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United States Senate

SENATE IMPEACHMENT
 TRIAL COMMITTEE

WASHINGTON, DC 20510-8326

DISPOSITION OF PRE-TRIAL MOTIONS

On August 4, 2010, the Committee heard oral argument on the following five pre-trial matters:

- (1) Judge G. Thomas Porteous, Jr.'s Motion to Dismiss the Articles of Impeachment as Unconstitutionally Aggregated; or, in the Alternative, to Require Voting on the Specific Allegations of Impeachable Conduct;
- (2) The House of Representative's Notice of Intent to Introduce at Trial Judge Porteous's Testimony Before the Fifth Circuit Special Committee;
- (3) Judge G. Thomas Porteous, Jr.'s Motion to Exclude the Use of His Previously Immunized Testimony;
- (4) The House of Representative's Motion to Admit Transcripts and Records from Prior Judicial and Congressional Proceedings; and
- (5) Judge G. Thomas Porteous, Jr.'s Motion to Exclude Prior Testimony and Limit the Presentation of Testimonial Evidence to Live Witnesses.

Thereafter, the Committee deliberated in closed session pursuant to Rules XX and XXIV of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials ("Impeachment Rules"). The Committee hereby (1) denies, and declines to refer to the full Senate, Judge Porteous's motion to dismiss; (2) grants the House's request to introduce Judge Porteous's prior immunized testimony; (3) denies Judge Porteous's motion to exclude the use of his immunized testimony; (4) grants in part and denies in part the House's motion to admit transcripts and records from prior proceedings; and (5) grants in part and denies in part Judge Porteous's motion to exclude testimony from prior proceedings. These rulings are made pursuant to Impeachment Rule XI, which states that the Committee proceedings are "subject to the right of the Senate to determine competency, relevancy and materiality . . . but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate."¹

BACKGROUND

Impeachment trial proceedings in general, and disposition of these motions in particular, involve some important considerations. First, the purpose, design, and operation of the impeachment trial process differ in fundamental respects from the criminal trial process. Our

¹ Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Rule XI.

nation's founders saw impeachment "as a legislative rather than judicial process."² As Alexander Hamilton stated, impeachable offenses "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."³

To that end, the Constitutional Convention rejected proposals providing for impeachment and removal of public officials by the judiciary, choosing instead to give the sole power to impeach and to try impeachments, respectively, to the House and the Senate.⁴ The Constitution's text reflects this purpose in several ways. It excludes familiar hallmarks of criminal proceedings such as trial by jury,⁵ a unanimous verdict requirement for conviction,⁶ and the possibility of a presidential pardon.⁷ It limits both the persons who may be impeached⁸ and the possible sanctions upon conviction,⁹ and it expressly provides that an impeached officer may be indicted and tried in a separate criminal proceeding.¹⁰ In short, "the Framers did not intend to obligate the Senate to replicate all features of a judicial trial."¹¹ Because of the limited nature of impeachment, the Senate historically has never utilized all of the legal strictures of a criminal trial.

Second, Impeachment Rule XI authorizes the Committee only to "receive evidence and take testimony."¹² As such, only the full Senate may grant a dispositive motion such as a motion to dismiss. The Committee, therefore, lacks jurisdiction to grant a motion to dismiss and may only deny or refer such a motion to the full Senate for consideration.

² Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 Duke L.J. 1, 145 (1999). See also *id.* at 42 (noting that Constitutional Convention delegates "saw impeachment trials as a continuation of the political process when a public decision of retention (rather than election) is required"); Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional & Historical Analysis* 11 (2000) (stating that Convention delegates saw impeachment as "an unusual political mechanism for disciplining and removing a special set of federal officials for certain kinds of misconduct").

³ The Federalist Papers No. 65, at 439 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also Joseph Story, *A Familiar Exposition of the Constitution of the United States* 113 (Regnery Gateway 1986) (1840) ("The offences to be tried are generally of a political character, such as a court of law is not ordinarily accustomed to examine, and such as its common functions exclude."); Michael J. Gerhardt, *supra* note 2, at 104 ("[T]he framers and ratifiers seemed to have shared a common understanding of impeachment as a political proceeding and impeachable offenses as political crimes.")

⁴ U.S. Const. art. I, §§ 2, 3.

⁵ *Id.*, art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.")

⁶ *Id.*, art. I, § 3 ("And no Person shall be convicted without the Concurrence of two thirds of the Members present.")

⁷ *Id.*, art. II, § 2 ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.")

⁸ *Id.*, art. II, § 4 (limiting impeachment to the "President, Vice President and all civil Officers of the United States").

⁹ *Id.*, art. I, § 3 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.")

¹⁰ *Id.* ("[B]ut the Party convicted shall nevertheless shall be liable and subject to Indictment, Trial, Judgment and Punishment, according to the Law.")

¹¹ Report of the Committee on Rules and Administration, Procedure for the Impeachment Trial of U.S. District Judge Alcee L. Hastings in the United States Senate, S. Rpt. 101-1, at 14 (1989).

¹² See S. Res. 458, 111th Cong., 2d sess. (2010); Rules of Procedure and Practice When Sitting on Impeachment Trials, Rule XI.

MOTION TO DISMISS ARTICLES AS UNCONSTITUTIONALLY AGGREGATED

On March 4, 2010, the House unanimously voted to adopt four Articles of Impeachment against Judge Porteous.¹³ Judge Porteous moves to dismiss each Article as unconstitutionally aggregating multiple acts.

Judge Porteous argues that the Articles, as drafted, violate the constitutional requirements that two-thirds of the Senate agree on whether he should be convicted of an impeachable offense in two ways. First, he contends that alleging multiple acts in a single article allows two-thirds of Senators to convict on that article even though less than two-thirds of Senators agree that any individual act is impeachable. Second, he argues that permitting votes on aggregated articles allows Senators to find that the aggregation of the acts, but none of the individual acts themselves, is impeachable. The House opposes Judge Porteous's motion on the basis that the aggregation of allegations does not violate the Constitution, which grants the House substantial discretion in drafting and framing articles of impeachment, and that each Article describes a single scheme or course of conduct supporting removal from office.

The Committee's decision to deny without referral to the full Senate Judge Porteous's motion is consistent with Senate impeachment trial precedent. Judge Porteous points to the impeachment trials of Judges Robert W. Archbald and Halsted L. Ritter to argue that some Senators have disfavored the use of aggregated articles of impeachment. This, however, was not the adopted view in either instance as both judges were convicted on the aggregated articles.¹⁴

More recently, during the Senate vote on the Articles of Impeachment against Judge Alcee L. Hastings, a parliamentary inquiry was made asking, "To find Guilty on this article, does one have to agree with each for the four allegations?" The President Pro Tempore of the Senate responded,

This is for each Senator to determine in his own mind and in his own conscience and in accordance with his oath that he will do impartial justice under the Constitution and law. It is the Chair's opinion, if the Senator in his own conscience and based on the facts as he understands them determines that, on any one of the paragraphs, Judge Alcee L. Hastings has undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States, he should vote accordingly.¹⁵

In declining to refer this motion to the full Senate, this Committee also looks to the impeachment of Judge Walter L. Nixon, Jr. There, Judge Nixon similarly moved to dismiss an impeachment article based on the aggregation of multiple allegations. The Nixon committee declined to refer the motion for two reasons. First, it recognized that the House has substantial discretion in drafting articles of impeachment.¹⁶ Second, the Nixon committee evaluated the article challenged in its proceeding based on whether it (1) gave fair notice of the contours of the charges against the judge and (2) contained an intelligible, essential accusation, thus providing a

¹³ H.R. Res. 1031, 111th Cong., 2d Sess. (2010).

¹⁴ See generally Impeachment Trial of Halsted L. Ritter, 80 Cong. Rec. 5 (1936); Impeachment Trial of Robert W. Archbald, in 49 Cong. Rec. 1-2 (1912-1913).

¹⁵ Proceedings of the U.S. Senate in the Impeachment Trial of Alcee L. Hastings, S. Doc. 101-18, at 702 (1989) [hereinafter "Hastings Proceedings"].

¹⁶ Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., S. Doc. 101-247, pt. 1, at 322 (1989) [hereinafter "Nixon Report"].

fair basis for conducting the evidentiary proceedings.¹⁷ The Committee adopts this standard because it is persuasive and not in conflict with the Constitution.

Each of the four Articles against Judge Porteous meets the Nixon standard. Article I alleges judicial misconduct and intentionally misleading statements related to his financial relationship with attorneys Jacob Amato, Jr. and Robert Creely. Article II alleges a corrupt scheme with Louis and Lori Marcotte, the owners of a bail bond business. Article III alleges material false statements and representations under penalty of perjury in Judge Porteous's personal bankruptcy filing. Finally, Article IV alleges material false statements made to obtain Judge Porteous's appointment to the federal bench. The Committee concludes that each Article provides Judge Porteous with fair notice of the contours of the charges against him and makes clear, intelligible allegations. As such, each Article constitutes a fair basis for conducting the evidentiary proceedings.

Furthermore, the Impeachment Rules do not permit Judge Porteous's suggestion that the Senate vote separately on the individual impeachable allegations within each Article. Impeachment Rule XXIII states that an article of impeachment "shall not be divisible for the purpose of voting thereon at any time during the trial."¹⁸ Consequently, the Committee denies Judge Porteous's motion to dismiss and declines to refer it to the full Senate.

USE OF JUDGE PORTEOUS'S PRIOR IMMUNIZED TESTIMONY

On October 29, 2007, Judge Porteous gave testimony, under immunity, before the Special Investigatory Committee of the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit (the "Fifth Circuit") regarding allegations of judicial misconduct. The order compelling and immunizing his testimony, signed by Chief Judge Edith H. Jones, stated that "no testimony or other information that Judge Porteous provides under this order and no information directly or indirectly derived from such testimony or other information shall be used against him in any criminal case, except in a prosecution for perjury, making a false statement, or failure to comply with this order." The House used Judge Porteous's testimony in its impeachment proceedings and intends to use the testimony in the Committee's evidentiary hearings. Judge Porteous moves to exclude this immunized testimony from use before the Senate.¹⁹

The use of prior immunized testimony of an impeached officer in an impeachment trial is an issue of first impression for the Senate. The parties raise two issues regarding the use of immunized testimony: (1) whether the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself" precludes the use of Judge Porteous's immunized testimony as evidence in impeachment trial proceedings; and, if not, (2) whether compelling prudential reasons nonetheless justify excluding the immunized testimony.

The Committee concludes that Judge Porteous's impeachment trial is not a "criminal case," and therefore, the use of his prior immunized testimony is not barred by either the Fifth

¹⁷ Nixon Report, *supra* note 16.

¹⁸ Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Rule XXIII.

¹⁹ Judge Porteous also filed suit in the U.S. District Court to enjoin use of his immunized testimony in the House impeachment proceedings. The court dismissed the case, holding that the "Speech and Debate Clause protects the independence and autonomy of the Legislative Branch from judicial intrusion Judicial restraint and comity dictate that this Court refrain from any interference with ongoing proceedings in the Senate." *Porteous v. Baron*, No. 18 Civ. 09-2131 (RJL) (D.D.C. August 2, 2010).

Circuit's immunity order or the Fifth Amendment.²⁰ This is consistent with Senate precedent regarding the Fifth Amendment's Double Jeopardy Clause. In his impeachment trial, Judge Hastings moved to dismiss the articles of impeachment because, he argued, the Double Jeopardy Clause barred impeachment for the same conduct on which he had been acquitted in a criminal trial. By a 92-1 vote, the Senate denied the motion.²¹ Both the arguments made by Judge Hastings regarding the application of the Double Jeopardy Clause and by Judge Porteous regarding the application of the Self-Incrimination Clause would require concluding that an impeachment trial is a "criminal case" under the Constitution. As explained above, it is not. Therefore, the Fifth Amendment's privilege against self-incrimination does not bar use of Judge Porteous's immunized testimony.

With regard to whether the Senate should exclude this testimony for prudential or policy reasons, the pertinent factors weigh in favor of permitting its use. The immunized testimony was lawfully compelled and obtained by the judiciary in the Fifth Circuit's disciplinary proceedings. The evidentiary record including this testimony was sent to the Judicial Conference of the United States, which unanimously voted to transmit it to the House of Representatives for impeachment consideration. Each Senator should have the opportunity to review Judge Porteous's prior testimony and accord it whatever weight may be appropriate.

The Committee grants the House's motion to use Judge Porteous's prior immunized testimony and denies Judge Porteous's motion to exclude it.²² The full Senate may choose to re-examine this issue as it "determine[s] competency, relevancy and materiality."²³

USE OF EVIDENCE FROM PRIOR PROCEEDINGS

The House and Judge Porteous filed cross motions on the admission of testimony and transcripts from prior judicial and congressional proceedings. The House requests that the complete evidentiary records of the Fifth Circuit judicial disciplinary proceedings and the House Impeachment Task Force ("House Task Force") hearings, as well as all related documentary evidence admitted into the record of those proceedings, be deemed admissible. The House argues that these transcripts include sworn testimony which is part of the public record and will assist the Committee in the evidentiary hearings.

Judge Porteous seeks to exclude all prior testimony, except for use to impeach the credibility of a testifying witness. His request encompasses the federal grand jury proceedings, the Fifth Circuit proceedings, as well as the House Task Force depositions and hearings. Judge Porteous argues that the testimony and transcripts should be excluded because he was not afforded the same Sixth Amendment and due process protections at these proceedings that he would have had in a criminal trial.

As explained above, a Senate impeachment trial proceeding is fundamentally different from a criminal proceeding. As such, Judge Porteous's argument that he should receive the

²⁰ No court has addressed this issue in the context of an impeachment proceeding, but the Supreme Court has held that "the privilege [against self-incrimination] does not extend to consequences of a noncriminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment." See *United States v. Apfelbaum*, 445 U.S. 115, 125 (1980). As noted above, the Constitution limits the consequences of impeachment and conviction to removal and disqualification from public office, which are clearly of a non-criminal nature.

²¹ Hastings Proceedings, *supra* note 15, at 53-54.

²² The Committee also denies without prejudice the House's request to subpoena Judge Porteous at this time.

²³ Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Rule XI.

identical Sixth Amendment and other protections as required in a criminal trial is as unavailing as his argument under the Fifth Amendment's Self-Incrimination Clause.

The Committee's decision to allow use of evidence from prior proceedings is consistent with precedent. The Senate has allowed the admission of prior testimony in other impeachment trial proceedings, including in the impeachment trials of Judge Harry E. Claiborne, Judge Nixon, and Judge Hastings. The committees in those proceedings admitted testimony that had been subject to the opportunity for cross examination. The Claiborne committee admitted select transcripts from Judge Claiborne's second criminal trial.²⁴ The Nixon committee admitted all testimony and exhibits from Judge Nixon's criminal proceeding, as well as all testimony and exhibits admitted in the House impeachment proceeding.²⁵ The Hastings committee also admitted prior testimony that had been subject to cross examination and noted that admitting the prior testimony of witnesses did not preclude calling those witnesses to testify at the committee's evidentiary hearings.²⁶

Permitting the use of prior testimony in which Judge Porteous has had the opportunity for cross examination strikes the appropriate balance between providing fair process for Judge Porteous and giving the Senate access to relevant evidence. Judge Porteous cross examined witnesses in both the Fifth Circuit proceedings and House Task Force hearings but did not have the opportunity to cross examine witnesses in the federal grand jury proceedings or in the House Task Force depositions. The Senate should have the benefit of the sworn testimony from the proceedings that led up to the Senate impeachment trial. Admitting such prior testimony will aid in the deliberations by the full Senate as it weighs the relevance and probative value of the evidence.

²⁴ Report of the Senate Impeachment Trial Committee on the Articles Against Judge Harry E. Claiborne, S. Hrg. 99-812, pt. 1 at 110 (1986).

²⁵ Nixon Report, *supra* note 16, at 323.

²⁶ Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee Hastings, S. Hrg. 101-194, pt. 2a at 62 (1989).

Therefore, the Committee grants the House's motion with respect to testimony from the Fifth Circuit and the House Impeachment Task Force hearings, and denies the motion without prejudice as to all related documentary exhibits admitted into the record in those proceedings. The Committee will rule separately on these exhibits should they be offered in the evidentiary hearings. The Committee denies Judge Porteous's motion to exclude prior testimony from the Fifth Circuit proceedings and House Task Force hearings and grants his motion regarding the grand jury testimony and House Impeachment Task Force deposition transcripts.

Dated: August 25, 2010



CLAIRE McCASKILL
Chairman



ORRIN G. HATCH
Vice Chairman