

THE *LEGATIO ASIATICA* OF SCAURUS: DID IT TAKE PLACE?

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It is generally accepted that M. Aemilius Scaurus, who rose from an undistinguished patrician family to become not only consul (115 B.C.), but also censor (109 B.C.) and *princeps senatus*, served as a Roman *legatus* to Asia Minor, either in the last decade of the second century or the first decade of the first century. This belief is founded on one passage of Asconius (21C), which, I suggest, has been misinterpreted.

Asconius is commenting on a sentence from a missing section of the *pro Scauro*, delivered by Cicero in 54 B.C. in defense of the son of the consul of 115. Cicero, in his discussion of the prosecutions launched against the father, states:

Reus est factus a Q. Servilio Caepione lege Servilia, cum iudicia penes equestrem ordinem essent et P. Rutilio damnato nemo tam innocens videretur ut non timeret illa.

He (Scaurus) was accused by Q. Servilius Caepio under the Servilian Law, since the courts were in the hands of the equestrian order and, after P. Rutilius had been condemned, no one seemed so free from guilt that he did not fear them (that is, the courts).

Asconius comments:

Q. Servilius Caepio Scaurum ob legationis Asiaticae invidiam et adversus leges pecuniarum captarum reum fecit repetundarum lege quam tulit Servilius Glaucia.

Q. Servilius Caepio accused Scaurus on a charge of extortion, on account of the indignation aroused by the Asian legation, and against the laws, under the extortion law which Servilius Glaucia passed.¹

¹ The words *pecuniarum captarum*, juxtaposed with *reum*, must be a Genitive of the Charge (cf. Tac. Ann. 3.67.2). The following objection has been made against my translation of *adversus leges* as "against the laws": *adversus leges pecuniarum captarum* must be

Since Asconius goes on to indicate that the trial took place during, or just before, the tribunate of M. Drusus, and, in fact, before Drusus introduced his judiciary legislation, it can be dated to late 92 B.C. or early 91 B.C.

Badian's explicit and clear treatment of the legation and the trial,² as modified later by him³ in details of chronology, has dominated all recent discussion of the matter. Briefly summarized, his reconstruction of events is as follows. The Senate, early in 97, ordered Mithridates VI ("the Great") to give up Cappadocia, and ordered Nicomedes of Bithynia to give up Paphlagonia.⁴ Since we know that at some time Scaurus was charged with having accepted a bribe from Mithridates,⁵ it is Scaurus who, as *legatus*, is likely to have led an embassy to Mithridates and Nicomedes. Furthermore, suggests Badian, he might well have seen the deplorable conditions in the province of Asia on his way to and from his final destination further east, and, upon returning to Rome (in late 97 or early 96), might have been a prime force in forming the mission of the proconsul Scaevola and his *legatus* P. Rutilius Rufus (the latter serving there, according to Badian, in 94 and 93). The outcome is, of course, notorious. This Rutilius (mentioned by Cicero in the passage from the *pro Scauro*) so angered equestrian interests by his fair provincial administration and necessary reforms that those interests used their power over the extortion courts to secure the condemnation of this model official. Of all

one phrase, meaning simply "for extortion," since *pecuniam contra leges capere* is a standard phrase meaning "to extort." Thus, the objection holds, Asconius is not saying that the prosecution was illegal. This objection can be refuted on three counts. First, according to it, the conjunction *et* awkwardly joins a prepositional phrase and a Genitive of the Charge, rather than two prepositional phrases. (Mommsen deletes *et*.) Second, there is no legal phrase *pecuniam adversus leges capere*; the closest wording to be found is *pecuniae coactae conciliatae videntur adversus leges, adversus rem publicam* (2 Verr. 3.194). Third, if the phrase *adversus leges* modified *captarum* ("seized illegally"), one would expect the two placed next to each other. A charge can be made under a certain law, but nevertheless admitted illegally, e.g., if the prosecutor has been disqualified from serving as prosecutor, or if the charges fail to meet the legal definition of the crimes covered by the law. See note 18. In any case, the argument of this article does not rest on the illegality of Caepio's prosecution. In view of the fact that *repetundarum* is not next to *reum*, and the fact that *lex repetundarum* is a set phrase (Cic. *Cluent.* 148, Pliny *Ep.* 2.11.3), it would be awkward to construe *repetundarum* as a Genitive of the Charge.

² E. Badian, "Q. Mucius Scaevola and the Province of Asia," *Athenaeum* n.s. 34 (1956) 117–22.

³ E. Badian, "Sulla's Cilician Command," *Athenaeum* n.s. 37 (1959) 302 = *Studies in Greek and Roman History* (Oxford 1964) 172. The conclusions of this article have been challenged by A. N. Sherwin-White, "Ariobarzanes, Mithridates, and Sulla," *CQ* n.s. 27 (1977) 173–83.

⁴ See A. N. Sherwin-White, "Roman Jurisdiction in Anatolia," *JRS* 67 (1977) 70–72.

⁵ Val. Max. 3.7.8.: *Qui (Scaurus) cum pro rostris accusaretur quod a rege Mithridate ob rempublicam prodendam pecuniam accepisset, causam suam ita egit . . .*

trials, this one is probably the most often mentioned in the ancient sources.⁶

There are two major objections to this reconstruction, both anticipated by Badian. First, why does Asconius speak of a *legatio Asiatica*, when the embassy was not sent to the province of Asia? Badian points out that *Asiaticus* can refer to Asia Minor in general, as well as to the province.⁷ Still, one might have expected the scholarly Asconius to have been somewhat more precise in his choice of words. Second, Scaurus in his last years was badly crippled. In the year 100, although he could hardly walk, he joined others in attacking the *seditiones*,⁸ and in 91 the 72-year-old Scaurus needed the help of young men merely to walk to the Forum, so that he could defend himself against the charges of Q. Varius.⁹ Presumably, then, in the mid-nineties he was quite crippled, and a trip to Asia Minor, by any ancient mode of passenger transport, would have been an ordeal. Badian attempts to counter this objection by drawing an analogy with the case of M. Licinius, who, Polybius tells us, went on an embassy to Bithynia in 149 B.C. though he suffered from gout and was completely powerless in his feet (*ἀνθρώπος ποδαγρικός καὶ τελείως ἀδύνατος τοῖς ποσὶ*, 36.14.2). On the other hand, this embassy was noteworthy precisely because the ambassadors were so unfit to perform their duties; it was ridiculed by Cato the Elder as lacking feet, a head, and a heart, because of the physical handicaps of Licinius and his colleagues. Furthermore, when one considers that Scaurus' walk to the Roman Forum in 91 attracted notice, it seems surprising that no praise survives of what would have appeared an even greater act of heroism and suffering on behalf of the Roman people.

The alternate reconstruction formulated by Bloch¹⁰ avoids these difficulties to some extent, but creates a new one. Bloch proposed that the legation of Scaurus occurred sometime around 104 B.C.; at this time, his medical problems might not have been so advanced (though, quite obviously, we cannot know the exact course of his disease). Against this view Badian counters that it is hard to see why such an old episode would have suddenly become a cause for prosecution. Though no statute of limitation existed which would have forbidden a prosecution based on such old

⁶ For references see *MRR* 2.8.

⁷ Thus, Cicero (2 *Verr.* 1.34) refers to Verres' *legatio* in Cilicia as a *legatio Asiatica*.

⁸ *Cic. Rab. per. r.* 21: . . . *cum armatus M. Aemilius, princeps senatus, in comitio constitisset, qui cum ingredi vix posset, non ad insequendum sibi tarditatem pedum sed ad fugiendum impedimento fore putabat* . . .

⁹ *Asc.* 22C: *Ille (Scaurus) per viatorem arcessitus, cum iam ex morbo male solveretur, dissuadentibus amicis ne se in illa valetudine et aetate invidiae populi obiceret, innixus nobilissimis iuvenibus processit in forum, deinde accepto respondendi loco dixit* . . .

¹⁰ G. Bloch, "M. Aemilius Scaurus," *Mélanges d'Histoire Ancienne* 25 (1909) 30–33.

grounds, the charge would have been stale after about thirteen years.¹¹ Moreover, Gruen has maintained that an embassy is difficult to fit into the last few years of the second century, when, at least for some time, the evidence shows that Scaurus was in Rome.¹²

Both these reconstructions seem historically improbable. It might therefore be tempting to pronounce a *non liquet* between the two because of insufficient evidence. But another approach must be considered; perhaps the central premise of both views is wrong—namely, that Asconius does indeed say that Scaurus served as legate in Asia,—a premise accepted by all¹³ scholars commenting on the question, whether they follow Badian's chronology,¹⁴ or Bloch's,¹⁵ or state no firm conclusion as to the date.¹⁶

Badian himself has suggested a useful approach to the solution of this problem, when he deals with another problematic passage from Asconius (14–15C), which related to the career of Q. Mucius Scaevola (cos. 95):¹⁷

... if Asconius has put in this irrelevant and vaguely expressed remark about the man and some province at all, it must surely refer to one of the greatest and best-known achievements of his life—the government of Asia after his consulship—and not

¹¹ Badian (above, note 2) 118. To be fair to Bloch, even by Badian's reconstruction the charge was at least almost five years old, not very fresh.

¹² Erich S. Gruen, "Political Prosecutions in the 90's," *Historia* 15 (1966) 56, note 147.

¹³ It is perhaps worth noting, as a possible exception, D. Magie, in whose magisterial *Roman Rule in Asia Minor to the End of the Third Century after Christ* (Princeton 1950) no mention of the legation of Scaurus appears.

¹⁴ Badian's basic reconstruction of the legation of Scaurus has been accepted by all later scholars writing on the subject: Gruen (above, note 12) 55–56 (somewhat tentatively); J. van Ooteghem, *Caius Marius* (Namur 1964) 12; T. F. Carney, *A Biography of C. Marius* (Chicago 1970²) 48; T. J. Luce, "Marius and the Mithridatic Command," *Historia* 19 (1970) 169; A. J. Marshall, "Livius Drusus and the Italian Question," *Historical Papers*, Canadian Historical Association (1976) 97; and E. Gabba, "Le origini della Guerra Sociale e la vita politica Romana dopo l'89 a.C.," *Athenaeum* 32 (1954) 84 and note 5 = revised in *Esercito e società nella tarda repubblica romana* (Florence 1973) 247 and note 126 = *Republican Rome, the Army, and the Allies*, trans. P. J. Cuff (Berkeley 1976) 88 and note 126. As Badian (above, note 2) 118, note 2, notes, already in 1952 H. Hill, *The Roman Middle Class in the Republican Period* (Oxford) 131, note 5, had maintained that Bloch's date for the legation was much too early. Badian's dating of Scaevola's governorship to after his consulship has been questioned by T. R. S. Broughton, *MRR, Supplement* (1960) 42, and challenged by B. A. Marshall, who argues for an earlier date (c. 98 B.C.) ("The Date of Q. Mucius Scaevola's Governorship of Asia," *Athenaeum* n.s. 54 [1976] 117–30).

¹⁵ Ettore Pais, *Dalle Guerre Puniche a Cesare Augusto, Indagini storiche-epigrafiche-giuridiche* (Rome 1918), "M. Emilio Scauro, I suoi processi e la sua autobiografia," I 96–100.

¹⁶ A number of reference works provide no date, while still accepting that Scaurus was legate: E. Klebs, "Aemilius (140)," *RE* 1 (1893) 586; *D.G.*² (1899) 1.19; F. Münzer, "Servilius (50)," *RE* 2.4 (1923) 1786; *MRR* (1952) 2.16, note 6; H. G. Gundel, "Aemilius (28)," *Kl. Pauly* I (1964) 94; and G. V. Sumner, *The Orators in Cicero's Brutus: Prosopography and Chronology* (Toronto 1973) 69.

¹⁷ Badian (above, note 2) 107.

to an otherwise quite unknown action of refusing an unknown province.

It would be prudent to try to refer the Scaurus passage to a well-known legation, rather than to an unknown legation. In the absence of any textual problem, such as obscures the meaning of the Scaevola passage, it would be *prima facie* very surprising if Asconius, whose comments are usually so helpful, had only confused us, and presumably his contemporaries too, by alluding to an enigmatic *legatio* which, as far as we know, went unnoticed in other sources, and in the other commentaries of Asconius. For if he had previously mentioned it in a commentary no longer extant, he would probably have provided a cross-reference, with a phrase such as *ut supra diximus*, as is his custom (e.g., 25C line 15, 27C line 1). If Cicero had mentioned it in a now missing passage in the *pro Scauro*, Asconius could be expected to have explained the reference with a note on that passage. A possible source from which Asconius might have learned of Scaurus' embassy, had it occurred, would have been Scaurus' autobiography, which is cited by Valerius Maximus (4.4.11), Pliny the Elder (*NH* 33.21), Frontinus (*Strat.* 4.3.13), and Tacitus (*Agr.* 1.3), though, at least in Cicero's time, it was little read (*Brut.* 112). On the other hand, Asconius would not have expected his readers to be so conversant with the autobiography that they would not need notes on events referred to in it. In other words, Badian's and Bloch's reconstructions are hard to accept not only because they result in historical improbabilities, but also because they are based on an interpretation of Asconius which implies highly uncharacteristic obfuscation on his part.

Asconius' comment is not at all mystifying if we connect it with the famous *legatus* P. Rutilius Rufus and his mission, to which Cicero has just alluded in the passage on which Asconius is commenting. Cicero has said that, after the condemnation of Rutilius, no one, no matter how innocent, appeared safe from the wrath of the *equites*, and the courts which they controlled. Asconius clarifies Cicero's point. Servilius thought that he could injure Scaurus with a prosecution, albeit an illegal one (*adversus leges*),¹⁸ because the equestrian jurors were eager to convict. The *legatio Asiatica* which Asconius mentions is that of Rutilius. The phrase *ob legationis Asiaticae invidiam* does not refer to an offense committed by Scaurus which provided grounds for prosecution. Rather, like the clause which it glosses (*P. Rutilio damnato nemo tam innocens videretur ut non timeret illa*), it informs us of the political climate which led Servilius Caepio to initiate his prosecution—the "reign of terror" which followed

¹⁸ If Asconius has specific laws in mind, he does not specify which they are—probably the Servilian extortion law itself and conceivably the *lex Remmia* relating to *calumnia*, a law which may have been passed in this decade (*MRR* 2.13; cf. 2.473).

the condemnation of such an innocent man, faced with jurors biased against him because of his interference with their interests.

In fact, there is another point at which Asconius uses the phrase *ob invidiam* to describe a *prejudicial climate* behind a trial, rather than to introduce the *legal grounds* for a trial. Cicero in the *in Pisonem* (95) has mentioned L. Opimius (cos. 121), and Asconius comments (17C):

Notum est Opimium in praetura Fregellas cepisse, quo facto visus est ceteros quoque nominis Latini socios male animatos repressisse, eundemque in consulatu Fulvium Flaccum consularem et C. Gracchum tribunicium oppressisse, *ob quam invidiam* postea iudicio circumventus est et in exilium actus.

It is known that he had taken Fregellae in his praetorship (125 B.C.), and by this deed he seemed to have checked the rest of the allies of the Latin name, and that the same man in his consulate had put down the consular Fulvius Flaccus and the tribunician C. Gracchus, and on account of this indignation he was thereafter ruined in a trial and driven into exile.

Now we know that while these prior acts of cruelty caused a hostility, or prejudice, against him,¹⁹ they did not provide the grounds for his condemnation in 109 B.C., for he was prosecuted before, and condemned by, the special commission which investigated those alleged to have aided Jugurtha (Sall. *Iug.* 40.1).²⁰

In the case of Opimius, he himself, many years before, had caused the *invidia* from which he later suffered; in the case of Scaurus, someone else, namely Rutilius, had aroused the *invidia* from which Scaurus suffered. There are several possible explanations as to why *invidia* against the actions of Rutilius might have adversely affected Scaurus. There might have been a direct connection between the *legatio* of Rutilius and Scaurus. Badian speculates that Scaurus might have been the chief proponent of the mission of Scaevola and Rutilius to Asia. The charges against him might have been connected with the case against Rutilius; in particular, as Badian suggests,²¹ the prosecution against Scaurus could have been designed to recover money allegedly stolen by Rutilius which had come into the hands of Scaurus, under a *quo ea pecunia pervenerit* procedure, such as we see operating against Rabirius Postumus in 54 B.C. under the *lex Iulia*

¹⁹ Not only Asconius, but also Vell. 2.7.3.

²⁰ Cicero too uses *invidia* to denote an existing prejudice or hostility, as in *Brut.* 127: *Nam (C. Sulpicius Galba) rogatione Mamilia, Iugurthinae conturbationis invidia, cum pro sese ipse dixisset, oppressus est.* A. E. Douglas, in his commentary (Oxford 1966) 102, translates, "because of the hostility aroused by the allegations of conspiracy with Jugurtha." Here, it should be noted, the political hostility and the actual charges both arise from the same matter. Also *Har. Resp.* 43 *invidia Numantini foederis.*

²¹ Badian (above, note 2) 120.

repetundarum. But this is speculation, since neither Cicero nor Asconius actually states that Scaurus was involved in the legation of Rutilius. Scaurus might have been indirectly connected to Rutilius by his status as adviser to Livius Drusus (Cic. *dom.* 50), whose judiciary legislation was probably motivated by the conviction of Rutilius, the uncle of Drusus.²² Though that legislation was introduced after the trial of Scaurus for extortion (Asc. 21C), the equestrian jurors may have already felt hostility to Drusus, if for no other reason than that he was the son of Gaius Gracchus' opponent (tr. pl. 122), and they may therefore have appeared likely to convict Scaurus. Or, conceivably, there may have been no connection at all between Scaurus and Rutilius; Scaurus undoubtedly, at some stage in his long career, had aroused equestrian ire. After all, Cicero claims, in the passage under discussion, that everyone, not just those who had been associated with Rutilius, stood the risk of possibly groundless accusation and conviction. His claim may be exaggerated, since by it he is attempting to diminish the harmful effect which the prosecution of the elder Scaurus would have on his client, the younger Scaurus. But the claim may have had some basis in fact; certainly the political and judicial tumult of the next few years, notably the many prosecutions under the *lex Varia*, ostensibly for aid to the rebellious allies, suggests that the conviction of Rutilius did usher in a period in which the courts were abused for political ends. Caepio, in prosecuting his enemies, not only Scaurus but also L. Marcius Philippus (cos. 91) (Flor. *Epit.* 2.5.5), may well have been attempting to take advantage of the disregard for the facts which the jurors had shown in convicting Rutilius. Quite possibly, it was a combination of two or all three factors—a direct connection with the *legatio* of Rutilius, advisory status to Livius Drusus, and the jurors' propensity to convict even the innocent—which persuaded Caepio (wrongly, as it turned out)²³ that he could succeed in a possibly weakly substantiated and even illegal prosecution of Scaurus.

If Asconius does not say that Scaurus was legate to Asia, then the accusation that he had received a bribe from Mithridates cannot stand as independent testimony to an Asian legation. That accusation might have been raised at the trial in a general attack on his character, but there must have been many other occasions, forensic and otherwise, when it might have surfaced.²⁴ It might have constituted a legal basis for the

²² See E. J. Weinrib, "The Judiciary Law of M. Livius Drusus (tr. pl. 91 B.C.)," *Historia* 19 (1970) 434. However, as far as we know from Asconius, Scaurus urged Drusus to reform the courts only after Caepio began to prosecute him (Scaurus).

²³ That Scaurus was not convicted can be inferred from his continued political activity in 91 B.C., and from Caepio's prosecution of him under the *lex Varia* the next year (sources *MRR* 2.27).

²⁴ Allegations that Mithridates had corrupted Roman politicians may have been a common topic of abuse; it was used against the whole Senate (including Scaurus, of course) by Saturninus (Diod. 36.15). My thanks to Erich S. Gruen for pointing this out to me.

prosecution, but only if the extortion law of Servilius Glaucia, under which Scaurus was tried, provided that a senator could be prosecuted for receiving a bribe from a foreign potentate. (It is worth noting in this connection that those who wished to prosecute senators for having received bribes from Jugurtha proceeded under a special *lex Mamilia* rather than the Acilian extortion law.) Even if Scaurus did accept a bribe from Mithridates, that bribe in itself is no evidence that he ever travelled to Asia Minor. If we may place any credence in Cicero's admittedly exaggerated testimony,²⁵ he was a very powerful man in foreign affairs, and he certainly could have negotiated for, and collected, a bribe from Mithridates through intermediaries, without an arduous journey to meet that potentate in person.

If Scaurus was not a legate to Asia Minor, and if therefore this legateship did not form the legal basis for Caepio's prosecution, then we do not know on what legal grounds he was accused under Glaucia's extortion law. It is often difficult to determine the legal basis of an extortion prosecution, and if the prosecution was illegal, as Asconius says, the task is doubly difficult. For then, since it might have been the charges themselves which were legally improper, we cannot use what we know about extortion laws to speculate on the nature of those charges. In view of the paucity of information about the nineties, it should not come as a surprise that our knowledge of the trial is limited to what Cicero and Asconius actually tell us, and that unanswered questions remain.

Yet it can perhaps be said that an extortion procedure against Scaurus came as no surprise. The very fact that Cicero lists, in the *pro Scauro*, the prosecutions against his client's father, presumably in an effort to diminish their effect against his client, shows that the reputation of the father—however much Cicero may praise him—was a possible threat to the son. In fact, a passage in Pliny's *Natural History* (36.113–16) suggests that the son was thought to have inherited an excessive fortune from, among others, his father, and that his father was thought to have enriched himself with extorted money: *totiens princeps civitatis et Mariani sodalicii rapinarum provincialium sinus* (NH 36.116). Whatever this puzzling language says about the relationship between Marius and Scaurus, it does imply that Scaurus the father might well have appeared to be a likely target for a successful extortion trial, especially at a time when the jurors appeared prone to convict.²⁶

It seems reasonable to conclude that Asconius does not refer to an otherwise unknown legation of Scaurus as ambassador to Asia Minor, but rather to the well-known legation of Rutilius Rufus as lieutenant to the

²⁵ Font. 24: . . . cuius . . . nutu prope terrarum orbis regebatur . . .

²⁶ See Elfrieda Frank, "Marius and the Roman Nobility," *CJ* 50 (1955) 150, Gruen (above, note 12) 58.

proconsul Scaevola in the province of Asia. In the absence of any other evidence for a legation of Scaurus, it would be prudent to remove that office from the list of his many honors. Scholars may wish to modify reconstructions of the politics of the nineties, to the extent that these reconstructions employ this legation as evidence.

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