

**II. COMMITTEE ACTIONS AND FILINGS OF
THE PARTIES PRIOR TO THE AUGUST 4,
2010 HEARING ON PRE-TRIAL MOTIONS**

d. Pre-Trial Motions

iv. Motion for an Extended Evidentiary Hearing

**In The Senate of The United States
Sitting as a Court of Impeachment**

_____)
In re:)
Impeachment of G. Thomas Porteous, Jr.,)
United States District Judge for the)
Eastern District of Louisiana)
_____)

**JUDGE G. THOMAS PORTEOUS, JR.'S
MOTION FOR AN EXTENDED EVIDENTIARY HEARING**

NOW BEFORE THE SENATE, comes respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and files this Motion for an Extended Evidentiary Hearing, which would allow the evidentiary hearings in this matter to continue past the currently scheduled five (5) days of hearings. Through this Motion, Judge Porteous is not requesting a delay in the start of the evidentiary hearings, but is requesting that the Senate Impeachment Trial Committee (the "Committee") add an additional three (3) days to the schedule so that the defense can fully present its case.

FACTUAL BACKGROUND

The evidentiary hearings in this matter are scheduled to take place between September 13, 2010 and September 17, 2010. (*See* Disposition of Judge G. Thomas Porteous Jr.'s Motion for a Continuance, dated June 21, 2010, at 7.) This amounts to only five days of hearings. Although daily times have not yet been set for the commencement and conclusion of the hearings, counsel for the Committee have indicated that they are prepared to hold the hearings before and after regular work hours on the scheduled dates to ensure that the hearings are, in fact, complete by September 17, 2010. The Committee's Order further advised that "no further

continuances [delays] based on this issue shall be granted.” (*Id.*) Judge Porteous is not hereby requesting a continuance, but rather additional time within which to present his defense.

The House of Representatives has designated eighteen individuals as witnesses that it may call during the evidentiary hearings. (*See* Supplemental Filing by the House of Representatives in Support of its Preliminary Requests for Subpoenas and Immunity, filed on June 30, 2010.) The House specifically sought an immunity order for Judge Porteous, indicating that, if allowed, they intend to call Judge Porteous as a witness in their case-in-chief.¹ (*Id.* at 2.) Judge Porteous has not yet submitted his final Witness Subpoena Requests or Witness Immunity Requests, which are due on August 2, 2010. At the present time, Judge Porteous expects to call a similar number of witnesses as that proposed by the House of Representatives. The five days currently scheduled, even including time beyond normal work hours, cannot possibly accommodate a full trial addressing all of the issues raised in the Articles of Impeachment and all of the witnesses and testimony expected to occur.

ARGUMENT

Judge Porteous respectfully requests that the Committee extend the currently scheduled evidentiary hearings to add three additional days of hearings beyond the currently scheduled five days.

The five-day hearing scheduled in this case is a fraction of the time afforded to the vast majority of previously accused judges. For the first time in over seven decades, the Senate will sit as a court of impeachment and conduct evidentiary hearings regarding a sitting federal judge

¹ The Committee has asked the parties to brief this issue – whether the accused, in a Senate impeachment trial, can be compelled to testify. Judge Porteous opposes any efforts by the House to subpoena him directly, and will discuss this in further detail in opposition to any House Motion seeking to compel such testimony. Whether Judge Porteous will testify in his own defense is still an open question.

in a case where the accused was never charged criminally for the same conduct, and no trial has been held in which the allegations and facts underlying the Articles of Impeachment could be tested, fully explored, and subjected to rigorous cross-examination.² In the absence of any prior trial in this case, this hearing will be the first full opportunity to examine key witnesses, on direct and in cross-examination. Further, this will be the first time testimony has been given in this matter by many of these witnesses.

The defense appreciates the willingness of the Committee to grant depositions of four of the key witnesses against Judge Porteous, but the need for more time at trial has been made greater by limiting depositions to only those four witnesses, and limiting the depositions to three hours each, all on a single day. (*See* Disposition of Judge G. Thomas Porteous, Jr.'s Motions to Compel and For Depositions, dated July 19, 2010.) As a result, many of the persons whom Judge Porteous otherwise might have deposed will have to be examined for the first time at trial.

The result of the current schedule is to allow Judge Porteous roughly two days to present his defense to four Articles of Impeachment, each containing a number of different alleged acts of misconduct, and dozens of witnesses. The task is not only wearing and difficult on everyone; it raises a real potential for depriving Judge Porteous of a realistic opportunity to defend himself.

While the defense respects that modern Senators have exceptionally busy schedules, prior Senates have afforded far greater time for a federal judge to oppose the extraordinary step of removal. It would be contrary to the Framers' expectation that such a trial allow for a full and fair examination of the claims and evidence charged by the impeachment. The abbreviated trial

² The past three impeachment trials of federal judges all followed a criminal trial, where the accused was prosecuted for conduct that was identical to, or made a part of, the Articles of Impeachment. *See* impeachment proceedings of (1) Walter L. Nixon (1989); (2) Alcee L. Hastings (1989); and (3) Harry L. Claiborne (1986). In 1936, impeachment proceedings against Judge Halsted L. Ritter commenced without being preceded by a criminal trial.

in this case undermines the traditions of this institution in carrying out its duties under Article I of the United States Constitution.

Judge Porteous is seeking only a modest increase in the trial period and far less than the time afforded to prior – including relatively recently – accused judges. More importantly, past trials show how critical witnesses often take almost a full day of examination by both sides in an impeachment matter. For example, in the Alcee Hastings Impeachment proceedings, on the first day of evidentiary hearings – Monday, July 10, 1989 – after opening statements by the parties and the resolution of procedural issues, the Committee was only able to complete the testimony of one witness. (*See Contents of Hastings Evidentiary Hearings*, attached as Exhibit 1.) On the second day, Tuesday, July 11, a single witness exhausted almost the entire day, allowing the Senate merely to begin the testimony of a second witness. (*Id.*) On the third day, Wednesday, July 12, the prior day's witness resumed and the Committee was able to get through one additional witness and begin the testimony of another, William Murphy. (*Id.*) On Thursday, July 13, the fourth day of hearings, the Committee resumed Murphy's testimony but was unable to complete his testimony that same day. (*Id.*) Finally, on Friday, July 14, Murphy's testimony concluded and the Committee received the live testimony of six other witnesses (one of which had to be continued on Monday, July 17, the next hearing day). (*Id.*) In sum, the Hastings Committee received the live testimony of only eleven witnesses during the first five days of their hearings, which did not include the testimony of the accused (which lasted three days on its own later in the hearings). (*Id.*) The Hastings trial is not unique.

In the Walter L. Nixon impeachment proceedings, the Committee only heard the testimony of ten witnesses over the course of the four day trial. (*See Contents of Nixon Evidentiary Hearings*, attached as Exhibit 2.) In the Harry E. Claiborne impeachment

proceedings, the parties and the Committee moved particularly quickly, but were still only able to complete nineteen witnesses (only one more than proposed by the house in the instant matter) in the first five days of hearings. (*See* Contents of Claiborne Evidentiary Hearings, attached as Exhibit 3.) Of course, in each of the above mentioned matters (Hastings, Nixon, and Claiborne), the parties and the Senate had the benefit of a fully developed record from already completed criminal trials, including transcripts of sworn testimony and previously admitted exhibits, not to mention the developed record that the Senate could lean on in its review of the facts.

Beyond the number of witnesses the Committee is likely to get through in any given day, previous individuals who have been impeached have been afforded far more time for evidentiary hearings. For example:

- In 1804, in the impeachment trial of John Pickering, the Senate considered four articles of impeachment over the course of approximately six days. *See* ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 45-52 (Univ. of Illinois Press 1992); *see generally* 13 *Annals of Cong.* 315-68 (1852).
- In 1805, the Senate impeachment trial of Samuel Chase lasted approximately twenty days, during which the Senate considered eight articles of impeachment. *See* BUSHNELL, *supra*, at 63-84; *see also*, SAMUEL H. SMITH AND THOMAS LLOYD, *TRIAL OF SAMUEL SMITH*, Vol. 1, 23-387 (Washington City: Printed for Samuel H. Smith 1805).
- In 1831, James Peck's Senate impeachment trial lasted approximately twenty-seven days, during which the Senate considered only one article of impeachment based on a single contested act. *See* Hinds' *Precedents*, Vol. III, Ch. 73; *see also*, ARTHUR J. STANSBURY, *REPORT OF THE TRIAL OF JAMES H. PECK* (Hillard, Gray and Co. 1833). The trial included lengthy summations, including a three day concluding speech by Judge Peck's counsel. *See* BUSHNELL, *supra*, at 107.
- In 1862, West Hughes Humphreys was convicted following a one day Senate impeachment trial on seven articles of impeachment. *See id.* at 122. The brevity of the trial, however, was largely due to the fact that Judge Humphreys did not attend the trial and no case was presented in his defense, likely in large part to his desertion of his position and acceptance of an appointment under the Confederate States prior to the impeachment trial. *See id.* at 117-18, 124.

- In 1905, the Senate impeachment trial of Charles Swayne lasted approximately thirteen days. *See Hinds' Precedents*, Vol. III, Ch. 78; *see also*, 58 Cong. Rec. S56-725 (1905). During the course of that trial, the Senate heard from approximately forty witnesses and considered twelve articles of impeachment. *See BUSHNELL, supra*, at 200-05. Judge Swayne was acquitted on all counts. *See Hinds' Precedents*, Vol. III, Ch. 78, at § 2485.
- In 1912 and 1913, the Senate considered thirteen articles of impeachment against Robert Archbald in an impeachment trial lasting approximately twenty-two days. *See* 62 Cong. Rec. S95-1678 (1913). Mr. Archbald was convicted on all counts. *See id.*
- In 1933, the Senate considered five articles of impeachment against Harold Louderback in a trial lasting approximately eight days. *See BUSHNELL, supra*, at 252-63. The Senate heard testimony from approximately fifty witnesses. *See id.* The defense called thirty witnesses, including Judge Louderback, who spoke on his own behalf as to all the charges against him. *See id.* at 257-58.
- In 1936, the Senate impeachment trial of Halsted Ritter lasted approximately eleven days. *See* 74 Cong. Rec. S77-684 (1936). The Senate considered seven articles of impeachment, and Judge Ritter was convicted on the single omnibus article of impeachment after being acquitted on each of the six specific articles. *See id.* at 638.
- On September 15, 1986, the Senate Impeachment Trial Committee began hearing seven days of witness testimony in the Harry Claiborne impeachment trial. *See* Exhibit 3; Hearings Before the Senate Impeachment Trial Committee United States Senate, S. Hrg. 99-812, Pt. 1 (1986) (hereinafter "S. Hrg. 99-812"); *see also* United States Senate, The Impeachment Trial of Harry E. Claiborne (1986), available at http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Claiborne.htm (hereinafter "Claiborne Trial"). Nineteen witnesses were called and the Senate considered four Articles of Impeachment. *See* Exhibit 3; S. Hrg. 99-812; *see also* Claiborne Trial, *supra*.
- In 1989, in the impeachment proceedings of Alcee Hastings, the Senate heard testimony from more than fifty witnesses and considered seventeen articles of impeachment over the course of eighteen days. Hastings' own testimony itself took three days. *See* Exhibit 1; Hearings Before the Senate Impeachment Trial Committee United States Senate, S. Hrg. 101-194, Pts. 2A and 2B (1989).
- In September 1989, the evidentiary hearings in the Senate impeachment trial of Walter Nixon lasted four days, during which the Senate heard testimony from a mere ten witnesses on three articles of impeachment. *See* Exhibit 2; Hearings Before the Senate Impeachment Trial Committee United States Senate, S. Hrg. 101-247, Pt. 2 (1989). Nixon was convicted. The trial followed Nixon's criminal conviction of making false statements to a grand jury, which was also the basis for Articles I and II of the Articles of Impeachment. *Id.* at 4.

Beyond Humphreys' impeachment proceedings, which was necessarily short because he failed to show up and present a defense, only one Senate impeachment trial of a federal judge was completed in less than five days. (See Nixon impeachment, taking only four days but also only requiring ten witnesses.) The average Senate impeachment trial of a federal judge lasted 12 days – more than double that which is currently allotted for the instant matter.³ Judge Porteous is seeking roughly half of that average period despite the fact that, unlike some of these judges, he has never had the benefit of an actual trial.

In comparing the upcoming proceeding with previous impeachment proceedings, it must be remembered that although there are four Articles of Impeachment filed against Judge Porteous, each Article contains numerous factual allegations, each one of which would have been a separate Article in many past Articles of Impeachment.⁴ Thus, in reality, there are approximately 22 Articles of Impeachment against Judge Porteous that must be tried in what is now a five-day period.⁵

If the defense is truly only to be allotted a little over two days (taking into account opening statements and procedural matters), which necessarily includes its cross-examination of House witnesses, Judge Porteous will be denied the opportunity to call witnesses he believes are essential to his defense. In such a reduced time frame, only certain witnesses will be able to be called and prepared, only certain questions and lines of inquiry planned, and the overall strategy

³ This figure was calculated based on the following figures: Pickering (6 days); Chase (20 days); Peck (27 days); Humphreys (1 day); Swayne (13 days); Archbald (22 days); Louderback (8 days); Ritter (11 days); Claiborne (7 days); Hastings (18 days); and Nixon (4 days).

⁴ See Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated; or, In the Alternative, To Require Voting on Specific Allegations of Impeachable Conduct, being filed concurrently herewith.

⁵ It should also be noted that the granting of any of Judge Porteous' Motions to Dismiss would have the effect of shortening the time necessary for a fair and complete trial.

of the defense will necessarily be altered. The abbreviated period for trial in this case magnifies the problem before both the House of Representatives and the Fifth Circuit. Before the House, Judge Porteous was allowed only ten minutes to examine witnesses. (See Transcript of House of Representatives Judiciary Committee Hearing before the Task Force on Judicial Impeachment, Serial No. 111-43, (Nov. 17, 2009) at 5, stating “counsel for Judge Porteous will be permitted to question any of the witnesses that he so chooses for 10 minutes each.”) Now, after being given less time to prepare than Hastings and less discovery, he is being given just over two days to present his entire defense to these charges for the first time. Notably, the House has also previously suggested that they will need more time than currently allotted. (See April 13, 2010 Letter from Alan Baron to Committee, stating “[t]he House believes it can put on its case-in-chief in 30 hours of direct testimony”; see also May 11, 2010 Letter from Alan Baron to Committee, stating “[b]ased on the parties' estimates of the time necessary for trial, we fear there is a reasonable possibility the trial could not be completed in this time frame.”)

It is obviously necessary to resolve this matter in advance of the trial to allow counsel to determine what witnesses can be practically called in defense of Judge Porteous.

CONCLUSION

WHEREFORE, Judge Porteous respectfully requests that the Senate extend the number of day for the evidentiary hearings to allow for the hearings to continue past the currently scheduled time frame.

1805

Respectfully submitted,

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Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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Exhibit 1

**REPORT OF THE SENATE IMPEACHMENT TRIAL
COMMITTEE ON THE ARTICLES AGAINST
JUDGE ALCEE L. HASTINGS**

**HEARINGS
BEFORE THE
SENATE IMPEACHMENT TRIAL
COMMITTEE
UNITED STATES SENATE
ONE HUNDRED FIRST SESSION**

FIRST SESSION

ON

**THE ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS,
A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTH-
ERN DISTRICT OF FLORIDA, FOR HIGH CRIMES AND MISDEMEANORS**

MISCELLANEOUS MATERIAL RELATED TO THE EVIDENTIARY HEARINGS

Part 2A of 3 Parts



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**REPORT OF THE SENATE IMPEACHMENT
TRIAL COMMITTEE**

**HEARINGS
BEFORE THE
SENATE IMPEACHMENT TRIAL
COMMITTEE
UNITED STATES SENATE
NINETY-NINTH CONGRESS**

SECOND SESSION

—————
AUGUST 15, 1986

**ORGANIZATIONAL MEETING OF THE SENATE IMPEACHMENT TRIAL
COMMITTEE**

—————
**SEPTEMBER 10 AND 15, 1986
MEETINGS ON PRETRIAL MOTIONS**

—————
**SEPTEMBER 15, 16, 17, 18, AND 19, 1986
TESTIMONY OF WITNESSES**

—————
Part 1 of 4 Parts



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In The Senate of the United States

Sitting as a Court of Impeachment

In re:)
Impeachment of G. Thomas Porteous, Jr.,)
United States District Judge for the)
Eastern District of Louisiana)

THE HOUSE OF REPRESENTATIVES' OPPOSITION TO JUDGE G. THOMAS PORTEOUS, JR.'S MOTION FOR AN EXTENDED EVIDENTIARY HEARING

The House of Representatives (the "House"), through its Managers and counsel, respectfully opposes Judge G. Thomas Porteous, Jr.'s "Motion for an Extended Evidentiary Hearing." In support of its Opposition, the House respectfully submits:

The House believes this case can be tried and completed in the week of September 13–17, 2010 if each side is allotted 20 hours of trial time. This may well require occasionally setting longer than an 8 hour day, but it is achievable. This estimate assumes a good faith effort to stipulate to uncontested facts, including authenticity of documents. The House has presented 308 proposed stipulations of fact and designated numerous documents whose authenticity should not be in dispute. Judge Porteous has not responded to date to these proposed stipulations, nor has he proposed any stipulations of fact or authenticity.

The House anticipates listing a total of 20 potential witnesses. Several of them are listed on a contingent basis and may not be called to testify. Judge Porteous has not produced a meaningful witness list to date, but there is an indication that he intends to list 18 witnesses.

The virtue of a specific number of hours for each side to try its case is that it forces all parties to use the time allotment economically and not waste time on peripheral matters. Accordingly, the House reiterates its view that each side should be allocated 20 hours to try its

case and that the trial should be completed during the week of September 13, 2010, as presently scheduled.

WHEREFORE, the House opposes Judge Porteous's Motion for an Extended Evidentiary Hearing and believes that Motion should be denied.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By
 Adam Schiff, Manager
 Bob Goodlatte, Manager


Alan I. Baron
Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

July 28, 2010