

CONTEMPT OF CONGRESS AND ELECTION INTERFERENCE

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Table of Contents

I. INTRODUCTION.....	132
II. LEGISLATIVE PRECEDENT	133
<i>A. English Precedent.....</i>	134
1. Thomas Long’s Case (1571).....	135
2. Lord Mordaunt’s Case (1666 – 1667)	136
3. Alexander Murray’s Case (1751)	137
<i>B. American Precedent</i>	139
1. Reeder v. Whitfield (1856 – 1857).....	140
2. Brooks v. Davis & Whyte v. Harris (1857 – 1858).....	145
3. Hunt v. Sheldon (1869 – 1875)	154
III. CONTEMPT POWER AND ELECTION INTERFERENCE	158
<i>A. Election Interference by Laymen.....</i>	160
1. Contempt Liability for Laymen.....	160
2. Contempt Procedure for the U.S. House of Representatives.....	165
3. Contempt Procedure for the U.S. Senate	166
<i>B. Election Interference by Members of Congress</i>	167
1. Contempt Liability for Members of Congress.....	168
2. Contempt Procedure for the U.S. House of Representatives.....	175
3. Contempt Procedure for the U.S. Senate	176
<i>C. Election Interference by the Executive</i>	177
IV. CONCLUSION	185

I. INTRODUCTION

And because Elections ought to be free, the King commandeth upon great Forfeiture, that [no Man] by Force of Arms, nor by Malice, or Menacing, shall disturb any to make free Election.

– Statute of Westminster the First of 1275, 3 Edw. 3, c. 5

On July 11, 1958, the United States Congress passed Joint Resolution 175, a code of ethics binding every employee of the federal government:

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.

9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.¹

Few things expose the weakness of a politician’s commitment to these principles of public service like the heat of a contested election. The chaos of public uproar molds his mettle. The hammer of adversity pounds his principles. The friction between competing interests tempers his tenacity. The 2020 Presidential Election of the United States was such a contest.

By January 1, 2021, the outcome of the election was clear. President-elect Joseph R. Biden defeated incumbent President Donald A. Trump. But several members of Congress resisted the proven legitimacy of the Democratic victory. They propounded the idea that the election was stolen through voter fraud—“the Great Lie.” These members shamelessly fed this conspiracy using their soapboxes and social media accounts. The hot air spewing from these members combined with the humidity of an acrimonious political environment to create a perfect storm.

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¹ H.R. Con. Res. 175, 85th Cong. (July 11, 1958).

On January 6, 2021, a joint session of Congress convened to certify the election in President-elect Biden's favor. President Trump and his personal lawyer, Rudolph W. Giuliani, preached vitriolic sermons decrying the election outcome just down the street at a "Save America" rally. Their pugnacious tone created an electric field ripe for a discharge of violence. Some of the protestors attending the rally transformed into a mob and diverted to the United States Capitol. The rioters stormed the halls of Congress like a microburst. The disturbance was sudden and terrifying, temporarily suspending the certification proceedings, and in its wake, creating a deluge of controversy.

In the aftermath of the Trump Riot, Representative Zoe Lofgren (Democrat, California), Chair of the House Committee on Administration, produced a social media report documenting the efforts of fellow members to overturn the election. In her opening letter, Representative Lofgren noted that "Congress has broad and express authority under Article I to 'punish its Members for disorderly Behaviour.' More research on this question is warranted." This article fulfills that warrant.²

I contend that Congress can vindicate assaults on the integrity of federal elections through contempt proceedings. I provide an extensive survey of relevant legislative history in Part II: I highlight three English contempt precedents and three American contested election precedents. I then explain how Congress can synthesize these two bodies of precedent with its current rules and procedures to hold members of the public, members of Congress, and members of the executive accountable for contemptuous interference with federal elections in Part III. Part IV concludes. Although I am fully aware of how arcane and politically impractical contempt proceedings may seem, contempt power remains an important vehicle for Congress to vindicate itself when other options are unavailing.

II. LEGISLATIVE PRECEDENT

The English Constitution is induced from customs and statutes that entered into force over the course of several centuries. The United States Constitution is deduced from a constitutive text inscribed at a particular moment in time. These frameworks for government, however, are not a case study in total contrasts—the former informed the latter to a significant degree. The common law arising under the English Constitution encompassed not only the unwritten law of judicial precedent, but also the unwritten customs, traditions, and usages of Parliament—the *lex parliamentaria*—a law highly insulated from judicial review. "And as every Court of Justice hath laws and customes for its direction," wrote Sir Edward Coke in 1644, "So the High Court of Parliament *Suis propriis legibus & consuetudinibus subsistit*—they subsist according to its own laws and customs." Sir William Blackstone, in characterizing this famous maxim in 1765, declared

² STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFF. & S. COMM. ON RULES AND ADMIN., 117TH CONG., EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES TO JANUARY 6, 1 (2021); ZOE LOFGREN, SOCIAL MEDIA REVIEW: MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES WHO VOTED TO OVERTURN THE 2020 PRESIDENTIAL ELECTION 2–3 (2021) [hereinafter, "HOUSE 2020 PRESIDENTIAL ELECTION SOCIAL MEDIA REVIEW"].

“the power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.”³

Though the Constitution of the United States is embodied in a single text, general principles of law and the presumption of common law meaning require that technical terms be given technical constructions. The American constitutional tradition consequently pays homage to parliamentary practice and procedure. Parliamentary precedent informed the framing and construction of Article I. Precedents from both constitutional traditions commend the view that Article I authorizes contempt proceedings against laymen and public servants who interfere with federal elections.⁴

A. English Precedent

The English Constitution in its medieval mode recognized the inherent power of the King to punish disrespect or disobedience of his prerogative even when there was no particular statute on point. This doctrine was known as “contempt of the sovereign.” Both Houses of Parliament and the courts of common law possessed power inherent to their duties delegated from the King because the King was originally conceived as the fount of all justice. When Parliament finally acquired supremacy over the royal prerogative after decades of conflict culminating in the Glorious Revolution, vestiges of the doctrine of contempt of the sovereign lingered in the new balance of constitutional power established by the now sovereign legislature—the King-in-Parliament.⁵

During the late eighteenth century, both Houses of Parliament, like the courts of common law, possessed inherent power to punish contempt of their prerogatives with reprimand, fine, corporal punishment, and imprisonment. The House of Commons could only incarcerate a contemnor till the end session; the House of Lords could do so at its own pleasure. Both Houses possessed inherent power to discipline and expel their own members.⁶ Both Houses were the final judges of the qualifications, elections, and returns

³ SIR EDWARD COKE, IV INSTITUTES OF THE LAWS OF ENGLAND (1628–1644), in II THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1053, 1092 (Steve Sheppard ed., Liberty Fund 2003) [hereinafter, “COKE, IV INSTITUTES”]; SIR WILLIAM BLACKSTONE, I COMMENTARIES c. 2, § 3, p. 160 (Henry St. George Tucker ed. 1803) (1765) [hereinafter, “BLACKSTONE, I COMMENTARIES”]; GEORGE P. PETYT, LEX PARLIAMENTARIA 2, 17, 236–37 (1689) [hereinafter, “PETYT’S MANUAL”].

⁴ SIR EDWARD COKE, I INSTITUTES OF THE LAWS OF ENGLAND (1628 – 1644), in II THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 576, 649–50 & n. 46 (Steve Sheppard ed., Liberty Fund 2003) [hereinafter, “COKE, I INSTITUTES”]; THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 3 (1801) [hereinafter “JEFFERSON’S MANUAL”]; LUTHER STEARNS CUSHING, *Introduction to LEX PARLIAMENTARIA AMERICANA* ix (1866) [hereinafter, “CUSHING’S MANUAL”]; JOSEPH STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 453, 797 (Thomas M. Cooley ed., 4th ed. 1873) (1833) [hereinafter, “STORY, I COMMENTARY”]; *Kilbourn v. Thompson*, 103 U.S. 168, 201 (1881).

⁵ See *MODUS TENENDI PARLIAMENTUM: AN ANCIENT TREATISE ON THE MODE OF HOLDING THE PARLIAMENT OF ENGLAND* 16–20 (Thomas Duffus Hardy ed. 1846) (c. 1294 – 1327); PETYT’S MANUAL, *supra* note 3, at 30–31; SIR WILLIAM HAWKINS, I A TREATISE OF THE PLEAS OF THE CROWN c. 21, §§ 1–15; c. 22, §§ 1–5 (3d ed. 1739).

⁶ See, e.g., Parliamentary Privilege Act of 1603, 1 Jac. 1 c. 13 (Eng.); ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 14–17 (Liberty Fund 1915); PETYT’S MANUAL, *supra* note 3, at 87–104; see also, e.g. *Rex v. Almon* [1765] 97 Eng. Rep. 94, 99; Wilm. 243, 254 (Eng.).

of their members. Parliament promulgated positive laws over the centuries to ensure that elections were conducted in good order.⁷

Political riots were endemic to Great Britain during the seventeenth and eighteenth centuries. These riots included poll riots—riots at the place of an election; and return riots—riots interfering with the sitting of newly elected Members of Parliament (“MPs”). Common law offenses committed during these disturbances were criminally liable.⁸ But criminal liability did not eliminate liability for contempt. Three examples below illustrate how Parliament used its inherent power to vindicate itself in the context of election interference.⁹

1. Thomas Long’s Case (1571)

The first precedent of a contested election I know to be preserved in the rolls of Parliament is Thomas Long’s Case. Long, the scion of a wealthy clothier, was a resident of Steeple Ashton parish near the town of Westbury and owned the *Bear* inn in Reading. His aspirations for a seat in the House of Commons compelled him to bribe two Westbury authorities £4.00 in 1571: Westbury Mayor Anthony Garlande and another man only known to us by the name of Watts. Long’s treachery was eventually found out. The Journal of the House of Commons simply states that “[Long] is a very simple Man, and of small Capacity to serve in that Place. . . .” Long confessed to the offense so the matter was swiftly resolved.

On May 10, 1571, the House ordered Garlande and Watts to return their bribe to Long and cancel the bonds for Long’s burgess-ship. Long was expelled from the House. The Commons also resolved to inflict collective punishment and fined the Town of Westbury £20.00, a sum assessed upon the municipal corporation or the inhabitants. The next day, the Commons ordered Garlande and Watts to personally appear before it to be interrogated. Although the Commons initially discharged Long, he was later incarcerated

⁷ *E.g.*, PETYT’S MANUAL, *supra* note 3, at 104–15, 125–29; 235–37; BLACKSTONE, I COMMENTARIES, *supra* note 3, at c. 2, pp. 162–63, 179–80 & nn. 29–30; Parliamentary Elections Act of 1770, 10 Geo. III c. 16; Corrupt Practices at Parliamentary Elections Act of 1728, 2 Geo. 2, c. 24; Corrupt Practices Act of 1695, 7 & 8 Will. III, c. 4; Misconduct of Sheriff’s Election Returns Act of 1444, 23 Hen. VI, c. 14; Election of the Knights of the Shire Act of 1429, 8 Hen. VI, c. 7; Election of the Knights of the Shire Act of 1427, 6 Hen. VI c. 3; 1 Hen. V. c. 1; Misconduct of Sherrif’s Election Returns Act of 1425, 4 Hen. VI c. 1; Justices of Assize Election Act of 1409, 11 Hen. IV c. 1, 9; Elections of Knights of Shires Act of 1405, 7 Hen. IV, c. 15.

⁸ *E.g.*, Riot Act of 1714, 1 Geo. 1, c. 5; Corrupt Practices Act of 1695, 7 & 8 Will. III, c. 4; Riot Act of 1429, 8 Hen. VI, c. 9; *see also* FRANK O’GORMAN, VOTERS, PATRONS, AND PARTIES: THE UNREFORMED ELECTORAL SYSTEM OF HANOVERIAN ENGLAND 1734–1832, 135–36, 256–58, 302 (Clarendon Press 1989); JOHN K. GRUENFELDER, INFLUENCE IN EARLY STUART ELECTIONS: 1604–1640, 47 (1981); Nicholas Rogers, *Aristocratic Clientage, Trade and Independency: Popular Politics in Pre-Radical Westminster*, 61 PAST & PRESENT 70, 72–75, 77 (1973); E. Lipson, *The Elections to the Exclusion Parliaments 1679–1681*, 28 ENG. HIST. REV. 59, 65–66 (1913).

⁹ *E.g.*, William Cobbett, Complaint Against the Duke of Bolton for Concerning Himself in the Southampton Election (1780), *reprinted in* 20 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1305, 1307 (T.C. Hansard 1808) [hereinafter, “Lord Bolton’s Case”]; Lord George Gordon’s Case, 37 J. of the H.C. 896–97, 907 (June 19, 1780); Bronker’s Case [1758], 73 Eng. Rep. 369, 2 Dyer, 163b (Eng.).

in Bridewell Prison for spreading seditious rumors to the effect that Queen Elizabeth I was dead.¹⁰

Whether bribery was a general offense at common law or only a genus consisting of several species of offenses defined by statute is still debated to this day. It does not appear that there was any statutory crime proscribing the bribery of MPs in 1571. The crime of bribery was anciently associated with impropriety in the judicial context. The closest relevant statute to the misconduct that transpired in Thomas Long's Case seems to be a law of Henry IV authorizing justices of the assizes to investigate elections and punish any county sheriffs making "undue returns." The act might be read to allow the justices to punish their receipt of a bribe by a sheriff, but not necessarily any other public officer involved in an election, let alone the man actually giving the bribe. The upshot of this excursus on bribery in the sixteenth century is my belief that the only way of correcting the election impropriety of Thomas Long was through the inherent power of Parliament.¹¹ Although the Commons did not formally try Long for contempt, his bribery was contemptuous, moreover, his expulsion is a precedent for Parliament's willingness to use its inherent power to punish election interference beyond its physical boundaries.

2. Lord Mordaunt's Case (1666 – 1667)

The ascension of Charles II vindicated those who remained faithful to the House of Stuart during the Interregnum (1649 – 1660). The life of John Mordaunt, 1st Viscount Morduant, provides an excellent illustration. Lord Mordaunt attempted to organize rebellions while Charles II was in exile. Charles II, upon his return and ascension, rewarded Lord Mordaunt's loyalty by granting him a viscountcy, several financial awards, and local offices. On February 28, 1661, for example, the King appointed Lord Mordaunt as the constable of Windsor Castle. The constablenesship endowed Lord Mordaunt with the right to act as a judge of the court of honor of Windsor and use Windsor Castle's lodgings when not used by the King. Unfortunately, the constablenesship also gave Lord Mordaunt an opportunity to unduly influence local elections and abuse his position to persecute political enemies. It seems he did to a considerable degree.¹²

In 1661 there was a contested parliamentary election between one Thomas Higgons and one William Tayleur, the surveyor of Windsor Castle. Higgons prevailed, in no small part thanks to the patronage of Lord Mordaunt. There is evidence of a feud between Lord Mordaunt and Tayleur that ultimately resulted in Parliament's first attempt to revive the process of impeachment following the Restoration. On December 29, 1666, the House of

¹⁰ See generally BLACKSTONE, I COMMENTARIES, *supra* note 3, at c. 2, p. 179; P.W. HASLER, II THE HOUSE OF COMMONS 1558 – 1603, 486–87 (1981); Thomas Long's Case, 1 J. of the H.C. 88 (May 10, 1571) ; 1 J. of the H.C. 89 (May 11, 1571).

¹¹ See generally U.K. LAW COMMISSION, LAW COMMAND PAPER NO. 313: REFORMING BRIBERY ¶ 2.4 (Nov. 19, 2008); BLACKSTONE, I COMMENTARIES, *supra* note 3, at c. 2, p. 179 & n.62; SIR EDWARD COKE, III INSTITUTES OF THE LAWS OF ENGLAND c. 68 (1644) [hereinafter, "COKE, III INSTITUTES"] ("This word [Bribery] commeth of the French word *Briber*, which signifieth to devoure or eat greedily, applied to the devouring of a corrupt Judge, whom the Psalmist speaking in the person of God, faith, *Qui devorat plebem meam sicut escam panis.*"); SIR EDMUND PLOWDEN, COMMENTARIES OR REPORTS (1816) (1579); Bribery Act of 1409, 11 Hen. IV, c. 1.

¹² RUTH PALEY, III HISTORY OF PARLIAMENT: THE HOUSE OF LORDS 1660 – 1675, 949–951 (2016).

Commons and the House of Lords conferred to discuss articles of impeachment against Lord Mordaunt for arbitrary and oppressive conduct towards Tayleur during Tayleur's contested election with Higgons five years before. Lord Mordaunt intended to "strike terror into those of the said borough which should give their voices for [Tayleur], and deprive them of the freedom of their voices at the election." The articles characterized Lord Mordaunt's interference with the election as contempt.¹³

The articles of impeachment alleged acts of misconduct by Lord Mordaunt that occurred before and after the contested election between Tayleur and Higgons as well. On March 17, 1660, for example, Lord Mordaunt and soldiers under his command removed Tayleur, Tayleur's pregnant wife, and Tayleur's children from Windsor Castle. One of Taylor's children apparently died of "fright" as a result of the incident. On March 23 of the same year, Lord Mordaunt removed Tayleur by force, without any lawful warrant, from a borough prison where Tayleur was detained for failure to pay a debt, and imprisoned Tayleur in Windsor Castle instead. In March 1664, Lord Mordaunt allegedly raped Tayleur's daughter and threatened to "persecute her and her family to all eternity" if she told anyone. He continued to imprison Tayleur for years and ignored writs of habeas corpus attempting to set Tayleur free. The articles also charged Lord Mordaunt of embezzlement, fraud, false accounting, contempt of court, refusing to vacate rooms required by the King, and refusing to pay taxes.¹⁴

Charles II killed the impeachment proceedings against Lord Mordaunt by proroguing Parliament in February 1667 and granted Lord Mordaunt a pardon in July. Historians note that the credibility of the charges against Lord Mordaunt are complicated by their political motivations: the House of Commons wanted to attack the King and Edward Hyde, the First Earl of Clarendon. A political attack on Lord Mordaunt was one way to undermine both of those men. Historians also note that it is controversial whether Lord Mordaunt's oppression of Tayleur, however cruel, truly encroached on the Commons as an institution. I believe Lord Mordaunt's Case at least provides an illustration of how interference with a parliamentary election can arguably constitute both a contempt of the legislature and justify impeachment proceedings.¹⁵

3. Alexander Murray's Case (1751)

On November 16, 1749, the House of Commons issued a writ of election for the City of Westminster. The contest lay between Granville Leveson-Gower, Lord Viscount Trentham—the Tory candidate—and George Vandeput, 2nd Baronet—the opposition (Whig) candidate. The election commenced in January 1750. This election, according to Nicholas Rogers, "turned out to be one of the most violent and vituperative struggles of the first half-century. . . . Nearly 9,500 inhabitants voted in the contest, and even when this

¹³ WILLIAM COBBETT, *Impeachment of Lord Mordaunt (1666–1667)*, in 4 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 347–58 (T.C. Hansard 1808) [hereinafter "Lord Mordaunt's Case"].

¹⁴ Lord Mordaunt's Case, *supra* note 13, at 347–58; PALEY, *supra* note 12, at 952–53.

¹⁵ PALEY, *supra* note 12, at 952–54; *see also* Graham S. McBain, *Abolishing "High Crimes and Misdemeanours" and the Criminal Processes of Impeachment and Attainder*, 85 AUSTRALIAN L. J. 810, 861 (2011); *Biography of John Mordaunt*, BCW PROJECT, <http://bcw-project.org/biography/john-mordaunt> (last visited Jan. 6, 2021).

number was whittled down to just over eight thousand, Lord Trentham emerged with a slender majority of 170.” Dissatisfaction with the final result of the close race unfortunately boiled over into violence.¹⁶

Alexander Murray, 4th Lord Elibank, a notorious Jacobite, demagogue, and supporter of Lord Vandeput, detested the outcome and resolved to vent his emotions at full blast. On May 15, 1750, Murray joined a mob of over a thousand people at the home of the High-Bailiff for the City of Westminster, Peter Leigh, to protest the return. Murray’s objective apparently was to intimidate the bailiff into escorting Lord Trentham to Parliament through the middle of the Covent Garden market, rather than through a portico lining sides of James Street that provided a natural barrier of protection from the center. If Murray succeeded, this change in route would make Lord Trentham more susceptible to insult and attack by the mob. Murray hurled stones and encouraged the mob to murder Leigh as Leigh escorted Lord Trentham, shouting “Will nobody knock the dog down? Will nobody kill the dog?” The authorities arrested Murray for this misbehavior and committed him to Newgate prison pending a full parliamentary inquiry.

On February 1, 1751, the Commons summoned Murray on charges of riotous behavior, threatening the High Bailiff of the City of Westminster, and committing other acts of violence. The allegations related to acts of misconduct both before and after the election concluded. The period of limitations expired for any common law or statutory criminal liability. But since the dignity of Parliament was at stake, there remained a question of whether Parliament should wield its inherent power to hold Murray in contempt.¹⁷

On February 6, 1751, the Commons voted 210 to 74 in favor of finding Murray guilty of contempt. It resolved “That the said Alexander Murray be, for his said dangerous and seditious practices, in violation and contempt of the authority and privileges of this House, and of the freedom of elections, committed close prisoner to his majesty’s gaol of Newgate.”¹⁸ When Murray arrived for sentencing, however, he refused to kneel at the bar of the House as his sentence was read. There was a bit of confusion on how to handle Murray’s obstinacy, as there was no precedent for inflicting a severer punishment than the manner of imprisonment Murray was already subject to. Murray was ultimately sent back to Newgate.

Murray challenged the Commons’ judgment before the Court of King’s Bench through a writ of habeas corpus. He pleaded that he should be entitled to liberty on the theory that the Habeas Corpus Act had higher authority than the inherent power of the Commons, especially considering the fact that the Commons was only one branch of Parliament. He requested bail in the alternative. Chief Justice William Lee, P.C. recused himself. Justices Martin Wright, Thomas Dennison, and Michael Foster were unanimous for the Commons, concluding that the King’s Bench had absolutely no jurisdiction over

¹⁶ See generally Rogers, *supra* note 8, at 77–78, 81 & n.33, 102–03 (citing Middlesex Rec. Off. Sessions Rolls 2932, Record No. 205; Sessions Book 1069/36).

¹⁷ See *id.*

¹⁸ William Cobbett, Debate in the Commons Respecting the Westminster Election (1751), *reprinted in* 14 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 893–94 (T.C. Hansard 1808).

proceedings adjudicating contempt of parliamentary privilege. It was without power, in their view, to take notice of the prisoner's illness. No bail was possible. Murray was therefore remanded to jail.

It appears that although Murray was very ill, he put his health at issue only to strengthen his cause to subordinate the law of Parliament to the law of the land. The Commons was actually willing to move Murray when his condition grew worse to the point of death, but Murray refused that kindness and instead played the martyr. He remained in prison until the prorogation of Parliament on June 25. When Parliament recessed, he was released and greeted by a mob exclaiming "Murray and Liberty!"¹⁹ Alexander Murray's Case supports the proposition that interference with a parliamentary election, even outside of Parliament's physical boundaries, is liable for contempt.

B. American Precedent

Article 1 of the United States Constitution frames the legislative branch of government. Section 5 authorizes both Houses of Congress to be the judges of the elections, returns, and the qualifications of their respective members. Section 6 enshrines legislative privileges appurtenant to each House. Section 8 empowers Congress to make all laws necessary and proper for wielding the legislative power. Legislative and judicial precedent since the Founding both confirmed that these provisions grant each House authority to judge their elections and enforce their prerogatives through contempt proceedings. A contempt allegation is tried before a Committee of the Whole House; a conviction is secured by a two-thirds majority.²⁰ Committees established for the purpose of investigating contested elections, as with impeachment matters, are armed with the contempt power as well.²¹

Congress enacted a statutory procedure to serve as an alternative to its inherent powers for resolving contested elections as early as 1798, but that statute was quickly found to be unconstitutional. It was not until 1851 that Congress successfully passed another statute to take its place.²² The Contested Election Act of 1851 was quickly challenged through a series of legislative precedents involving extreme forms of election interference. These precedents implicated the most sensitive social questions of the Antebellum period: immigration, slavery, and civil rights. We will explore three examples below showing how

¹⁹ See generally Murray's Case [1751], 95 Eng. Rep. 629, 1 Wils. K.B. 299 (Eng.); William Cobbett, Debate in the Commons Respecting the Westminster Election (1751), *reprinted in* 14 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 870–902 (T.C. Hansard 1808); HORACE WALPOLE, I MEMOIRS OF THE REIGN OF KING GEORGE THE SECOND 14–17 (London, Henry Colburn ed. 1847); Rogers, *supra* note 8, at 77–78, 81 & n.33, 102–03 (citing Middlesex Rec. Off. Sessions Rolls 2932, Record No. 205; Sessions Book 1069/36).

²⁰ See, e.g., 2 J. of the H.R., 404–05 (Jan. 6, 1796); 3 J. of the S. 404–05 (Mar. 27, 1800); see generally U.S. CONST. art. I, §§ 5–6, 8; Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); Kilbourn v. Thompson, 103 U.S. 168 (1880); JEFFERSON'S MANUAL, *supra* note 4, at §§ 3, 17, 53.

²¹ See, e.g., 74 J. of the H.R. 716 (Apr. 4, 1874); 2 J. of the H.R. 404–05 (Jan. 6, 1796); 3 J. of the S. 404–05 (Mar. 27, 1800); 67 J. of the H.R. 226 (Jan. 28, 1869).

²² 2 J. of the S. 422–24 (Jan. 15–16, 1798); Annals of Cong. 5th Cong., S., 2d Sess. 485–86 (Jan. 11–12, 1798); H.R. 402, Bills and Resolutions, H.R., 31st Cong., 2d Sess. (Feb. 19, 1851); Contested Elections Act, 9 Stat. 566–68, §§ 1–3, 5, 8 (Feb. 19, 1851); Contested Elections Act, 2 Stat. 537, ch. 8, § 1 (Jan. 23, 1798).

Congress investigated violent election interference in the past that I believe can be reasonably characterized as contempt.

1. Reeder v. Whitfield (1856 – 1857)

During the Antebellum period, many northerners felt that there was a conspiratorial effort by pro-slavery political forces—the so-called “slave power”—to undermine the Union. Thanks to the effort of Democratic senators David Rice (Missouri), Robert M.T. Hunter (Virginia), James Murray Mason (Virginia), and Andrew Pickens Butler (South Carolina)—the so-called “F Street Mess,” the very embodiment of the slave power—Congress did indeed repeal the Missouri Compromise and passed an organic law on May 30, 1854, creating the territories of Kansas and Nebraska.²³ In a speech given by Representative G. A. Grow (Democrat, Pennsylvania), Chair of the House Committee for the Territories, the congressman stated that the “repeal of the Missouri compromise was, from its inception, a conspiracy against freedom.”²⁴ Maybe so, if not literally then at least in the metaphorical sense. Historian Alice Elizabeth Malavasic surmises that it destroyed the second American political party system and precipitated the American Civil War.²⁵

A series of violent conflicts over the issue of slavery plagued the Territory of Kansas from its inception until its eastern portion acquired statehood in 1861. The Kansas-Nebraska Act presented a radical departure from tradition in the annals of American slavery policy. Congress endorsed for the first time the concept of territorial self-determination on the question of slavery—the people of the territory would decide that question themselves. Laying so vital a national question at the feet of a provincial plebiscite was politically convenient in the short term but strategically foolish in the long run. Congress laid a proverbial powder keg of clashing political interests under the floorboards of democracy. Turmoil ensued. Voting fraud and voter suppression played an important part in the ensuing election violence that later came to be known as “Bleeding Kansas.”

The thirty-fourth Congress convened for the first time on March 4, 1855, and proceeded for the remainder of President Franklin Pierce’s administration. The Democratic Party controlled the Senate. But in the House of Representatives there was no traditional two-party divide. The Whig party collapsed. Three different sects formed the first coalition majority in American history in the Whigs’ place: the American party, also known as the Know-Nothing Party—defined by pro-labor policies, feminism, nativism, and anti-popery; the Free-Soil party—so-named for its platform of keeping the territories free of slavery; and the Republican Party—a more demographically generic brand that plucked a few ideological feathers from the Whigs’ cap. Each faction would play a role in the fight over contested elections in the territories.

On November 29, 1855, an election was held in the Territory of Kansas for the seat of a delegate to the House of Representatives. General John W. Whitfield ran on the pro-slavery Democratic ticket. Rival candidate Andrew Horatio Reeder, the first and former

²³ See generally An Act to Organize the Territories of Nebraska and Kansas, 10 Stat. 277; ALICE ELIZABETH MALAVASIC, *THE F STREET MESS: HOW SOUTHERN SENATORS REWROTE THE KANSAS-NEBRASKA ACT* 7–8, 143, 189 (2017).

²⁴ *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 147 (Mar. 5, 1856).

²⁵ See MALAVASIC, *supra* note 23, at 7–8, 143, 189.

governor of the territory, was a staunch Democrat but believed in the principle of popular sovereignty. Reeder was handily defeated, or at least so it seemed. Pro-slavery ruffians from Missouri crossed the border and engaged in voter fraud and voter suppression to ensure their man got the chair. An election for the territorial legislature commenced on March 30, 1855. Ruffians from Missouri crossed the border again and helped swing the ballot boxes in favor of pro-slavery candidates. The so-called “Bogus Legislature” met in Pawnee, Kansas in early July 1855. The assembly removed to Shawnee Mission, closer to Missouri, four days later. Pro-slavery legislators unseated and replaced their Free-Soil rivals with members of their own tribe upon removal. President Pierce fired Reeder for failure to pursue a pro-slavery agenda aggressively enough.

On October 16, 1855, General Whitfield received notice from Reeder that Reeder would contest both the delegate election and the election of the entire territorial legislature before the United States House of Representatives. Reeder presented a memorial requesting an investigation of the election when Whitfield presented his credentials to sit in February 1856. Reeder did not claim the delegate seat for himself; he only insisted that the election was void because of rampant voter suppression. Reeder contended that the law authorizing the election was void because it was passed by a territorial legislature that was unlawfully constituted through election interference. He submitted that the decision of the territorial legislature to remove itself was also illegal, therefore, every act following removal was void ab initio. Reeder claimed standing not only as an individual, but as a representative on behalf of the entire territory. The House referred Reeder’s memorial its Committee on Elections for further inquiry.²⁶

On February 19, 1856, Representative John Hickman (Democrat, Pennsylvania) made a resolution to empower the House Committee on Elections to send for persons and papers, that is, to conduct discovery in Kansas to ascertain whether the election was tainted by fraud and suppression as Reeder alleged. This resolution presented the question of whether the House should allow the Committee on Elections to look into the matter under its inherent power or remand the case for resolution through the procedure provided by the Contested Election Act of 1851. This question, in turn, caused a massive fight over two threshold issues underlying the House’s methodology for executing its judicial function for contested elections by two different factions. The most zealous advocates for the slave power on this occasion were Representatives William W. Boyce (Democrat, South Carolina), John S. Phelps (Democrat, Missouri), Miles Taylor (Democrat, Louisiana), John S. Millson (Democrat, Virginia), and Alexander Stephens (Democrat, Georgia). Representatives John Hickman (a moderate Democrat who would later join the Republican Party), Lewis D. Campbell (Opposition, Ohio) and Israel Washburn Jr. (Opposition, Maine) spoke for the other side of the aisle.²⁷

The first threshold issue was whether the removal of the territorial legislature from Pawnee to Shawnee Mission rendered that legislature illegitimate. The Democrats invoked

²⁶ Reeder v. Whitfield, 51 J. of the H.R. 533 (Feb. 14, 1856); *Cong. Globe*, 34th Cong., H.R., 1st Sess. 426–432 (Feb. 14, 1856); *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 143–44 (Mar. 7, 1856); MALAVASIC, *supra* note 23, at 147–49; Kan. Hist. Soc’y, *First Territorial Capitol Exhibits*, <https://www.kshs.org/p/first-territorial-capitol-exhibits/11777> (last visited June 28, 2021; 9:29 p.m.).

²⁷ *Cong. Globe*, 34th Cong., 1st Sess. 451–56 (Feb. 19, 1856).

the recent decision of the Territorial Supreme Court of Kansas approving removal and prevailed.²⁸ The second threshold issue was trickier—whether the House had the authority to empower a committee investigation into the election of General Whitfield. Two positions emerged that were not necessarily coextensive with party or attitudes on slavery. I shall refer to them as the “exclusive” and “inclusive” positions, respectively. I style the former position as “exclusive” because it held that the Contested Elections Act of 1851 was a general act and therefore was the *exclusive* vehicle for resolving election controversies. Some Democrats felt that an exercise of inherent investigative power was categorically unjustified. Reeder came before the House sitting as a Court of Elections with the wrong writ, according to this line of thinking, therefore, his memorial should be cast asunder. I style the latter position as “inclusive” because it held that the Contested Election Act was a declaratory act, therefore, it only expressed the inherent power of the House to judge its own elections. It did not exhaust the meaning of Article I, Section 5; it only provided a statutory mechanism for executing it.

The inclusive position was more nuanced by some internal disagreement. Some members like Representative Boyce felt that the Contested Election Act had priority over inherent power to investigate contested elections by order of operations. Inherent power could only justify an investigation in the alternative that the act expired before the House received a memorial. Representative Boyce believed that although the act was not technically binding on territories, it was still meaningful dicta—parliamentary precedent that should not be easily ignored when prescribing the contours of an investigation. The conflicting view within the inclusive position was that the Contested Election Act was entirely discretionary: the House could assign the Committee of Elections to appoint a subcommittee to investigate independent of the statute in any case. The act, from this perspective, was just a tool of convenience, nothing more.²⁹

“The Constitution, which gives to this House the power of judging of the election and qualification of its members, on the very ground assumed by the gentleman from Louisiana, [Mr. Taylor,] entitles the committee to what is here asked,” Representative Hickman thundered, “for, as the major includes the minor, all other incidental powers necessary to the exercise of that power are necessarily given to them.”³⁰ Prudence also justified an investigation. What was the harm of inquiring into the matter, assuming it was proper to do so? “If there is wrong, expose it,” Representative Hickman concluded, “if there is right, let it be published from the mountain-top.”³¹

The first round of debates concluded the next day. The House instructed the Committee on Elections to report, with more particularity, the reasons and grounds for the committee’s initial recommendation to send for persons and papers.³² The House Committee on Elections submitted their revised report on March 5. The House then began

²⁸ *Id.* at 451–52, 456–58 (Feb. 19, 1856); *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 121–22 (Mar. 6, 1856).

²⁹ *See generally* *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 119 (Mar. 6, 1856); *cf.* THEODORE F. T. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* 133–34 (CAMBRIDGE UNIV. PRESS 1922).

³⁰ *Cong. Globe*, 34th Cong., H.R. 1st Sess. 462 (Feb. 19, 1856).

³¹ *Cong. Globe*, 34th Cong., H.R. 1st Sess. 464 (Feb. 19, 1856).

³² *Reeder v. Whitfield*, 51 J. of the H.R. 568–73 (Feb. 20, 1856).

a second round of debates that ran to the end of the month. Representative Hickman once again spoke for the majority of the committee and took up the helm of due process. He made a resolution to appoint a subcommittee of three members to investigate the alleged election improprieties. Representative Stephens argued that the resolution violated what he referred to as the *lex parliamentaria americana*. Only territorial legislatures, in his view, could investigate and resolve contested territorial elections. The slave power lost this round. On May 19, 1856, the House approved an amended form of Representative Hickman's resolution to create an investigative subcommittee. The subcommittee of three were all members of the opposition—John Sherman (Opposition, Ohio), William A. Howard (Opposition, Michigan), and Mordecai Oliver (Opposition, Missouri).³³

On July 2, 1856, the investigative subcommittee made their report to the House Committee on Elections. Twenty-two days later, the Committee on Elections reported its findings to the Committee of the Whole House. The majority of the House found for Reeder, concluded that pro-slavery border ruffians from Missouri indeed tainted the delegate election beyond repair, and resolved to seat Reeder in General Whitfield's place. On the other hand, the minority report of the Committee stuck to the slave power party line and denied that any outrages occurred at all. A third round of debates ensued over which report to adopt.³⁴ Finally, on August 1, the House resolved by a vote of 110 to 92 that General Whitfield was not entitled to the seat; the subsequent vote to seat Reeder in General Whitfield's stead failed by a vote of 88 to 113. The seat was therefore vacated rather than replaced.³⁵

The territorial legislature of Kansas proceeded to hold a new election for the empty delegate seat. Unfortunately, that second election was also hampered by voter suppression. On February 12, 1857, the House Committee on Elections reported a second contest between Reeder and General Whitfield. General Whitfield appeared with a certificate from the governor purporting to legitimate his claim to the vacant seat in the House. Once again, the majority of the Committee of Elections determined that the election was tainted. It discovered that the territorial legislature actually imposed a test oath requiring all voters to pledge their support for the Fugitive Slave Act. There was no residency requirement for voting, so slavery-supporting Missourians had no need to resort to violence this time around. They simply showed up and voted their conscience, knowing that Kansan residents were effectively disfranchised and would be no trouble. "If ever the Congress had been faced with a case in which concern for basic principles of democratic government called for the invalidation of an election," Joshua Chafetz concludes, "this was it."³⁶

³³ Reeder v. Whitfield, 51 J. of the H.R. 658–86 (Mar. 17, 1856); *Cong. Globe*, 34th Cong., H.R., 1st Sess., 173–200 (Mar. 17, 1856); Reeder v. Whitfield, 51 J. of the H.R. 693–701 (Mar. 19, 1856); 1 Hind's Precedents § 826, at pp. 1072–73.

³⁴ Reeder v. Whitfield, 51 J. of the H.R. Rep. 658–86 (Mar. 17, 1856); *Cong. Globe*, 34th Cong., H.R., 1st Sess., 173–200 (1856); 51 J. of the H.R. 693–701 (Mar. 19, 1856); 1 Hind's Precedents § 826, at pp. 1072–73.

³⁵ Reeder v. Whitfield, 52 J. of the H.R. 1336–40 (Aug. 1, 1856); *Cong. Globe*, 34th Cong., H.R., 1st Sess. 1114–1117 (1856); 1 Hind's Precedents § 827, at 1076.

³⁶ JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 181–82 (2007).

The majority report added another, more technical basis for rejecting the outcome of the election. The election violated the Kansas-Nebraska Act because the governor prescribed its time, place, and manner rather than a statute. This time the majority did not recommend that Reeder be seated because it was not apparent that he received more votes. The second part of the Kansas contested election controversy of 1856 sadly ended on a much more sour note than the first. The House narrowly voted to table the motion to endorse the majority report and the matter was dropped. General Whitfield retained his seat. The Democrats won. Democracy lost. Reeder went unvindicated. He subsequently converted to the Free-Soil cause. But a pro-slavery grand jury indicted him for high treason, forcing him to flee to Pennsylvania, where he died in 1864. Sadly, he did not live to see his country reunified. General Whitfield meanwhile went on to serve as a Brigadier General for the Confederate Army during the Civil War. He became a farmer following his discharge from military service, moved to Texas, and died in 1879.³⁷

Reeder v. Whitfield was a case defined by partisan gridlock and a willingness to prioritize tribal loyalty over democratic values and the rule of law. Technical arguments went back and forth on nuances of parliamentary procedure, but the heart of the matter was crystal clear. The investigative subcommittees of the House collected ample evidence proving that there was election interference. The Democrats, however, were skeptical—even to the point of mockery—that any real violence occurred, and engaged in some of the worst gaslighting in the nation’s history. They engaged in finger pointing and focused on “Free-Soil violence.”

Representative John Phelps (Democratic, Missouri) was indignant at the accusations that members of his own constituency invaded Kansas to force the issue of slavery. He made no secret of his raw hatred for the emigrant aid societies that were aspiring to strengthen the Free-Soil population of the territory. “Border ruffians,” he howled, “from whom comes this opprobrious epithet!?” He pointed to the sack of the town of Lawrence,³⁸ Kansas by a pro-slavery militia on May 21, 1856, as evidence that it was the Free-Soil party that was stirring up insurrection and rebellion.³⁹ Representative Martin J. Crawford (Democrat, Georgia) similarly accused Reeder of inspiring a “revolutionary movement.”⁴⁰ Representative Robert Toombs (Democrat, Georgia) stated even if there was an invasion of border ruffians from Missouri, Reeder was governor at the time. “It was his duty,” therefore, “to prevent such an outrage, if it happened, by all the civil and military power of the Territory; and if that failed, he was bound by his official oath and duty to report it to the President.”⁴¹ Representative J.V. Wright (Democrat, Tennessee), even went so far as to say that “If any organized body of men in that Territory are in a state of

³⁷ See *Cong. Globe*, 34th Cong., H.R. 3rd Sess., 798–99 (Feb. 21, 1857); *Cong. Globe*, 34th Cong., H.R., 3rd Sess. 277 (Jan. 10, 1857); *Reeder v. Whitfield*, 53 J. of the H.R. 203 (Jan. 10, 1857); 1 *Hind’s Precedents* § 827, at 1076–1078; U.S. Dep’t of Justice, U.S. Marshall’s Off., *Writ of Arrest for Andrew Reeder and Charles Robinson*, KSHS DaRT ID: 228352, KANSAS MEMORY, <https://www.kansasmemory.org/item/228352/text> (last visited Apr. 10, 2021; 11:50 p.m.).

³⁸ See *Kan. Hist. Soc’y, Sack of Lawrence*, KANSAPEDIA (1856), <https://www.kshs.org/kansapedia/sack-of-lawrence/19754>.

³⁹ See generally *Cong. Globe*, 34th Cong., H.R., 1st Sess. 452–53 (Feb. 19, 1856); *Kan. Hist. Soc’y, Sack of Lawrence*, KANSAPEDIA (1856), <https://www.kshs.org/kansapedia/sack-of-lawrence/19754>.

⁴⁰ *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 126, 135–36 (Mar. 6, 1856).

⁴¹ *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 115–16 (Feb. 28, 1856).

rebellion,” such as the Missouri border ruffians so vigorously in dispute, “this House has no more or further power than to make appropriations to aid the Executive in enforcing the law. . . .”⁴²

Although the case of *Reeder v. Whitfield* is not a contempt precedent per se, I believe that the House could have initiated contempt proceedings against the border ruffians that got Whitfield into office, if not Whitfield himself as well. The border ruffians’ violent, constructive election interference was as contemptuous as Alexander Murray’s in 1751, if not more so. Failure to hold the border ruffians and their favored candidate accountable through the exercise of contempt power or otherwise stemmed not from a lack of legal authority but from a lack of political will.

2. Brooks v. Davis & Whyte v. Harris (1857 – 1858)

As blood cooled in Kansas on the issue of slavery it began to boil in Maryland on the issue of immigration. The rosters of the Democratic Party in the Age of Jackson were filled with naturalized citizens from Ireland and Germany. Anti-immigrant attitudes may have briefly declined after the war of 1812 but they rose again with the help of three factions founded during the Antebellum period: the Native Americans in 1835, the Order of the United Americans in 1844, and the Americans (colloquially referred to as the Know-Nothings) in 1852. The last group formed a powerful bloc in the national legislature during the last decade before the Civil War. The formation of this group is where the tales of the next two contested election cases begin: *Brooks v. Davis* and *Whyte v. Harris*.

It should not be supposed that the politics of nativist factions were co-extensive with politics of the Whig party, though they would put their weight behind the Whig ticket when that was to their advantage. By the end of the 1850s the Whig party was dying off and the power vacuum needed to be filled. Like Lord George Gordon’s famed Protestant Association, the Know-Nothings were united against foreign born Catholic immigrants, and for equally complex reasons. Their struggle could be nominally characterized as the cause of Anglo-Protestant republicanism against the faith of absolutism and the specter of papal supremacy. The underlying motivations appear to be an admixture of a populist zeal for labor reform, temperance, and antislavery, along with a contempt for Democratic voter fraud, corruption, and urban machine politics feeding off of foreign-born constituencies.⁴³

The Know-Nothing party owed its name to a common repartee whenever people inquired about its internal operations. When outsiders asked about its inner dealings, its members’ common reply was simply “I know nothing.” The dark spirit of this secretive organization made its way to Maryland and would eventually possess Baltimore like a demon. The city was a perfect vessel. Weakened by endemic corruption and contaminated

⁴² *Cong. Globe App’x*, 34th Cong., H.R., 1st Sess. 137 (Mar. 11, 1856).

⁴³ See RONALD P. FORMISANO, *FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION TO THE 1850S* 199–202 (2008); 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, 106–07 (Ian Haywood & John Seed eds., Cambridge Univ. Press 2014); CHRISTOPHER HIBBERT, *KING MOB: THE STORY OF LORD GEORGE GORDON AND THE RIOTS OF 1780*, 66–68, 97–98, 106, 135, 122, 139–40 (2004); Benjamin Tuska, *Know-Nothingism in Baltimore, 1854–1860*, 11 *CATH. HIST. REV.* 217, 217–19 (1925).

by violent gangs, Know-Nothingism was a malevolent maestro, orchestrating street thugs with the wand of demagogic rhetoric and machismo. “It invented nothing but made thorough use of all the materials that were at its disposal and carried that use to the highest potentialities.”⁴⁴

In the Fall election of 1852, the Whigs suffered a serious loss in Baltimore that one historian later described as a “Waterloo.”⁴⁵ The Democrats took power but knew there would be trouble. Democratic Governor T. Watkins Ligon knew evil was brooding in the shadows and requested a public inquiry in a stirring speech before the Maryland General Assembly in 1855. “All history admonishes us,” he declared “that war of races and sects is the deadliest curse that can afflict a nation. Let us not turn a deaf ear to her warning voice, by countenancing those who may rashly involve us in both, in the effort to accomplish political ends, by appealing to a morbid and fanatical religious zeal, and thus stirring at their sources the most ungovernable passions and prejudices of the human heart.” The Maryland House of Delegates launched an investigation but it failed to accomplish anything.⁴⁶

On October 8, 1856, Know-Nothing candidate Thomas Swann was elected Mayor of Baltimore. The polls were bloody. The most eminent of Maryland historians, Colonel J. Thomas Scharf, remarks that “[i]n the vicinity of the Lexington market and in the public squares surrounding the Washington Monument, pitched battles were fought, in which muskets were freely used, and cannon even brought into the streets—which the authorities made no attempt to quell,”⁴⁷ and that more Americans died that day than were killed at Palo Alto. It was only just the beginning. The Know-Nothing reign of terror had begun. And the Whig leaders in Maryland prostrated themselves, to their shame, rather than confronting the vices of their coalition partners head on.

The Know-Nothing National Convention assembled in Philadelphia on February 26, 1856, and nominated Millard Fillmore for President of the United States. The Old-Line Whig National Convention, meeting in Baltimore in September of that year, resolved “That without adopting or referring to peculiar doctrines to the know-nothing party, we look to them as well tried and faithful friends of the Constitution and the Union.”⁴⁸ So, the Whigs, with one cowardly whimper, endorsed the Know-Nothing nominee. On September 11, 1856, the Republican Party assembled for the first time in Maryland history. That assembly’s attendees, in the best of Baltimore traditions, were assaulted by a violent mob—a Democratic gang known as the Sag Nichts. The mob also assaulted the office of a German Republican paper, *Der Wecker*, and nearly destroyed it but for the intervention of the police. A Democratic mob attacked a gathering of Millard Fillmore supporters with guns and clubs on the following day.

On September 13, two Know-Nothing gangs attempted to retaliate by marching past the Democratic headquarters in the seventeenth ward but were fought off by locals

⁴⁴ See Tuska, *supra* note 43, at 219, 222, 224–25, 230.

⁴⁵ See J. THOMAS SCHARF, III HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT: 1819 – 1880, 246 (1879) [hereinafter “SCHARF, III HISTORY OF MARYLAND”].

⁴⁶ SCHARF, III HISTORY OF MARYLAND, *supra* note 45, at 246–49.

⁴⁷ *Id.* at 250.

⁴⁸ *Id.* at 251.

using bowie knives and slingshots. Things got worse in the Fall. During one day in October, Democratic gangs attempted to seize control of the polls in the twelfth ward near Lexington Market and fired into the crowd from a nearby firehouse they controlled. The Know-Nothings fought them off and responded by sacking the firehouse. At least four people were murdered and over fifty people were injured. The following month, rival gangs fought a pitched battle over an election in the streets of Baltimore involving firearms and a makeshift cannon. The Know-Nothings would not forget these attacks and resolved to seize the initiative by making their own over the next two years.⁴⁹

The thirty-fifth Congress convened on March 4, 1857, and proceeded during the last two years of the administration of President James Buchanan. The Democratic Party controlled the White House, and, unlike the previous Congress, both chambers of the legislature as well. November 4, 1857, election day for several offices in Maryland—including Maryland seats in the House of Representatives—became a fateful landmark in the history of American political violence. Governor Ligon and Mayor Swann exchanged passive-aggressive letters over the issue of preventing bloodshed at the polls. Mayor Swann only answered Governor Ligon’s honest inquiries with evasions, deflections, and outright lies. The two men eventually sat down for a meeting a mere two days before the election to discuss precautions, but the “arrangements” put in place by Mayor Swann “resulted in a more complete and shameful mockery of the elective franchise than any that had gone before.”⁵⁰ Know-Nothing gangs—the Blood Tubs, Red Necks, Pioneers, Ashlands, Spartans, Regulators, Black Snakes, Tigers, Eubolts, Gladiators, Rip Raps, Ranters, Little Fellows, Plug Uglies, etc.—went out in force to suppress voting. They created a bloody spectacle reminiscent of scenes from Martin Scorsese’s cinematic classic *Gangs of New York*.

Colonel Scharf exclaims that “almost the entire body of naturalized citizens was disfranchised, and thousands of even native-born voters were intimidated from voting.” Eight men were killed, and over two-hundred and fifty were wounded. “[T]he city of Baltimore has been given up, without remorse, to the abuse of the whole country,” one congressman concluded, “The election was fraudulently conducted; that in the exclusion of thousands of people from the polls, there has been no expression of the popular will; and that the whole of the rotten form the city are vicious, without a decent claim to official recognition anywhere, and in all their character to gross insult to our institutions, and laws, and a most offensive mockery of the great principles of political independence and popular suffrage”⁵¹ The ruffian tactics in Baltimore on November 4, 1857, tainted the elections for two of Maryland’s seats in the House of Representatives. I will relate the interference with each election in turn.⁵²

First, there was the contest for the seat for the fourth congressional district between Know-Nothing candidate Henry Winter Davis and Democrat candidate Henry P. Brooks.

⁴⁹ See *Id.* at 250–51 & n.1; DAVID GRIMSTED, *AMERICAN MOBBIING: 1830–1860*, 236 (1998).

⁵⁰ SCHARF, III *HISTORY OF MARYLAND*, *supra* note 45, at 262.

⁵¹ *Id.* at 251–63, 273 & n.1; see also GRIMSTED, *supra* note 49, at 237–38; *Gangs of New York* (Miramax 2002); *Cong. Globe App’x*, 35th Cong., H.R., 1st Sess. 731 (Feb. 16, 1858).

⁵² See H.R. 402, Bills and Resolutions, 31st Cong., H.R. 2d Sess. (Feb. 19, 1851); An act to prescribe the mode of obtaining evidence in cases of contested elections, 9 Stat. 566–68, §§ 1–3, 5, 8 (Feb. 19, 1851) (codified as amended at 2 U.S.C. §§ 381–396).

In 1855, Davis beat his competitor by a margin of 495 votes—7,988 for Davis, 7,493 for his opponent. In 1857, by contrast, Davis beat his competitor by 6,536 votes, hauling in 10,515 votes to Brooks' mere 3,979. Despite the lower overall election turnout, Davis suspiciously improved his margin of victory in two years by a factor of thirteen. He was sworn into office on December 9, 1857. Brooks submitted a memorial to Congress challenging the outcome and made four assertions: the authorities of Baltimore failed to uphold public peace on election day; the ordinary sixty day period for discovery in an election matter under the Contested Election Act was insufficient given the scope of the criminal conspiracies of the Know-Nothing gangs; the witnesses that would be called upon in an election investigation would likely be intimidated by those gangs; and it was preferable to have these witnesses testify in person on Capitol Hill rather than be deposed in Baltimore. Brooks did not seek the seat himself; he merely wanted the election declared void.

In a letter personally addressed to Davis, Brooks gave notice of his memorial and did not pull any punches. “Both before and on the day of election threats and actual violence towards naturalized citizens became so notorious that that class of voter were almost entirely disfranchised,” he exclaimed. “[Y]our party, by its organization, by the doctrines it promulgates, and by the oaths it imposes, having aroused animosities between different classes of our citizens, a conspiracy was formed by and between certain clubs, or orders, or councils, or persons, in the party whose nominee you were, to intimidate and exclude large numbers of legally qualified voters and thus carry the election, and that this conspiracy was carried into effect by fraud, force, and intimidation.” Brooks went on to relate the tactic of the Know-Nothings to ensure their men got the chair. Know-Nothing managers at the polls provided tickets for the election bearing red stripes, enabling partisans nearby to detect which way the citizen went on his “secret ballot” so they could destroy those unfavorable to their cause.⁵³

Davis responded in kind by formally answering Brooks' memorial to Congress and personally writing to Brooks himself. Davis quibbled with Brooks' concerns in a frivolous, even petulant manner reminiscent of boilerplate objections to discovery requests in civil actions today. He flat out denied any interference: “I deny that intimidation, force and fraud, or either of them, were used by any persons on my behalf to such an extent as to deprive the proceedings of that day of all or any of the true characters of an election, on the contrary, in my judgment, it was the most quiet and peaceful election held in Baltimore for many years.” The lack of sufficiently particular facts supporting allegations of violence was Davis' chief criticism. He maintained that he was utterly unaware of “any such ‘conspiracy,’ and as to the tickets with stripes, he even made a concession. “Some were cast for me,” he wrote, “but I suppose it quite immaterial whether the tickets were white,

⁵³ Henry P. Brooks, *Memorial of Henry P. Brooks Contesting the Right of H. Winter Davis to His Seat As a Representative From the Fourth Congressional District of the State of Maryland* (Dec. 16, 1857), in THOMAS L. HARRIS (DEMOCRAT, ILLINOIS), H.R. Comm. of Elections, 35th Cong., H.R., 1st Sess. Misc. Doc. No. 42 at pp. 3, 3–4, 12 (1858); H.R. 45 (Dec. 9, 1857); *Cong. Globe App'x*, 35th Cong., H.R., 1st Sess. 22 (Dec. 9, 1857).

or red or striped, in the absence of any law on the subject, and it would seem difficult to avoid the objection since any color is equally liable to the same objection.”⁵⁴

On February 5, 1858, Harris submitted discovery to the House. Seven days later, Representative Boyce formally produced Brooks’ memorial contesting Davis’ election and requested an independent investigation by the House Committee on Elections under its inherent power. The Committee split on the memorial five to four. The majority resolved that the memorial should be denied and that the matter should be remanded and proceed under the Contested Election Act instead. The minority resolved that an independent investigation was justified and requested the authority to send for persons and papers.⁵⁵

The House quickly came to a head in deliberating which report to adopt. The central question was eerily reminiscent of the controversy in *Reeder v. Whitfield*—how to construe the Contested Election Act relative to the inherent power of Congress. This time, partisan roles were reversed. Now it was the Democratic Party’s time to cry havoc, while the opposition thumbed its nose and preferred to look the other way. Now it was the Democratic Party’s turn to insist on principle over party. Boyce recalled the earlier deliberations in the Kansas affair and reiterated the view that while the act was not exhaustive, it had priority; Brooks could not seek relief through the inherent power of the House until he first followed the statutory avenue first, his concerns about Baltimore hospitality notwithstanding. “There is an old fable, which has a great deal of wisdom in it, like most of the old fables,” Representative Boyce said. “A wagoner found his wagon in a tight place; whereupon he began to pray to Jupiter to help him out of his difficulty. Jupiter calmly replied: ‘Put your own shoulders to the wheel; and, if you fail, then will be time enough to call upon me.’ I think this House may very well imitate the prudence of the great Jove. Let Mr. Brooks put his shoulder to the wheel; and, if he fails, then let him call upon us, and we will the go to the rescue.”⁵⁶

Representative Henry M. Phillips (Democrat, Pennsylvania) gave a thorough history of contested election act legislation. He recounted that the Contested Election Act of 1798 was held to be unconstitutional. A similar law was passed in 1801 but expired in 1805. Efforts to pass a permanent piece of legislation were made in 1806, 1810, and 1820 but all failed. Representative Phillips sided with the minority report and took the view that the Contested Election Act of 1851 only applied to personal election contests, not in cases such as the one at hand, where the memorialist came on behalf of the people. He actually clashed swords with Representative Boyce, his colleague, and took a more extreme view, holding that the act itself was unconstitutional. Representative Thomas F. Bowie (Democrat, Maryland) did the same, contending that the act of 1851 violated the separation of powers. The Senate necessarily provided input into the act through the normal legislative

⁵⁴ Henry Winter Davis, *The Response of Henry Winter Davis, of Maryland, to the Memorial of Henry P. Brooks, Contesting the Election in the Fourth District of Maryland*, in THOMAS L. HARRIS (DEMOCRAT, ILLINOIS), H.R. Comm. of Elections, 35th Cong., H.R., 1st Sess. Misc. Doc. No. 42 at pp. 6, 7, 9 (1858) (emphasis added); Henry Winter Davis, *Answer to Notice*, in THOMAS L. HARRIS (DEMOCRAT, ILLINOIS), COMM. OF ELECTIONS, 35th Cong., H.R., 1st Sess. Misc. Doc. No. 42 at p. 13 (1858).

⁵⁵ Brooks v. Davis, 54 J. of the H.R. 299 (Feb. 5, 1858); *Cong. Globe App’x*, 35th Cong., H.R., 1st Sess. 590 (Feb. 5, 1858); 54 J. of the H.R. 375 (Feb. 12, 1858); *Cong. Globe App’x*, 35th Cong., H.R., 1st Sess. 692 (Feb. 12, 1858).

⁵⁶ *Cong. Globe App’x*, 35th Cong., H.R., 1st Sess. 725–27, 732–33 (Feb. 16, 1858).

process, he argued, and therefore impermissibly circumscribed the House’s judicial function. Under that radical interpretation, positive law designed to operationalize Article I Section 5—be it of either a general or declaratory nature—was categorically unconstitutional. Procedures for implementing Section 5 in this light could only be guided by House rules. Even in the alternative that the act was constitutional, Representative Phillips insisted that the act was merely a declaratory act and did not circumscribe the inherent power of the House in any way—it was completely discretionary. The Democrats, in sum, took the same doctrinal position as the opposition did in *Reeder*.⁵⁷

Representative Horace Maynard (Know-Nothing, Tennessee) ironically expressed the view of the opposition that coincided with the Democratic position in *Reeder*. He and other members of the opposition argued that Article I, Section 5 and the Contested Election Act of 1851 did not conflict. Rather, the statute was a general act and therefore prescribed the mode—the *exclusive* mode—for the operation of Section 5. How the tables had turned! Now it was the opposition who attempted to put the inherent power of the House in a box. Maynard asserted that the act was constitutional but exclusive. “With my reading of the act, and my understanding of the Constitution, I cannot conceive any other mode by which a seat can legally be contested, than by the provision of the act of 1851,” Maynard averred. “That provision is general. It provides for all and every case. It makes no exception. It intends to make none, and this contestant manifestly so understood it when proceeding under it.” As in *Reeder*, there was some diversity on these legal points even within both camps. Representative Cadwallader C. Washburn (Republican, Wisconsin) accepted the constitutionality of the act but believed it to be declaratory and discretionary; he urged that the Contested Election Act should control this case. If for no other reason, he thought the statutory process preferable because that way the parties would bear the cost of the controversy, not the government.⁵⁸

Representative Washburn’s comments illustrate the proclivity of the opposition in this case, like the Democrats in *Reeder*, to rely on the slippery slope argument. If the House intervened here, he argued, it could trigger an avalanche of contested election claims and associated costs. “By a departure from the law of 1851, by a special commission. Do so, and what might be the result?” deflected Representative James Wilson (Republican, Indiana). “Possibly a memorial might come here from the city of Philadelphia; might come from the city of New York; possibly from the city of Cincinnati; contesting the election of members of this House. Would the House upon any such memorial grant extraordinary commissions in all those cases for the purpose of taking evidence by which to determine the legality of the election?”⁵⁹

The opposition took their turn to feign incredulity. They responded to the allegations of election interference with searing skepticism.

Was ever a more ridiculous, ever a more unworthy, ever a
more baseless argument submitted to the consideration of
two hundred and thirty-odd men, who claim some sort of

⁵⁷ *Id.*; see *supra*-Part II.B.2.

⁵⁸ *Cong. Globe App*’x, 35th Cong., H.R., 1st Sess. 727–28, 731–34 (Feb. 16, 1858).

⁵⁹ *Cong. Globe App*’x, 35th Cong., H.R., 1st Sess. 732 (Feb. 16, 1858).

character for general intelligence? Terrific names! ‘Know-Nothing,’ ‘Plug Ugly,’ ‘Shoulder-hitter,’ ‘Blood-bones’ and ‘Knock-under’ desperadoes! . . . Sir, why did not this very prudent man learn wisdom from a very sage piece of advice, which, we are told, was given by one of the old demi-gods to the wagoner when he got his wheel into the rut? Why did he not put his own shoulder to the wheel, and then, if he could not lift it out, call upon us Herculeses’ to give him a helping hand?⁶⁰

Representative Maynard concluded his remarks by returning to the fable of the wagoner who cried out to Jupiter. In doing so, he effectively told the free citizens of Maryland, “Stop crying out for the gods. They will not save your democracy, and neither will we. Put your back into the wheel and save it yourselves.”⁶¹

The demographic tensions that defined the Antebellum period manifest themselves in the remarks of Representative Israel T. Hatch (Democrat, New York). Recall that the axes of disagreement between Democrats and Know-Nothings were opposing attitudes on immigration and slavery. To probe these disagreements with the delicacy they deserve, I offer a simple maxim: Let not race obscure ethnicity. American politics in the Antebellum period, as in the Pontic Steppe ten thousand years ago, was defined by two things: patron-client relationships and tribal warfare. Irish and German immigrants, who typically polled Democratic, despised Black Republicans and the abolitionist attitudes of the Know Nothings. Wealthy Democratic patrons recruited the immigrant classes as political clients with social assistance and work, and in return, gave that constituency skin in the game for preserving the institution of slavery. “There is not a constituency in this country so largely filled with adopted citizens as the constituency which I am proud to represent on this floor. Probably all the civilized nationalities of the world are represented there, and some nine-tenths of these adopted citizens voted for me,” Hatch rattled indignantly, “There was one nationality, however, which did not vote for me. The negroes in my district do not think enough of the Democrats to vote with them.” Popular antipathy towards Catholic elites and nativist resentment towards migrant workers—especially Irish policemen—was equally intense among Northern Anglo-Protestant whites and blacks.⁶²

Representative Hatch joined hands with his Democratic colleagues and expressed his firm conviction that an investigation was warranted.

Every man knows—it is notorious, it is undeniable—that in every city in this Union where this proscriptive, bigoted Know-Nothing party has had power, they have secured that power by blood and violence, and have held it by blood and violence. This is not a mere question of the election in the

⁶⁰ *Cong. Globe*, 35th Cong., H.R., 1st Sess. 727–28 (Feb. 16, 1858).

⁶¹ *See id.*

⁶² *Cong. Globe*, 35th Cong., H.R., 1st Sess. 729 (Feb. 16, 1858); compare also GRIMSTED, *supra* note 49, at 16, 62, 203, and 227, with DAVID W. ANTHONY, *THE HORSE, THE WHEEL AND LANGUAGE: HOW BRONZE-AGE RIDERS FROM THE EURASIAN STEPPES SHAPED THE MODERN WORLD* 259–60, 343, 366–67, 369–70, 460–61 (Princeton Univ. Press 2007); cf. Rogers, *supra* note 8, at 89.

city of Baltimore. All the adopted citizens of the country are interested in it; ay, sir, and the perpetuity of this Government and the progress of self-government are concerned in it; for if you cannot protect the ballot-box, your liberties are gone. You must be ruled by the ballot or the bayonet.⁶³

Representative Hatch also saw fit to read the oaths sworn by the Know-Nothings into the record, to illuminate their creeds so that the whole nation might truly know what they were up to. Every member of Congress knew what was lurking in the shadows.⁶⁴

Representative Hatch brought his remarks to a conclusion by addressing the legal question squarely before the House: should the Committee of Elections investigate? His insight on the scope of inherent power and Article I was incisive in spite of whatever biases he may have had.

The Federal power extends over elections, and it is all vested in Congress. This would be, doubtless, a novel proceeding, and should only be resorted to in great emergencies. Yet the constitutional right of the citizens should be acknowledged and proclaimed. Congressional constituencies should understand that when State or municipal governments either through neglected or fraud, fail to protect the citizen in the free exercise of the elective franchise, that he has an appeal to a reserved constitutional prerogative placed here for his protection. Here it exists. It is undeniable. The power of the House is defined in article first, section five of the Constitution, which is in these words: ‘Each House shall be the judge of the elections, returns and qualifications of its own members.’ Now, sir, in my opinion, where violence has been used at an election, I care not how the election may go, or what the result, it is the duty of this House to declare the election void. What is an election? It is the choice, the free will, the liberty to act, or not to act. They hold no election where violence or intimidation is used; and this House, if there is no precedent, ought to set a precedent, and set aside an election in such a case.⁶⁵

These words deserve a special place in the annals of contested elections because they highlight the revolutionary properties of the law of Congress, the so-called *lex parlamentaria americana*. Like the law of Parliament, the law of Congress is a unique enclave largely insulated from judicial review. Representative Hatch understood that the privilege of the House to judge its own elections, in the words of Thomas Jefferson, “was continually progressive.” Revolution was encoded into the genotype of common law institutions. The House of Commons operated these institutions with immense success to

⁶³ *Cong. Globe*, 35th Cong., H.R., 1st Sess. 729 (Feb. 16, 1858).

⁶⁴ *See id.*

⁶⁵ *Id.* at 730–32.

resist tyranny from above. Now was an equally critical opportunity for the House of Representatives to resist tyranny from below. Representative Hatch's comments therefore reveal an important truth at the center of the American constitutional tradition: Generating new precedents inflecting ancient privileges for the exigencies of modern times is a perennial duty of the legislative power.⁶⁶

The memorial was carried over until the next day. On February 17, the resolutions of the Committee of Elections came to a vote. The motion for the majority resolution was carried by a vote of 115 to 89. The House therefore decided against an investigation under its own inherent power. The popular branch failed the people of Maryland just as it had failed the people of Kansas the year before. The desperate pleas of Representative Hatch and his Democratic colleagues fell on deaf ears.⁶⁷

The second contested election was the race for the third congressional district between Know-Nothing candidate James Morrison Harris and Democrat candidate William Pinkney Whyte. Whyte resolved to challenge the election immediately. His would-be colleague, Representative Thomas F. Bowie (Democrat, Maryland), presented Whyte's memorial contesting Harris' seat on December 16, 1857, alleging fraud and corruption. The memorial was referred to the House Committee on Elections.⁶⁸ The Speaker laid before the House evidence in support of the committee investigation throughout the following Winter. Harris presented his reply to Whyte's memorial in early March.

The House Committee on Elections finalized its report in the Summer. On June 1, 1858, Representative Thomas L. Harris (Democrat, Illinois) delivered the majority report of the committee, concluding that the election was void and the seat was vacant. The minority report of the committee concluded to the contrary that Harris' seat should not be vacated because of election improprieties. The minority believed Whyte was entitled to sit. Full deliberation of these reports was postponed.⁶⁹ On December 15, 1858, the House resumed, but lost too much steam to give the matter the attention it deserved. Representative Boyce initially took great interest in the case but wavered after the postponement.⁷⁰ The next day, the Speaker called the House to order. The case of *Whyte v. Harris* was first on the docket. The House voted to allow Whyte to make his case on the floor by a vote of 106 to 97.⁷¹ Although the journals do not explicitly disclose the disposition of the case, it appears that the memorial was defeated. The House even voted against awarding Whyte mileage and per diem to compensate his travels for contesting the

⁶⁶ See JEFFERSON'S MANUAL, *supra* note 4, at § 3.

⁶⁷ *Cong. Globe*, 35th Cong., H.R., 1st Sess. 746 (Feb. 16, 1858).

⁶⁸ SCHARF, III HISTORY OF MARYLAND, *supra* note 45, at 251–63, 273 & n.1.

⁶⁹ *Whyte v. Harris*, 54 J. of the H.R. 1083–89 (June 11, 1858); *Cong. Globe*, 35th Cong., H.R., 1st Sess., 2959–60 (June 11, 1858); *Whyte v. Harris*, 54 J. of the H.R. 989 (June 1, 1858); *Cong. Globe*, 35th Cong., H.R., 1st Sess. 2605 (June 1, 1858); *Whyte v. Harris*, 54 J. of the H.R. 450 (Feb. 26, 1858); *Whyte v. Harris*, 54 J. of the H.R. 428 (Feb. 25, 1858).

⁷⁰ *Whyte v. Harris*, 55 J. of the H.R. 72–73 (Dec. 15, 1858); *Cong. Globe*, 35th Cong., H.R., 2nd Sess. 102–03 (Dec. 15, 1858).

⁷¹ *Cong. Globe*, 35th Cong., H.R., 2d Sess. 120–21 (Dec. 16, 1858).

election. Despite the rank injustice, gross violence, and wanton anarchy that launched Harris into office, Harris was able to keep his seat. The result was sheer impunity.⁷²

Beyond the disappointing failure of the House to vindicate the claims of Brooks and Whyte was also its failure to effectively deal with the underlying election violence itself. A resolution offered in *Whyte v. Harris* characterized the Know-Nothing disturbances as “contempt of the law,” that is contempt in the general sense. Neither *Whyte v. Harris* nor *Brooks v. Davis*, however, are contempt precedents per se. There remains a very real question as to whether any violent interference with an election procedure within or without the Capitol grounds is liable for contempt of Congress, bar any other civil or criminal penalty. One could certainly argue that the House could have used its contempt power to vindicate the integrity of its election procedures in these cases. The failure of the public justice system to address election violence in the Know-Nothing era in Baltimore, as in Bleeding Kansas, only further undermined the democratic process.⁷³

I must conclude this case study with a disclaimer to balance the historical narrative. Colonel Scharf’s three-volume history of Maryland is an invaluable resource to any scholar and still the greatest general history of the state. His version of the Know-Nothing riots in Baltimore is mandatory reading for any student of the time. May it be remembered, however, that Colonel Scharf served in the Confederate Army. His attitudes on states’ rights were typical of his tribe. He was a Southern Democrat. His mother was Irish and his father was German. His exclusion of the Democratic contribution to the disorder in Baltimore and his rather one-sided account of Know-Nothing gangsterism reveals unmistakable evidence of bias. The reader should not form a conclusive opinion about the Know-Nothings by gazing through his looking glass.

Democratic corruption, as famously illustrated by the machinations of Tammany Hall, inspired the Know-Nothing movement. The Democratic Party was no stranger to election interference, as well attested by Bleeding Kansas and the Baltimore riots of 1856 and 1857.⁷⁴ In my view, the historical record shows that the Know-Nothings and Democrats were both to blame for the disorder in Baltimore in the 1850s. The elites on both sides failed to own up to the shortcomings of their violent foot soldiers. The entire episode illustrates a political universal: if patrons are dogmatic, their clients will be dangerous.⁷⁵ It seems to me that the Whigs used nativism as oxygen to reignite their political hopes. They played with fire and paid the price.⁷⁶

3. Hunt v. Sheldon (1869 – 1875)

Contempt for the federal government was keen in the Reconstruction South. Louisiana was no exception. Lionel A. Sheldon ran on the Republican ticket for a seat in

⁷² *Whyte v. Harris*, 55 J. of the H.R. 615 (Mar. 3, 1859).

⁷³ *Cong. Globe*, 35th Cong., H.R., 2d Sess. 120 (Dec. 16, 1858); CHAFETZ, *supra* note 36, at 182.

⁷⁴ See FORMISANO, *supra* note 43, at 208–09; see also, generally, GEORGE WASHINGTON PLUNKITT, A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS 76 (William L. Riordan & Peter Quinn eds., 2015).

⁷⁵ Thomas Swann, *Address of the Mayor to the Citizens of Baltimore* (Oct. 19, 1857), in THOMAS L. HARRIS (DEMOCRAT, ILLINOIS), H.R. Comm. of Elections, 35th Cong., H.R., 1st Sess. Misc. Doc. No. 42 at pp. 17, 19–22 (1858).

⁷⁶ SCHARF, III HISTORY OF MARYLAND, *supra* note 45, at 264–65 & n .1, 284–86 (emphasis added).

the House of Representatives in 1868 and was the apparent victor. In March of that year, one Caleb S. Hunt, Sheldon's Democratic opponent, filed a memorial contesting the seat. The Louisiana legislature threw out a large quantity of votes that would have given Hunt the victory on the basis that those parishes where he prevailed were tainted by voter suppression. The House of Representatives referred Hunt's memorial to its House Committee on Elections. The House Committee on Elections, in turn, appointed a special sub-committee to visit Louisiana and investigate.

The report of the House sub-committee revealed that during the election, the city of New Orleans and adjacent parishes were consumed by "a condition of terrorism. . . ." The Knights of the White Camelia, a paramilitary white supremacist organization consisting "of nearly the entire adult male white population," engaged in a campaign of "organized intimidation and riot." "[F]or more than one week," Representative Job E. Stevens (Republican, Ohio), ranking member of the House Committee on Elections, declared that "the city of New Orleans, with its vast, excitable, mercurial population, was one wild scene of riot, influenced by authority of law, uncontrolled and unawed by any authority, State or national. During that period violence took and held possession of New Orleans. The mob was the master there." King Mob reigned supreme and killed or wounded not less than 2,000 Republicans, resulting in widespread voter suppression. Skeptics in the House attacked the sufficiency of the report and the motivations of the committee appointed by the Louisiana legislature to investigate the affair but to no avail. The Louisiana legislature's remedial actions were vindicated. On April 13, 1870, the House finally resolved that Sheldon was entitled to his seat. This time democracy won, but it was a pyrrhic victory.⁷⁷

Hunt v. Sheldon was a seismic tremor signaling an impending eruption of election violence over the next five years. Its most important aspect was its aftermath. "To say that lawlessness, turbulence, and bloodshed have characterized the political affairs of that State since its re-organization under the reconstruction acts," President Ulysses S. Grant wrote in a letter to the United States Senate, "is only to repeat what has become well known as a part of its unhappy history. . . ." Southern Democrats were indeed resentful of Reconstruction policies and bitterly lamented the loss of their candidate, John McEnery, to Republican William Pitt Kellogg in the 1872 Louisiana gubernatorial election. In fairness, President Grant admitted that the election of 1872 was a giant fraud, that no one truly knew who the winner was, but that in his personal opinion, Kellogg had the better claim. The Senate's Committee on Privileges and Elections investigated the political troubles in Louisiana and produced a report on February 20, 1873, declaring the election null and void. Yet Congress declined to act further. President Grant continued to support Kellogg. Given the frailty of his claim to legitimacy, Kellogg, truly only a de facto governor, held the reins of power with unease as the gubernatorial election of 1874 approached. Meanwhile

⁷⁷ See *Hunt v. Sheldon*, 69 J. of the H.R. 612 (Apr. 13, 1870); *Hunt v. Sheldon*, 69 J. of the H.R. 608 (Apr. 12, 1870); *Cong. Globe*, 41st Cong., H.R., 2d Sess. 2618–22 (Apr. 12, 1870); *Hunt v. Sheldon*, 69 J. of the H.R. 476 (Mar. 16, 1870); *Hunt v. Sheldon*, 68 J. of the H.R. 199 (Apr. 8, 1869); *Cong. Globe*, 41st Cong., H.R., 1st Sess. 638–44 (Apr. 8, 1869); *Hunt v. Sheldon*, 68 J. of the H.R. 64 (Mar. 17, 1869); *Cong. Globe*, 41st Cong., H.R., 1st Sess. 124 (Mar. 17, 1869); 1 Hinds' Precedents §§ 328–33, at 213–21; CHAFETZ, *supra* note 36, at 185–86.

confusion and uncertainty only emboldened the enemies of democracy, giving them ammunition to fire not only at their opponents, but the entire Reconstruction project.⁷⁸

Radical forces were chomping at the bit for a chance to take down Carpetbaggers. Their reactionary state of mind was expressed in their use of the term “Radical” to refer to Republicans, federals, reconstructionists—those seeking to deliver the promise of the Declaration of Independence to all. The White League, a rural, paramilitary, white supremacist faction—a faction certainly more worthy of the term “Radical”—gained some sway in Louisiana by this time, along with another notorious group—the Ku Klux Klan. In 1873, a mob of White Leaguers and Klansmen, dissatisfied with a local election, laid siege to the courthouse in Colfax, the seat of Grant Parish. What transpired there later came to be known as the “Colfax Massacre.” When black militia and other Republican freedmen defending the courthouse surrendered after a brief fight, most of them were slaughtered—perhaps as many as 153 of them.⁷⁹

The White League was eager to strike again and spent the Summer of 1874 swelling its ranks with new recruits. It played upon economic insecurities and social anxieties to inflame tribal instincts towards expelling the “Yankee invader.” It accused the Republican administration of tyranny and oppression, lambasted the Kellogg administration for corruption, and waved the specter of “Negro Domination” to scare the electorate into a racialized, zero-sum frame of mind. The White League consisted of southern white men from different classes; older veterans yearned for an opportunity to purge their defeat in the Civil War; those who were too young to fight in the War of Northern Aggression yearned to acquire the prestige of a great victory in their own time. The aim was regime change by any means necessary.⁸⁰

A spy for the White League told the Superintendent of the New Orleans Police, aptly named Algernon Sydney Badger, that the White League would receive a large weapons shipment on September 14, 1874. The purpose of the tip was actually to lure public officers into the public square for a fight. On September 13, the White League put out a call to arms, asking members of the general public to meet at the Clay statue “and in tones loud enough to be heard throughout the length and breadth of the land, declare that you are, of right ought to be, and mean to be free.” The next day, the fight came. Five thousand people flocked to the intersection of Royal Street, Canal Street, and St. Charles Avenue in New Orleans to hear speeches demanding that Governor Kellogg abdicate. Governor Kellogg refused and took precautions to protect himself in the event that things should turn violent. They did . . . very much indeed.⁸¹

⁷⁸ See Hunt v. Sheldon, 70 J. of the S. 105–10 (Jan. 13, 1875); Althea D. Pitre, *The Collapse of the Warmoth Regime, 1870–72*, 6 LA. HIST: J. LA. HIST. ASSOC. 161, 186 (1965).

⁷⁹ See generally, Justin A. Nystrom, *The Battle of Liberty Place*, 64 PARISHES (Jun. 4, 2021) <https://64parishes.org/entry/the-battle-of-liberty-place>; *Louisiana*, HARPER’S WEEKLY (Oct. 3, 1874); Hunt v. Sheldon, 70 J. of the S. 105–110 (Jan. 13, 1875);

⁸⁰ See generally, Nystrom, *supra* note 79; *Louisiana*, HARPER’S WEEKLY (Oct. 3, 1874); Hunt v. Sheldon, 70 J. of the S. 105–110 (Jan. 13, 1875); cf. Joe Gray Taylor, *New Orleans and Reconstruction*, 9 LA. HIST: J. LA. HIST. ASSOC. 189, 190 (1968).

⁸¹ See *Anniversary of Battle Ending Carpetbag Reign to be Marked Wednesday*, THE TIMES-PICAYUNE 2, 6 (Sept. 11, 1932); CHARLES L. DUFOUR, TEN FLAGS IN THE WIND: THE STORY OF LOUISIANA C. 18, pt. 2 (1967), reprinted in *Grant Backs Kellogg*, THE TIMES-PICAYUNE 12 (Sept. 19, 1967).

Kellogg and his staff collected themselves in the United States Custom House on Canal Street. Former Confederate General James Longstreet was placed in charge of the city's defense. At General Longstreet's disposal were several black regiments of the state militia and an integrated Metropolitan Police force armed with firearms, cannon, and Gatling guns. The White League saw its moment had arrived, cut telegraph lines to the city, and sent in an armed force of 2,400 men. What ensued truly was a "battle" and a proper insurrection, not a riot. The ranks of the White Leaguers, as noted above, included trained veterans of the Confederate Army. They were organized, skilled, and well supplied. The White League ultimately prevailed and took possession of the city. Thirteen metropolitan police officers, sixteen members of the White League, and six bystanders were killed in the firefight. Many more were injured. Joe Gray Taylor claimed in an article of the *Journal of the Louisiana Historical Association* that this battle, in fact, was "the largest military insurrection that has ever occurred against the government of a state of the United States."⁸²

President Grant was beside himself when he heard the news. The Union recaptured New Orleans in the late Spring of 1862. For a moment, at least, it appeared that the Big Easy reverted to the Confederacy. On September 15, 1874, a presidential proclamation declared Kellogg to be the lawful governor and called for the raising of federal troops under the First Militia Clause, the Civil Rights Act of 1871, and the Suppression of the Rebellion Act of 1861. Not wanting a contest with such a superior force, the White League allowed federal troops to return the reins of government back to Kellogg without incident. On December 9, 1874, Governor Kellogg communicated his fear that the White League intended to attack the Louisiana State House. But President Grant was unwilling to involve federal troops again, knowing that to the fire of secessionism, federal troops were more likely to be oxygen than water. President Grant did, however, opt to intervene just over a month later when things got truly out of hand.⁸³

On January 4, 1875, there was an intense dispute in the Louisiana State House on the propriety of several election returns. Eight Democrats not duly certified by the State Returning Board defiantly took seats in the legislature. Republicans loudly objected that those eight men were denied certification because their elections were tainted by fraud and violence, further, if they successfully mugged their way past the returning board, they would flip the House and engender a political crisis. Governor Kellogg once again appealed for federal intervention. Federal troops responded and escorted that hateful eight out of the building. The Democrats subsequently removed to another part of the state and created a rump legislature, led by their own gubernatorial candidate, Francis T. Nicholls. The phrase "two-party" system in those days was apt but carried a dark double meaning. Louisiana

⁸² See generally, Nystrom, *supra* note 79; 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) ("Most of the soldiers in my own company as well as the others were Confederate soldiers and did not require much instruction."); *Anniversary of Battle Ending Carpetbag Reign to be Marked Wednesday*, *THE TIMES-PICAYUNE* 2, 6 (Sept. 11, 1932); *Hunt v. Sheldon*, 70 *J. of the S.* 105–110 (Jan. 13, 1875); Taylor, *supra* note 80, at 203.

⁸³ U.S. CONST. art. I, § 8, cl. 15; Suppression of the Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281, 281 (codified as amended at 10 U.S.C. § 332 (2000)); Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, § 3, 17 Stat. 13, 14 (codified as amended at 10 U.S.C. § 333 (2000)); *Hunt v. Sheldon*, 70 *J. of the S.* 105–110 (Jan. 13, 1875).

was effectively in a state of political anarchy until the so-called “Compromise of 1877,” which resulted in a de facto Democratic victory and the removal of federal troops from the South. Nicholls was subsequently elected governor of Louisiana. Reconstruction failed.⁸⁴

On January 13, 1875, President Grant transmitted to the Senate a letter memorializing his involvement with the whole affair. In defending his decision to intervene, President Grant presented an articulate defense of how the federal militia power squares with the rights and privileges of the legislatures to enforce and judge their own elections:

Each branch of a legislative assembly is the judge of the election and qualifications of its own members. But if a mob, or a body of unauthorized persons, seize and hold the legislative hall in a tumultuous and riotous manner, and so prevent any organization by those legally returned as elected, it might become the duty of the State executive to interpose, if requested by a majority of the members elect, to suppress the disturbance and enable the persons elected to organize the house.⁸⁵

Contested elections were critical to Republican efforts to maintain a southern presence during Reconstruction. They “were used as a partisan tool to combat the Democratic-sanctioned fraud, corruption, and violence that had become common-place in southern electoral politics.” *Hunt v. Sheldon* illustrates this pattern beautifully.⁸⁶

None of the controversies afflicting Louisiana politics covered here constitute congressional contempt precedents per se. The federal legislature held no one in contempt. And the Louisiana state legislature did not enforce its privileges through contempt proceedings. But it could have sent a powerful political message by doing so. These controversies, moreover, provide case studies illustrating how the First Militia Clause, militia statutes, and civil rights legislation can work together to suppress contemptuous insurrections that interfere with elections and even dare to directly assault legislative buildings. They reveal a scenario where—bar the Seventeenth Amendment—election interference at the state level can corrupt the returns of the United States Senate. They also show how delicate true democracy really is—how civil order, without adequate security, is no order at all.

III. CONTEMPT POWER AND ELECTION INTERFERENCE

The long nineteenth century feels like a world away from us. There is a famous saying that “the past is a strange land.” That violence declined remarkably over the past few hundred years is a popular theory. Perhaps it is true.⁸⁷ Even so, progress is not

⁸⁴ *Hunt v. Sheldon*, 70 J. of the S. 105–110 (Jan. 13, 1875); Taylor, *supra* note 80, at 204.

⁸⁵ *Hunt v. Sheldon*, 70 J. of the S. 105–110 (Jan. 13, 1875).

⁸⁶ Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789 – 2002*, 18 *STUD. AM. POL. DEV.* 112, 135 (2004).

⁸⁷ See generally STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 47 (2011).

inevitable. The history of the human race is not a rectilinear curve rising in a seemingly perpetual fashion like the legendary ziggurats of ancient Mesopotamia.⁸⁸ Freedom is fought. Equality is earned. Norms take generations to grow. When they are wounded, they heal just as slowly. Just as the mind recalls trauma more readily than joy, bad precedents more readily provoke the body politic to evil than good precedents inspire it to righteousness. Strong democratic norms and good parliamentary precedents are therefore all the more indispensable to the health of a republic. So, we must now turn our attention to how the first branch ought to develop future precedents that help maintain the dignity of its particular constitutional prerogatives and the integrity of federal elections as whole.

The prior contempt and contested elections precedents I surveyed, when synthesized together, support the proposition that both public servants and laymen are liable for contempt of Congress if they engage in election interference. Congress therefore ought to initiate contempt proceedings against those who commit exceptionally destructive acts of election interference today, for example, members of either House who maliciously mischaracterize proven election results, incite violence, or both. The framework for operationalizing this proposal is that the appropriate committees of each House investigate contemptuous election interferences, appoint subcommittees to conduct discovery as necessary, and then prepare reports recommending contempt proceedings to their respective main bodies. Each House can then consider those recommendations, vote to initiate contempt trials, and, if satisfied, convict and pass judgment. The standards in place for committee investigations and contempt proceedings for other kinds of offenses provide sufficient due process at every stage of the proceedings I envision in this context. Liability attaches not only to contempts against the main bodies of each House as a whole but to contempts of the proceedings of their respective committees and subcommittees as well.⁸⁹

I propose that the substantial evidence standard should be the standard of proof for Congress to initiate a committee investigation of an alleged contempt arising from election interference. A plurality vote by that committee should be sufficient to recommend to the main body that the allegation is sufficiently meritorious to justify a trial before a Committee of the Whole House. A plurality vote by the main body likewise should be sufficient to adopt that committee recommendation and initiate the trial. Finally, the clear and convincing standard should be the standard of proof for a vote to convict by the Committee of the Whole House. Committee rules currently in effect support the former two standards at the committee stage. The latter standard is sensible for the trial stage because a contempt conviction requires a two-thirds majority vote. An unreasonable doubt standard is therefore inappropriate because a unanimous vote is not required to convict for contempt. The probative threshold should match the epistemological one: clear and convincing evidence compels a majority.⁹⁰

⁸⁸ *Cf.* Genesis 11.

⁸⁹ *See* *In re Chapman*, 166 U.S. 661, 672, 688 (1897).

⁹⁰ *Cf., e.g.*, *Addington v. Tex.*, 441 U.S. 418, 424 (1979) (defining the clear and convincing evidence standard as lying between the preponderance of evidence standard and the beyond a reasonable doubt standard); 4 C.F.R. § 28.61(d) (“The substantial evidence standard means the degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.”).

A. Election Interference by Laymen

I contend that election interference by laymen is liable for contempt of Congress under current Supreme Court doctrine. It is true that in the cases of *Reeder v. Whitfield*, *Brooks v. Davis*, *Whyte v. Harris*, and *Hunt v. Sheldon*, no one was held in contempt of an investigative subcommittee or a full committee on elections or privileges. None of the Missouri border ruffians in Bleeding Kansas were sanctioned by the House of Representatives for creating the Bogus Legislature. None of the Know-Nothings who terrified naturalized citizens in Baltimore with awls and icepicks were brought before Congress. None of the White Supremacists in Louisiana during Reconstruction were forced to kneel before the bar of either House of the Louisiana state legislature. But some of them should have been, perhaps a few leaders who could have made a better example through their humiliation than through their politicking. The contempt power attaches to contested election cases just as surely as an arm attaches to the body.⁹¹

1. Contempt Liability for Laymen

The purpose of exercising congressional contempt power under current Supreme Court doctrine is self-defense, not punishment for punishment's sake. I will not challenge that doctrine here though I may disagree with it. Necessity—self-defense—these were the key concepts raised by Representative St. George Tucker (Democrat, Virginia) and others in congressional deliberations coinciding with the Supreme Court's decision in *Anderson v. Dunn*. These concepts are at core of the Supreme Court's subsequent discussions of congressional contempt power in *Kilbourn v. Thompson* and *Marshall v. Gordon*. These concepts and precedents support contempt liability for laymen who interfere with elections. Alexander Murray's Case reinforces them decisively because it illustrates how inciting or actually participating in an election riot is contemptuous of legislative authority. There has yet to be an American contested election case that resulted in a contempt judgment against someone who engaged election interference. Alexander Murray's Case therefore deserves an American counterpart.⁹²

There are several reasons why Congress should follow the example of the House of Commons in 1751 by creating a similar precedent to Alexander Murray's Case. First, Alexander Murray's Case establishes that constructive contempt liability for election interference in federal elections is legally justified. There are parliamentary precedents that cannot extend to our system of government. But this is not one of them. When our nation was founded, the *lex parliamentaria* was hermetically sealed from judicial review. Even writs of habeas corpus were not reviewable by the courts. Ashby's Case allowed actions in

⁹¹ See generally U.S. CONST. art. I, § 5; H.R., 117th Cong. Standing Rules of the House of Representatives XXIII (2021) [hereinafter, "House Standing Rules"]; U.S. Sen., Standing Rules of the Senate XXXIV–XLIII (2013) [hereinafter, "Senate Standing Rules"].

⁹² See *Annals of Cong.*, 15th Cong. H.R., 1st Sess. 595, 631–36 (Jan. 8–9, 1818) (“[Representative Henry St. George Tucker:] It is inconceivable that the convention which framed the Constitution should have intended the creation of a legislative body, which should be without the power of self-protection; without the right to assume to itself freedom from disturbance; without the means of securing order in its deliberations; and without the privilege of preserving itself entirely free from the influence of fear, or the corruptions of gold.”); see also *Anderson v. Dunn*, 19 U.S. 204, 226, 228, 230–31, 234 (1821); *Kilbourn v. Thompson*, 103 U.S. 168, 196, 204–05 (1881); *Marshall v. Gordon*, 243 U.S. 521, 534, 541–43, 548 n.1 (1917).

common law courts to recover damages sustained by subjects who were unjustly denied access to the polls. Beyond that narrow lane of intrusion, however, Parliament's authority to vindicate the integrity of its own election procedures lay within well-defined borders no judge dared to encroach. Federal courts in the American system likewise should give congressional prerogatives in this area a wide birth. Adopting Alexander Murray's Case by creating a similar precedent in the American system is entirely concordant with *Anderson* and its progeny. Of course, *Anderson* distinguished our system because it allowed judicial review of writs of habeas corpus. But there is no other federal legislative or judicial precedent that prevents Congress from holding a lay individual or business association in constructive contempt for interfering with an election.⁹³

The Supreme Court's "imminent lawless action test" set forth in *Brandenburg v. Ohio* is inapplicable to impeachment proceedings. I think the same is true for contempt proceedings as well. Alexander Murray's case naturally extends to all political riots interfering with elections in the American context—return riots, poll riots, petition riots, etc. The trickier issue is how far to extend this principle beyond incitement of an actual riot or insurrection. The internet and social media have a proven track record of facilitating the spread of political misinformation and disinformation leading to election interference. Domestic and foreign influencing campaigns pose a threat not only to our democratic spirit but also to our national security. In view of these concerns, I believe that contemptuous reflections by individuals and institutions that mischaracterize, mislead, or misrepresent the proven integrity of federal elections are liable for contempt of Congress.⁹⁴

Such a broad application of inherent power may understandably raise some concerns. But, as I explain below, the principles of necessity and self-defense are nowhere more salient than in the context of contested elections. The federal courts should construe the legislative contempt power most broadly when it touches on election matters. There is ample precedent to support this view. "The House of Commons, without doubt," wrote Lord Chief Justice de Grey, "have power to commit persons examined at their Bar touching elections, when they prevaricate or speak falsely; so they have for breaches of privilege, so they have in many other cases."⁹⁵ These words were inscribed in the last judicial precedent discussing legislative contempt power in Great Britain before the ratification of the United States Constitution and therefore should be given special consideration. It is true that *Anderson*, *Kilbourn*, and *Gordon* espouse a more conservative theory of contempt power than expressed in English law leading up the Founding. But those cases were largely fact specific and did not touch on election interference or contested elections cases. Congress

⁹³ See, e.g., *Ashby v. White* [1704], 1 Eng. Rep. 417; 1 Brown 62 (Eng.); *Ashby v. White* [1703], 87 Eng. Rep. 808, 813; 6 Mod. 46, 50 (Eng.) (Holt, C.J., dissenting); William Cobbett, Proceedings of Both Houses in the Great Case of Ashby and White (1704), in 6 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 225-28 n* (T.C. Hansard 1808); see also *Regina v. Paty* [1704], 92 Eng. Rep. 232, 236-39, 2 Ld. Raym. 1106, 1112-16 (Eng.); *Regina v. Paty* [1704], 92 Eng. Rep. 232, 233-36, 2 Ld. Raym. 1106-1112 (Eng.) (Holt, C.J., dissenting); William Cobbett, Proceedings in the Case of the Aylesbury Men Committed By the House of Commons (1704), in 6 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 376, 384 (T.C. Hansard 1808); cf. ERSKINE MAY, PARLIAMENTARY PRACTICE § 16.2 (25th ed. 2019).

⁹⁴ See 395 U.S. 444 (1969) (per curiam).

⁹⁵ *Brass Crosby's Case* [1771], 95 Eng. Rep. 1005, 1010-12, 3 Wils. K.B. 188, 198-201 (Eng.).

is most susceptible to abuse and attack in the context of its elections, therefore, that is where congressional armor should be the thickest.⁹⁶

Second, the sanctions in Alexander Murray’s case are legally justified in the American system. The principle espoused by the House of Commons that Murray could suffer no punishment more severe than incarceration to the end of session is compatible with Supreme Court’s decision in *Anderson*. Although *Anderson* forbids the possibility of lengthy incarceration and corporal punishment, it does not address fines or more creative purge conditions employed by the courts in their contempt proceedings, such as the requirement that the contemnor atone by apologizing to private parties, pay reparations to harmed individuals, participate in clean-up operations at the sites of riots, etc. *Anderson* also does not address whether the Senate, like the House of Lords, can imprison at its pleasure—potentially longer than end of session. In my view, all of these sanctions are cognizable in our system. But even if I am wrong, the sanctions employed in Alexander Murray’s Case and *Anderson* are sufficient. Some might suggest that the humiliation of kneeling before the speaker, the sting of public reprimand, and the ignominy of incarceration are too antiquated or arcane for modern sensibilities. But I disagree. Shame and stigma are both necessary for the conservation of the democratic process and republican norms we hold so dear. The modes and degrees of the sanctions imposed in 1751 were just then and they are just now.

Third, contested election precedents illustrate the need for constructive contempt liability. Given the absence of reliable law enforcement in the territory of Kansas, it is reasonable to conclude that the House of Representatives could have tried those guilty of voter suppression in *Reeder v. Whitfield* with contempt. *Reeder* is an important precedent because it stands for the proposition that the inherent powers of Congress under Article I, Sections 5 and 6 extend to the territorial context. The congressional contempt power tracks the prerogatives of both Houses in judging their elections, including any authority they delegate to ad hoc committees investigating territorial election improprieties. Impunity in *Reeder* led to disorder. Violence tore Kansan communities apart. True, the degree of this disorder was overstated in the past. Some versions of the “Kansas-Border War” are overly romantic, even mythical. Modern scholars agree that territorial Kansas was not a state of nature. There were federal courts operating in the territory. There was legal process. But given these facts, the territory was still not up to par. A contempt trial before the inquest of the nation was probably one of the few, if not the only avenue for political accountability on a national scale against Missouri border ruffians who made a mockery of the rule of law.

The same is true for the Know-Nothing violence at issue in *Brooks v. Davis* and *Whyte v. Harris*. The evidence collected by the House Committee on Elections initially, and the historical record since, both proved beyond a reasonable doubt that the Swann

⁹⁶ See generally *Gordon*, 243 U.S. at 546–48; *Kilbourn*, 103 U.S. at 196, 204–205; *Anderson*, 19 U.S. at 233; Colonel Anderson’s Case, 11 J. of the H.R. 117–19 (Jan. 7, 1818); *Brass Crosby’s Case* [1771], 95 Eng. Rep. at 1010–12, 3 Wils. K.B. at 198–201; *Murray’s Case* [1751], 95 Eng. Rep. at 629, 1 Wils. K.B. at 299; William Cobbett, Debate in the Commons Respecting the Westminster Election (1751), reprinted in 14 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 870–902 (T.C. Hansard 1808); cf. MARK AARONSON et al., CONSTITUTIONAL LAW SCHOLARS ON PRESIDENT TRUMP’S FIRST AMENDMENT DEFENSE 1–2 (Feb. 5, 2021).

Administration was compromised. Baltimore City was called “Mob Town” by James Madison. Over half a century later, the mob was no longer simply the antagonist of City Hall. The mob *was* City Hall. The corruption of the police was undeniable. These cases are not congressional contempt precedents in the affirmative sense: contempt proceedings against Harris, Davis or the Know-Nothings bullies that put them in office never occurred. In hindsight, however, I think that the conduct of the Know-Nothing thugs who held the polls of Baltimore hostage was liable for contempt. Voter suppression and voter fraud actually succeeded in swinging those elections. A resolution offered by Representative Harris correctly characterized the Know-Nothing conspiracy as “contempt of the law.” Indeed, it was, both in the generic sense of the word, and in the more specialized sense too. Given the inadequacies of local law enforcement and the national interest in resolving the crisis, I would suggest that the House could have lawfully tried the Know-Nothing gangsters for contempt, certainly at least a few ring leaders and their enablers, perhaps even Thomas Swann himself.

The underlying facts in *Hunt v. Sheldon* were no better than the last two sets of cases. Arguably even worse. Who could honestly say that there was rule law in Louisiana at that time? With a rump legislature groaning loudly in the backcountry and white supremacists patrolling the streets, Louisiana in 1871 was a republic in name only. *Hunt* is not an affirmative contempt precedent: no party to the case or any of the thugs who manipulated that election or subsequent elections throughout the state were held in contempt. The need for the federal militia power to suppress election insurrections was more salient during the Reconstruction Era than it was during the Antebellum period. President Grant chose to hammer southern insurgents with federal force, whereas Presidents Martin Van Buren and James K. Polk left it to the states to sort out populist outbursts like the Buckshot War of 1838 in Pennsylvania and the Know-Nothing riots in Maryland in the 1850s. Whereas state officials resolved these crises, the Reconstruction South was a tougher patient demanding harsher tools. The passage of the Enforcement Acts helped to close impunity gaps for civil rights violations but there was still no final victory.⁹⁷

Now one could say that the proliferation of federal criminal statutes and civil rights legislation targeting organized crime and election violence renders constructive contempt liability unnecessary. *Anderson* resolved a bribery case when there was no anti-bribery statute for Congress. The Supreme Court’s decision in *Marshall* emphasized that the legislative power to enact criminal laws covering contemptuous behavior compensated for the fact that Congress could not punish contempt for punishment’s sake. The Civil Rights Act of 1964, Contested Election Act of 1969, and the federal criminal code expanded the counter-majoritarian role of law enforcement in protecting minorities from political and criminal abuse. Should constructive contempt liability therefore, like wisdom teeth, pass away as the body politic evolves?⁹⁸

⁹⁷ U.S. CONST. art. I, § 8, cl. 15; Suppression of the Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281, 281 (codified as amended at 10 U.S.C. § 332 (2000)); Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, § 3, 17 Stat. 13, 14 (codified as amended at 10 U.S.C. § 333 (2000)); *Hunt v. Sheldon*, 70 J. of the S. 105–110 (Jan. 13, 1875).

⁹⁸ See, e.g., 18 U.S.C. § 211; 18 U.S.C. § 246; 18 U.S.C. §§ 597–606; see also U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 33–79 (2017).

My answer is that the *need* for contempt liability does not rise and fall on whether or not local or state law enforcement supervising federal elections are completely compromised. There may be circumstances in the future when the executive does not investigate violations of voting rights as zealously as it should. During the Buckshot War of 1838, Democratic rioters trained up from Philadelphia, penetrated the State House in Harrisburg, and forced the legislators to flee for their lives. President Martin Van Buren refused the Governor of Pennsylvania's request for federal troops. President Franklin Pierce looked the other way when pro-slavery Democratic marauders swept over the border into Kansas two decades later. Executive negligence is well precedented in the annals of American history at every level of our federal system. Contempt liability still remains necessary and proper despite the availability of civil remedies and criminal penalties.

Fourth, the need for power to punish constructive contempt is immutable because it promotes discrete institutional goods. Each House of Congress has an interest in vindicating itself for its own sake. If the dignity and authority of either House are upset, the scales of justice are offset. Balance is in order, if not for the sake of retribution, then at least for the sake of preserving the reverence and respect duly accorded to the national legislature. We hear in the judicial context that the purpose of criminal contempt proceedings is not to punish but to vindicate the courts' dignity. So too with contempt proceedings in the legislative context. The word *dignitas* in the classical sense, if I am not mistaken, evoked a sense of prestige associated with a position of public trust. If not for just deserts, then let contempt proceedings preserve the status and eminence of the popular branch. As Lord Erskine said, "If the dignity of the law is not sustained, its sun is set, never to be lighted up again." The need for constructive contempt liability is immutable because the dignity of Congress is not. Dignity is not simply a matter of legal entitlement. Dignity is a matter of political will.⁹⁹

Fifth, the need for power to punish constructive contempt is immutable because it promotes the public good. Contempt power is a normative force. It serves a pedagogical purpose. It teaches the public to respect the institutions with which they are so often dissatisfied, yet so seldom understand. A legislature that is ready and willing to exercise its inherent power also earns the respect of the people with one and the same stroke. And it must have that respect. That respect, that trust, that legitimacy, is not invincible to time. The people will not remain in Congress if Congress does not remain in them. Faith must be rewarded. A House of deliberation, like a House of worship, must bless those who follow The Way. It must reward those who shrug off their tribal instincts and believe in forming a reasonable and enlightened consensus upon which democracy depends, even in the dark dead of night, when electoral nightmares make our system seem impossible.

Alexis de Tocqueville was right to characterize American democracy as a spirit, for any democracy is like the wind: you can only sense it when it moves.¹⁰⁰ If the Spirit of Democracy does not move, it does not exist. We must therefore make every effort to inspire

⁹⁹ *Cf.* *Burdett v. Abbot* [1817], 3 Eng. Rep. 1289, 1301, V Dow 165, 200 (Eng.) (Erskine, J.); *Burdett v. Abbot* [1811], 104 Eng. Rep. 501, 551, 552, 554, 14 East 3, 131, 134, 138 (Eng.) (Ellenborough, C.J.); *Rex v. Almon* [1765], 97 Eng. Rep. 94, 100; *Wilm.* 243, 256–57 (Eng.).

¹⁰⁰ *See generally* Alexis de Tocqueville, *Democracy in America*, reprinted in *DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA* 1, 55 (Penguin 2003) (1835); *cf.* John 3:8.

the democratic spirit with symbols of strength. Just as the very definition of law requires enforcement, the very essence of democracy is belief. Democracy is, ultimately, a spiritual phenomenon. It is not enough that electoral procedures are rooted in reason and tradition. Legitimacy requires heroism, exemplary character, charismatic leadership, and political accountability. A contempt trial conducted by a House of Congress can restore the faith of The People in their institutions by providing an outlet for public catharsis and political redress.¹⁰¹

The First Branch has an even greater interest in the liability of those who interfere with its elections than the other coordinate branches of government, for it is the department most directly injured. Its portion of the State's sovereignty receives the greatest offense. It should therefore be entitled to bring its own weight to bear, for in defending its prerogatives, it is, as in any other case with the other departments, *primus inter pares*—first among equals. Let Congress defend itself.

2. Contempt Procedure for the U.S. House of Representatives

Contested elections in the House of Representatives are the province of the House Committee on Administration. The supervisory prerogatives of the committee include the application, administration, execution, and effectiveness of federal election laws. The Contested Election Act of 1969 provides a statutory mechanism for the resolution of contested elections. The deliberations in *Reeder v. Whitfield*, *Brooks v. Davis*, and *Whyte v. Harris* concerning the Contested Elections Act of 1851 apply, mutatis mutandis, to the Contested Election Act of 1969; therefore, the latter act should be construed as a declaratory act that does not circumscribe or eliminate the inherent power of the House to investigate its own elections through House Standing Rule X. In light of these precedents, my view is that the statutory process afforded by the act of 1969 has no priority over an ad hoc committee investigation. The House can conduct the latter entirely at its own discretion. There is nothing in the text of the act of 1969 to foreclose any inherent authority of the House. It cannot be construed as a general act that exhausts all other remedies.¹⁰²

If a House election is tainted by election improprieties such as voter suppression or voter fraud, the executive will hopefully perform due diligence in investigating and prosecuting any violations of federal election laws: the Civil Rights Act, the Voting Rights Act, etc. At its discretion, the House may establish a subcommittee under House Standing Rule X(2)(b)(2) purpose of investigating the election itself whether or not there is pending civil rights litigation, criminal litigation, or political litigation under the act of 1969. An ad hoc subcommittee investigation is most warranted in three scenarios: cases where the efficacy of the executive's investigation of election improprieties is itself under scrutiny;

¹⁰¹ Cf. MAX WEBER, I ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 34–35, 215 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff trans. 1968) (1922); Matthew 12:32–32; Mark 3:28–29; *Burdett v. Abbot* [1812], 128 Eng. Rep. 384, 403, 4 Taunt 399, 444, 448 (Eng.) (Mansfield, C.J.); *Burdett v. Abbot* [1811], 104 Eng. Rep. 501, 559, 14 East 3, 131, 151–52 (Eng.) (Ellenborough, C.J.); JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 177 (David Lieberman ed. Liberty Fund 2007) (1784).

¹⁰² Compare 2 U.S.C. §§ 381 et seq., with Contested Elections Act, 9 Stat. 566–68, §§ 1–3, 5, 8 (Feb. 19, 1851), and *Cong. Globe*, 34th Cong., 1st Sess. 460–64 (Feb. 19, 1856), and *Cong. Globe App'x*, 34th Cong., H.R., 1st Sess. 119 (Mar. 6, 1856), and *Cong. Globe*, 35th Cong., H.R., 1st Sess. 726–733 (Feb. 16, 1858).

cases where a petitioner requests an ad hoc investigation rather going through the statutory procedure, such as when a citizen brings a complaint on behalf of an entire electoral district to void an election rather strictly on his own behalf to gain the seat himself; and cases when a committee determines that an ad hoc investigation is in the best interest of the House for some other reason.¹⁰³

The procedure for an ad hoc investigation falls under House Standing Rule X and the House Committee on Administration’s own supplemental rules.¹⁰⁴ House Committee on Administration Rule XVII provides that the chairman is only required to create one standing subcommittee—a Subcommittee on Elections. The chairman may also create select subcommittees to perform ad hoc functions.¹⁰⁵ The committee’s supplemental rules do not specify in detail the procedures ad hoc subcommittees must follow. House Standing Committee on Administration Rule XIX merely states that the “subcommittee is authorized to meet, hold hearings, receive evidence and report to the full committee on all matters referred to it,” and that “[t]he subcommittee shall not meet during any full Committee meeting or hearing.” House Standing Committee on Administration Rule XX further states that the Chairman “may establish such other procedures and take such actions as may be necessary to carry out the foregoing rules or to facilitate the effective operation of the committee.”¹⁰⁶

I propose that the best way to coordinate the Committee on Administration’s supervisory role over contested elections with the contempt power is to model an ad hoc subcommittee’s procedures on the investigation procedures outlined for the House Committee on Ethics. When the Committee on House Administration resolves to inquire into a contested election, it will create a special subcommittee to investigate. In doing so, it will formulate rules under which the special subcommittee will operate, synthesizing contemporary ethics committee procedures and the processes of the now defunct contested election committee, as necessary. It will adopt a statement of alleged violation and produce a report along with any comments by the respondent to the Committee on Administration. The Committee on Administration, in turn, will transmit to the main body a majority report, a minority report, the petitioner’s complaint, the respondent’s comments, and a final recommendation over whether a trial by a Committee by the Whole House is justified.¹⁰⁷

3. Contempt Procedure for the U.S. Senate

Contested elections in the Senate are the province of the Senate Committee on Rules and Administration.¹⁰⁸ There is interestingly no Senate analogue to the Contested Election Act of 1969. This appears to be due to a lack of demand. Committees and subcommittees explicitly designated for handling contested election cases ceased operating in 1947 and 1977, respectively. There are no procedural rules specially crafted for handling

¹⁰³ See House Standing Rule X(1)(k)(12); House Standing Rule X(2)(a)(1)(A), (b)(2).

¹⁰⁴ See U.S. H.R., Comm. on Admin., 117th Cong., Rules of the Committee on House Administration I(b) (2021) [hereinafter, “House Comm. on Admin. Rules”].

¹⁰⁵ See House Comm. on Admin. Rule XVII.

¹⁰⁶ See House Comm. on Admin. Rule XIX – XX.

¹⁰⁷ See generally House Standing Rule XI; House Comm. on Admin. Rule XIX–XX; House Ethics Manual 8–12; cf. House Standing Rule XI(3)(a)(3), (8)(B)(iii); House Standing Rule XI(3)(m), (n), (q)(2)(B)–(D).

¹⁰⁸ See Sen. Standing Rule XXV(1)(n)(1).

contested elections either in the Standing Senate Rules or in any committee supplemental rules. Senate Standing Rule XXVI provides general parameters for how committees work in general: every committee and their respective subcommittees have authority to investigate matters in their jurisdiction, conduct discovery, and create rules of procedure. When a committee comes to a vote and produces a report, it is to be accompanied by any relevant supplemental information, additional views, and a minority report.¹⁰⁹

I propose that the best way to coordinate the Senate Committee on Rules and Administration's supervisory role over contested elections with the contempt power is for it to imitate the investigation procedures for the Senate Select Committee on Ethics outlined in Senate Ethics Committee Rules III–IV and the Senate Ethics Manual. The procedure for the Senate Committee on Rules and Administration must be inflected, however, by contested elections precedents and the rules of the now defunct Senate Privileges and Elections Committee. Under my proposal, the Senate Committee on Rules and Administration should create a special subcommittee to investigate when it receives a complaint of election interference.

A member of the Senate can bring the original complaint but the committee must also be able to do so *sua sponte*. The committee will formulate rules under which a special subcommittee will operate, synthesizing contemporary ethics committee procedures and historic contested election committee processes, as necessary. The subcommittee will adopt a statement of alleged violation and produce a report along with any comments by the respondent to the full committee. The committee, in turn, will transmit to the main body a report, including a majority report, minority report, the petitioner's complaint, the respondent's comments, and a recommendation for whether trial by a Committee of the Whole House is justified.¹¹⁰

B. Election Interference by Members of Congress

The unwritten law of Congress—the *lex parliamentaria americana*—contemplates unwritten standards of ethics. These standards are indefinite and immutable at one level of abstraction, and yet, at another, are both distinct and evolutionary. The law of Congress, as with any other form of common law, crystallizes and refines itself through experience and precedent. The ethics standards of both Houses are positively expressed, albeit not exhaustively, through statutes, resolutions, rules, and advisory guidance. The second clause of Article I, Section 5 of the United States Constitution provides that “[e]ach House may determine the rules of its proceedings, punish its members for disorderly behavior, and,

¹⁰⁹ Standing Rules of the S. R. XXVI cl. 1-2, 10(b)-(c)(1)–(2), (10)(b)–(c), reprinted in S. Doc. No. 113-18, at 31, 36–37 (2013); Senate Procedures in Contested Elections, U.S. Sen., https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/procedures_contested_elections.htm (last visited July 5, 2021).

¹¹⁰ Cf. *infra* Part III.B.2; STAFF OF S. SELECT COMM. ON ETHICS, 108TH CONG., 1ST SESS., SENATE ETHICS MANUAL RULES III, IV, VII(e) (Comm. Print 2003), available at <https://www.ethics.senate.gov/downloads/pdffiles/manual.pdf>.

with the concurrence of two thirds, expel a member.” This clause is declaratory of the inherent power of the legislature to discipline its own members for ethical misconduct.¹¹¹

Neither House has ever promulgated statutes, rules, resolutions, or advisory memoranda about their members’ respective obligations when making public reflections about elections. There are no precedents for discipline or expulsion of a member of either House for unethical comments about the legitimacy of elections either. It is well established, however, that contempt proceedings are a parliamentary vehicle for disciplining and even expelling members who violate the public trust. I propose that public reflections undermining the legitimacy of a proven election are, under the law of Congress, unethical, and bring into contempt not only the entire legislative department, but the Constitution of the United States itself. Contempt proceedings are therefore an appropriate vehicle for discipline and expulsion in such cases.

1. Contempt Liability for Members of Congress

General principles forming the foundation of the unwritten law of Congress are occasionally expressed through congressional resolutions. Recall, for example, the principles articulated in Joint Resolution 175. Put country over party. Expose corruption wherever you find it. Uphold these principles in a fashion worthy of the public trust. These principles are essential to any ethical inquiry. The resolution introducing amendments to the Rules of the Senate on March 22, 1968, also provides a window into unwritten law of Congressional ethics.

Resolved, It is declared to the policy of the Senate
that—

- (a) The ideal concept of public office, expressed by the words, ‘A public office is a public trust,’ signifies that the officer has been entrusted with public power by the people; that the officer holds his power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs as to infringe on the public interest. All official conduct of Members of the Senate should

¹¹¹ See generally U.S. CONST. art. I, § 5; H.R. CON. RES. 175, 85th Cong. (July 11, 1958) (enacted); 114 CONG. REC. S7406 (daily ed. Mar. 22, 1968); RULES OF THE HOUSE OF REPRESENTATIVES, 117TH CONG. H.R. DOC. _____, r. XXIII, at 39 (2022); Standing Rules of the Senate R. XXXIV-XLIII, *reprinted in* S. Doc. No. 113-18, at 45-67 (2013); COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., 2D SESS., HOUSE ETHICS MANUAL 1-21 (2008) [hereinafter HOUSE ETHICS MANUAL], available at https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf; STAFF OF S. SELECT COMM. ON ETHICS, 108TH CONG., 1ST SESS., SENATE ETHICS MANUAL 3-17 (Comm. Print 2003) [hereinafter SENATE ETHICS MANUAL], available at <https://www.ethics.senate.gov/downloads/pdf/files/manual.pdf>.

be guided by this paramount concept of public office.

- (b) These rules, as the unwritten expression of certain standards of conduct, complement the body of unwritten but generally accepted standards that continue to apply to the Senate.

More particular applications of these overarching principles can develop as time and circumstances permit. I maintain that a member can violate these principles through speech or conduct that interferes with a federal election.¹¹²

I believe Lord Mordaunt’s Case supports the principle that a member of Congress who interferes with an election is liable for contempt. To be sure, Lord Mordaunt did more than allegedly interfere with an election. He also allegedly committed false imprisonment and rape with impunity. But in an alternative world where the only offense committed by Lord Mordaunt was manipulating the outcome of the Windsor election, I am inclined to think the House of Commons would have been just as eager to impeach, and we should interpret this precedent accordingly. Lord Mordaunt’s conduct was characterized as a contempt, and therefore his case lends itself to the view that contempt proceedings can be a predicate for, or collapsed into, impeachment proceedings.¹¹³

A more recent judicial precedent provides an analytical framework for applying the principle of Lord Mordaunt’s Case: the disciplinary proceedings initiated by the Attorney Grievance Committee for the First Judicial Department of New York against Rudolph W. Giuliani. The committee moved for the suspension of Giuliani from law practice for undermining the 2020 Presidential Election by violating rules 3.3(a), 4.1, 8.4(c), and 8.4(h) of the New York Rules of Professional Conduct. Rules 3.3 and 4.1 rules require candor towards tribunals, candor towards clients and third parties, respectively. Rule 8.4 prohibits any conduct involving dishonesty, fraud deceit or misrepresentation and any other conduct that “adversely reflects on the lawyer’s fitness as a lawyer.” The standard of proof for a violation 8.4(c) specifically is subjective intent—a “knowing” violation.¹¹⁴ The committee presented statements made by Giuliani during the 2020 Presidential Election during press conferences, hearings, broadcasts, podcasts, television appearances, and a court appearance as a representative of President Trump. The New York Supreme Court dismissed Giuliani’s arguments under the First Amendment and found that he was guilty as charged.¹¹⁵

The Court’s holding consisted of nine determinations. The first determination was that Giuliani violated Rules 4.1 and 8.4(c) by knowingly misrepresenting the number of absentee ballots distributed in Pennsylvania and incorrectly asserting that many were fabricated.¹¹⁶ The second determination was that Giuliani violated Rules 3.3, 4.1, and 8.4(c) by making material misrepresentations about voter fraud during election litigation

¹¹² H.R. CON. RES. 175, 85th Cong. (July 11, 1958) (enacted); S. Res. 266, 114 CONG. REC. S7406 (daily ed. Mar. 22, 1968).

¹¹³ Lord Mordaunt’s Case, *supra* note 13, at 347–358.

¹¹⁴ *In re Rudolph W. Giuliani*, No. 2021-00506, at **1, 1–5, 8 (N.Y. App. Div. June 24, 2021).

¹¹⁵ *Id.* at *5–6, 9.

¹¹⁶ *Id.* at *5–6, 9.

proceeding before the United States District Court for the Middle District of Pennsylvania. The fact that Giuliani withdrew claims about canvassing improprieties by filing an amended complaint did not excuse him.¹¹⁷ The third determination was that Giuliani violated Rules 4.1 and 8.4(c) by misrepresenting that Democratic polls benefited from fraudulent votes cast on behalf of dead people in Philadelphia, Pennsylvania.¹¹⁸

The next five determinations all involved Giuliani's misleading statements about the election results in Georgia, asserting at one point that there were "hundreds of pages of affidavits and declarations in [respondent's] possession that document gross irregularities . . .," that there were tens of thousands of illegal votes cast by underage persons, felons, and "dead people." He also accused Georgia election officials of tampering with mail-in ballots, even though security camera footage proved that was a lie. The Court reasoned that these statements about improprieties in Georgia violated Rule 4.1 and 8.4(c).¹¹⁹ The ninth and final determination was that Giuliani made false statements about illegal aliens voting in Arizona.¹²⁰

The Court held that the cumulative effect of Giuliani's violations of Rules 3.3, 4.1, and 8.4(c) constituted a violation of Rule 8.4(h) and therefore adversely reflected on his fitness as a lawyer. The Court's conclusion did pull any punches about the gravity of Giuliani's conduct.

The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society. When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information. It tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice. . . . One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections.¹²¹

The applicability of this passage to problematic comments made by members of Congress and President Trump about the election, I think, is quite obvious.

¹¹⁷ *Id.* at **11–14.

¹¹⁸ *Id.* at **15–16.

¹¹⁹ *Id.* at **16–23.

¹²⁰ *In re Matter of Rudolph W. Giuliani*, No. 2021-00506, at **24–25.

¹²¹ *In the Matter of Rudolph W. Giuliani*, 2021-00506, at **25–31 (internal citations omitted) (emphasis added).

Ethics rules are rules of reason. They embody universal principles. The ethics rules of the New York bar at issue *In the Matter of Guliani* are incorporated by the bar of every other American jurisdiction and the American Bar Association’s Model Rules of Professional Responsibility.¹²² And they overlap with ethical standards binding members of Congress, not only as lawyers—(very many of them are attorneys)—but as members as such. The duty of candor pervades all positions of public trust. The preamble to the ABA model rules states that “A lawyer is a representative of clients, an officer of the legal system and a public citizen have special responsibility for the quality of justice. . . . A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.” Likewise, government employees and members of Congress specifically have a duty to “Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.” House Standing Rule XXIII requires members to conduct themselves in a manner that reflects creditably on the House. Likewise, members of the Senate must not engage in “improper conduct reflecting upon the Senate.”¹²³

Now let us look more deeply into each’s House’s precedents established under their respective ethics rules. First, let us examine the precedents of the House of Representatives. No one has ever been expelled, censured, or reprimanded for unparliamentary language about an election.¹²⁴ The House never invoked Joint Resolution 175 or the modern edition of the House ethics rules—including House Standing Rule XXIII—to investigate or discipline members for making contemptuous reflections about legitimate elections. The House did invoke Joint Resolution 175, however, to investigate and discipline in other instances. The House expelled Representative James Anthony Traficant Jr. (Democratic, Ohio) for violating his duty as a government employee to uphold federal laws.¹²⁵ The House invoked Rule XXIII to conduct disciplinary proceedings against a member for making statements that impugned the reputation of the House—statements threatening to retaliate against a fellow member because of that member’s vote on particular legislation. Most importantly, the House censured members for unparliamentary language in other domains: insulting the Speaker of the House, insulting a fellow member during debate, insulting the House as whole in a resolution, inappropriate language criticizing legislation, and false accusations that a fellow member made false statements. The House also

¹²² *E.g.*, *Scope to Am. Bar Assoc. Model Rules of Prof’l Responsibility*; *compare also* N.Y. Rules of Prof’l Conduct 3.3, 4.1, 8.4, *with* Am. Bar. Assoc. Model Rules of Prof’l Responsibility 3.3, 4.1, 8.4.

¹²³ *Compare Preamble to Am. Bar Assoc. Model Rules of Prof. Responsibility*, *with* U.S. Cong., Joint Resolution 175 (July 11, 1958), *and* S. Res. 266, 114 Cong. Rec. 7406 (daily ed. Mar. 22, 1968); *compare also* Am. Bar. Assoc., Model Rules of Prof’l Responsibility 3.3, 4.1, 8.4., *with* House Standing Rule XXIII, *and* House Ethics Manual 20, *and* Senate Ethics Manual 18.

¹²⁴ U.S. H.R., *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, HISTORY, ART & ARCH., <https://history.house.gov/Institution/Discipline/Expulsion-Censure-Reprimand/#expel> (last visited July 6, 2021) [hereinafter, “House Discipline List”].

¹²⁵ House Ethics Manual 20–21 (citing House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant, Jr.*, H. Rep. 107-594, 107th Cong., 2d Sess., Vols. I–VI (July 19, 2002)).

reprimanded members for all kinds of false statements, including falsehoods regarding campaign contributions.¹²⁶

Second, let us examine the precedents of the Senate. The Senate never expelled, censured, or reprimanded anyone for making contemptuous reflections about the integrity of an election. Similarly, neither Joint Resolution 175, Senate Resolution 266, nor the contemporary edition of the Senate ethics rules were ever invoked to investigate and discipline a member for making contemptuous reflections about a legitimate election. In three of the fifteen cases in congressional history when senators were threatened with expulsion, however, the grounds were election fraud. In the cases of Senators John H. Overton (Democratic, Louisiana) and Huey P. Long (Democratic Louisiana), the Senate Committee on Privileges and Elections concluded that charges of impropriety were insufficient and dropped them. The case of Senator Truman H. Newberry (Republican, Michigan), however, stands out. The proverbial writing was on the wall because the charges against him were sufficient, therefore, he resigned in lieu of expulsion.¹²⁷

The authorities and precedents of both Houses confirm that unparliamentary language insulting members or the House as a whole are liable for sanction. So is election fraud. I therefore conclude that unparliamentary language about an election—mischaracterizations, misrepresentations, and misleading statements akin to those made by Giuliani about the 2020 Presidential Election, for example—is also liable for sanction. Now it is true that neither House necessarily has to use contempt proceedings as a vehicle for sanctions in the form of expulsion, censure, or reprimand. But contempt proceedings are a proper vehicle for sanctions—and the disciplinary action against Giuliani supports this point. The analogy between attorney grievance proceedings and congressional contempt proceedings against its own members is robust. The ethical principles of the legal profession and those of each House of Congress overlap. Actions by the bar of New York or any other jurisdiction, like contempt proceedings, are initiated not to punish for punishment’s sake, but to protect the public.¹²⁸ Contempt liability for a member of Congress who makes material misrepresentations about the integrity of a federal election is therefore legally sound under *Anderson*, *Kilbourn*, and *Marshall*.¹²⁹

The sanctions ordinarily imposed through contempt proceedings—reprimand, censure, incarceration, and even expulsion—are appropriate under Supreme Court doctrine as well. Expulsion is the natural analogue to disbarment and will be fully justified in cases where the contemptuous language is as severe as Giuliani’s. Expulsion in such cases certainly constitutes the least amount of power adequate to the end proposed. That *end*, of course, is protecting the House, its constituent members, their individual constituencies, and the nation as a whole. The *power* employed is proportionate to that end in light of the

¹²⁶ House Ethics Manual 14–15 (citing House Comm. on Standards of Official Conduct, Investigation of Certain Allegations Relating to Voting on the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, H. Rep. 108-722, 108th Cong., 2d Sess.).

¹²⁷ U.S. Sen., About *Expulsion*, POWERS AND PROCEDURES, <https://www.senate.gov/about/powers-procedures/expulsion.htm> (last visited July 6, 2021).

¹²⁸ Compare *In the Matter of Rudolph W. Giuliani*, 2021-00506, at **3, 5 (quoting *Matter of Nearing*, 16 AD2d 516, 518 (1st Dept. 1962)], with *Gordon*, 243 U.S. at 534, 541–43 & n.1.

¹²⁹ See *Anderson*, 19 U.S. at 228, 230–31; *Kilbourn*, 103 U.S. at 181–82, 89, 195–97; *Gordon*, 243 U.S. at 534, 541–43 & n.1.

same factors considered by the New York Supreme Court: continuous unparliamentary language, the proven future potential for similar language, and the serious harm and threat of future harm that language inflicts on the dignity of the legislature, republican norms, and public health and safety.¹³⁰

The normative justification—the need for precedent in this area—is borne out by the historical experience of Congress and its role in public discourse. The Trump Riot proved that contemptuous reflections dishonoring Congress can incite an existential threat to Congress itself. If Stop-the-Steal-esque propaganda precipitated violence once, it can do so again. The Trump Riot illustrated a common theme in congressional history that imitates a well-established paradox in the natural sciences: a legislative body, like a human body, creates its own environment. There is a feedback loop of violence and rhetoric circulating between the Capitol and the public square. During the Antebellum period, for example, there were more than seventy violent incidents involving members in chamber scuffles, duels, etc. The members of Congress imbibed the vitriol of their constituents and chose to swallow, not spit. As a result, those members poured on the floors of their respective Houses a steady stream of toxic backwash that poisoned the well of public opinion even further. This example must never be repeated.

I maintain that contemptuous reflections about either House by any one of their respective constituent members is liable for contempt. By extension, I would argue that improper reflections about a fellow members' conduct during an election, or improper reflections about the integrity of an election itself, is contempt as well. Now one might complain that my theory of constructive contempt liability for contemptuous reflections on elections effectively resurrects the crime of seditious libel. I understand this point, but I must insist that under my theory, an improper reflection about an election is not liable for seditious libel as such, that is, as a crime. Rather it is strictly liable as a specie of contempt. Exceptionally destructive libels and slanders against proper elections may have no other effective remedy than contempt proceedings because of the higher protections that criminal defendants have in the courts under the First Amendment and the Treason Clause. The law of Congress is insulated from judicial review. Congressional contempt proceedings, therefore, in my view, are not affected by the First Amendment and the Treason Clause to the same degree as criminal proceedings before the courts.¹³¹

If a member is expelled for contemptuous reflections about an election, there is a possibility that his constituency will re-elect him. Perhaps they will forgive him. Perhaps they do not care. Or perhaps they are so convinced by a “Great Lie” that they see the expulsion as an injustice. The closest precedent in the American tradition we have for handling this scenario is Joshua Giddings' Case. Representative Giddings (Whig, Ohio) was attacked and censured for his anti-slavery activism. He was not expelled but voluntarily resigned. He was later reelected by an overwhelming majority. We might infer

¹³⁰ Compare generally *In the Matter of Rudolph W. Giuliani*, 2021-00506, at **25–31, with *Anderson*, 19 U.S. at 228, 230–31, and *Kilbourn*, 103 U.S. at 181–82, 89, 195–97, and *Gordon*, 243 U.S. at 534, 541–43 & n.1.

¹³¹ Cf. *In the Matter of Rudolph W. Giuliani*, 2021-00506, at *31 (“This event only emphasizes the larger point that the broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, is corrosive to the public’s trust in our most important democratic institutions.”); JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* 15, 233–34 (2018).

from that precedent that reelection of an expelled member of Congress is the people's veto and the ultimate pardon. There can be no infinite regression.

This position is reinforced by a notable British precedent coinciding with the American Revolution: the Middlesex Affair of 1769. John Wilkes, a prominent demagogue, radical, and sitting MP for Aylesbury, edited and printed a blasphemous and obscene publication in 1763. He was charged with seditious libel and prosecuted in the Court of Commons Pleas. The Court cut him loose on the theory that even if the libel constituted a breach of the peace, it was still shielded from liability by Wilkes' parliamentary privilege from arrest. The House of Commons reacted by formally resolving that the privilege of arrest would no longer apply to seditious libels. When Wilkes' edited another scandalous publication later that year, he was expelled. Five years later, Wilkes ran three consecutive times for the Middlesex seat in 1769. Each time he won. Each time, Parliament voided the election on the theory that Wilkes was expelled for impropriety and therefore disqualified, even though he was never impeached for his prior conduct.¹³²

The decision to bar Wilkes was tremendously unpopular at the time and resulted in riots and disturbances. Since then, many concluded, as I do, that the Commons acted unconstitutionally. Wilkes ultimately succeeded in getting reelected to Parliament and having the resolution of 1769 against him struck from the official record. The comments of one MP during the deliberations of 1769 capture the impropriety of the resolution against Wilkes brilliantly:

That the power of expulsion is sufficiently great: it may be used to disgrace, to harass, to ruin an individual; but it carries with it no public danger. If the House abuse its power in the execution of it, the electors have their remedy, by reelecting the expelled member. But when incapacity of being reelected is superadded to the expulsion, it is no longer the case of an individual; the rights of the electors are most materially affected. A stop is put to the freedom of their election. The number of persons open to their choice is diminished; and though that diminution is one only, that single person may be their first favourite, and perhaps on that account rendered incapable. Nor does the evil stop here. The elected learn to taste the sweets of culling their company, not only by removing troublesome opponents, but barring their reentry; and by putting a negative on the first interest in any place, make room for the second. That reason cries aloud against such a power in any set of men whatever. Happily she is opposed by no considerable list of precedents, except in 18 years of confusion from 1642 to 1660. That when we see this

¹³² Compare Joshua Giddings' Case, 37 J. of the H.R. 573, 872 (Mar. 3, May 27, 1842), and *Cong. Globe*, 27th Cong., H.R., 2nd Sess. 346–49 (Mar. 22–23, 1842), with William Cobbett, Proceedings in the Commons on the Expulsion of Mr. Wilkes (Dec. 9, 16, 1763; Jan. 19, 1764), reprinted in 15 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO 1803, 1386, 1386–1388 (T.C. Hansard 1808), and George Rudé, *The Middlesex Electors of 1768–1769*, 75 ENG. HIST. REV. 601, 601–02 (1960).

power so seldom exercised in old times, so grossly abused when it was, and so entirely abandoned since, we cannot but conclude that usage disclaims the power as much as reasons protest against it, and that it does not exist in our constitution.¹³³

I concur with this reasoning in its entirety. If a member makes contemptuous reflections about an election, is held in contempt, and then expelled, the only way to permanently disbar them from reelection would be to impeach them. The contempt conviction would, needless to say, form a natural predicate for successful impeachment. I will explore that idea more later in the context of contempt proceedings against members of the executive.¹³⁴

Before exploring the particular procedures in each House for handling contemptuous reflections by members, I must observe that congressmen frequently are barred attorneys. These members are therefore liable for any ethical misconduct not only to their respective House, but also to their respective bars. Ethical duties to both kinds of institutions are mutually reinforcing. The discipline of a member through an attorney grievance proceeding can be certified to the ethics committee of either House just as it can be certified to the bar of any other jurisdiction. It is well within the purview of state and federal bars, therefore, to certify disciplinary judgments against members of Congress for contemptuous reflections about elections to the ethics committees of those members' respective Houses, and vice versa.¹³⁵

2. Contempt Procedure for the U.S. House of Representatives

Rule XI, Clause 3 of the Standing Rules of the House of Representatives prescribes the organization of the House Committee on Ethics. The committee's purpose includes the creation of an ethics code, which is actually incorporated into House Standing Rule XXII. The committee can investigate any alleged violation by a member of the House code of conduct "or other standard of conduct applicable to the conduct of such Member. . . . in the performance of the duties of the discharge of the responsibilities of such individual." The investigatory prerogatives of the House Committee on Ethics therefore appertain not only to specific ethics rules articulated in Standing Rule XXII, but in "unwritten" ethical principles as well, such as those recognized in Congressional Resolution 175. It is perfectly parliamentary, therefore, for the committee to investigate a complaint that a member has made unparliamentary reflections contesting the proven legitimacy of a federal election and refer the matter for contempt proceedings before a Committee of the Whole House.¹³⁶

Under House Standing Rule XI, the committee must collect any evidence of a member's contemptuous words or conduct interfering with or undermining a proven election, including any memorials of speeches, social media activity, etc. It may appoint special investigative and adjudicatory subcommittees to assist this endeavor, especially in large cases where the allegations concern complex facts or a group of respondents

¹³³ William Cobbett, *Debates on the Expulsion of Mr. Wilkes (1769)*, reprinted in 16 PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 589 (T.C. Hansard 1808).

¹³⁴ See *infra*—Part III.C.

¹³⁵ See, e.g., U.S. D. Md. L.R. 705(3)(d).

¹³⁶ See House Standing Rule XI(3)(a)(2).

involving an election of great public importance. The standard of proof is the substantial evidence standard: if “there is a substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member. . . . has occurred.” If there is substantial evidence, the investigative subcommittee will adopt a statement of alleged violation and produce a report along with any comments by the respondent to the Committee on Elections. The Committee on Elections, in turn, will transmit a report and the respondent’s comments to the whole House. Upon approval by a plurality of the House, contempt proceedings will begin. A conviction for contempt can be secured by a vote of a two-thirds majority. The appropriate sanctions will be fact specific, but may include reprimand, censure, incarceration, suspension, and expulsion. If the comments were knowing, willful, and malicious, expulsion is the appropriate sanction.¹³⁷

The maxim *nulla crimen sine poene lege* embodies the concept of nonretroactivity, a general principle of law. It is unjust to punish conduct that did not constitute a crime at the moment it occurred. Contempt is not a crime in the proper sense, nevertheless, Standing Rule XI(b)(3) provides that “[t]he committee may not undertake an investigation of an alleged violation of a law, rule, regulation, or standard of conduct that was not in effect at the time of the alleged violation.” Under my theory that contemptuous reflections on a proven election are contemplated by the unwritten law of congressional ethics, I believe that members of the House have adequate notice that such contempt is unethical and unlawful. It is self-evident and a natural extension of right reason that words tending to defame the integrity of an election outcome thoroughly vetted by experts is unjust and unbecoming of a public servant. Standing Rule XI(b)(3) therefore provides no shield from contempt liability of this kind.¹³⁸

3. Contempt Procedure for the U.S. Senate

The procedures of the Senate Select Committee on Ethics are chiefly prescribed by committee specific rules under Senate Resolution 338.¹³⁹ Senate Ethics Rule II provides a process for handling complaints and allegations. The committee can investigate any alleged violation by a member of law, the Senate code of official conduct, “or any other rule or regulation of the Senate relating to the conduct of individuals in the performance of their duties as members, officers, or employees of the Senate. . . .” The investigatory prerogatives of the Senate Select Committee on Ethics therefore appertain not only to specific ethics rules articulated in the Senate code of conduct, but also in “unwritten” ethical principles as well, such as those noticed in Joint Congressional Resolution 175. It is parliamentary, therefore, for the committee to investigate a complaint that a member made unparliamentary reflections contesting the proven legitimacy of a federal election and refer the matter for contempt proceedings before a Committee of the Whole House.¹⁴⁰

¹³⁷ See House Standing Rule XI(3)(a)(3), (8)(B)(iii); House Standing Rule XI(3)(m), (n), (q)(2)(B)–(D).

¹³⁸ See House Standing Rule XI(3)(b)(2).

¹³⁹ See generally U.S. Sen., Sen. Select Comm. on Ethics, Rules of Procedure 19 (2015) [hereinafter, “Senate Ethics Rules”].

¹⁴⁰ See Senate Ethics Rule II(b)(1).

The procedure for handling an allegation that a member made unparliamentary reflections breaks down into several stages. First, the Senate Ethics Committee must conduct a preliminary inquiry upon receipt of an allegation. When a final report on the matter is produced, the committee will vote on the matter, and take one of three actions: if the allegation is without merit, dismiss; if meritorious but de minimis, issue a letter of admonition; if fully meritorious, as established by substantial credible evidence, initiate adjudicatory review.¹⁴¹ At the second stage, the committee engages in adjudicatory review by using outside counsel or staff to begin collecting discovery, provides notice to the respondent with an opportunity to be heard, and then produces a final report as to whether disciplinary action is proper. Upon a vote of four or more members that contempt proceedings are warranted, the committee's recommendation for contempt proceedings will be presented to the Secretary of the Senate and the whole House. Upon approval by a plurality of the whole House, contempt proceedings will begin.¹⁴²

The Senate Select Committee on Ethics incorporated the concept of nonretroactivity into its rules like the House of Representatives. Senate Ethics Rule 7(e) provides that “no adjudicatory review shall be initiated of any alleged violation of any law, the Senate Code of Official Conduct, rule, or regulation which was not in effect at the time the alleged violation occurred.” Once again, under my theory that contemptuous reflections on a proven election are contemplated by the unwritten law of congressional ethics, I believe that members of the Senate have adequate notice that such contempt is unethical and unlawful. It is self-evident and a natural extension of right reason that words tending to defame the integrity of an election outcome thoroughly vetted by experts is unjust and unbecoming of a public servant. Senate Ethics Rule 7(e), therefore, provides no shield against contempt liability.¹⁴³

C. Election Interference by the Executive

Article II, Section 4 of the United States Constitution provides that the “President, Vice President and all civil Officers of the United States can be removed from office if convicted in an impeachment trial for Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁴⁴ But what is a “high crime and misdemeanor?” The answer must come from parliamentary practice.¹⁴⁵ And in this case parliamentary practice provides an answer that is clear and unmistakable: conspiring, inciting, or actually participating in a riot or insurrection that attacks the legislature is a high contempt of the legislature *and* also a high crime and misdemeanor. Congress should therefore impeach any person who violates the public trust by conspiring, inciting, or participating in a riot or insurrection at the Capitol, including members of Congress, the executive, and the judiciary. I believe this rule, by extension, applies to election interference, including riots and insurrections, in other contexts. The application of this conclusion to the executive is complex and therefore requires extensive discussion.

¹⁴¹ See Senate Ethics Rule III.

¹⁴² See Senate Ethics Rule IV.

¹⁴³ See Senate Ethics Rule 7(e).

¹⁴⁴ U.S. CONST. art. II, § 4.

¹⁴⁵ STORY, I COMMENTARIES, *supra* note 4, at §§ 796–99.

I propose that congressional contempt power is the key to successfully impeaching someone for election interference—especially a current or former member of the executive. Lord Mordaunt’s Case, in my view, supports the notion that contemptuous behavior is a lawful predicate to impeachment of a member of legislature, *mutatis mutandis*, members of the executive and judiciary as well. Contempt and impeachment were dealt with in Lord Mordaunt’s case simultaneously, not successively. But we ought not make a negative inference that they could not be dealt with successively. The King would be entitled to prosecute Lord Mordaunt if he so chose, just as the House of Lords could try Lord Mordaunt with contempt and then impeach him if it so chose. Similarly, both Houses of Congress can try someone for contempt before moving to impeach them.¹⁴⁶

The technique of using a contempt conviction as a predicate for impeachment also draws support from congressional precedent. St. George Tucker emphasized in *Anderson v. Dunn* that congressional power to punish constructive contempt is necessary. That emphasis arose in part from a fearful scenario where the executive branch is tainted by corruption and conspiracy and therefore is unwilling to hold its own members accountable for misconduct offending the legislature. His position was that Congress possesses a residual executive function that is inherent to the legislative power. He contemplated the rare occasion when Congress must enforce its prerogatives when the executive is unwilling or unable to do so.¹⁴⁷

Representative John Forsyth (Democrat-Republican, Georgia) extended St. George Tucker’s reasoning when reflecting on the Philadelphia Mutiny of 1783. In his view, the constitutionality of Congress punishing constructive contempt was most salient in the context of impeachment.

Judging that the time might arrive when a President would conspire with corrupt and ambitious men, of his own country or of a foreign nation, to change his temporary and limited authority to a permanent and despotic power, the supposed a sufficient barrier was erected to defeat such conspiracy, by giving to this House the power of impeachment, and the Senate the authority to judge and punish the offender, when

¹⁴⁶ See Lord Mordaunt’s Case, *supra* note 13, at 347, 348 (providing, in the second article of impeachment, “That the said lord M. at the time of Mr. Tayleur’s imprisonment, when £2,000l. bail was proffered for his release, being told that the said Mr. T. was the king’s servant, and had the king’s Great Seal for his place as well as be the said lord M. had for his, in high contempt of his majesty’s royal authority and Great Seal, replied, ‘He would dispose of the said Mr. Tayleur’s places, and break the Great Seal, and justify it when he had done.’”); Lord Mordaunt’s Case, 8 J. of the H.C. 668–69 (Dec. 29, 1666 – Jan. 3, 1667); Lord Mordaunt’s Case, 8 J. of the H.C. 676–682, 684–87 (Jan. 16, 18–19, 21–22, 26, 28–29, 31, 1667); Lord Mordaunt’s Case, 8 J. of the H.C. 687–691 (Feb. 1, 4–7, 1667); *cf.* STORY, I COMMENTARIES, *supra* note 4, at § 804 (“Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided.”). *But see* Graham S. McBain, Abolishing “High Crimes and Misdemeanors” and the Criminal Process of Impeachment and Attainder, 85 AUSTRALIAN L.J. 810, 813–14, 819, 825 & nn.73, 123 (2011) (distinguishing contempt of the sovereign and contempt of Parliament in several cases). McBain never goes so far to suggest that impeachment and contempt of Parliament are exclusive remedies for the same underlying offense.

¹⁴⁷ *Annals of the Cong.*, 15th Cong., H.R., 1st Sess. 631–36 (Jan. 9, 1818).

brought to their bar by the charges of the Representatives of the people, and convicted by proper evidence. Has it not occurred to the members of this House, especially to those who support the resolutions on your table, that the efficacy of this provision resides wholly in the power of this House and of the Senate, respectively, to issue process of attachment for contempt? Strange as it may appear, the truth of this proposition is beyond dispute. But, for this now called dangerous and alarming stretch of our Constitutional authority, the terrible engine of impeachment is a bugbear to frighten childish corruption; but the scorn and contempt of full-grown villainy. A practical illustration will best show the correctness of this position. A President forms treasonable designs against the United States. By one of those fortunate events which, in the order of Providence, usually occurs to defeat the machinations of guilt, a partial discovery of the design is made, and an inquiry is instituted you ascertain the sources from which accurate and certain information is to be procured. How are you to compel obedience to your call upon the witnesses, who are known to possess all the information necessary for your purpose? How are you to compel the production of the treasonable correspondence in their custody? *By attachment for contempt.*

Representative Forsyth went on,

Sir, it is vain to say we can provide by law for such an occurrence. Such provisions is impossible. You may make laws, but these laws are nugatory. You may provide penalties, but to inflict them must be judicial process, trial, conviction and sentence. The inevitable delay is ruinous to the country, and gives to the traitors the time to consummate their horrible designs. But even the guilty witness, the contemnor of your authority, escapes the punishment provided by your law. The same Constitution under which you defined his offense, and annexed an appropriate punishment, gives to the President, for whom he commits it, the power of pardoning the offender. You have the consolidation to know that he is convicted, and he has the consolation of laughing at an impotent breach of the Legislature, called, in derision, the Grand Inquest of the Nation! It is not impossible, however, but that sufficient evidence may be procured to justify the exhibition of articles of impeachment. They are carried to the Senate. How is this august body to perform its functions? How will it compel the

appearance of the accused, and the attendance of the witnesses? *By process of attachment for contempt.*¹⁴⁸

These opinions support, in my view, not only the use of contempt power to *enforce* impeachment, but also the use of contempt power in conjunction with impeachment to *discipline* the same underlying conduct. The remedies are mutually reinforcing, not mutually exclusive. Supreme Court Justice Joseph Story remarked that the power of impeachment “would seem to result from the principle on which the power of each branch of the legislature to punish from contempts is founded, that the executive authority cannot interpose between them and the offender. The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all of their duties.”¹⁴⁹ If impeachment is truly designed to be a “method of National Inquest into the conduct of public men,” then there is no better occasion to inquire than in the case where a public official incites violence against the legislature, and in doing so, essentially incites one department into making war on another.¹⁵⁰

The next question is *how* contempt and impeachment proceedings mutually reinforce one another? There is an interesting and related question as to whether crimes should be prosecuted before or after impeachment for the same underlying conduct. The best wisdom suggests that if criminal prosecution is prudent, the House should use criminal prosecution as a predicate for impeachment, rather than impeaching first and then referring the matter to the executive later.¹⁵¹ The same logic extends to contempt. If a member of Congress or the executive—even the President of the United States himself—incites a mob to attack the legislature, the contempt should be tried first. If a conviction is secured, it facilitates impeachment in three ways.

First, the contempt of participating in or inciting a riot or insurrection against Congress is, in and of itself, an appropriate basis to impeach. The contempt proceeding would trigger an impeachment proceeding in stepwise fashion. The select committee or commission appointed to investigate the contempt will acquire evidence. That evidence will be used by the House of Representatives when sitting as Committee of the Whole House in adjudicating and convicting the defendant of contempt. The House of Representatives will use that evidence when conducting its impeachment investigation and form the crux of its Articles of Impeachment presented to the Senate. The conviction for contempt in the House of Representatives, in other words, is the high crime and misdemeanor the Senate would be responsible for adjudicating. The conviction of the defendant for the most heinous form of contempt of Congress observed in the precedents of the United States and the United Kingdom of Great Britain could therefore render his impeachment a *fait accompli*.

Second, a trial for contempt is less encumbered by procedural obstacles than a criminal prosecution. One obstacle is executive privilege. The best example of when this barrier comes into play is when the President of the United States and civil officers working

¹⁴⁸ *Annals of Cong.*, 15th Cong., H.R., 1st Sess. 742–46 (Jan. 14, 1818) (emphasis added).

¹⁴⁹ See STORY, I COMMENTARIES, *supra* note 4, at § 1503.

¹⁵⁰ See Hamilton, Federalist No. LXV.

¹⁵¹ See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 31, 60–61 (3d ed. Univ. Chicago Press 2019), *contra* Alexander Hamilton, Federalist LXIX.

at his behest allegedly incite a riot or insurrection on the United States Capitol. The sitting President can generally invoke executive privilege against state and federal prosecution for good cause. Neither the Supreme Court nor Congress, however, have any precedents explicitly deciding whether executive privilege would protect the sitting President or civil officers from being tried for contempt under the inherent power of either House. Although executive privilege may shield a sitting President or a civil officer from criminal prosecution under 2 U.S.C. § 192 or some other criminal statute, I contend that it cannot shield them from political accountability through impeachment or contempt proceedings under Congress' inherent power.¹⁵²

Assuming, for the sake of argument, that the sitting President can invoke executive privilege against articles of impeachment and every specie of contempt—including contempt proceedings under inherent legislative power—his right to invoke that privilege is not necessarily immutable. Current Supreme Court doctrine holds that executive privilege can be invoked to shield a former President and civil officers who served him, but it is unclear who precisely can assert that privilege. By contrast, there is no statute of limitations on inherent power. I take the widely shared view that executive privilege attaches to the office not the person, therefore, only the currently sitting President can invoke executive privilege to protect a former President or civil officer from criminal prosecution. In the alternative, however, I would even argue that if a former President can invoke executive privilege—a position that is by no means uncontroversial—that privilege only applies to criminal proceedings, not trial for impeachment or for contempt. I would even go as far as to say that executive privilege cannot even be invoked by a sitting President to shield a former President or civil officer if the subject matter of the allegations involves election interference or the threat of violence to Congress itself.¹⁵³

The reason I believe that executive privilege cannot be invoked to defeat contempt and impeachment proceedings—as to both current and former Presidents and civil officers—is that subordinating legislative privilege to executive privilege violates the doctrine of the separation of powers. The legislative branch is the first branch; therefore, legislative privilege should trump executive privilege under the *primus inter pares* principle. To hold otherwise would upset the constitutional balance of a workable government and gravely impair the role of the legislature under Article I. Each House is the high court of its own elections and its own privileges. It is true that the only parliamentary privileges specifically enumerated in Article I are the privilege of freedom from arrest and the privilege of speech and debate. But these are not exclusive. The privilege of self-defense, however implicit it might be, is well precedented in the Anglo-Saxon legal tradition and commensurate with right reason. The parliamentary privilege

¹⁵² Cf. Jonathan Shaub, *Can a Former President Assert Executive Privilege in an Impeachment Trial?* LAWFARE BLOG (Jan. 29, 2021, 8:01 a.m.).

¹⁵³ Cf. *United States v. Nixon*, 418 U.S. 638, 707 (1974); *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 446–49 (1977); Register of Debates, H.R., 22nd Cong. 3890 (July 10, 1832); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 Nexus 12–20 (1997); Shaub, *supra*, at note 152.; *United States v. Justices of Lauderdale Cnty.*, 10 F. 460, 462 (C.C. W.D. Tenn. 1882); *The Laurens*, 14 F. Cas. 1193, 1195 (C.C. S.D.N.Y. 1849).

against political extortion of the national legislature through riot and insurrection is indefeasible to executive privilege.¹⁵⁴

Another procedural barrier is the pardon power. Article II, Section 2 of the United States Constitution authorizes the President to pardon all federal crimes except in cases of impeachment. Some have taken the view that a President can pardon himself for any crime outside impeachment, giving him a sort of post-hoc immunity. But what if a contempt conviction is the predicate for impeachment, as I suggest? Neither Congress nor the Supreme Court have ever held that the President can pardon a contempt of Congress. A series of opinions issued by the United States Attorney General's Office during the mid-to-late nineteenth century concluded that the President could pardon contempt of court. Several opinions issued by lower federal courts during that same timeframe concurred. They presaged the Supreme Court's analysis of the issue in *Ex parte Grossman* in 1925. There the Court considered the question of whether extending the Presidential pardon power to judicial contempts would violate the principle of the separation of powers and the independence of the judiciary.

The respondent's brief in *Ex parte Grossman* referenced the parallel scenario where contempt of Congress occurs. "We know of no reason justifying a denial of the pardoning power for contempt of Congress that does not apply with equal or greater force to contempts of court," wrote Amos C. Miller and F. Bruce Johnstone, Special Assistants to the Attorney General, "The power to deal with contempt rests in the right of self-preservation." The Supreme Court did not, however, address this argument directly or even through dicta. Chief Justice William H. Taft's majority opinion admitted that the principle of the separation of powers is nowhere explicitly declared in the Constitution, and in light of the Constitution's design, is impossible to achieve completely. The Court held that presidential pardon for criminal contempt of the judiciary was justified in light of the English common law tradition, precedent, and their own determination that the possibility of prejudice and abuse was not very great.¹⁵⁵

Ex parte Grossman should not dissuade us from concluding that the President cannot pardon a contempt of Congress—even his own contempt. Assessing the possibility of prejudice to your own department is one thing, to someone else's is quite another. Were the Court to squarely confront the latter issue head on, it would, I hope, note the basic difference between the legislature and the judiciary: the legislature is the first branch, the popular branch—it represents The People. The Founding Fathers, after much deliberation, gave the legislature the exclusive responsibility of charging and trying impeachment. All of the functional justifications for keeping the pardon power out of the impeachment process map onto the contempt process. The intersection between those two processes reinforces the conclusion that contempt of Congress is an unpardonable offense. If the

¹⁵⁴ Compare U.S. Const. art. I §§ 2–3; art. II § 4, with *Case of the Tumultuous Crowd*, 22 J. of the H.C. 115–16 (Apr. 12, 1733); compare also U.S. Const. art. I, §§ 5–6, with *Purser Rioter's Case*, 13 J. of the H.C. 228, 230–31 (Mar. 27, 1699).

¹⁵⁵ See U.S. Const. art. 2 § 2.; *Ex parte Grossman*, 267 U.S. 87, 100 (1925) (first citing *Marshall v. Gordon*, 243 U.S. 521; then citing *Toledo Newspaper Co. v. United States*, 247 U.S. 402; and then citing *STORY, I COMMENTARIES*, *supra* note 4, at § 1503); *In re Mullee*, 17 F. Cas. 968 (C.C. S.D.N.Y 1869); see also *John MacPherson Berrien, Pardons and Remissions of Forfeitures*, 2 U.S. OP. ATT'Y GEN. 329 (U.S.A.G.) 330–31, 1830 WL 846, at **1, 1 (Mar. 17, 1830).

President interfered with his own impeachment or one of his officers, could he issue a pardon for offense? Surely not! In applying a similar methodology in *Grossman* by consulting the common law, the Supreme Court would be wise to recall Lord Mordaunt's Case. The treachery of that rapacious royalist presents a compelling lesson in how the availability of an executive pardon to a man impeached for contempt can illustrate the very height of tyranny.¹⁵⁶

The foregoing scenario leads us to an important insight. The contempt power of Congress acts as a circuit breaker against the corruption of the executive. Justice Story once declared that the main object of the congressional contempt power "is to secure a purity, independence, and ability of the legislature adequate to the discharge of all their duties."¹⁵⁷ Building on that notion, we must also consider Representative St. George Tucker's remarks in *Anderson v. Dunn*:

When the days of purity and virtue shall have passed away, and an Executive Magistrate shall attempt to influence this House, or any of its members, by its corruptions, how deplorable will be the condition of this body, if it must depend upon such an Executive to give its assent to laws to preserve the House of the people from such pollution! What are the petty attempts of such a man as John Anderson to the dangerous and fatal influence and intrigues of a designing and artful Chief Magistrate, if such should ever fill the Presidential Chair? Can it be [] that the convention could ever have intended we should depend for our protection from the assaults of violence, or the wiles of corruption? Can that convention, whose work contains so many evidences of jealousy of Executive power and influence, have intended that this body should look for its power to punish a crime, to that branch of the Government, which the history of the world has taught us, is under a constant temptation to commit it? I think not sir; and while I feel satisfied that the power to punish exists somewhere, the same train of reasoning, convinces me that the power exists here, independent of every other branch of Government, if we choose so to exert it.¹⁵⁸

Contempt power is indispensable to the impeachment power; therefore, both contempt power and impeachment power are equally indefeasible to the pardon power.¹⁵⁹

¹⁵⁶ See *Ex parte Grossman*, 267 U.S. at 118–22; STORY, I COMMENTARIES, *supra* note 4, at § 1503; Lord Mordaunt's Case, *supra* note 13, at 357–58.

¹⁵⁷ STORY, I COMMENTARIES, *supra* note 4, at §§ 1501–03

¹⁵⁸ Annals of Cong., 15th Cong., H.R., 1st Sess. 631–36 (Jan. 9, 1818).

¹⁵⁹ Compare *Ex parte Grossman*, 267 U.S. at 118–22, and *Marshall*, 243 U.S. at 542, with Annals of Cong., 15th Cong., H.R., 1st Sess. 631–36 (Jan. 9, 1818), and STORY, I COMMENTARIES, *supra* note 4, at § 1501–03; cf. James Madison, *Speech in the Federal Convention on Impeachment* (July 20, 1787), reprinted in JAMES MADISON: WRITINGS 128, 128 (Jack N. Rakove ed., Library of America 1999) ("In the case of the

Yet another impediment to accountability avoided through a contempt proceeding is the beyond a reasonable doubt standard that applies to criminal cases. A contempt charge tried by Congress is not criminal but *sui generis*, therefore, the Bill of Rights does not apply to a contempt proceeding as it ordinarily would in a judicial proceeding. There are some basic protections afforded to the accused in a contempt proceeding. He is entitled to an attorney, for example, and time to make his case. The burden of proof is on the House. But the standard of proof has never been formally fixed by precedent. Conviction may only require clear and convincing evidence or a preponderance of the evidence. Parliament has no definitive position on this issue. Parliament's Joint Committee on Privileges published a report in 1999 recommending that when either House tries its members for contempt, "the criterion applied at all stages should be at least that the allegation is proved on the balance of probabilities. In the case of more serious charges, a higher standard of proof may be appropriate." This guidance was intentionally left open ended, as if only future incidents could crystalize the proper policy.¹⁶⁰ The proper policy is evident now. The clear and convincing standard should apply.¹⁶¹

Whatever the burden of proof is for contempt of Congress, it may be easier to satisfy than the elements of criminal offenses that constitute high crimes and misdemeanors. As an alternative to the strategy I propose, consider the hypothetical where the legislature allows the executive to prosecute for the crime of treason first, intending to use that judgment as a predicate for impeachment. The crime of treason is notoriously hard to prove. It requires not only a unanimous jury, but two witnesses to convict. *King v. Gordon* is merely one example of the perils of trying to prove treason by demonstrating that the contemnor incited a riot at the seat of government. A contempt proceeding is a preferable predicate to impeachment than criminal prosecution because it poses fewer procedural hurdles. This is because a contempt proceeding, like an impeachment proceeding, poses penalties that are more political and symbolic than carceral or corporal.¹⁶²

Third, convicting a defendant of contempt before impeaching him provides political protection to senators who support impeachment but for the hostility of their own constituencies. Suppose that the underlying riot or insurrection assaults the Capitol and penetrates both Houses. And suppose that while the House of Representatives supports impeachment, the Senate lacks the political will to hold the President of the United States or some other civil officer to account, even when there is damning evidence of their culpability. Successful impeachment may turn upon the votes of a few senators who face a difficult political conundrum: vote to acquit and save their seat or vote to convict and lose it—and perhaps even be censured by their own constituency on the way out the door. Just as the contempt power operates as a circuit breaker against a recalcitrant executive, it also provides a natural bypass around political cowardice in the Senate by changing the political

Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of the might be fatal to the Republic."); *cf.* McBain, *supra* note 146, at 860 & nn.425–26 (reciting Brouncker's Case (1668) where MP Henry Brouncker was expelled from the House of Commons for contempt for failure to attend impeachment proceedings and fleeing abroad).

¹⁶⁰ JOINT COMMITTEE ON PRIVILEGES, PARLIAMENTARY PRIVILEGE - FIRST REPORT, ¶ 281 (UK).

¹⁶¹ *Cf.* GERHARDT, *supra* note 151, at 41–42, 67–68.

¹⁶² *See* 18 U.S.C. § 2381; STORY, I COMMENTARIES, *supra* note 4, at § 796; 21 HOWELL'S STATE TRIALS 485, 578 (T.B. Howell ed. 1816).

equation altogether. Instead of having to make a finding of fact—whether the defendant incites or engages in rioting and insurrection—the troubled senator now only has to make a conclusion of law—whether the defendant’s contempt constituted a high crime and misdemeanor. The latter question—as it is a question of law—is far more defensible to a constituency that is hostile to impeachment. To those who would oppose him or seek to censure him, the wizened *senex* can now wave his finger and truthfully say with a smile, “I just followed the rules.”

That a conviction for contempt by the House of Representatives in this particular circumstance simplifies an impeachment vote should not be a cause of concern. The law of Parliament and the law of Congress both indisputably establish that riot and insurrection against Congress is both contempt and a high crime and misdemeanor per se. This is not a loophole in the Constitution; it is an essential feature. In our system of checks and balances, the lower chamber of the legislature is the voice of The People. If the representatives of The People are put in physical danger by the executive, they are entitled to vindication. It has been said that the power of the President is the power to persuade. There is no greater evil than for the President to use this power to undermine the Constitution’s guarantee of a republican system of government by targeting its most democratic element. Such a scenario provides a beautiful illustration of the fact that congressional contempt power operates as a circuit breaker in not one, but two ways. Contempt power is a shield against executive and legislative tyranny at one and the same time: it provides security from above and below.

There are those who will undoubtedly say that this interpretation goes too far. They will say that this proposal subverts the Houses’ respective duties in the impeachment process. But I would respond that the kind of contempt we speak of here is rare and does not impinge the overarching intent of the Founding Fathers. In our system of checks and balances, the theory of popular sovereignty supports the view that the chamber closest to the people, with the most frequent elections, should possess the greatest coercive power. Democracy must be defended. Ethereal though the concept of inherent power may be, in a Federal Republic it ought to wax to its greatest extent when wielded by the *ecclesia*, not the *Areopagus*.¹⁶³

IV. CONCLUSION

The political tension stemming from the Trump Riot is reminiscent of—though not entirely analogous to—the sectional conflict during the thirty-fourth, thirty-fifth, and thirty-sixth Congresses. Joanne B. Freeman reflects that the spiral toward Civil War resulted from a spiritual decline—a crisis of faith in the Union and in each other. Now as then, the dominant political parties throw our nation in jeopardy by forfeiting their

¹⁶³ Cf., RICHARD E. NEUDSTADT, *PRESIDENTIAL POWER: THE POLITICS FROM FDR TO CARTER* 28–29 (1980); James Madison, *Speech in Congress on Presidential Removal Power* (June 16, 1789), reprinted in JAMES MADISON: *WRITINGS* 453, 454 (Jack N. Rakove ed., Library of America (1999)). The reasoning of this section applies, mutatis mutandis, to contempt proceedings against members of Congress and civil officers in the executive appointed by the President as a predicate for impeachment.

principles at the center to gain political advantage and emotional gratification by feeding extremists at their respective peripheries.¹⁶⁴

No political party is righteous. But the failures of Republican leadership are especially salient in the context of the Trump Riot.¹⁶⁵ Recall that during Antebellum period, the Whig Party, and the leaders of the opposition coalition that replaced it, failed to hold the Know-Nothings accountable for the excesses of their populist ideology, their nativist sentiments, their conspiratorial temperaments, their violent machinations. The result was one of the worst seasons of election interference in American history.

In view of the extensive history of impunity for election interference in the United States, I maintain that contempt proceedings remain a viable tool for holding laymen and public servants accountable. I go as far as to say that improper reflections and comments castigating the propriety of elections of proven integrity is liable for contempt. It is quite ironic that the first legislative precedent for holding a member of Congress in contempt was created on January 6, 1796.¹⁶⁶ Although legislative contempt power is ancient, it is not irrelevant. A modern contempt trial conducted by either or both Houses of Congress can provide a powerful opportunity to marshal and employ the evidence collected by the Select Committee to Investigate the January 6th Attack on the United States Capitol. That evidence demands a verdict.

¹⁶⁴ See FREEMAN, *supra* note 131, at 212–13.

¹⁶⁵ *Cf. Romans* 3:10.

¹⁶⁶ Robert Randall's Case, 2 J. of the H.R. 404–05 (Jan. 6, 1796).