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

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Part 3: Evidence from the Drafting of the Impeachment Clauses

This is the third 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 Part 2, I turned to the arguments based on the English practice of impeachment prior to the drafting of the U.S. Constitution. In this part, I reach the arguments based on James Madison's notes from the Constitutional Convention on the framing of the impeachment clauses.

As a reminder, the Constitution provides 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. In addition, the "removal clause" of Article II states 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.

Arguing against jurisdiction, Belknap defense counsel Montgomery Blair insisted that the understanding of the Framers at the Convention was that impeachment would only be available for officers currently in office. Blair argued that the records from the Convention showed that removal was the primary purpose of the impeachment clauses. Blair noted that the additional potential punishment of disqualification was added toward the end of the Convention, by the committee of detail. Blair reasoned that, given the lack of discussion around this addition, the disqualification clause appeared to have been added almost as an afterthought. *See* Congressional Record: Containing the Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War 30 (Government Printing Office, Washington 1876). "In no part of the debate" at the Convention, "from the beginning to end, was [disqualification] a subject of discussion. And it has in fact no relation to the subject, which was simply whether the Executive should be removed by impeachment. It is but an addition to the judgment, which might or might not be added if impeachment should take place." *Id.*

Blair pointed out that if the Constitution had limited the consequences of impeachment solely to removal, as it did during the drafts used through most of the Convention, then impeachment

would indisputably have been limited solely to current officers. Given that the additional punishment of disqualification was added so late and without discussion, Blair argued that "the disqualification clause did not enlarge the category of persons subject to impeachment" and that impeachment therefore remained limited to current officers. *Id.* In other words, Blair interpreted the lack of discussion of the disqualification clause as an indication that "the framers of the Constitution never contemplated the prosecution of anybody not at the moment holding office." *Id.* The sole focus of discussion at the Convention on removal, Blair contended, showed that "[a]ll the reasons upon which the [impeachment] proceeding was supposed to be necessary were applicable only to a man who wielded at the moment the power of the Government[.]" *Id.*

Another defense counsel for Belknap, Matthew Carpenter, reinforced this point by reminding the Senate that the entire discussion of impeachment at the Convention focused on removal. When the Convention took a vote as to whether the Constitution should include the Article II removal clause, the exact wording of the proposition voted upon was: "Shall the Executive be removable on impeachment[?]" *Id.* at 38. Since "the principal debate in the convention" focused on removal, Carpenter held that "no member of the convention entertained the idea that impeachments should be employed against any but public officers." *Id.*

Carpenter bolstered this interpretation by offering an explanation for why the disqualification clause might have been added late in the Convention and without discussion. Carpenter averred that the "disqualification clause of punishment was evidently put in for the purpose of making the power of removal by impeachment effectual." *Id.* at 42. Carpenter reasoned that without the disqualification clause, an executive-branch officer who had been impeached and removed could be reinstated by the President the next morning, which would give the President "substantially the power of pardon." *Id.* Carpenter speculated that the reason disqualification "is not a necessary part of the judgment" is because this concern only arises for appointed officials. *Id.* Carpenter suggested that the Senate "might impose [disqualification] where you had removed an officer appointed by the President whom the President could re-instate. You could stop that by fixing disability upon the officer; and that I take to have been the sole purpose of this clause." *Id.*

Arguing in favor of jurisdiction, the House impeachment managers used Madison's notes from the Convention to once again stress the relative importance of the Constitution's Article I impeachment clauses. (Recall that 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.) At the same time, the House impeachment managers also used Madison's notes to rebut the defense's argument that the removal clause of Article II was intended to limit jurisdiction to current officers. Instead, the impeachment managers offered an alternative explanation—that the removal clause was included to clarify that the President's four-year term could be shortened by impeachment.

According to Representative George F. Hoar (R-MA), the structure of the Constitution showed that the impeachment clauses of Article I established the impeachment power. It was Article I, Rep. Hoar insisted, that "extended the [impeachment] power to all cases of national official wrong-doers[.]" Belknap Trial 57. And Hoar observed that the Article I impeachment clauses were included in the Constitution "without an objection from any quarter, reported unanimously from the committee of the whole[.]" *Id.* at 58.

Hoar argued that the removal clause of Article II was only added because the Framers thought it was necessary as a caveat to the otherwise mandatory terms of office for the President and judges. Hoar noted it was only later on in the drafting process, when the Framers "came to provide that the judge should hold office during good behavior, and that the President should hold for four years, and the Vice-President also, in order that there might be no apparent repugnance, they said these officers may be removed, however, on judgment and conviction on impeachment." *Id.* at 57. In other words, Hoar maintained that the removal clause was added "to guard against the argument that officers, whose term is fixed in the Constitution, cannot be removed under the power of impeachment[.]" *Id.* at 61.

Hoar stressed that when the removal clause was proposed and debated "the general power to impeach, to try, and to convict, had been already conferred in the amplest manner" in Article I. *Id.* at 57. But the Framers may have believed that Article II's explicit rule that the President serves for four full years would have served as a *limitation* on the extent to which a sitting President could be punished via impeachment, unless a removal clause were added. Thus, Hoar understood the debate over whether to include the removal clause to be only a debate over "whether the President should be liable to be impeached while in office or only after the expiration of his term." *Id.* In Hoar's view, the removal clause was specifically placed in Article II, "as an exception to the clauses which previously had determined the tenure of" the President and Vice President. *Id.* In sum, when this language "was added the convention was dealing with the tenure of executive office. They had passed from the subject of impeachment." *Id.* at 58.

Bolstering this interpretation, Representative George A. Jenks (D-PA) highlighted what he believed to be a telling passage from Madison's notes. In debating whether to include the removal clause, Charles Pinckney had urged that the President "ought not to be impeachable *while in office*." *Id.* at 53 (emphasis supplied by Rep. Jenks). Jenks noted that Pinckney did not object to including the more general impeachment power that had been granted in Article I. *Id.* From this, Jenks concluded that even if Pinckney had gotten his way and the removal clause in Article II had been excluded, the President would still have been "subject to the general jurisdiction" granted in Article I and thus would have been "impeachable at the discretion of the House." *Id.* Jenks took this to imply that the President, like all officers, "was to be impeachable when out of office[.]" *Id.* Jenks thus maintained that when the Framers were debating the removal clause, they "were not discussing . . . whether the right of impeachment should exist at all, but whether the President, speaking of him alone and no other civil officer, should be removed. The query was whether he ought to be impeached while in office or left until after he had gone out[.]" *Id.* at 54.

Rep. Hoar also contended that Pinckney's statement "shows the understanding perfectly, that under the general [Article I] clause [the President] was impeachable after he left office, but that his four years' term, according to Mr. Pinckney, should go on." *Id.* at 58. In addition, Hoar called attention to a change in the wording of the removal clause during the Convention drafting process. Hoar presented this change as further support for his view that the removal clause was never intended to limit impeachment jurisdiction. Hoar recounted that an earlier draft of the removal clause had read: "The President *shall be removable* on impeachment by the House of Representatives and conviction in the Senate. . . ." *Id.* (emphasis added). Later in the Convention, Hoar explained, the delegates "voted, without debate and apparently without division, to add to the clause making the President the subject of removal the further words 'the Vice-President and

all civil officers of the United States shall be removed from office on impeachment and conviction.'" *Id.*

Hoar argued that the only intention behind this amendment was to add the Vice President and other officers to the removal clause; the additional change in the language, from "shall be removable" to "shall be removed," was *not* intended to be meaningful. Given the lack of debate, Hoar asserted that this small shift in wording could not have been intended to be a substantive change and was not meant to limit the jurisdiction of impeachments to only current officeholders. Thus, Hoar concluded that the Framers viewed the meaning of the final version of the removal clause to be functionally the same as the original version, a clause only clarifying that the officers named are "removable." In other words, this history showed that the final "shall be removed" language "was inserted solely as a limitation on the tenure of office, and not as a limitation on the judgment on impeachment or on the jurisdiction." *Id.*

Given that there was much debate over the removal clause in Article II but no noted dissent to the general grant of an impeachment power in Article I, Hoar inferred that there was no dispute in the Convention "that the power to impeach" all officers except the President "should be as unlimited as it was in England, the extent of the punishment alone being restrained." *Id.*

Rep. Jenks similarly stressed that during all the debates at the Convention over whether to include the removal clause, "it never occurred to any one to doubt the propriety of impeachment after the criminal had gone out of office." *Id.* at 54. Jenks argued further that the placement of the removal clause in Article II rather than Article I bolstered the view that the removal clause was intended only to clarify that a President's term could potentially be shortened, *not* to narrow Congress's Article I jurisdiction over who could be impeached. Jenks pointed out that if the removal clause "were intended as a definition of the powers of the court of impeachment, either as to the persons on whom these powers should be exercised or the crimes of which it should take cognizance, the location [in Article II] is truly remarkable." *Id.* at 49. Jenks insisted that it would make no sense "to find a section with such an object among the powers and duties of the Executive." *Id.*

Representative J. Proctor Knott (D-KY) similarly held that the extensive debate over the removal clause was solely a debate over the question whether the President's four-year term should have the potential to be shortened by impeachment. Rep. Knott insisted that when the Convention debated the removal clause "[t]he question then was, not whether a man should be impeached after he was *out* of office, but whether the President should be impeached while he was *in* office. There was no objection anywhere, so far as I have been able to see, to the proposition that he might be impeached *after* the expiration of his term." *Id.* at 65 (emphasis in original).

With the text, prior history, and drafting of the impeachment clauses fully explored, there was still one more category of argument at the Belknap trial: the implications of permitting or denying late impeachments. I will recount those arguments in the fourth and final part of this series.

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