Attachment Twelve

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Dear Mr. Baron:

You asked for my views on an issue that has arisen in the impeachment proceedings regarding United States District Judge Judge G. Thomas Porteous, Jr. The House of Representatives has impeached Judge Porteous, and the matter is now before the Senate.

The question you asked me to address is whether the conduct for which a civil officer may be impeached, convicted, and removed from office includes only actions that took place while the officer held the office that is the subject of impeachment. Judge Porteous argues, in motions to dismiss two of the articles of impeachment, that conduct that took place prior to his appointment as United States District Judge cannot support impeachment.

In my view the Constitution imposes no such limitation. As I will explain, the important question concerning the relationship between the officer's alleged high crimes and misdemeanors and the officer's current office is not temporal. Rather, the question is whether the conduct, whenever it occurred, is such as to disqualify the officer from any longer holding the public trust.

Article II, Section 4 of the Constitution provides 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." The text identifies the individuals who are subject to impeachment and the kind of conduct for which they may be impeached, but does not impose any explicit requirement regarding the time at which a high crime or misdemeanor must have occurred. While that silence is not dispositive, it is significant, especially because the Constitution elsewhere draws such a distinction. The Ineligibility Clause of Article I, Section 6, provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." It would be too much to say simply that because the framers knew how to impose that kind of restriction, whenever they did not do so in so many words

they did not do so implicitly, but the drafters' familiarity with the possible importance of terms of service does make it less likely that they would have left the restriction to be inferred.

Despite the absence from the text of such a limitation, the idea that impeachment must be based on conduct during office has some appeal. That appeal, though, derives from considerations that when thought through lead to a different limiting principle. An example in which those considerations are quite strong involves a civil office holder who, as a youth, committed a serious criminal offense and was convicted and punished for it, and who has since been a model of probity and public service. It is tempting to say that the Constitution does not authorize the House and Senate to bring back that long-past misconduct and remove the officer for it. But intuitions based on examples are only the beginning of analysis, and are often readily countered by seemingly contrary intuitions based on other examples. The case of the youthful offender can be countered by that of the civil officer who, shortly before being appointed, committed treason. If it is troublesome to think that the Constitution permits the removal of the former, it is shocking to think that the Constitution does not permit the removal of the traitor.

While the principle that impeachment may be based only on conduct during office cannot reconcile the contrary reactions to those cases, another principle can, and it is quite reasonably attributed to the Constitution. The difference between the two examples is that the youthful offender's past conduct does not bear on current fitness for office, whereas recent treason does. Two powerful considerations indicate that this, and not a temporal cut-off, is the actual constitutional principle. First, the context of the Constitution's provisions concerning impeachment is of course federal office, and context routinely supplies implicit limitations and other modifiers to seemingly general language. Hence it is natural to think that the high crimes and misdemeanors that support impeachment are those that have some connection to office. As the example of the traitor shows, that connection need not be contemporaneity. Second, the central instance of the kind of culpable conduct that gives rise to impeachment and removal is precisely culpable conduct that shows the officer to be, or makes the officer, unfit for the public's confidence. "Omitting qualifications, and recognizing that the definition is only an approximation, I think we can say that 'high Crimes and Misdemeanors,' in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator." Charles L. Black, Jr., *Impeachment: A Handbook* 39-40 (1974).

The question whether bad conduct has made an officer holder's continuance in office inconsistent with the public interest is fundamentally political. It is thus in keeping with the fundamentally political character of the impeachment process. While that process is of course in an important sense judicial, with Senators on oath or affirmation for the trial itself, U.S. Const., Art. I, sec. 3, it also involves the kind of judgments about what is good for the country that are properly made by elected and electorally accountable individuals, not judges whose primary expertise is in law. And just as the

judgments to be made in an impeachment proceeding are political, so are the stakes. Conviction upon impeachment may entail no punishment other than removal from office and ineligibility to hold further office. *Id.* Life, liberty, and private property are not at stake, only eligibility to exercise power in the name of the people. Because impeachment is about the interests of the public, and not primarily about punishing wrongdoing, it is appropriate that a judgment of unfitness may be based on conduct that took place before an officer-holder's appointment. Wrongdoing before one enters office can demonstrate serious untrustworthiness just as can wrongdoing while in office, and the ultimate touchstone in impeachment is whether the people can trust the office holder.

It may be objected that if there is no absolute temporal limitation on the wrongdoing that can support impeachment, the House and Senate can ransack an officer's past, fixing on long-ago and now irrelevant actions in order to remove someone whom they do not like. But if the past conduct is indeed irrelevant to current fitness, then the two houses would be wrong to rely on it, if I am correct that the Constitution does require that impeachment and conviction be based on wrongdoing that renders the officer unfit. And if the two houses were intent on removing an officer in the face of all constitutional difficulties, they could easily enough decide that some action the officer committed while in office was a high crime or misdemeanor.

So far I have discussed the Constitution's provisions specifically regarding impeachment. Under Article III, section 1, of the Constitution, Judge Porteous was appointed to serve "during good Behaviour." One might infer that a judge may be removed through impeachment only for bad behavior that occurs during his term of office. The reasoning would be that the judge has been appointed to hold office until he behaves badly, so that bad behavior after the term begins is a necessary predicate for removal. Senator John D. Works of California gave this as a reason, in the impeachment trial of Judge Robert W. Archbald in 1913, for voting not to convict on the articles of impeachment that related to conduct before Judge Archbald was appointed to the office he held at the time of impeachment. S. Doc. No. 62-1140, v. II, at 1635-1636 (1913). (Judge Archbald was convicted on other articles and removed from office.) But the President is to hold his office "during the Term of four Years," U.S. Const., Art. II, sec. 1, and similar reasoning would lead to the conclusion that the President therefore may not be removed until four years are up, which would mean that a President could not be removed by impeachment at all. Yet Article II's list of impeachable officers begins with the President, *id.*, sec. 4. Impeachment thus must be a particular exception to the general rule that the President serves for four years. In similar fashion, if there is a conflict between the term set out in Article III and the provision for removal through impeachment, the latter prevails.

As just indicated, some Senators were unwilling to vote to convict Judge Archbald on the articles related to conduct before he was appointed Circuit Judge, the office he held at the time of his impeachment. Those votes are part of the practice of the Senate, and hence must be weighed in assessing the bearing of precedent on this issue. So must the willingness of the House of Representatives to impeach Judge Archbald on

those grounds. In weighing the Senators' statements, it important to bear in mind that they were not actually confronted with a situation in which a sitting judge had engaged in otherwise-impeachable conduct during a prior judgeship and no other impeachable misconduct could be proved. Indeed, Senator Borah made this point, explaining that he voted not to convict on counts based on prior behavior because of his doubts about the constitutional question and the fact that it was unnecessary to resolve that issue, "the object of the impeachment being fully accomplished." *Id.* at 1634-1635. What he and other Senators would have done had they been forced to make such a choice we do not know.

I have not examined in detail the facts on which the House of Representatives based its decision to impeach Judge Porteous, and so will comment only generally on the application of the foregoing principles to those facts. It does seem to me that the House and Senate reasonably could conclude that misconduct in a prior judicial office of the kind that would support impeachment and removal if engaged in during the officer's current judicial office is both sufficiently culpable and sufficiently indicative of unfitness to serve to lead to impeachment and removal now. The connection between the past misconduct and fitness for the current office is clear enough. So is the connection between an office and culpably false statements made in the process of obtaining that office. Whether the House's allegations are true, and whether if true they describe high crimes or misdemeanors that render Judge Porteous unfit to serve on the federal bench, is for the Senate to decide. In my view, the fact that the alleged conduct took place before Judge Porteous was appointed to his current position does not remove it from the category of high crimes and misdemeanors that can be the subject of impeachment.

These views are my own. They are presented as a public service, not on behalf of any client or of my employer, the University of Virginia. If there is anything more I can do to be of assistance, please let me know.

Sincerely,

John C. Harrison