Yale Journal on Regulation

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

Thomas Berry

February 5, 2021

Part 2: The History of the Word "Impeachment"

This is the second part of a four-part series on the 1876 impeachment trial of former Secretary of War William Belknap. In each part, I will examine a different category of argument made at that trial on the question whether the Senate has constitutional jurisdiction to try and convict a former officer. In Part 1, I summarized the arguments at the trial based on constitutional text. In this part, I turn to the arguments based on the history and meaning of the word "impeachment" and the English practice of impeachment prior to the drafting of the U.S. Constitution.

As a reminder, Article I of the U.S. Constitution 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.

**Arguing in favor of jurisdiction**, House impeachment manager Representative Scott Lord (D-NY) acknowledged that the Constitution did not define the word "impeachment." In the absence of a definition, Rep. Lord argued that "the common law [is] in force in regard to impeachment" and that "there is nothing to prevent the House of Representatives of the United States exercising the right to impeach the citizen as fully as can the House of Commons of Great Britain."Congressional Record: Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War 34 (Government Printing Office, Washington 1876).

Representative George F. Hoar (R-MA) similarly argued (quoting a legal treatise) that "[i]mpeachments are thus introduced [in the Constitution] as a known definite term, and we must have recourse to the common law of England for a definition of them." *Id.* at 60. By way of analogy, Rep. Hoar noted that many other words used in the Constitution went undefined in the Constitution itself and were understood by reference to the common law, including "admiralty," "maritime," "levying war," "felony," "bribery," and "quorum." *Id.* Hoar thus concluded that "[t]he word 'impeachment' meant, when used in the Constitution, the right to proceed according to the usages of Parliament against such persons and for such offenses as those usages permitted." *Id.* Thus, "[f]or what is meant by impeachment, what offenses it shall cover, and what persons are liable to it, for the forms of pleading and rules of evidence recourse must be had to the common law." *Id.* Hoar then explained that the impeachment power in England was broad, noting that "all abuses of official trust are impeachable in Parliament" and that "there is no limit as to time[.]" *Id.*

Representative George A. Jenks (D-PA) similarly observed that "English precedent, whence the framers of the Constitution derived their opinions on the subject, are distinctly in favor of the

court retaining its jurisdiction in this case." *Id.* at 53. "Once guilty," Rep. Jenks explained, an officer under the English system "is for life at the mercy of the impeaching tribunal." *Id.* at 54. Jenks recounted the impeachment of former Governor-General of Bengal Warren Hastings by the British Parliament. That impeachment was initiated in 1786, and Hastings was first brought before Parliament in May 1787, while the Constitutional Convention was ongoing. For that reason, Jenks noted that Hastings's "case has a peculiar significance when it is remembered that it was so very recent as to be immediately in the presence of the framers of the Constitution—their daily reading at the very time they were engaged in their labor." *Id.* at 53. Jenks also emphasized that Constitutional Convention delegate George Mason "expressly cited" the Hastings case "to show the scope of the power of impeachment in England[.]" *Id.* Jenks insisted that if the Framers did not want the Hastings case to be used as "a guide as to what impeachment meant," they would have "thought to guard this by an express clause that an officer could not be impeached after he had gone out of office[.]" *Id.*

Given this history and the lack of any express distinction in the constitutional text, Jenks concluded that the Constitution adopted the language "of English parliamentary law; and whatever [impeachment] then signified the framers of the Constitution meant it should signify here; otherwise it is meaningless, and the whole grant an inanity." *Id.* at 50. Based on the history and development of impeachment in Germany and Great Britain, Jenks then elaborated that "the definition of impeachment as used in the Constitution" is "the parliamentary prosecution of official crimes." *Id.* Jenks contended that "the Constitution, when it says the Senate shall have the power to try all impeachments, says this Senate shall have power to try all cases of official crime[.]" *Id.* Or as Jenks later put it succinctly, "the very word 'impeachment' itself defined that it included nothing but official crime." *Id.*

Rep. Hoar similarly held that the Constitution's silence on the subject of late impeachment should be interpreted as adopting the English status quo. "It seems impossible that [the Framers] should not have expressly confined impeachment to persons in office, if it had been their desire so to confine it. It seems impossible that any provision so confining it would have got into the Constitution without debate." *Id.* at 60.

Representative J. Proctor Knott (D-KY) pressed the same argument. If in fact "the framers of the Constitution did intend that no person should be impeached unless he should be in office at the time of the impeachment," Rep. Knott asked rhetorically "why they did not say so" and "why they did not express it in some clause upon the face of that instrument[?]" *Id.* at 65. Given the Framers' knowledge that late impeachment was permissible in England, Knott insisted that "if they had intended that no man should be impeached except he should be in office at the time, they would doubtless have said so in plain, unmistakable terms[.]" *Id.* Knott concluded that this silence required accepting late impeachment. "[T]he very moment [an official] commits an impeachable offense he becomes liable to impeachment; and, as there is no provision in the Constitution exonerating him from that liability until his conviction or acquittal on impeachment, it must continue, notwithstanding the termination of his official service, whether by resignation, removal, or lapse of time." *Id.* at 67.

Rep. Lord emphasized, however, that under his and his fellow House managers' interpretation, impeachment in the U.S. would not actually extend as far as in Great Britain. This was because of protections found *elsewhere* in the U.S. Constitution. The most important of these protections was the constitutional provision "which guarantees to every citizen the right of trial by

jury[.]" *Id.* at 34. Rep. Hoar similarly emphasized the Constitution's express prohibition on bills of attainder. *Id.* at 56. Given these explicit limitations, Rep. Lord reasoned that private citizens who had never been officers could not be impeached. *Id.* at 34. Thus, Lord summed up the House impeachment managers' view that under the American system, "impeachment was only intended for *a public officer, either while in office or after he has left office,* for offenses committed while in office." *Id.* (emphasis in original).

**Arguing against jurisdiction**, Belknap defense counsel Jeremiah Black entirely rejected the premise that the word "impeachment" in the U.S. Constitution should be interpreted by looking to the English practice of impeachment. Given that a major purpose of the U.S. Constitution had been to prevent abuses of power seen in England, Black argued that there should be no presumption that the word "impeachment" was intended to include by reference the totality of the British Parliament's power. "We acknowledge that the power of Parliament in that country is unlimited, and for that very reason there is no resemblance, except in the name of the thing, between impeachment here and impeachment there. The great purpose and object of our Constitution was to protect our people against the power that had been so much abused in England." *Id.* at 70.

Defense counsel Matthew Carpenter likewise maintained that given how expansive the English power of impeachment was, the American impeachment clause should not be interpreted to "confer a power as broad as" the power that had been "exercised by the British Parliament in regard to the persons who may be impeached and the crimes for which impeachment may be had." *Id.* at 37.

Belknap's defense focused less on the question of impeachment in England and more on the intent of the Framers themselves as discerned from James Madison's notes from the Constitutional Convention. That constituted the third major category of argument: evidence from the drafting of the impeachment clauses at the Convention. I will turn to those arguments in the next part of this series.

*Thomas Berry is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the* Cato Supreme Court Review.