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Late Impeachment: An In-Depth Account of the Belknap Trial, by Thomas Berry (Part One)

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(Part 1: Constitutional Text)

Since the House of Representatives impeached President Trump for the second time on January 13th, a widespread debate has ensued over the constitutionality of the Senate trying a former president. In recent weeks, many legal scholars have offered arguments both for and against the Senate's jurisdiction to try former President Trump. In a preliminary vote, the Senate tabled an objection to the trial's constitutionality by a 55–45 margin. But some senators who voted not to table that objection have indicated they are still undecided on the ultimate constitutional question.

Michigan State Law Professor Brian Kalt has written the definitive Article on this question, exploring the arguments on both sides and coming out in favor of the Senate's jurisdiction to try and convict former officers. *See* Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13 (2001). It is impossible to match Professor Kalt's Article in scope. This four-part series will instead focus more narrowly on just one precedent, which Kalt calls "the single most important precedent in the realm of late impeachment." *Id.* at 94. That precedent is the 1876 impeachment trial of former Secretary of War William Belknap, who resigned from office a few hours before the House impeached him. *Id.* at 95. Belknap was tried and ultimately acquitted by the Senate, but not before the Senate found by a 37–29 vote that it retained jurisdiction to try Belknap notwithstanding his resignation. *Id.* at 97. Arguing in favor of the constitutionality of trying former President Trump, Senate Majority Leader Chuck Schumer (D-NY) cited the precedent of the Belknap trial.

The debates at the Belknap trial are thus a crucial piece of history for today's constitutional moment, but they are currently not easily accessible without significant effort. The arguments by the House impeachment managers and Belknap's defense counsel on the question of jurisdiction span 45 dense pages of the Congressional Record. *See* Congressional Record: Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War 28–72 (Government Printing Office, Washington 1876). Further complicating matters, many of the arguments made during the Belknap trial are not relevant to Trump's trial because they focused on questions that are not at issue in Trump's trial. These included debates over the relevance, if any, of: 1. Belknap's having resigned as opposed to his term having expired; 2. Belknap's having resigned for the purpose of evading impeachment; 3. Belknap's having left office before the House had formally voted to impeach him; and 4. Belknap's having left office only a few hours before the impeachment vote, as opposed to at least a full day.

The purpose of this series is to summarize the remaining *relevant* arguments from the Belknap trial.[1] In each part of this series, I will recount the arguments made by both sides on one of the four major topics of argument at the jurisdictional portion of the trial: text, history, intent, and consequences. As the Senate prepares to begin former President Trump's trial in earnest on February 9th, this series can be used as a roadmap to understand the arguments that the Senate heard in a similar trial 145 years ago.

Constitutional Text

Unlike most topics in the Constitution, impeachment is mentioned in *both* Article I, which establishes the legislative branch, and Article II, which establishes the executive branch. Article I includes clauses mandating that the House of Representatives "shall have the sole Power of Impeachment" and that the Senate "shall have the sole Power to try all Impeachments." U.S. Const. art. I, § 2, cl. 5; § 3, cl. 6. In addition, Article II includes a clause (which I will call the "removal clause") requiring that the "President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. In debating the import of these various clauses, Belknap's defense counsel relied primarily on Article II to argue *against* jurisdiction, while the House impeachment managers relied primarily on Article I to argue *for* jurisdiction.

Arguing against jurisdiction, Belknap defense counsel Montgomery Blair insisted that the list of persons found in the removal clause of Article II (the "President, Vice President and all civil Officers of the United States") represented the sum total of persons who could be impeached. Pointing to this list, Blair contended that "only those persons who are specially described in the Constitution are subject to be impeached." Belknap Trial 28. That was because, Blair argued, the persons named in the removal clause were "the only persons specified as subject to impeachment[.]" *Id.* at 29. Thus, Blair maintained, a person must qualify as either the President, Vice President, or one of the "civil Officers of the United States" in order to be "made subject to impeachment." *Id.*

If indeed a person not found in the removal clause's list could not be impeached, then it followed, Blair argued, that a former officer could not be impeached. Given that Belknap was at the time a *former* secretary of war, Blair framed the determinative question as "whether the term *'officer'* can be applied to a person not at the time in the holding of an office." *Id.* (italics in original). Blair contended that the term could not be so applied. That was because the removal clause did not list "persons who have been President, Vice-President, or civil officers, but only persons who can be at the time truly described as President, Vice-President, or as civil officers[.]" *Id.*

Another member of Belknap's defense team, Matthew Carpenter, similarly insisted that the removal clause only "authorizes an impeachment of certain persons, described by the class to which they belong; that is, civil officers of the United States." *Id.* at 40.

The third and final member of the defense team, Jeremiah Black, echoed his colleagues in contending that only persons named in the removal clause could be impeached. And Black argued that in ordinary English usage, a former officeholder does not qualify as either the President, Vice President, or one of the "civil Officers of the United States." Black said "[w]hen we speak about *the* President do we ever refer to anybody except the incumbent in that office? A

half-grown boy reads in a newspaper that *the* President occupies the *White House*; if he would understand from that that all Ex-Presidents are in it together he would be considered a very unpromising lad." *Id.* at 71 (italics in original).

Black pointed out that where other provisions of the Constitution used the word "the" to refer to a position, it was understood that they referred only to the current occupier of that position. "Where it is provided that the Vice-President shall preside in the Senate," Black noted that even the lawyers on the other side "know very well that nobody is included but the actual incumbent." *Id.* And Black argued that this was also true for statutes. "Statutes have been passed declaring that the members of Congress shall have certain privileges, such as franking letters and receiving an annual compensation out of the Treasury," Black recounted. *Id.* "Did anybody ever claim," he then asked rhetorically, "that this extended to old members retired from public life?" *Id.* To Black, these examples showed that when "the Constitution says that all civil officers may be impeached, it is a violation of common sense to hold that the power may be applied to a late Secretary of War or other person who does not at the time actually hold any office at all." *Id.*

Belknap's defense also relied on the latter half of the Article II removal clause, which states that an officer "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Based on this text, Blair maintained that the Senate could only "entertain articles of impeachment" against a person "who can 'be removed from office on impeachment and conviction of treason,' &c." *Id.* at 29.

Picking up this line of argument, Carpenter reasoned it necessarily followed "that impeachment can only be brought against one who is an officer of the United States at the time of impeachment." *Id.* at 38. To Carpenter, the mandatory nature of removal demonstrated that impeachment "is only a proceeding to remove an unworthy public officer." *Id.* at 37 (emphasis removed). Anticipating the rebuttal of the House impeachment managers, Carpenter rejected the theory that removal is mandatory only "when the person impeached happens to be" a current officeholder. *Id.*

Black likewise insisted that removal was necessary in *all* cases of impeachment. Summing up the defense's position, Black concluded by asking rhetorically "[h]ow can a man be removed from office who holds no office? How turn him out if he is not in?" *Id.* at 71.

But the language in the Article II removal clause was not the only constitutional language the defense used for support. The defense also brought up language in Article I requiring that "[w]hen the President of the United States is tried, the Chief Justice shall preside[.]" U.S. Const. art. I, § 3, cl. 6. Carpenter argued that this text, like the removal clause, demonstrated a presumption that only current officeholders could be impeached. Otherwise, Carpenter insisted, strange paradoxes would follow. Carpenter pressed that under the House impeachment managers' view "that once a President is always a President for the purposes of impeachment," the necessary logical conclusion would be that "the Chief Justice would have to preside" over even the impeachment of a *former* president. Belknap Trial 40. To Carpenter, this was an absurd conclusion and an indication that the premise leading to the conclusion must have been false: "General Grant is President," and thus the impeachment of any president who served before Grant "would be an impeachment of a private citizen, and not of the President." *Id.*

Black likewise highlighted the difficulty of fitting the Chief Justice clause into a theory of impeachment for former officeholders: "The question has been propounded repeatedly, and by

several Senators, who would preside if an Ex-President was impeached? I admit that that is a puzzle. The puzzle arises out of the absurdity of impeaching an Ex-President. Our friends on the other side are so hampered by their own theory that they are obliged simply to decline answering." *Id.* at 71.

Arguing in favor of jurisdiction, the House impeachment managers repeatedly urged an alternate reading of the Article II removal clause. They argued that the clause did not limit *all* impeachments to cases where an officer could be removed, but rather required only that a convicted officer must be removed *if* he was currently in office. To bolster this interpretation, the House impeachment managers frequently reminded the Senate that the Constitution provided for *two* possible punishments upon impeachment and conviction: both "removal from Office" and "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States[.]" U.S. Const. art. I, § 3, cl. 7. The possibility of disqualification, they insisted, meant that the removal clause should not be interpreted as mandating removal in *all* cases.

Representative J. Proctor Knott (D-KY) granted that "if at the time of conviction the party convicted is in office, all discretion is taken from the Senate" and that "they are then bound to remove him." Belknap Trial 47. But Rep. Knott held that the removal clause said "only that and nothing more," leaving open the possibility of convicting those not in office. *Id.* Knott maintained that nothing in the removal clause "takes away from the Senate the power to disqualify, although the power to remove may have been taken away by the resignation of the party accused." *Id.* Knott suggested it would be absurd to conclude "that you cannot disqualify because you cannot remove" since this would require accepting a more general premise "that you cannot render a portion of the judgment because you cannot the whole." *Id.*Indeed, Knott reasoned further that because disqualification was made an available punishment and "this punishment is applicable to persons who are not officers as well as to those who are, it follows that the power of impeachment, if its extent be measured by that of the power of punishment, is applicable to all persons, whether officers or not." *Id.* at 65.

Representative Scott Lord (D-NY) similarly interpreted the removal clause as a requirement that *if* a convicted person "is in office, of course under the Constitution he must be removed." *Id.* at 34. But Rep. Lord rejected reading the removal clause as saying that "no judgment can be pronounced without pronouncing the judgment of removal." *Id.*Rep. Lord contended that if an officer is "out of office, the sentence of disqualification or some inferior sentence may be passed upon him, for the obvious reason that the sentence is divisible." *Id.*

Representative George A. Jenks (D-PA) also declared that the removal clause "simply signifies that if the criminal civil officer shall not before have been removed, the removal shall in all cases be inflicted as part of the sentence of the court." *Id.* at 53. "If he be not in office," Rep. Jenks argued, "that portion of the judgment cannot be inflicted, but still whatever judgment the circumstances warrant, not exceeding full disqualification, may be imposed." *Id.* at 48. Jenks thus rejected the view that if the Senate "cannot inflict the whole punishment prescribed by law, it has no jurisdiction and cannot inflict any portion of it." *Id.* at 52.

Representative George F. Hoar (R-MA) likewise held that the Senate's power to remove and disqualify "authorizes any lesser penalty included within those limits to be imposed at the discretion of the Senate." *Id.* at 61. Rep. Hoar noted, by analogy, that it would have been absurd to argue "that when a statute prescribes two punishments, one of which has become impossible, that the offender is thereby exempted from the other." *Id.*

The House impeachment managers also responded to the other textual arguments made by the defense. Rep. Knott rejected the argument that the difficulty of interpreting who should preside over a former President's trial implies that former Presidents cannot be tried. "There is another case not provided for, and that is, who shall preside in case the Vice-President is upon trial? Yet I suppose that no one would pretend that the Vice-President could not be tried because that is an open and unsettled question. These are simply matters that will have to be settled by the Senate when the exigency arises." *Id.* at 68.

In addition, Rep. Hoar contended that late impeachment would still be permissible even if it were accepted, for the purposes of argument, that the persons named in the removal clause were a complete list of those who could be convicted. The question, as Hoar framed it, would then be whether the phrase "[t]he President, Vice President and all civil Officers of the United States" should be "taken to apply to them at the time of the commission of the offense or at the time of the punishment?" *Id.* at 61. Hoar insisted that the phrase must refer to their status at the time of commission. "Suppose a statute enact that all wrong-doers may be punished. Is it not clear that if they be wrong-doers when they commit the act the liability to punishment attaches?" *Id.*

Rep. Lord similarly argued that to the extent the text of the removal clause limited the impeachment power, "the limitation of the Constitution is not as *to time*; it simply relates to a class of persons." *Id.* at 34 (emphasis in original). Lord bolstered this conclusion with a textual analysis of "the real intent and meaning of the word 'officer' in the Constitution." *Id.* Observing that even former officers continue to carry the prestige of their title for the rest of their lives, Lord maintained that the word officer "is but a general description" and that an "officer in one sense never loses his office. He gets his title and he wears it forever, and an officer is under this liability for life." *Id.*

Rep. Jenks likewise insisted that even if the list in the removal clause was indeed a limitation on impeachment jurisdiction, it should be interpreted according to the standard rule of criminal law that "the locality or status of the criminal at the commission of the crime" establishes both "his guilt and the jurisdiction to which he should be held amenable." *Id.* at 50–51. Offering an analogy, Jenks pointed out that if a statute criminalized embezzlement by cashiers or trustees, that would not mean a criminal could escape punishment for the crime "by resigning the office of cashier or trustee." *Id.* at 51. Making his point plain, Jenks asked the Senate to "[s]ubstitute for cashier or trustee the case of a President committing treason, bribery, &c." *Id.*

Jenks concluded that to be lawfully impeached a person "must be President at the time he did this wrong," not "at the time of conviction or at the time of sentence." *Id.* Indeed, Jenks observed that the federal bribery statute criminalized any "member of Congress or any officer or agent of the Government who directly or indirectly takes, receives, or agrees to receive any money, property, &c.," and that this statute had always been interpreted to allow the prosecution of former officers who had taken bribes while in office. *Id.* Jenks also reminded the Senate that the court martial system had been interpreted to allow punishment of former military officers for offenses committed while they were in the military. *Id.*

But the House impeachment managers did not just respond to the textual arguments made by Belknap's defense counsel; they also brought up constitutional clauses that were more favorable to their own position. Jenks focused on the Article I command that "[t]he Senate shall have the sole power to try all impeachments." *Id.* at 48. Specifically, Jenks highlighted the word "all." Jenks reasoned that because "'all impeachments' are expressly included in the grant, it would

seem to forbid that some who have committed impeachable crimes could, by their own act or the act of any earthly power, place themselves without the pale of this comprehensive declaration." *Id.* Jenks argued that even when removal was impossible because an officer had left office, this clause gave the Senate jurisdiction to "try and decide and execute so far as the circumstances of the criminal will permit[.]" *Id.* at 55. Jenks concluded that Article I provided "a complete definition of [the impeachment] powers, and a definition that in itself is amply sufficient for a limitation of jurisdiction and for the conferring of the ample powers of the grant." *Id.* at 49.

Rep. Hoar similarly contended that Article I "contain[s] a complete provision for impeachment. The House is vested with the sole power of impeachment. The Senate is vested with the sole power to try all impeachments." *Id.* at 60. Article I thus provided, according to Hoar, "an adequate and ample provision covering the entire process: authority to institute it, authority to try it, the method of proceeding, and the limitation of the judgment." *Id.*

Echoing his colleagues, Rep. Knott averred that "the Constitution vests in the House of Representatives the power to institute proceedings by impeachment, and clothes [the Senate] with full and complete jurisdiction to try all cases of impeachment[.]" *Id.* at 65.

Of course, the Senate's power to try "all Impeachments" raised the question: what exactly was meant by the word "impeachment," which the Constitution did not define? Debating the meaning of this clause necessarily required debating the extent to which the Constitution incorporated the prior English practices of "impeachment." That itself was the subject of another debate at the Belknap trial, which I will recount in the next part of this series.

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