her classic history of the capital.⁹⁷ She overlooks, however, evidence that the mutineers were contemplating more desperate tactics to convey their complaints, including

⁹³ George Washington, *Letter to Joseph Jones* (Dec. 14, 1782), reprinted in GEORGE WASHINGTON: WRITINGS 478-79 (John Rhodehamel ed., Library of America, 1997).

⁹⁴ 24 Cont. Cong. Jo. 399–401 (June 17, 1783).

⁹⁵ See U.S. ART. CONFED. art. VII, IX; 5 Elliot’s Debates 93–94 (June 21, 1783).

⁹⁶ 25 Cont. Cong. Jo. 973 (June 21, 1783); 20 Letters of Delegates to Congress 349–350 (June 21, 1783).

⁹⁷ See CONSTANCE McLAUGHLIN GREEN, WASHINGTON: A HISTORY OF THE CAPITAL: 1800 – 1950, 10–11 (1962).

an assault on a nearby bank, and even a plan to seize members of Congress to physically coerce indemnification.⁹⁸ The mutineers were bold enough to seize the public magazine, rendering the whole affair into a literal powder keg. Alexander Hamilton (New York) managed to talk them into letting the members leave at the end of the day, but the mob did not let down. The situation was dire.⁹⁹ Elias Boudinot (New Jersey) wrote to George Washington, urging that “this wound to the dignity of the Federal Government should not go unpunished.”¹⁰⁰

On June 21, Oliver Ellsworth (Connecticut) and Alexander Hamilton conferred with the Supreme Executive Council. Congress reported to the Council “[t]hat though they had declined a specification of the measures which they would deem effectual, it was their sense, that a number of the militia should be immediately called out, sufficient to suppress the revolt.” The Council’s reply was infuriating. The local militia was unwilling to intervene until someone was shot or the State House was torched. These militia were fellow Pennsylvanians. They were no more disposed to fire on their own countrymen than the British regulars were in the Gordon Riots three years earlier. The glory of relieving the legislators from their misery instead fell to Cincinnatus.¹⁰¹

Upon receiving word of the mutiny on June 24, President George Washington dispatched 1,500 soldiers under the command of Generals William Heath and Robert Howe. Hamilton proposed that this force assume a constabulary role—to discover, disarm, and detain anyone who participated in the mutiny. The mutiny actually disbanded before the troops arrived. This was in part because Congress managed to remove itself (with indignation) to Princeton, New Jersey. The removal succeeded for two reasons. First, Benjamin Rush, a fellow Pennsylvanian, skillfully negotiated with the mutineers about their grievances. Second, the storm ran its course. The mutineers had enough and went home. The troops sent by President Washington were discharged on August 21.¹⁰²

The Council maintained that it was just as dishonored as Congress. But that was not true.¹⁰³ There could be no greater proof of the Commonwealth’s hypocrisy than the Council’s decision not to investigate the mutiny. Congress, on the other hand, appointed committees to investigate the incident and later resolved that the mutineers should be deprived of the ordinary privilege of carrying home their arms.¹⁰⁴ During the late Summer, General Howe conducted courts martial for the mutineers and kept Congress informed of those proceedings. As to the six members of the mutineer committee that negotiated with Rush, one was not court-martialed, three were acquitted, and two fled. Four mutineers were convicted and received whippings. Two

⁹⁸ 25 Cont. Cong. Jo. 974 (June 21, 1783).

⁹⁹ 20 Letters of Delegates to Congress 349–350 (June 21, 1783).

¹⁰⁰ 20 Letters of Delegates to Congress 350–52 (June 21, 1783).

¹⁰¹ See Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY 419, 443–46 (1977); 25 Cont. Cong. Jo. 973–74 (June 21, 1783); 20 Letters of Delegates to Congress 350–52 (June 21, 1783).

¹⁰² 24 Cont. Cong. Jo. 517–18 & n. 1 (Aug. 21, 1783); 24 Cont. Cong. Jo. 411–21 (July 1, 1783); 24 Cont. Cong. Jo. 411 & n.1 (June 30, 1783); Bowling, *supra* note 101, at 443–46.

¹⁰³ 24 Cont. Cong. Jo. 423–33 (July 15, 1783); 24 Cont. Cong. Jo. 425 (July 4, 1783); 24 Cont. Cong. Jo. 423–25 (July 2, 1783).

¹⁰⁴ 24 Cont. Cong. Jo. 452–53 (July 28, 1783).

men who led the mutiny—John Morrison and Christian Nagle—were sentenced to death but pardoned. No civilians were ever found to have conspired or participated in the mob. On September 13, James Duane (New York), John Rutledge (South Carolina), and Jacob Read (South Carolina) delivered Howe’s final report.¹⁰⁵

Although the offenses committed by the mutineers were prosecuted under military justice, not civil justice or any inherent authority of the Confederation Congress, I believe they were in the genre of contempt and proper crimes at common law. Hamilton was livid with Pennsylvania’s “weak and disgusting position,” during the mutiny. “New governments emerging out of a revolution, are naturally deficient in authority,” he later reflected, “This observation applies with peculiar force to the government of the union; the constitutional imbecility of which must be apparent to every man of reflection.”¹⁰⁶

The trauma of the Philadelphia Mutiny moved Congress to explore a deeper question: How could it better protect itself from riots, tumults, and insurrections in the future? It appointed a committee to consider defining a jurisdiction where the national legislature could reside, and thereby exercise full control over its own security.¹⁰⁷ The work of that committee was ultimately fulfilled in the United States Constitution. Article I, Section 8 formally invests the United States Congress with authority to govern the District of Columbia, a federal city, as well as the right to call upon militias to defend it in the event of riot or rebellion.¹⁰⁸

2. *The Buckshot War of 1838*

The next major episode occurred at the peak of the Anti-Mason movement. It all started in 1826, when one William Morgan, a printer from Batavia, New York, published a piece attacking the Free-Masons and then disappeared. The public raised its eyebrows. Did the Masonic Order kidnap Morgan, or worse? The incident stirred up public suspicions. At the turn of the century, there were eleven grand Masonic lodges and 16,000 members across the country. The Freemasons were indeed a powerful organization, with important connections in politics and the press.¹⁰⁹

Over the next five years, legal proceedings related to Morgan’s disappearance resulted in several indictments. These proceedings were tainted by the fact that Masonic witnesses refused to appear; moreover, several jurors and judges in these cases were Masons themselves. It came to light that the Masons did indeed abduct Morgan and (probably) murdered him. The public also learned that Eli Bruce, Sheriff for Niagara County, New York, was a Mason and not only participated in the abduction, but packed juries to frustrate its investigation and prosecution. Bruce and two others were ultimately convicted of kidnapping in 1828.¹¹⁰

¹⁰⁵ 24 Cont. Cong. Jo. 540–41 & n.1 (Sept. 9, 1783); 24 Cont. Cong. Jo. 535 (Sept. 4, 1783); 24 Cont. Cong. Jo. 533 & n.1 (Sept. 2, 1783); Bowling, *supra* note 101, at 444–47.

¹⁰⁶ See Alexander Hamilton, Nat’l Arch. *Defense of Congress*, FOUNDERS ONLINE (July 1783), <https://founders.archives.gov/documents/Hamilton/01-03-02-0273>, *derived from* III THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed. 1962 (1782–1786)).

¹⁰⁷ 24 Cont. Cong. Jo. 428 & n.1 (July 8, 1783).

¹⁰⁸ See U.S. CONST. art. 1, § 8, cl. 15–17; Bowling, *supra* note 101, at 449.

¹⁰⁹ See generally FORMISANO, *supra* note 24, at 96–99, 137.

¹¹⁰ *Id.* at 137.

The Morgan affair inflamed the anxiety of constituencies around the country. The Masons were widely perceived to be a danger to the American family because of their machinations to suppress public criticism, their grip on positions of power and influence, their exclusion of women, and their reputation for intemperance. As a result, a faction known as the “Anti-Masons” formed on planks that appealed to many voters among the working classes: an evangelical perspective on family values, temperance, and theological orthodoxy, plus a contempt for Masonic-Democratic elites.¹¹¹

Anti-Mason fervor, the “Blessed Spirit,” found a warm political reception in the Keystone State. The Pennsylvania House of Representatives began investigating the Masonic order across the state in 1835. Anti-Masonic candidate Joseph Ritner was elected Governor. His “humble farmer” image and antipathy for Masonic domination of elite public offices were agreeable to populist sentiments animating the electorate. Pennsylvania adopted a new constitution in 1838 curbing the Governor’s appointment power by, among other things, requiring the Senate to confirm judicial nominations. Ritner was re-nominated that same year and supported by a coalition of the Whigs and Anti-Masons. The Democrats put up a desperate fight. The final tally showed that the Democratic candidate, David R. Porter, was the winner by a mere 5,540 votes. The Blessed Spirit was reduced but not retired.¹¹²

The struggle for the executive was finished. But the struggle for the legislature had just begun. The Fall election of 1838 for the Pennsylvania General Assembly was tight. The Democrats and Whig/Anti-Mason coalition contested eight seats in the Pennsylvania House of Representatives. The Whig/Anti-Mason coalition needed those seats to win a majority in the Pennsylvania House of Representatives. They already won a majority in the Senate. Those seats therefore not only represented control of the General Assembly, but possession of a seat in the United States Senate for their faction as well. During the course of those contested elections, the Democrats threw out all the votes from the Northern Liberties precinct of Philadelphia, a working-class district, on the grounds of election fraud.¹¹³ Members of the Van Buren administration stationed in Philadelphia conspired with local elites in the Democratic party to take additional steps to ensure that there was no challenge. John J. McCahen of the U.S. Post Office, James H. Hutchinson of the U.S. Customs House, and Charles F. Meusch, Deputy U.S. Marshal, shipped an angry mob by train to Harrisburg, the state capital, to prevent the legislature from investigating and overturning the election. Pennsylvania was in for a political showdown the likes of which had not seen since the Whiskey Rebellion of 1794.¹¹⁴

¹¹¹ *Id.* at 118–19, 125–26.

¹¹² *Id.* at 131–32; William Henry Egle & Joseph Ritner, *The Buckshot*, 23 PA. MAG. HIST. & BIO. 137, 137–143 (1899); Roy H. Akagi, *The Pennsylvania Constitution of 1838*, 48 PA. MAG. HIST. & BIO. 301, 332 (1924).

¹¹³ Egle & Ritner, *supra* note 112, at 137–143.

¹¹⁴ See DAVID GRIMSTED, *AMERICAN MOBBING, 1828–1861: TOWARD CIVIL WAR* 207 (1998) (citing PENNSYLVANIA GENERAL ASSEMBLY, HOUSE OF REPRESENTATIVES, THE REPORT OF THE MINORITY COMMITTEE APPOINTED TO ENQUIRE INTO THE CAUSE OF DISTURBANCES 3 (1839); and then citing 55 *Niles Register* 225 (Dec. 8, 1838)); Egle & Ritner, *supra* note 112, at 137–143, 147–53; Akagi, *supra* note 112, at 332; FORMISANO, *supra* note 24, at 131–32.

On December 4, 1838, the Pennsylvania House of Representatives came to order. There were one hundred representatives. The Democrats held forty-eight seats in other quarters besides the eight contested in Philadelphia. The Anti-Masons and Whigs held forty-four seats. The contest for the eight seats from Philadelphia prevented the constitution of a lawful quorum, a condition precedent for electing a Speaker of the House. Both factions were so incensed by each other that they began electing *their own* Speakers on an independent basis. The Whigs and Anti-Masons elected Thomas S. Cunningham (Beaver County) as their Speaker. The Democrats elected William Hopkins (Washington County) as theirs. This was a terrible development. A servant cannot obey two masters, let alone a house full of public servants.¹¹⁵

The rancor in the Pennsylvania Senate was even worse. The lobbies in the rear of the upper chamber began to fill with the mob of “concerned citizens” that trained in from Philadelphia. Charles B. Penrose (Anti-Mason, Philadelphia) presided as Speaker. Two members of the Pennsylvania House of Representatives were present on the floor of the Senate at that time: Thaddeus Stevens (Anti-Mason, Adams County) and Thomas H. Burrowes (Anti-Mason, Lancaster County). Representative Burrowes also served as the Secretary of the Commonwealth; in the past he served on the Anti-Mason State Committee as well. He was given the task of reading the returns for the contested elections.¹¹⁶

Senator Charles Brown (Anti-Mason, Philadelphia) interrupted Burrowes, protested that one of the returns was false, and presented a substitute document that he claimed was the “true” return. This created an uproar in the gallery. “The scene now became one of fearful confusion, disorder, and terror. . . .”¹¹⁷ In the words of Stevens, “a gang of rough, ferocious men, addicted to the lowest habits and vices,” armed with dirks and clubs, began an assault on the chamber. They were led by one “Balty” Sowers, a Philadelphia butcher so-called because he was originally from Baltimore. “Kill Burrowes!”—“Kill Stevens!”—“Kill Penrose!”—cried King Mob.¹¹⁸ Penrose abandoned his post and escaped the assailants with Stevens and Burrowes. They were forced to jump from a window twelve feet off the ground, run through a row of thorn bushes, and climb over a seven-foot picket fence.¹¹⁹ Governor Ritner issued a proclamation the same day announcing a state of insurrection.¹²⁰

Men who constructed and maintained public works supported by the Governor’s policy, like canals and railroads, seized the state arsenal in anticipation of a fight on behalf of their patron. William Cochran, Sheriff of Dauphin County, Pennsylvania, issued a counter-proclamation, asserting that there was no disorder and that the Governor’s proclamation was unnecessary. The next day, Governor Ritner ordered Major-General Robert Patterson of the First Division of the Pennsylvania Militia based in Philadelphia to “call out from your command force sufficient to quell this

¹¹⁵ See Egle & Ritner, *supra* note 112, at 143–46.

¹¹⁶ *Id.* at 146; *About the Buckshot War*, N.Y. TIMES. (Dec. 18, 1887).

¹¹⁷ Egle & Ritner, *supra* note 112, at 143–46.

¹¹⁸ *As quoted in About the Buckshot War*, N.Y. TIMES. (Dec. 18, 1887).

¹¹⁹ See GRIMSTED, *supra* note 114, at 208; Egle & Ritner, *supra* note 112, at 143–46; *About the Buckshot War*, N.Y. TIMES. (Dec. 18, 1887).

¹²⁰ *As quoted in Egle & Ritner, supra* note 112, at 147–48.

insurrection and march them immediately to the seat of government.”¹²¹ General Patterson complied, obtained supplies from the United States Arsenal at Frankford, Pennsylvania, and distributed buckshot to his men—the action for which this whole affair is named. Some of the mob in Harrisburg, led by Representative Thomas B. McElwee (Democrat, Bedford County), conspired to derail a train carrying militia but gave up when they realized that Patterson, a wealthy Philadelphia Democrat, was at the helm. General Patterson and 100 of his men arrived on December 8.¹²²

Governor Ritner appealed to President Martin Van Buren for aid. He contended that the federal government had an obligation to support him because several federal officers lead the insurrection. President Van Buren did not bother to respond personally; rather, he elected the Secretary of War, Joel R. Poinsett, to serve as his mouthpiece. The message was eerily reminiscent of the Pennsylvanian Council’s response to the Congress of the Confederation during the mutiny of 1783: There would be no intervention unless it became impossible for the Pennsylvania legislature to reconvene. A dark irony of history indeed. One can imagine Hamilton turning over in his grave. Unsatisfied, Governor Ritner requisitioned Major-General Alexander of the Eleventh Division of the Pennsylvania State Militia, to support him. General Alexander, a staunch Whig, marched out on December 15 and joined the First Division in Harrisburg.¹²³

There was no additional violence or insurrectionary activity following the riot on December 4. The only martial arrest, ironically, seems to have stemmed from military rather than civilian sources. The state militias only compounded the political strain rather than relieving it. The city received an influx of soldiers with nothing to do, no enemy to fight. King Mob was nowhere in sight. So, the bored troops enjoyed their time in Harrisburg as “a mere frolic.” The deadlock in the state legislature was eventually broken by compromise. On December 17, three lawfully elected Whig Representatives from Union County defected from the Anti-Masons and joined “Hopkins’ House.” On December 27, a resolution was passed 17 to 16 in the Senate recognizing that this advantage of three votes gave the Democrats a quorum, rendering the House properly constituted and ready to proceed with business. Both Houses reconciled. David R. Porter was officially declared the lawfully elected Governor.¹²⁴

The riot of December 4, in my view, constituted a direct contempt of the Pennsylvania legislature because it occurred on the grounds of the State House itself. The mob in the gallery and the lobbies of the Pennsylvania Senate certainly committed direct contempt of that House by suspending election proceedings and driving public servants out of the windows. Some of the ruffians committed offenses that could be prosecuted by the Pennsylvania executive at common law as well. The federal government could have anticipated and planned for the eventuality of a similar disturbance at the Capitol. But alas, Congress ignored the

¹²¹ *Id.* at 149–150.

¹²² *Id.* at 147–152; *About the Buckshot War*, N.Y. TIMES (Dec. 18, 1887).

¹²³ Compare Egle & Ritner, *supra* note 112, at 152–54, and *About the Buckshot War*, N.Y. TIMES (Dec. 18, 1887), with Alexander Hamilton, Nat’l Arch. *Defense of Congress*, FOUNDERS ONLINE (July 1783), <https://founders.archives.gov/documents/Hamilton/01-03-02-0273>, derived from III THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed. 1962 (1782–1786)).

¹²⁴ See Egle & Ritner, *supra* note 112, at 153–54.

cry of Pennsylvania, the perennial canary in the coal mine of political unrest. The Buckshot War is nevertheless helpful towards informing the posture of Congress towards direct assaults and interferences with its elections. Although the Buckshot War was not an instance of contempt of Congress per se, it naturally informs congressional posture, *mutatis mutandis*, towards direct contempts of its own prerogatives.¹²⁵

3. The Bank Riot of 1841

The Age of Jackson was named for one of, if not the greatest, populist personages in American history. In word, President Andrew Jackson took political opposition personally and always wore his heart on his sleeve. In deed, however, President Jackson never directly incited mob violence. He actively suppressed riots of every kind during his tenure, perhaps better than any president before the Civil War. It was the incidental effect of President Jackson's fiery words and brash actions that gave him the veneer of a rabble-rousing kingpin. "[T]he central charge of the Whigs by 1835," David Grimsted recounts, "was that 'King Andrew,' very like that of 'King Mob,' was 'marked by violence, obstinacy, and daring disregard' for any legal restraints on 'his violent impulses.'" These tendencies were well on display throughout his administration.¹²⁶

The issue at the heart of the so-called Bank War, which defined the Age of Jackson, was whether the Second Bank of the United States should be dissolved. The national bank was the darling of Alexander Hamilton, the nationalist of his generation. The national republican wing of the Whig Party—an indirect successor to Federalist ideology—long supported the national bank because it was their favored mechanism for financing infrastructure and promoting economic growth. Democratic resistance to the national bank did not, however, qualify this partisan divide as a straightforward clash between nationalist and populist sensibilities. There was division within the Democratic party about the propriety of a national bank. Moreover, the Bank War intersected with other axes of political conflict—the tension, for example, between the money power in the East and the debtor class in the West.¹²⁷

The death blow to the national bank, ironically enough, was delivered neither by Jackson, nor any other Democrat, but rather by a politician who ran on the Whig ticket for the office of President of the United States: John Tyler.¹²⁸ The Second Bank of the United States liquidated as a result of payment complications induced by the Panic of 1837. Resolutions from citizens' meetings around the country poured into Congress concerning a proposal to create a Third Bank of the United States,

¹²⁵ Cf. Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733).

¹²⁶ See GRIMSTED, *supra* note 114, at 5–7.

¹²⁷ See FED. RES. BANK OF PHILA., THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 2–4 (2015); Harry N. Scheiber, *Some Documents on Jackson's Bank War*, 30 PENN. HISTORY: A J. OF MID-ATL. STUDIES 46, 48–52 (1963); George Frederick Mellen, *Some Documents on Jackson's Bank War*, 10 THE SEWANEE REVIEW 56, 63–67 (1902).

¹²⁸ John Tyler, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/John-Tyler> (last updated Jan. 14, 2021).

the Whigs being for it, and the Democrats being mostly against.¹²⁹ On August 16, 1841, President Tyler dispatched a letter to the Senate that made his position clear. “The power of Congress to create a National Bank to operate per se over the Union, has been a question of dispute from the origin of the Government,” he wrote. “It will suffice for me to say, that my own opinion has been uniformly proclaimed to be against the exercise of any such power by this Government.”¹³⁰ He vetoed the bank bill. Groans of disapprobation reverberated in the chamber. One indignant spectator in the gallery was detained by the Sergeant-at-Arms for causing a disturbance.¹³¹

The capital up until this point was relatively peaceful. There were rowdy children and some gang activity by fire companies stationed around the district. The authorities were helpless to deal with these issues, however, because there was no municipal police force, only part-time ward constables who rarely patrolled at night. The city was about to pay the price for its threadbare security.¹³² On August 17, the day following the veto, a mob gathered at the Log Cabin Hotel with the intention of marching on the White House. Its goal was to vocalize its displeasure about the defeat of the bank bill. The Mayor of Washington, D.C., William W. Seaton, addressed the mob in person and ordered them to desist. The rabble shunned the Mayor’s admonitions, intoxicated themselves at a tavern on the corner of 10th street, and then gathered around the White House around 2:00 a.m. They “commenced hooting, hissing, drumming, and making a variety of noises sufficient to arouse all and to alarm several of the inmates of the house,” hurled stones, shot guns in the air, and then dispersed. Some of that mob later convened to burn President Tyler in effigy a short distance from the White House as well.¹³³

On August 25, 1841, Mayor Seaton submitted a letter to the Speaker of the House of Representatives declaring his regret and indignation over a riot that took place the week prior. He expressed “the anxious wish of the people of Washington that an efficient and vigorous police be established in the city, under the Authority of the Government of the United States.”¹³⁴ If we read between the lines, there seems to be an inference that the “vigorous police” envisioned would prevent like riots from assaulting the Capitol itself. This was not necessarily an episode in nationalist or populist violence per se. But it does, in my view, showcase the potential for more dangerous disturbances in the future animated by those ideas to cause greater harm. The Bank Riot of 1841 was a very real act of intimidation. Shooting firearms outside of the office of the Chief Magistrate with impunity is no trivial matter.¹³⁵

Congress did not take proactive steps after this incident to protect itself from riots in particular. The riot did motivate Congress, however, to pass legislation

¹²⁹ 36 H.R. Jo. 383 (Aug. 19, 1841); 36 H.R. Jo. 350 (Aug. 12, 1841); 36 H.R. Jo. 347 (Aug. 11, 1841); 36 H.R. Jo. 307 (Aug. 3, 1841); 32 S. Jo. (Aug. 2, 1841).

¹³⁰ 32 S. Jo. 165 (Aug. 16, 1841).

¹³¹ See 32 S. Jo. 165–69 (Aug. 16, 1841); THE MADISONIAN (Aug. 21, 1841); THE MADISONIAN (Aug. 17, 1841).

¹³² See GREEN, *supra* note 97, at 159–60.

¹³³ See THE MADISONIAN (Aug. 19, 1841); *President Tyler is Burned in Effigy Outside White House*, HISTORY, <https://www.history.com/this-day-in-history/tyler-is-burned-in-effigy-outside-white-house> (last updated Aug. 13, 2020).

¹³⁴ 36 H.R. Jo. 412 (Aug. 25, 1841).

¹³⁵ See 36 H.R. Jo. 412 (Aug. 25, 1841); GREEN, *supra* note 97, at 160–61; *President Tyler is Burned in Effigy Outside White House*, HISTORY, <https://www.history.com/this-day-in-history/tyler-is-burned-in-effigy-outside-white-house> (last updated Aug. 13, 2020).

promoting the better policing of the District of Columbia as a whole. On May 20, 1842, the House Committee for the District of Columbia reported H.R. No. 468, entitled “An Act to Establish a Police for the Protection of Public and Private Property in the City of Washington, and for Other Purposes.” The bill authorized the establishment of an auxiliary police force. The force initially consisted of one captain and one lieutenant appointed by the President, and thirty men, including five sergeants, to be appointed by the United States Marshall for the District of Columbia. Its purpose was to serve as a night watch. The bill was amended to give the Mayor of the capital the authority to appoint the captain and his subordinates due to concerns that the force would otherwise become a “presidential ‘praetorian guard.’”¹³⁶ It made its way to the President’s desk and was signed into law on August 23, 1842, nearly a year to the day when Mayor Seaton sent his letter of apology to Congress.¹³⁷

The Bank Riot is not a congressional contempt precedent per se. There was no direct contempt in the form of a mob, riot, or insurrection committed against Congress itself. It is, however, a meaningful case study representing the possibility of political violence in one quarter of the capital spilling over onto Capitol grounds. Mobs in other places in the city can make their way to the Capitol itself even if the Capitol is not their premeditated target. In the case of insurrections transpiring over the course of several days or weeks, this is especially true, as illustrated by the Gordon Riots. This case is also a meaningful precedent in the annals of congressional efforts to better police the District of Columbia that vicariously impact its capacity for protecting the Capitol and quelling any disorders that arise there.¹³⁸

D. CONGRESSIONAL CONTEMPT POLICY

The efficient policing of the District of Columbia remains a work in progress. Congress was practically naked against immediate threats to the safety of its members and guests during the Early Republic. But it became apparent over time that there should be a Congressional Guard of some kind. On February 4, 1828, Representative Stephen Van Rensselaer III (Anti-Jacksonian, New York) reported from the House Committee on Public Buildings and Grounds a joint resolution to create a police force for the Capitol. The tipping point came when a member of the Presidential family was victimized. Russell Jarvis, a Jacksonian journalist, assaulted John Adams II, the President’s son and personal secretary, while he was in the Rotunda on his way to deliver a message to the House of Representatives.¹³⁹

¹³⁶ Bills and Resolutions, 27th Cong., H.R., 2nd Session, H.R. No. 468 (May 20, 1842).

¹³⁷ 37 H.R. Jo. 1366 (Aug. 20, 1841); Bills and Resolutions, 27th Cong., H.R., 2nd Session, H.R. No. 468 (May 20, 1842); Cong. Globe, 27th Cong., H.R., 2nd Session 421 (June 2, 1842); 37 H.R. Jo. 1392 (Aug. 23, 1842); GREEN, *supra* note 97, at 160–61.

¹³⁸ Cf. Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733).

¹³⁹ BENJAMIN PERLEY POORE, I SIXTY YEARS IN THE NATIONAL METROPOLIS 22–24 (1886); An Act Making Appropriation for Public Buildings and Other Purposes, 1 Stat. 265, ch. 45 (May 2, 1828) (codified as amended at 2 U.S.C. §§ 1901 et seq.); NARA HR 20A-B1, RG233, Rec. H.R., <https://www.archives.gov/legislative/features/capitol-police>; Statutes at Large, 20th Cong., 1st Session 265–66 (May 2, 1828); John P. Deeben, *To Protect and to Serve: The Records of the D.C. Metropolitan Police, 1861 – 1930*, 40 PROLOGUE MAG. (2008), <https://www.archives.gov/publications/prologue/2008/spring/metro-police.html#nt4>.

Neither House ever held Jarvis in contempt, perhaps because zealous punishment of the man who assaulted the President's son (and employee) would give an appearance of impropriety and incite political backlash. Congress opted to just focus on the overarching security concern instead. By the Public Buildings Appropriations Act passed on May 2, 1828, Congress established the United States Capitol Police. The Capitol Police operates under the auspices of the Sergeants-at-Arms of both Houses; therefore, they are a force that belongs to the legislature, not the executive. Prudence suggested that the legislature required an in-house constabulary to effectuate its prerogatives, including its inherent power. Two Sergeants in modern times were indeed not enough.¹⁴⁰

The Capitol finally had its own force but the district did not. The district was only patrolled by local constables before the Civil War—at first those from other states, and, after the city incorporated, by its own. Reform came in ten-year intervals. In 1851, Congress regularized the salary for local constables. At that time the force was still less than 100 men strong—not nearly enough to secure an entire city. On July 26, 1861, Senator James W. Grimes (Republican, Iowa), a member of the Senate Committee for the District of Columbia, laid before the whole House a petition of the city residents to create a municipal constabulary. Senator Grimes introduced S.B. 49 to do exactly that. The force initially consisted of 1 superintendent, 10 sergeants, 5 commissioners, and not more than 150 officers. On August 6, 1861, the President signed the bill into law, and the Metropolitan Police for the District of Columbia was born.¹⁴¹

To this day, there is no comprehensive framework for how Congress might respond to a riot or insurrection imperiling its members or congressional proceedings. The Trump Riot is the first event of its kind; therefore, it presents a case of first impression as to how civil authorities should defend Congress and punish disorder of great magnitude. Congress lacks the experience of Parliament in this arena. It has no contingency plan for coordinating the Capitol Police, other law enforcement agencies, and the militia power in the event of a large-scale attack. It has no general policies governing its inherent contempt power generally or in the case of riot or insurrection specifically. First experiences are the most formative. Congress must address these issues.¹⁴²

¹⁴⁰ See 21 H.R. Jo. 589–60 (Apr. 18, 1828) (emphasis omitted); 17 S. Jo. 314 (Apr. 18, 1828) (emphasis omitted); Register of Debates, 20th Cong., S., 1st Session 668–69, 671–72 (Apr. 18, 1828); 21 H.R. Jo. 587–88 (Apr. 17, 1828); 17 S. Jo. 309–10 (Apr. 17, 1828); POORE, *supra* note 139, at 22–24 John P. Deeben, *To Protect and to Serve: The Records of the D.C. Metropolitan Police, 1861 – 1930*, 40 PROLOGUE MAG. (2008), <https://www.archives.gov/publications/prologue/2008/spring/metro-police.html#nt4>. The Capitol Police share concurrent jurisdiction with other national and local police and can be reinforced by militia.

¹⁴¹ See 53 S. Jo. 181, 256 (Aug. 5, 1861); Cong. Globe, 37th Cong., S., 1st Session 275, 288 (July 27, 1861); S. 49 (July 26, 1861); GREEN, *supra* note 97, at 227; John P. Deeben, *To Protect and to Serve: The Records of the D.C. Metropolitan Police, 1861 – 1930*, 40 PROLOGUE MAG. (2008), <https://www.archives.gov/publications/prologue/2008/spring/metro-police.html#nt4>.

¹⁴² Cf. U.S. SEN., COMM. ON HOMELAND SEC. & GOV. AFFAIRS & COMM. ON R. & ADMIN., EXAMINING THE U.S. CAPITOL ATTACK; A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, 1–13 (June 8, 2021).

IV. DEFENSE OF THE UNITED STATES CONGRESS

The scope of the inherent contempt power of the United States Congress is incoherent and poorly understood. This is largely because it has fallen out of use. There was no need to systematically organize its principles and precepts since the influx of contempt cases during the McCarthy Era. But this power is useful and belongs to the national legislature by right. Congress must ensure that when an appropriate occasion arrives, it will hold to account those persons who treat it with contempt through riot and insurrection. Contempt proceedings provide a unique forum for political accountability.

As the report of the House Select Committee in *Rousseau's Case* declared in 1866, "An act of violence against a representative is an act of insurrection against the people he represents."¹⁴³ Having thoroughly combed the annals of Parliament and Congress for useful precedents and case studies, we now begin a daunting task—blending the experience of Great Britain and America together to formulate a comprehensive framework for the defense of the legislature against riots and insurrections. If King Mob strikes, Congress must strike back. Both Houses must develop a bicameral policy for dealing with King Mob. My recommendations for that policy come next.

A. Detect the Threat

The intelligence community and law enforcement institutions, including the Federal Bureau of Investigation, must detect the impending assault. If the executive obtains reliable intelligence of a pending attack, there may be enough time for law enforcement to neutralize the threat and in doing so spare the legislature any effort. Alternatively, it may obtain intelligence at least far enough in advance to allow law enforcement time to bolster its defense and facilitate an evacuation. But in the event that the executive fails to provide timely intelligence, and the attack comes as a surprise, it will probably be impossible for the legislature to evacuate most if not all members, staff, and guests. Instead, as illustrated in the case of the Trump Riot, the Capitol will lockdown and hold until relieved. Prudence demands that the members of both Houses adjourn and take refuge until the tumult is suppressed. In either event, Congress must ensure that it has effective evacuation and lockdown protocols.¹⁴⁴

B. DEFEAT THE THREAT

The Capitol is a fortress of national sovereignty built to last for posterity. When a riot or insurrection threatens the national legislature, the first priority is to eliminate that threat by force of police and, if necessary, militia. The District of Columbia is home to several local and federal law enforcement agencies who can respond when the

¹⁴³ See 63 H.R. Jo. (July 14, 1866); Cong. Globe, 39th Cong., H.R., 1st Session (3818–19 (July 14, 1866).

¹⁴⁴ See 24 Cont. Cong. Jo. 423–25 (July 2, 1783); 24 Cont. Cong. Jo. 411–21 (July 1, 1783); U.S. Capitol, *U.S. Capitol Visitor Emergency Evacuation Information*, VISITOR CTR., <https://www.visitthecapitol.gov/plan-visit/us-capitol-visitor-emergency-evacuation-information> (last visited on Mar. 24, 2021; 2:35 p.m.).

Capitol is threatened.¹⁴⁵ The three law enforcement organizations whose prerogatives most directly bear upon the security of the Capitol are the United States Capitol Police, the United States Park Police, and the Metropolitan Police Department for the District of Columbia (“MPD”). The Capitol Police is the principal security force for Congress. The Park Police and the MPD are available to support the Capitol in a time of crisis. The mission of the Park Police in the District of Columbia is to protect national monuments, the nearest to Congress being the Capitol Reflecting Pool. The MPD is the local police force that serves the city. All three forces share concurrent jurisdiction over 200 city blocks around the Capitol complex. These forces must cooperate with each other and call for reinforcement should the need arise.¹⁴⁶

The Capitol Police are the first line of defense. The second line of defense consists of national and local law enforcement units that are available to respond. In the event of a significant emergency, the Mayor of the District of Columbia is compelled give the President of the United States control of the MPD for at least forty-eight hours under Section 740 of the District of Columbia Home Rule Act. This is a substantial force. As of 2008, the MPD had the highest ratio of full-time officers to citizens in the country—34 officers per 100,000 residents. The President can retain control for a longer period if he consults the Chairman and ranking minority members of both Houses’ Committees on the District of Columbia. The legislature and the executive must ensure that there is an effective protocol for communicating to each other about invoking Section 740. The latter must be able to respond to a congressional request quickly; it must also be able to invoke Section 740 on its own if it deems that step prudent. The use of Section 740 is unprecedented.¹⁴⁷

If the threat is sufficiently serious, the legislature may call upon the executive to send in the National Guard.¹⁴⁸ The Wilkes Riots of 1763/1768, Gordon Riots of 1780, Philadelphia Mutiny of 1783, Buckshot War of 1838, District of Columbia Bank Riot of 1841, and Trump Riot of 2021 all illustrate the perils of relying on local police forces for effective and immediate relief from large scale instances of public disorder.¹⁴⁹ The Founders’ understanding of this peril is why the District of Columbia is a federal city to begin with. Law enforcement may lack the strength or the will to stop the attack—their integrity may even be compromised by a criminal conspiracy, and even a treasonous one at that.¹⁵⁰ The First Militia Clause grants Congress the authority to raise troops to execute the laws, suppress insurrections,

¹⁴⁵ Architect of the U.S. Capitol, *U.S. Capitol Building*, <https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building> (last visited Mar. 22, 2021; 8:21 p.m.).

¹⁴⁶ 2 U.S.C. §§ 1901 et seq; D.C. CODE §§ 5-101.01 et seq; D.C. CODE §§ 5-201 et seq.; U.S. DEP’T OF JUSTICE, OFF. JUSTICE PROG., BUR. OF JUSTICE STAT., BRIAN A. REEVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, 5 (2011).

¹⁴⁷ See U.S. CONST. art. I, § 8; District of Columbia Home Rule Act, Pub. L. 93-198, § 740, 87 Stat. 774 (Dec. 24, 1973); D.C. CODE § 10-503; D.C. CODE § 5-101.01; D.C. CODE §§ 5-201 et seq; 2 U.S.C. §§ 1901 et seq.; 40 U.S.C. § 6306.

¹⁴⁸ Cf. STORY, I COMMENTARIES ON THE CONSTITUTION, *supra* note 84, at § 1186.

¹⁴⁹ See 36 H.R. Jo. 412 (Aug. 25, 1841); 24 Cont. Cong. Jo. 517–18 & n. 1 (Aug. 21, 1783); 24 Cont. Cong. Jo. 411–21 (July 1, 1783); 24 Cont. Cong. Jo. 411 & n.1 (June 30, 1783); Lord George Gordon’s Case, 37 H.C. Jo. 902 (1778–1780); RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 96–98, 105.

¹⁵⁰ Cf. 25 Cont. Cong. Jo. 973 (June 21, 1783); 20 Letters of Delegates to Congress 352 (June 21, 1783); 70 S. Jo. 105–110 (Jan. 13, 1875); RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 42–43.

and repel invasions. Congress in turn enacted hundreds of statutes governing the militia power.¹⁵¹ An organized insurrection in which a plurality, if not an outright majority, of participants are members of a criminal conspiracy is the scenario most likely to justify the application of the militia power. I must emphasize, however, that this scenario is rare. The militia power is only appropriate when the local police are truly compromised by an assault involving overwhelming force or internal treachery.¹⁵²

C. DISSOLVE THE DEFENSE

The heightened police presence at the Capitol must dissolve after a disturbance resolves and the dust settles. But when? If a militia is called, how long should it remain in place? If defenses are erected around the Capitol, how long should they stand? By default, I think no more than a fortnight. Every act in exigent circumstances must be treated as precedential. A tentative deadline should accompany the authorization of any militia to deploy in response to an emergency and must be enforced absent a proper showing of good cause. Congress must not invite conspiracy and suspicion by walling itself off from the outside world. Recall Edmund Burke's warning during the Gordon Riots against "establishing a military on the ruins of the civil government." The District of Columbia is not like Paris, Berlin, or Saint Petersburg. In insurrections as in government, the United States, like the Great Britain, is constitutionally more liberal than its European counterparts, to say nothing of other parts of the world.

The rule of thumb in the wake of an attack, as expressed by President Gerald Ford after the Weather Underground bombing of 1971, should be to keep the Capitol "as open as possible. . . ."¹⁵³ The *status quo ante* must be restored as quickly as possible. We do not permit state of siege legislation in this country. It is not who we are. Whatever damage is done cannot dissuade us from restoring public access to institutions that work on their behalf, for the damage an assault inflicts upon the Capitol may even be eclipsed by an over-zealous effort to suppress it. The militia must not be allowed to linger as a political firebrand that stokes partisan flames rather than suppressing them. One spectacle ought not produce another.¹⁵⁴

D. DENOUNCE THE THREAT

Congress is a ceremonial body. It must respond to any riot or insurrection at its gates with one voice. A public pronouncement is not only appropriate but necessary. Both Houses should express their deep disapprobation, both for sake of their dignity and to benefit posterity. Whether or not a committee ultimately recommends that anyone be tried for contempt by either House, Congress should still pass a joint resolution in the spirit of parliamentary tradition so that the People recall their history, and therefore better appreciate the constitutional significance of the moment.

¹⁵¹ See U.S. CONST. art. I, § 8, cl. 15–16; *see also, e.g.*, Efficiency in Militia Act of 1903, 32 Stat. 775; CONG. RES. SERV., NATIONAL EMERGENCY POWERS (Feb. 16, 2021).

¹⁵² See 24 Cont. Cong. Jo. 411–21 (July 1, 1783).

¹⁵³ Cong. Rec., 92nd Cong., H.R., 1st Session 4216 (Mar. 1, 1971).

¹⁵⁴ See BURKE, *supra* note 73, at 45, 87, 105; *cf.* Ecclesiastes 7:16; MODUS TENENDI PARLIAMENTUM, *supra* note 16, at 37–38.

Resolved and declared, Nemine contradicente, that the assaulting, insulting, or menacing, any member of this House, in his coming to, or going from the House or upon the account of his behavior in Congress, is a high infringement of the privilege of this House, a most outrageous and dangerous violation of the rights of Congress, and a high crime and misdemeanor.

Resolved and declared, Nemine contradicente, That the assembling and coming of any number of persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the passing of any bill, or other matter, depending before the House, is a high infringement of the privilege of this House, is destructive of the freedom and tradition of Congress, and a high crime and misdemeanor.

Resolved and declared, Nemine contradicente, That the Assembling and Coming of any number of persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the passing of any bill, or other matter, depending before the House, is a high infringement of the privilege of this House, is destructive of the freedom and tradition of Congress, and a high crime and Misdemeanor.

Resolved and declared, Nemine contradicente, That the inciting and encouraging any number of persons to come, in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the passing of any bill, or other matter, depending before this House, is a high infringement of the privilege of this House, is destructive of the freedom and tradition of Congress, and a high crime and misdemeanor.

Resolutions of this kind were known to our Founding Fathers. The Congress of Confederation, for example, formally memorialized their disapprobation of the Philadelphia Mutiny of 1783. That resolution is an example that Congress should follow.¹⁵⁵

E. DISCUSS THE THREAT

Congressional committees are essential to the work of both Houses of Congress in preserving their privileges, digesting their experiences, and implementing reforms. The Founding Fathers understood that just as both Houses of Parliament continually delved into their own history to guide their steps, both Houses of Congress must do the same. Both Houses must therefore preserve tradition and employ the lessons of history by assigning committees to investigate contempts of their prerogatives, discover and digest the facts of what occurred into a coherent record, and then apply their precedents to enact reforms and to prevent like indignities in the future. Although the possibility of foreign interference is plausible, history teaches us that

¹⁵⁵ See, e.g., Lord George Gordon's Case, 37 H.C. Jo. 902–910 (June 6, 1780); Case of the Tumultuous Crowd, 31 H.L. Jo. 209 (May 17, 1765); Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 13, 1733); Silk Rioters' Case, 11 H.C. Jo. 667–68 (Jan. 21, 1697).

the greatest dangers lie within. The true test of any Congress is its capacity for internal inquisition—to look inward and hold its own accountable.¹⁵⁶

It is parliamentary for Congress to appoint joint select committees and independent commissions to investigate riots and insurrections assaulting the Capitol. Congress routinely appointed committees for investigating all species of contempt since the Founding. If an assault only antagonizes one particular House, only that House need appoint a Select Committee. Alternatively, in the event that the assault targets and interferes with both Houses—as was the case in the Trump Riot—it is advisable for Congress to appoint a joint select committee or independent commission to investigate the affray.¹⁵⁷

The charter of a joint select committee should enumerate narrowly tailored objectives that are clear, concise, and time sensitive. It should subpoena discovery and hold hearings to elicit testimony. It should consult with the Architect of the United States Capitol on any security improvements that should be made on the grounds. It should liaise with the House Committee on Oversight and Government Reform, the Senate Committee on the District of Columbia, and the Council of the District of Columbia in determining how national and local law enforcement and militia forces can better cooperate and settle jurisdictional or methodological differences in the context of responding to a riot or insurrection. Toward this end, the joint select committee should order the Capitol Police to update its strategic plan with a discrete protocol for handling riots and insurrections.¹⁵⁸

The joint select committee should recommend what disciplinary actions Congress should take, either by trying contempt, certifying contempts for prosecution, or simply leaving punishment to the full discretion of the executive. The joint select committee should also recommend commendations for individuals who committed acts of valor and heroism in the line of duty and memorialize any lives lost in the struggle. The report will not only edify Congress but will also serve the public by providing a consolidated public record of what transpired. That record is the bedrock of placing the riot in historical and political perspective. That record is the foundation of reform. The Select Committee investigating the Trump Riot, for example, used its record to educate the public and cast those responsible in the proper light, particularly Trump and his associates. The fact-finding, truth telling function of the Select Committee is its greatest. A catastrophe that is not properly investigated and documented in a manner that is publicly accessible is otherwise nothing but a foil for partisan grievances.

¹⁵⁶ See, e.g., Cong. Globe, 39th Cong., H.R., 1st Session, 3818–19 (July 14, 1866); Cong. Globe, 28th Cong., H.R. 577 (May 6, 1844); 39 H.R. Jo. 846–48 (Apr. 23, 1844); Cong. Globe, 28th Congress, H.R., 1st Session 551–54, 678–79 (Apr. 23, 1844); 29 H.R. Jo. 989 (June 11, 1836); 25 H.R. Jo. 616 (Apr. 20, 1832); 21 H.R. Jo. 587–88 (Apr. 17, 1828); 17 S. Jo. 309–10 (Apr. 17, 1828); 3 S. Jo. 98 (Mar. 28, 1800); 3 S. Jo. 52–54 (Mar. 20, 1800); Annals Cong., 6th Cong., S., 1st Session 113–14, 122–24, 126–46 (Mar. 20, 27–28, 1799); 24 Cont. Cong. Jo. 410 (June 21, 1783); Lord George Gordon’s Case, 37 H.C. Jo. 902 (June 6, 1780); cf. 73 H.R. Jo. 504 (Feb. 27, 1873); 69 H.R. Jo. 363 (Feb. 22, 1870).

¹⁵⁷ See Brian Michael Jenkins, *Why We Need a January 6 Commission to Investigate the Attack on the Capitol*, RAND (Jan. 20, 2021).

¹⁵⁸ Compare generally U.S. CAPITOL POLICE, DEPARTMENT STRATEGIC PLAN 2021–2025, with STATEMENT OF INSPECTOR GENERAL MICHAEL A. BOLTON TO THE U.S. HOUSE OF REPRESENTATIVES’ COMMITTEE ON HOUSE ADMINISTRATION 8 (Apr. 15, 2021).

F. DISCIPLINE THOSE RESPONSIBLE

Congress should consider disciplinary measures when order is restored. The balance of relevant historical experience supports a broad reading of inherent congressional power. Contempt power is the strong right hand of the national legislature. Its reach is long.¹⁵⁹ Riots, tumults, insurrections, and rebellions that directly assault the Capitol indisputably breach the privileges of both Houses and constitute high contempt. It is within the purview of a joint select committee or independent commission appointed to investigate such incident to recommend any political remedies that are in order, including contempt and impeachment proceedings.¹⁶⁰

Inherent power is the principal tool of both chambers to discipline direct contempt of their respective privileges, dignities, and procedures. But what about rioting or insurrection in other quarters of the District of Columbia? What if the Capitol is not penetrated, but encircled by a rabble attempting to intimidate or coerce it in some way? Representative John Forsyth (Democrat-Republican, Georgia) forcefully argued in congressional deliberations underlying *Anderson v. Dunn* that even riots in the streets surrounding the vicinity of the Capitol grounds were liable for contempt.¹⁶¹ Representative St. George Tucker (Democrat-Republican, Virginia) agreed.¹⁶²

When alleged contempts are tried and proven guilty, incarceration and reprimand by the Speaker of the House of Representatives or the President of the Senate are appropriate penalties. When reprimand is justified, the Speaker of the House and the President of the Senate should use substantially similar language to that used in *Colonel Anderson's Case* because of its elegance, firmness, and precision. But Congress should also be creative in setting purge conditions when punishing contempt. Congress might compel a contemnor to make private or public apology to congressional staff and Capitol Police, for example, or physically participate in cleaning up Capitol grounds.¹⁶³

Congress should take the appropriate steps to ensure that contemnors are given jail space at the District of Columbia prison both during the pendency of their proceedings and upon final conviction. It may be prudent for the legislature to collaborate with the executive for the purpose of adding additional prison space for contempt proceedings. They might also create frameworks for joint ventures between the Capitol Police and other law enforcement institutions around the country in arresting persons of interest sought by the Sergeant-at-Arms. The notion that the lack of an official carceral space for those found guilty of contempt of Congress is an insurmountable obstacle is indeed one of the silliest objections to contempt proceedings. Congress is a lawmaking body. It can make one.

¹⁵⁹ See *Watkins v. United States*, 354 U.S. 178, 187 (1957); WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND bk. 1, cap. 2, at pp. 146, 162–64 (St. George Tucker ed. 1803) (1765–1770).

¹⁶⁰ See 36 H.R. Jo. 412 (Aug. 25, 1841); 24 Cont. Cong. Jo. 410 (June 21, 1783); 20 Letters of Delegates to Congress 350–52 (June 21, 1783); Purser Rioters' Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699); Silk Rioters' Case, 11 H.C. Jo. 667–68 (1697); Lord George Gordon's Case, 37 H.C. Jo. 900–910 (1778–1780); see also WITTKE, *supra* note 31, at 38; cf. James' Lane's Case, 3 H.R. Jo. 748 (1800).

¹⁶¹ Annals of the 15th Cong., H.R., 1st Session 612–24 (Jan. 9, 1818).

¹⁶² *Id.* at 631–36.

¹⁶³ See *id.* at 789–90.

The legislature can of course certify or refer the role of discipline to the executive—to obtain justice through civil litigation and criminal prosecution. But the legislature should not be so quick to shift this burden of responsibility. The privileges of each House must be preserved. A privilege is like a muscle: if it is not used it will be lost. If nothing else, contempt trials are pedagogical: they show the public that privileges are to be taken seriously. They are one of the last vestiges of the ancient folkmoot. They have an ethnic luster, a historic purpose, and a cathartic quality that can ventilate public outrage and provide communal closure. Making an example of those most responsible for inciting a riot on the Capitol through *legislative* action is, in my view, a sound strategy for signaling bipartisan cooperation and the strength of the First Branch.¹⁶⁴ Congress should not shy away from using its inherent contempt power if the executive is unwilling to prosecute, if executive privilege will bar criminal liability, or if a select committee appointed to investigate the assault on Congress expires. Those who benefit from impunity arising from executive privilege and prosecutorial discretion may be, in fact, the best candidates for contempt proceedings.

It is axiomatic that under the doctrine of the separation of powers, the first branch of government, the national legislature, is *primus inter pares*—first among equals. When there is a charge that the executive levied war against the legislature—if not in the legal sense of those terms under the Treason Clause and the federal criminal code, then at least in the political sense under principles of right reason and natural justice—I believe there ought to be a rebuttable presumption that executive privilege cannot apply in legislative proceedings appointed to investigate and adjudicate that charge. The presumption only ought to be rebutted when the allegation is malicious, frivolous, or presented in bad faith. By default, however, parliamentary privilege trumps executive privilege. Whether executive privilege is invoked in this context by the sitting or former President matters not. Our republican system requires that when the grave charge of incitement against the legislature is brought against a current or former member of a coordinate branch of government, discovery must flow like a river. Executive privilege is not absolute. As parliamentary privilege waxes, executive privilege wanes.

Of course, no Supreme Court case ever grappled with how executive privilege squares with the *lex parlamentaria americana*. But it is well established in the Anglo-Saxon legal tradition that the law of the legislature is a domain where the coordinate branches of government should fear to tread. Never is it so necessary and proper for the veil of executive privilege to be pierced as when there are credible allegations that members of the executive conspired to interfere with congressional freedom of speech and debate, interfered with federal elections, or incited riots and insurrections at the Capitol.¹⁶⁵

¹⁶⁴ Cf. *Purser Rioters' Case*, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699).

¹⁶⁵ See U.S. CONST. art. I, §§ 5–6, 8; cf. Brookings Inst., Lawfare Podcast, *What's Up With the January 6 Investigation?* LAWFARE 33:48 et seq. (Oct. 15, 2021); David French & Sarah Isgur, Advisory Opinions Podcast, *January 6 and Executive Privilege*, THE DISPATCH 7:05 et seq. (Oct. 11, 2021); 2 U.S.C. § 192.

V. REFLECTION ON THE TRUMP RIOT OF JANUARY 6, 2021

The affray at the Capitol on January 6 triggered a public debate over where the tipping point between riot and insurrection lies. The exact threshold cannot be formulated with mathematical exactitude. This does not mean, however, that we cannot at least use historical precedents to benchmark and baseline future disturbances. The history of political riots teaches us to consider the scope of the riot, the size of the mob, and the scale of the damage. Not all tumultuous mobs qualify as insurrections or rebellions. A disorganized and spontaneous crowd is a mob. An organized and armed militia or paramilitary force endeavoring to overthrow the government is an insurrection. In the horizon between those two poles, as in all issues of criminality, I believe the more lenient of two or more interpretations is probably the best.

In England during the eighteenth century there was a widely held belief that outbursts of violence like the Wilkes Riots and Gordon Riots stemmed from some kind of conspiracy. “[I]t was almost axiomatic,” George Rudé states, “that a ‘hidden hand’ should be sought behind all outbursts of popular violence.”¹⁶⁶ But this was not actually the case. During the Gordon Riots, groups of rioters had “captains,” but they tended to emerge on a temporary basis. “It is in fact, remarkable,” George Rudé observes, “what a large proportion of those brought to trial resided in the neighbourhood, if not in the actual parish, of the incident with which they were supposed to be concerned.”¹⁶⁷

Today there appear to be many who believe that there was some sort of higher conspiracy provoking the mob that assaulted Congress on January 6. Some even apparently believe that paramilitary groups with representatives in the mob conspired with Trump. But this belief is equally mistaken. Though some radical groups participated in the Trump Riot, they did not control it. I propose that the proportion of a mob that can be convicted of criminal conspiracy presents a compelling test of whether a riot amounts to an insurrection. Of the 750 plus charges brought against participants in the Trump Riot thus far, less than 50 are charged for any kind of criminal conspiracy, and only 11 are for seditious conspiracy in particular. None are charged with conspiracy to commit treason. These proportions are too weak to support the label of “insurrection.” The tumultuous crowd at the Capitol was simply a riot. Nothing more. Nothing less. I believe the plurality if not the outright majority of participants in a disturbance at the seat of government must stem from the same criminal conspiracy for the term “insurrection” to apply.

Populist outbursts like January 6 are well-precedented in the Anglo-American tradition. The history of riots and insurrections at the seat of government should instill both calm and caution. We have a baseline. Relative to today, riots and insurrections were far more frequent in the seventeenth and eighteenth centuries. Objectively speaking, however, riots and insurrections were infrequent even during the Early Modern Period in Great Britain and America.¹⁶⁸ As with the Wilkes Riots and Gordon Riots, those who stormed the Capitol on January 6 were not career criminals for the most part; rather, they were, an eclectic assortment of professional

¹⁶⁶ Rudé, *supra* note 57, at 8–9.

¹⁶⁷ Rudé, *supra* note 58, at 102–03.

¹⁶⁸ See STEVENSON, *supra* note 33, at 319–20.

and working-class people. The lesson the Anglo-American tradition of riot at the seat of government teaches us time and time again is the proclivity of the masses to engage in conspiracy, contempt, and civil disorder when incited by demagogic hyperbole.¹⁶⁹

I do not mean to suggest that Donald Trump is an avatar of John Wilkes. There could be no greater difference between two men in capacity for speech and wit. Those who overreacted to Wilkes in his heyday did so at their peril. Those who do so with demagogues today by indulging absurd historical analogies compound this same mistake with their own errors. For all the right-wing hysteria about impending jihadist, globalist, and socialist takeovers, those on the left have not done any better with their reflexive takes casting January 6 as an augur for the rise of fascism. White supremacy does not explain the election of Trump, the riot on January 6, or the populist phenomenon in the Anglo-American tradition.¹⁷⁰ Populism predates fascism and should never be used as a synonym. The Trump Riot featured some extremists, but it was not a coordinated white supremacist uprising like the Battle of Liberty Place.¹⁷¹ It was an alarm bell, not a death knell. Neither papists nor Persians lie hidden below the floorboards of the Republic.¹⁷²

Horace Walpole wrongly believed that Britain was on the verge of civil war if Lord Frederick North's government was not dismissed by George III. Those who believe the United States is on the verge of internecine conflict are just as wrong today. Burke, the father of modern political conservatism, shunned Wilkes and Gordon. In fact, Gordon later denounced Burke as Catholic agent for his unwillingness to pander to popular resentments. True conservatives today similarly turn their back on Trump in spite of the derision they receive from many who nominally identify with the political right. Yet such is the depravity of human nature that politicians all too easily convert the competing anxieties of their constituencies about extremists on each other's fringes into political shuttlecocks to be batted back and forth, inflaming public sentiments of revanche and self-righteousness. True leadership is not so petty or obtuse.¹⁷³

¹⁶⁹ Compare UNIV. CHIC. PROJECT ON SEC. & THREATS, ROBERT A. PAPE & KEVEN RUBE, *THE FACE OF AMERICAN INSURRECTION* 9–14 (2021), with GEORGE RUDÉ, *THE CROWD IN HISTORY: A STUDY OF POPULAR DISTURBANCES IN FRANCE AND ENGLAND, 1730–1848*, 60–61 (1964), and STEVENSON, *supra* note 33, at 2–3.

¹⁷⁰ Compare Matthew Porter, *The Society of Cultural Anthropology's Campaign to Present American Populism as Fascism*, QUILLET (Aug. 5, 2021), <https://quillette.com/2021/08/05/the-society-of-cultural-anthropologys-campaign-to-present-american-populism-as-fascism/>, with Hugh Gusterson, *American Fascism and the Storming of the Capitol*, SOC'Y FOR CULTURAL ANTHO., HOT SPOTS, FIELDSIGHTS, (Apr. 15, 2021), <https://culanth.org/fieldsights/american-fascism-and-the-storming-of-the-capitol>; see also Sheridan Stewart & Robb Willer, *The Effects of Racial Status Threat on White Americans' Support for Donald Trump: Results of Five Experimental Tests*, GRP. PROCESSES & INTERGROUP REL. 1, 9, 13 (Oct. 18, 2021) (reporting that out of five experiments conducted ($N = 3,076$), four experiments—including the only one conducted with a nationwide probability sample—showed a null effect for racial demographic shift and support for Donald Trump).

¹⁷¹ Cf. Frank L. Richardson, *My Recollections of the Battle of the Fourteenth of September, 1874*, in *New Orleans, LA*, in 3 LA. HIST. SOC'Y 498, 498–501 (Oct. 1920).

¹⁷² Cf. HIBBERT, *supra* note 53, at 28; Daniel 5:30–31 (ESV); HERODOTUS, *supra* note 53, at 1.189–191.

¹⁷³ See Seed, *supra* note 70, at 69, 87–88, GREEN, *supra* note 97, at 245, 249.

Populist movements can speak a language that resonates with the people, grapples with legitimate concerns, and yes, offers or inspires, directly or indirectly, serious solutions. In reflecting upon popular petitions of grievances, Benjamin Franklin wisely reflected that disdain for such movements is dangerous: “Nothing can have a better effect in producing the alienation proposed; for though many can forgive injuries, *none ever forgave contempt*.”¹⁷⁴ Disgust for demagoguery cannot lead to a blinding hatred for the middle or lower orders. “Distrust naturally creates distrust,” wrote John Jay, “and by nothing is good-will and kind conduct more speedily changed than by invidious jealousies and uncandid imputations, whether expressed or implied.”¹⁷⁵ Yes, a particular *kind* of populism can be pernicious, yet its existence is itself a testimony to our liberty. The petitioning movement of the eighteenth century is indeed one of the purest historical expressions of popular sovereignty.

Even if we concede to George Rudé that riot and insurrection was the language of the unheard in the Early Modern Period, that language cannot be so described let alone justified today. Elections are frequent. Suffrage is universal. The People have a greater voice. The House of Representatives is their mouthpiece. The body of the lower chamber is supposed to embody the Spirit of Democracy, to form a breakwater against plutocracy and popular prejudice. As in the famed story of Hans Brinker, however, there is a hole in the dike. Members of the legislative body that was attacked on January 6 stoked the coals of the very conspiracy that caused the conflagration. The demagogic element of populism is always the most dangerous. The Spirit is willing but the body was weak.¹⁷⁶

Yet even if we concede Wilkes championed the petitioning movement. He led the resistance to general warrants and the crime of seditious libel. He was also the first MP to propose a bill for universal male suffrage. His legacy illustrates the positive potential for populism sans political violence, and not even necessarily on its own, but rather as one stitch in a more eclectic electoral fabric.¹⁷⁷ In its highest form, populism is a vehicle for The People to contend with opaque institutions and decadent elites.

Stripped of its depth and nuance, our nation’s founding documents and most precious symbols are harvested by politicians to divide rather than heal. The Democrat-Republican Societies were sympathetic with backcountry sentiments during the Whiskey Rebellion. It is no surprise that populists today typically peddle memes featuring choice quotes from Patrick Henry and Thomas Jefferson. They do so at our peril, for their comments often betray a belief in the old farce that the Constitution is a compact between states, not citizens. I fear that the sails of populism today are propelled by the winds of a renascent Anti-Federalism. The

¹⁷⁴ Benjamin Franklin, National Archives, RULES BY WHICH A GREAT EMPIRE MAY BE REDUCED TO A SMALL ONE, THE PUBLIC ADVERTISER (Sept. 11, 1773), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-20-02-0213>, *derived from* 20 THE PAPERS OF BENJAMIN FRANKLIN 389–99 (William B. Willcox ed. 1976).

¹⁷⁵ John Jay, Federalist No. V.

¹⁷⁶ See STEVENSON, *supra* note 34, at 2–3; *cf.* Matthew 26:41.

¹⁷⁷ See *generally*, e.g., Knights, *supra* note 70, at 61–62; ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 52 (2006); RUDÉ, WILKES AND LIBERTY, *supra* note 33, at 192–96; KAZIN, *supra* note 24, at xi, 1, 31, 63, 82, 112, 116, 131, 137, 151, 165, 237.

specter of the Old South haunts our land like a lion, seeking whom it may devour.¹⁷⁸ The demagogues of our time make contempt of government the populist creed. And it is one that is entirely incommensurable with the American Creed. For the former to prevail, the latter must be rebuked. Contempt of government is contempt of the Sovereign Nation.¹⁷⁹

VI. CONCLUSION

When popular disapproval erupts into violence at the seat of government, the coercive power of the State must compel honor and obedience to Congress. When rioting threatens the fundamental pillars of our Republic, force and fear are the order of the day. There are few truths so evident in history as that the blood of the rabble dignifies the State. Gravity requires weight. Authority requires danger. For contempt of government, if unchecked, may otherwise break out into mass unrest. A riot is not an insurrection, but it certainly can become one. The very justification for a national government lies in its utility as a safeguard against factious insurrection and internecine conflict.¹⁸⁰ The nation is the true victim of the Trump Riot of January 6, 2021, for as Joanne Freeman so poignantly observed, the Capitol is the “Union incarnate.” For the sake of the Perpetual Union, the national consciousness must be conserved at all costs. The nation as such must be vindicated. King Mob must be held accountable whenever he rears his ugly head.¹⁸¹

History and experience prove the following two propositions to be true: *First*, the law of Parliament declares riots at its door to be high contempts of the Constitution and high crimes and misdemeanors; and *Second*, that law of Parliament is our law. Contempt proceedings and impeachment proceedings in the wake of the Trump Riot are therefore not grotesque institutional manipulations as some would suppose. They are completely commensurate with our national heritage and rooted in the Anglo-Saxon legal tradition. Only a rigorous investigation by the legislature combined with a vigorous prosecution by the executive can make the words of Virgil speak true to our own times: “Fixed the Capitol’s foundation lies”—*Capitoli immobile saxum*.¹⁸²

¹⁷⁸ See George Washington, *Letter to Henry Lee* (Aug 26, 1794), reprinted in GEORGE WASHINGTON: WRITINGS 875, 876 (John Rhodehamel ed., Library of America, 1997); FORMISANO, *supra* note 24, at 62; cf. 1 Peter 5:8; CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 16 (2017).

¹⁷⁹ See STORY, I COMMENTARIES ON THE CONSTITUTION, *supra* note 84, at § 290; Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WILLIAM & MARY Q. 3, 15–16 (1970).

¹⁸⁰ Alexander Hamilton, Federalist No. IX.

¹⁸¹ JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR 158–160, 24–25 (2018).

¹⁸² Compare VIRGIL, IX AENEID 446–449, with JOSEPH STORY, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1222 (Thomas Cooley ed. 1873).