Attachment Nine

Written Statement of

Michael J. Gerhardt,

Samuel Ashe Distinguished Professor of Constitutional Law, UNC-Chapel Hill School of Law

Committee on the Judiciary Task Force on the

Possible Impeachment of Judge G. Thomas Porteous, Jr.

December 15, 2009

Introduction and Overview

I appreciate the invitation to appear today before the House Committee on the Judiciary Task Force pertaining to the possible impeachment of Judge Porteous. I have long been interested in constitutional issues relating to the federal impeachment process. I have written a book and several articles on the federal impeachment process, worked as a special consultant to the National Commission on Judicial Discipline and Removal, consulted with many members of Congress on past impeachment proceedings, and testified during President Clinton's impeachment proceedings as a joint witness in the special hearing held by the House Judiciary Committee on the history of impeachment. I have also long had been interested in the quality and composition of the federal judiciary; I have, among other things, written a book and several articles on the appointments process, testified in confirmation hearings, consulted with the Senate and the White House on several judicial nominations, and served recently as Special Counsel to Senator Leahy and the Judiciary Committee on the nomination of Sonia Sotomayor to the Supreme Court. It is an honor and privilege to participate in today's hearing in my personal capacity as a constitutional law professor.

In this Statement, I focus on four issues of particular concern to the Task Force. These issues are (1) whether a federal judge may be impeached, convicted, and removed from office for misconduct that is not indictable; (2) whether a federal judge may be impeached, convicted, and removed from office for misconduct committed prior to becoming a federal judge; (3) whether an impeachment proceeding is a criminal proceeding such that it would be covered by the immunity agreement pursuant to which Judge Porteous testified before the Fifth Circuit Judicial Council; and (4) which if any impeachment precedents are useful for guiding the Task Force's deliberations.

I have previously written about and given substantial thought to each of these questions. First, there has long been widespread consensus among impeachment scholars and members of Congress that impeachable offenses are not restricted to indictable offenses but rather are political crimes. Political crimes are injuries to the Republic and breaches of the public trust that are not restricted to either indictable offenses or only the abuses of an office's formal powers or duties. Second, any egregious misconduct not disclosed prior to election or appointment to an office from which one may be impeached and removed is likely to qualify as a "high crime or misdemeanor." While murder would be one obvious example of such misconduct, it is not the only one. Another example is lying to or defrauding the Senate in order to be approved as a federal judge. Such misconduct is not only serious but also obviously connected to the status (and responsibilities) of being a federal judge. Such misconduct plainly erodes the essential, indispensable integrity without which a federal judge is unable to do his job. Third, an impeachment proceeding is not a criminal proceeding but rather a unique, political proceeding. Thus, the current proceedings are not affected – or restricted in any way -- by Judge Porteous' immunity agreement. Last but not least, the current proceedings are not affected, or deterred, in any way by the fact that there are no precedents directly on point. The fact that the charges made against Judge Porteous are different than those made against the officials who have been impeached and convicted says much more about the extent of his misconduct than it does about anything else. In any event, the charges made against Judge Porteous have enough in common with the grounds on which two other judges were impeached, convicted, and removed.

Consequently, I do not believe that any of these issues present any reasons whatsoever to keep the Task Force from moving forward in its impeachment proceedings against Judge Porteous.

I.

I understand that one matter of interest to Task Force members is whether the scope of impeachable offenses is restricted to indictable offenses – offenses that are statutorily prohibited as felonies and that the punish for the breach of which includes a substantial loss liberty. This question is not new; both constitutional scholars and members of Congress have extensively the question throughout the history of this nation. I will not review the literature here. It should suffice to say that the overwhelming weight of authority supports construing the phrase "Treason, Bribery, or other high Crimes or Misdemeanors" in Article II is not restricted to indictable crimes.

First, the language and examples that the framers and ratifiers used to describe the scope of impeachable offenses reflect their common understanding that the terms "high Crimes or Misdemeanors" in Article II refers to what the framer's generation understood to be "political crimes." They expressed their understanding of "political crimes" through such terms or phrases as "great offences against" or injuries to the Republic," abuses of authority, and breaches of the public trust. Almost all their examples were of misdeeds that were not liable at law, such as a president's entering into an unlawful treaty that benefitted foreign but not American interests. To the framers and ratifiers, the criterion for determining whether an offense was impeachable was not whether it had been proscribed through a specific criminal statute but rather the extent and nature of its injury to the State, abuse of power, or breach of the public trust.

Second, the most prominent, post-ratification commentators agreed that the scope of impeachable offenses were not limited to indictable crimes. Alexander Hamilton, James Wilson, and Joseph Story each explained that the offenses for which people could be impeached, convicted, and removed from office were political crimes. Hamilton the constitutional grounds for removal as consisting of "those offences which proceed from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[1] Wilson referred to such offenses as "political crimes and misdemeanors,"[2] while Story opined that impeachable offenses were "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust."[3] Both Hamilton and Story believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation or codification. Story emphasized that no statute would be able to codify the range of misconduct that could qualify as impeachable, because "political offences are so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impractical, if it were not almost absurd to attempt it."[4] Story suggested that subsequent generations would have to define impeachable offenses on a case-by-case basis rather than through criminal statutes.

---

[1]Alexander Hamilton, Federalist No. 65, The Federalist Papers 396 (Rossiter, ed. 1961).
[2]James Wilson, 1 The Works of James Wilson 426 (McCloskey ed. 1967).
[3]Joseph Story, Commentaries on the Constitution section 788, at 256 (Nowak & Rotunda 1987).
[4] Id, section 405, at 287.

If we turn, as Story suggested, to the practice of impeachment in order to determine the kinds of offenses for which people may be impeached, convicted, and removed from office, a clear pattern emerges: Of the 16 men impeached by the House of Representatives, only five have been impeached on grounds constituting an indictable offense, and one of those was Alcee Hastings, who had been formally acquitted of bribery prior to his impeachment. The House articles of impeachment against the nine others include misconduct that did not constitute indictable offenses, at least at the time that they were approved. Of the seven men (all federal judges) actually removed from office by the Senate, four were charged with and convicted of misconduct that did not constitute any indictable offenses. These four were Judges Pickering (public drunkenness and blasphemy); West Humphreys (supporting the Confederacy and failing to fulfill his duties as a federal judge); Robert Archibald (obtaining contracts for himself from persons appearing before his court and for adjudicating cases in which he had a financial interest or received a payment – offenses that were not indictable at the time); and Halsted Ritter (bringing "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein . . ."). The other three judges who have been removed from office – Harry Claiborne, Alcee Hastings, and Walter Nixon – were each charged with indictable crimes. Hence, the pattern of convictions indicates that impeachable offenses include, but are not limited to, certain indictable crimes. The common theme in these cases is not committing felonies but rather engaging in misconduct that is incompatible with being a federal judge and depriving the judge of the integrity required in order to maintain public confidence in his continuing to exercise the powers of an Article III judge. A felony might qualify as a political crime but a political crime does not have to be a felony.

II.

Another issue of interest to the Task Force is whether a federal judge may only be impeached, convicted, and removed for abusing their official constitutional responsibilities. What follows from this argument is that no federal judge may be impeached, convicted, or removed for misconduct committed prior to becoming a judge, because such misconduct is not, after all, among his current duties or responsibilities.

To appreciate why this argument and the premise on which it rests (that federal judges are only impeachable for their abuses of official duties) are mistaken, one should consider how the Constitution treats each of the following three kinds of misconduct. The first is misconduct that is committed prior to becoming a federal judge and that is both inconsequential and unknown (or undisclosed) at the time of a judge's confirmation proceeding. The second is misconduct that is known at the time the judge is confirmed. The third is misconduct that is egregious but not known at the time of the judge's confirmation proceedings.

I believe the Constitution clearly permits impeachment in the third circumstance but not necessarily in either of the other two. In the first circumstance, we are not dealing with misconduct that is consequential or serious; it is, by definition, unimportant, innocuous, or trivial. As such, it is the kind of misbehavior (if one wants to use that term), which no one would expect a nominee to disclose or that would, if disclosed, make any difference to the outcome. Moreover, something inconsequential is not a political crime. To be sure, some judgment might be required to determine whether something is inconsequential, but I have supposed that in this first scenario everyone would agree that the misconduct is not serious enough to be a breach of

the public trust, an injury to the State, or an abuse of power. Hence, it does not matter if it is known or not at the time of the judge's confirmation.

The second kind of misconduct is likely not to be impeachable, because the proper authority – the Senate – effectively ratifies the misconduct at the time it decides to confirm the judge. It does not matter, in this scenario, whether the misconduct is serious or inconsequential because the Senate has had the opportunity to assess its magnitude and relevance to its confirmation decision. By confirming the judge, the Senate has effectively ratified the previous misconduct or signaled that it does not regard the earlier misconduct as disqualifying.

The third kind of misconduct is different than either of the first two kinds. This third kind is egregious and not known at the time of confirmation. Such misconduct is, in other words, likely to be of sufficient gravity that it is an impeachable offense. It does not matter whether the conduct has any formal relationship to a judge's specific duties; it is bad behavior that by itself demonstrates a level of moral depravity and bad judgment that it is completely incompatible with the responsibilities of a judge. If we add to the facts that the nominee lied to the Senate about this bad misconduct, then the nominee has not only done something morally reprehensible but he has also engaged in misconduct that directly undermines the integrity of the confirmation process itself.

Say, for instance, that the offense was murder – it is as serious a crime as any we have, and its commission by a judge completely undermines both his integrity and the moral authority he must have in order to function as a federal judge. The timing of the murder is of less concern than the fact of it; this is the kind of behavior that is completely incompatible with the public trust invested in officials who are sufficiently high-ranking to be subject to the impeachment process. The fact that a nominee would suppress or not bring this misconduct to light to either the President who is considering his nomination or the Senate which is considering his confirmation makes the misconduct all the more reprehensible. It clearly reflects such poor judgment and complete lack of regard for the Senate that it is an offence against the State and a breach of the public trust.

My understanding is that Judge Porteous has been charged with misconduct that falls into this third circumstance, and treating such misconduct as impeachable is consistent with the language of Article II. The latter provides that an impeachable official may be impeached, convicted, and removed from an office for certain kinds of misconduct; however; it does not say *when* the misconduct must have been committed. To be sure, the framers deliberately designed the impeachment process to distinguish it from the British system in which private citizens were subject to impeachment. It seems to follow that the misconduct of a private citizen – or someone who is not an impeachable official in the federal constitutional sense – is, at the time it was done, an impeachable offense. It might even seem odd to allow the Congress to transform such misbehavior later into an impeachable offense simply because the person's status changes later. Yet, this is not odd, if we recognize that once a person becomes a federal judge, he is plainly subject to the clause, which says, quite explicitly, that he may be impeached, convicted, and removed for "Treason, Bribery, or other high Crimes or Misdemeanors." The critical questions are whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function as an Article III job. In Judge Porteous' case, the Task Force does not have to be concerned about whether some misconduct committed to his becoming a judge may, on its own,

serve as an impeachable offense. For, by defrauding the Senate in his confirmation proceedings, Judge Porteous has engaged in misconduct that is egregious and has a more than obvious connection to his present position. The nexus is that Judge Porteous deprived the Senate of information that would undoubtedly have changed the outcome in his confirmation hearing. His failure to disclose is nothing less than an attack on the integrity of the confirmation process and an affront to the constitutional responsibilities of the President and the Senate.

In my book on impeachment, I had considered the question of whether a judge or some other impeachable official might be impeached for misconduct committed prior to assuming his current office. I wrote that there might be some difficult cases but "it is easy to imagine instances in which impeachable offenses could be based on present misconduct consisting of fraudulent suppression or misrepresentation of prior misconduct. Particularly in cases in which an elected or confirmed official has lied or committed a serious act of wrongdoing to get into [his] present position, the misconduct that was committed prior to entering office clearly bears on the integrity of the way in which the present officeholder entered office and the integrity of that official to remain in office."[5] I continue to stand by this analysis. Judge Porteous' misconduct fits squarely into this analysis. There is no question that his defrauding the Senate undermined the integrity of his confirmation process and deprives him of the essential, indispensable integrity that he needs in order to continue to function as a federal district judge.

III.

Another concern of the Task Force might be that the immunity agreement pursuant to which Judge Porteous testified before the Fifth Circuit Judicial Council bars using in these proceedings any of his testimony before that body or any evidence derived from that testimony. The agreement expressly immunizes Judge Porteous from having used against him in any "criminal" proceeding either the testimony he gave to the Fifth Circuit Council or any evidence derived from such testimony. Some members of the Task Force might wonder whether an impeachment proceeding is essentially the same as a criminal proceeding and thus none of Judge Porteous' prior testimony, or any evidence derived from it, should be used in the instant impeachment proceedings.

The problem is that an impeachment proceeding is NOT the same as a criminal proceeding. In fact, the framers designed the impeachment process as a unique, political proceeding. In his classic treatise on impeachment, the late Charles Black stressed this point,[6] as do I in prior writings.

The uniqueness of an impeachment proceeding is evident in both the language and structure of the Constitution. As I suggested over a decade ago, "[The Constitution expressly limits the punishments for impeachment [and conviction] to removal and disqualification from office, punishments that are unavailable in any other proceeding in our legal system. In addition, the Constitution does not entitle the target of an impeachment the right to a jury or to counsel; the president may not pardon a person convicted by impeachment (whereas he is able to pardon any other convicted official); the federal rules of evidence do not apply in an impeachment trial;

[5]Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 108 (2d edition 2000).

[6] See Charles Black, Impeachment: A Handbook 17 (1973).

and a conviction does not require unanimous agreement among the senators sitting in judgment."[7] Other critical differences are that the case is not tried before a jury of one's peers or a judge and the burden of proof is unique. In his classic treatise on impeachment, the late Charles Black explained that the unique, "hybrid" nature of an impeachment trial required that the burden of proof be unique (and thus not be the same as the standard of beyond a reasonable doubt that is required in criminal trials).[8] Indeed, the unique structure of the Senate has made it practically impossible for it to have a uniform burden of proof; instead, the Senate has long taken the (unique) "position that each senator should follow whatever burden of proof he or she thinks is best."[9] Indeed, the Senate has never approved this conception of impeachment and, in the late 1980s, flatly rejected the argument that impeachment proceedings are the same as criminal trials. A few years later, the National Commission on Judicial Discipline and Removal reached the same conclusion that impeachment proceeding are unique, political proceedings and are not structurally, or meant to be, the same as criminal trials.

IV.

A final issue raised in the present proceedings is whether there are any prior impeachment proceedings – any precedents – that would be useful guides to the Task Force. One argument that might be made on behalf of Judge Porteous is that he should not be impeached because no one has ever before been impeached, convicted, and removed in like circumstances. But, the fact that there are no precedents directing on point is of no consequence. There is no precedent of impeaching an official for murder, but this would not, I am sure, prevent the House and the Senate from considering such misconduct to be an impeachable offense and to proceed accordingly. The fact that the House has not proceeded before against a judge on grounds similar to those on which it is proceeding against Judge Porteous says much more about the nature and extent of his misconduct than it does about anything else. To refrain from acting would create a precedent that would be bad for the Congress and for the federal judiciary, since it would not only suggest a permissible level of corruption for federal judges but also provide an incentive for judicial nominees to refrain from disclosing bad behavior to the Senate.

Nevertheless, there are two impeachments that have some things in common with the instant case. In the first, the House impeached and the Senate convicted and removed Robert Archibald from office because of misconduct he had committed as a member of the Commerce Court whole he was serving as a judge on the Third Circuit. As David Kyvig explains in his important, recent treatise on impeachment, "None of the judge's conduct, if carried out by a private businessman, would have been indictable, but his use of judicial influence for personal gain provoked outrage. Among other things, Archibald had written letters on Commerce Court stationary encouraging the sale or lease of property on favorable terms to third parties who, in turn, rewarded the judge, their silent partner. In another instance, Archibald clandestinely corresponded with an appellant's attorney in a railroad case before his court, asked the lawyer for his opinion on the case, and then supported the successful appeal, all of which violated judicial ethics."[10] As Professor Charles Geyh suggests in his testimony to the Task Force, Judge

[7] Gerhardt, supra note 5, at 112.
[8] See Black, supra note 6, at 17.
[9] Gerhardt, supra note 5, at 113.
[10] David E. Kyvig, The Age of Impeachment: American Constitutional Culture since 1960 31 (2008).

Porteous is guilty of several ethical violations, which, as the Archibald case shows, may properly serve as the basis for impeachment, conviction, and removal.

In the second case, Halsted Ritter was impeached by the House and convicted and removed from his judgeship in 1936 by the Senate. As Kyvig explains, "Ritter was convicted and removed from office . . . for taking a kickback of fees in a resort-hotel bankruptcy case, for evading income tax, and for continuing to practice law after going on the bench. All the alleged misconduct dated from the first year of Ritter's judgeship."[11] The Senate did not convict Ritter on any specific charge of misconduct but rather, as Kyvig further notes, "voted 56-28 for an article that collected all the previous charges into one summary article that charged Ritter with bringing his court into 'scandal and disrepute, to the prejudice of said court, and public confidence in the administration of justice.' By the margin of a single vote, the Senate convicted and removed him from the federal bench. Notably, Senator Sherman Minton of Indiana, later named to the federal appellate bench by Franklin Roosevelt and elevated to the Supreme Court by Harry Truman, voted to acquit Ritter on all six of the substantive articles and to convict on the omnibus article."[12] The pattern of Judge Porteous' misbehavior,[13] which extends over a longer period than Judge Ritter's, has, at the very least, undermined confidence that he has the requisite integrity and moral authority to continue to function as a federal judge. As demonstrated in both the Archibald and Ritter convictions, the integrity of the courts is ultimately the responsibility of the Congress to ensure and maintain through its impeachment authority.

Conclusion

The issues before the Task Force are among the most serious that the House of Representatives must consider in the discharge of its constitutional responsibilities, and I am mindful of what is at stake in these proceedings. I do not take lightly the responsibility that the Task Force has placed in me as a witness in these proceedings. There is nothing more important to our system of justice than a judge's integrity, and the loss of this integrity, as is abundantly apparent in the instant proceedings, provides as sound a basis for the exercise of the awesome impeachment authority as any I know. The constitutional issues before the Task Force are straightforward: A federal judge may be impeached, convicted, and removed for non-indictable offenses and ethical lapses, including defrauding the Senate in the confirmation proceedings to occupy the office he now holds. Consequently, this Task Force is acting well within its constitutional responsibilities to recommend the impeachment of Judge Porteous.

---

[11] Id. at Id. at 32-33.

[12] Id. at 33.

[13] For a good description of the pattern and seriousness of Judge Porteous' misconduct, see Report and Recommendations of the Judicial Conference Committee on Judicial Conduct and Disability 33 (June 2008) ("In the Committee's view, the various acts must be viewed as a whole and the applicable laws and Canons as a coordinated scheme. A judge's soliciting and receiving cash and things of value from lawyers appearing before the judge is so obviously a questionable practice that it is subject to numerous substantive, disclosure, and ethical regulations. Were it not so regulated, judges could ask for and take money from lawyers, sit on cases involving those lawyers, and deny any impropriety. Those who would claim otherwise would be left with the burden of proving the judge's and lawyer's contrary states of mind.").