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Impeaching a Federal Judge: Some Lessons from History

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Impeaching a Federal Judge: Some Lessons from History

Arthur D. Hellman

Abstract

In August 2014, Federal District Judge Mark Fuller was arrested on a charge of misdemeanor battery after his wife called 911 from an Atlanta hotel room and told the operator, “He’s beating on me.” Judge Fuller has agreed to enter a pre-trial diversion program; if he completes the program, the criminal case against him will be dismissed. But Judge Fuller may face other consequences. The Acting Chief Judge of the Eleventh Circuit has initiated proceedings under the federal judicial misconduct statute. And some members of Congress and editorial writers have said that if Judge Fuller does not resign from the bench, Congress should begin impeachment proceedings.

Federal judges serve during “good behavior,” and they can be impeached and removed from office only for “Treason, Bribery, or other high Crimes and Misdemeanors.” If the domestic-violence charges are substantiated, would that constitute an impeachable offense?

In this statement, submitted at a hearing of the Task Force on Judicial Impeachment of the House Judiciary Committee, the author addresses some of the questions raised by a proposal to impeach a federal judge. What is the meaning of the constitutional language? No one argues that Judge Fuller has committed treason or bribery, so the question is whether his conduct falls within the category of “other high Crimes and Misdemeanors.” The author discusses the evidence from the founding generation and from the commentators, and he briefly surveys the impeachment precedents. These historical materials suggest two broad (and overlapping) categories of conduct that may justify impeachment. The first is serious abuse of power. The second is conduct that demonstrates that an official is “unworthy to fill” the office that he holds.

Another question is the relevance of the pending criminal charges. Can the House rely on a criminal conviction as the basis for impeachment? Can the House proceed with impeachment if the criminal charges are dropped? The author concludes that the House must exercise an independent judgment; it is not bound by determinations of other actors in other proceedings.

The statement was submitted to the Task Force on Judicial Impeachment at a hearing on the possible impeachment of Judge Samuel B. Kent of the Southern District of Texas. The written statement is followed by supplementary material that includes the author’s oral testimony and the colloquies that followed. Based on the testimony at the hearing and other evidence, the House approved four articles of impeachment. Judge Kent resigned from the bench before his Senate trial.

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**Statement of
Arthur D. Hellman**

Chairman Schiff, Ranking Member Goodlatte, and Members of the Task Force:

Thank you for inviting me to express my views at this hearing held to consider the possible impeachment of Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas.

On May 11, 2009, Judge Kent was convicted on one felony count of obstructing justice in violation of 18 U.S.C. § 1512(c)(2). The conviction was based on a guilty plea in which Judge Kent admitted that he gave false testimony to a special committee of the Fifth Circuit Judicial Council that was investigating a complaint of judicial misconduct that had been filed against Judge Kent. Judge Kent was sentenced to a term of 33 months in prison. At the sentencing hearing, two witnesses – both employees at the Galveston courthouse where Judge Kent was the only resident Article III judge – described repeated instances of sexual abuse by Judge Kent.

In my view, based on the public record, Judge Kent has engaged in conduct that justifies impeachment, conviction, and removal from office under Article II of the Constitution. First, the conduct that Judge Kent acknowledged as part of the guilty plea proceedings – making false statements to a judiciary investigating body – is, without more, a sufficient basis for impeachment because it demonstrates Judge Kent's unfitness for judicial office. In addition, if the House credits the testimony of the two victims who testified at the sentencing hearing, the sexual assaults and other unwanted sexual contact demonstrate not only unfitness for office but also abuse of power. They thus constitute a second, independent basis for impeachment.

Before elaborating on these points, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. Since 2007 I have published three articles dealing with judicial misconduct and other aspects of federal judicial ethics. In November 2001, I testified at a hearing of the Subcommittee on Courts, the Internet, and Intellectual Property on “Operation of the Judicial Misconduct Statutes.” Subsequent to that hearing, Chairman Coble, joined by Ranking Member Berman, introduced the bipartisan Judicial Improvements Act of 2002, which became law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273. More recently, I testified at the hearing held to consider the possible impeachment of District Judge Manuel L. Real.

I. Background: Investigating Misconduct by Federal Judges

For most of the nation’s history, the only formal mechanism for dealing with allegations of misconduct by federal judges was the cumbersome process of impeachment. Criminal prosecution was a theoretical possibility, but up to 1980, “no sitting federal judge was ever prosecuted and convicted of a crime committed while in office.”¹ A 1939 statute created judicial councils within the circuits, but

¹ Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 326 (1993) [hereinafter National Commission Report]. In 1939, Judge Martin T. Manton of the Second Circuit Court of Appeals was convicted of crimes committed while he served as a federal judge, but he resigned from the bench before the criminal prosecution began. See Joseph Borkin, *THE CORRUPT JUDGE* 27, 45 (1962). Since 1980, four federal judges (in addition to Judge Kent) have been convicted of crimes committed while in office. Two (Harry Claiborne and Walter Nixon) were impeached and removed from office. One (Robert Collins) resigned from the bench, and one (Robert Aguilar) retired “on salary.”

their powers were vaguely defined, particularly with respect to authority over individual judges.²

In the mid-1970s, prominent members of Congress came to the conclusion that the impeachment process did not provide an adequate remedy for the many possible varieties of misconduct that might arise. After extensive debate, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (1980 Act). This law established a new set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits.

Of particular relevance here, the 1980 Act created a system that relied on the judiciary itself to carry out initial investigations of possible misconduct, even where impeachment might ultimately be warranted. As Senator Thurmond observed, the procedures established by the Act “would serve to isolate the most serious instances of misconduct and to actually set before the House of Representatives a record of proceedings revealing misconduct which might constitute an impeachable offense.”³

Two decades later, Congress passed a revised version of the Act in the Judicial Improvements Act of 2002.⁴ This legislation retained the framework of the 1980 Act but added some procedural details drawn from provisions adopted by

² See Peter Graham Fish, *The Politics of Federal Judicial Administration* 417-26 (1973); *Chandler v. Judicial Council*, 398 U.S. 74 (1969).

³ 126 Cong. Rec. 28097 (Sen. Thurmond).

⁴ The legislation was enacted as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273. The standalone version was passed by the House in July 2002 as H.R. 3892. For the legislative history, see H.R. Rep. 107-459 (2002). As noted in the text, I testified at the hearing that preceded the introduction of the bill.

the judiciary through rulemaking. The new law also gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

Under Chapter 16 and the implementing rules, the primary responsibility for identifying and remedying possible misconduct by federal judges rests with two sets of actors: the chief judges of the federal judicial circuits and the circuit judicial councils.⁵ A national entity—the Judicial Conference of the United States—becomes involved only in rare cases, and only in an appellate capacity.⁶

Ordinarily, the process begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit.⁷ The clerk must “promptly transmit” the complaint to the chief judge of the circuit, and the chief judge must “expeditiously” review it. As part of that review, the chief judge “may conduct a limited inquiry” but must not “make findings of fact about any matter that is reasonably in dispute.” Based on that review and limited inquiry, the chief judge may dismiss the complaint or terminate the proceedings. That, indeed, is what happens in the overwhelming majority of cases, typically because the complaint is frivolous or seeks only to challenge the merits of a judicial decision.

⁵ For a detailed description and analysis of procedures under the Act, see Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 *Notre Dame J. L. Ethics & Pub. Pol.* 325 (2008).

⁶ Chapter 16 also authorizes the circuit judicial councils to “refer” complaints to the Judicial Conference of the United States and to “certify” determinations that a judge has engaged in serious misconduct. *See* 28 U.S.C. § 354(b) (Supp. V 2005). Technically this section of the statute does not establish a channel of appellate review, but even here the council makes the initial decision, and the Judicial Conference becomes involved only after that decision has been made. At this writing, the Fifth Circuit’s certification in the Kent matter is pending before the Judicial Conference.

⁷ The Act also provides that the chief judge of the circuit may “identify a complaint” and thus initiate the investigatory process even when no complaint has been filed by a litigant or anyone else. That aspect of the Act does not come into play in the matter now under consideration by the Task Force.

If the chief judge does not dismiss the complaint or terminate the proceeding, he or she must promptly appoint a “special committee” to “investigate the facts and allegations contained in the complaint.”⁸ A special committee is composed of the chief judge and equal numbers of circuit and district judges of the circuit. Special committees have power to issue subpoenas; sometimes they hire private counsel to assist in their inquiries.

After conducting its investigation, the special committee files a report with the circuit council. The report must include the findings of the investigation as well as recommendations. The circuit council then has a variety of options: it may conduct its own investigation; it may dismiss the complaint; or it may take action including the imposition of sanctions.

Final authority within the judicial system rests with the Judicial Conference of the United States. A complainant or judge who is aggrieved by an order of the circuit council can file a petition for review by the Conference. In addition, the circuit council can refer serious matters to the Conference on its own motion. If the Conference determines that “consideration of impeachment may be warranted,” it may so certify to the House of Representatives.⁹

One final point about the process: Congress has authorized the Conference to delegate its review power to a standing committee, and the Conference has done so.¹⁰ The committee is the Committee on Judicial Conduct and Disability. But it is

⁸ See 28 U.S.C. § 353.

⁹ See 28 U.S.C. § 355(b).

¹⁰ See 28 U.S.C. § 331; *see also In re Complaint of Judicial Misconduct*, 37 F.3d 1511 (U.S. Jud. Conference 1994).

the Conference itself that takes the grave step of certifying to the House its determination that consideration of impeachment may be warranted.¹¹

II. The Accusations and the Procedural History

This impeachment proceeding has its origin in a judicial misconduct complaint filed on May 21, 2007, by Cathy McBroom, Judge Kent’s case manager.¹² Ms. McBroom alleged that she had been sexually harassed by Judge Kent. In response to the complaint, Chief Judge Edith Hollan Jones of the Fifth Circuit appointed a special committee to conduct an investigation of the allegations.

At some point during that investigation, the special committee notified Judge Kent “of an expansion of the original complaint . . . to investigate instances of alleged inappropriate behavior toward other employees of the federal judicial system.”¹³ Either before or after that notification, Judge Kent requested an opportunity to appear before the special committee. The special committee granted his request. What happened next is described in the “Factual Basis for Plea” signed by Judge Kent and also by his counsel:

As part of its investigation, the Committee and the Judicial Council sought to learn from defendant KENT and others whether defendant KENT had engaged in unwanted sexual contact with Person A and individuals other than Person A.

¹¹ On June 18, 2008, the Conference certified its determination that consideration of impeachment of District Judge Thomas G. Porteous may be warranted.

¹² Ms. McBroom is referred to in many of the documents as “Person A.” She identified herself as “Person A” in open court at the sentencing hearing in the criminal case. See Transcript of Sentencing Before the Hon. C. Roger Vinson, United States District Judge 45 (May 11, 2009) [hereinafter Sentencing Transcript].

¹³ In re Complaint of Judicial Misconduct, Dkt. No. 07-05-351-0086, Sept. 28, 2007, at 2 [hereinafter September 2007 Order].

On June 8, 2007, in Houston, Texas, [Judge Kent] appeared before the Special Investigative Committee of the Fifth Circuit.

[Kent] falsely testified regarding his unwanted sexual contact with Person B by stating to the Committee that the extent of his non-consensual contact with Person B was one kiss, when in fact and as he knew the defendant had engaged in repeated non-consensual sexual contact with Person B without her permission.

[Kent] also falsely testified regarding his unwanted sexual contact with Person B by stating to the Committee that when told by Person B that his advances were unwelcome, no further contact occurred, when in fact and as he knew the defendant continued his non-consensual contacts even after she asked him to stop.

Three months after Judge Kent’s appearance before the special committee, the special committee filed its report with the Judicial Council of the Fifth Circuit. Judge Kent submitted a response to the report. Based on the report and the response, the Judicial Council, on Sept. 27, 2007, issued a public order “reprimand[ing] Judge Kent for the conduct that the report describes.”¹⁴ The report itself was not made public, and the Judicial Council order did not describe the misconduct. The Judicial Council “concluded [the] proceedings because appropriate remedial action had been and will be taken, including but not limited to the Judge’s four-month leave of absence from the bench, reallocation of the Galveston/Houston docket and other measures.”¹⁵

Ms. McBroom filed a motion for reconsideration of the misconduct order. She alleged that there was additional evidence of misconduct by Judge Kent, including conduct that might constitute grounds for impeachment. Meanwhile, the United States Department of Justice initiated a criminal investigation of Judge

¹⁴ September 2007 Order at 2.

¹⁵ Id.

Kent. On Dec. 20, 2007, the Fifth Circuit Judicial Council deferred action on the motion for reconsideration “in light of the ongoing investigation.”

The criminal investigation proceeded, and on Aug. 28, 2008, a grand jury indicted Judge Kent on two counts of abusive sexual contact and one count of attempted aggravated sexual abuse. All three counts involved abusive sexual behavior that took place in the United States Courthouse in Galveston; the victim was “Person A” – Cathy McBroom, the original complainant. Judge Kent pleaded “not guilty.”

Three months later, on Jan. 6, 2009, the grand jury returned a superseding indictment. The new indictment reiterated the three counts of the August indictment and added three more. Counts Four and Five alleged that Judge Kent committed offenses of “aggravated sexual abuse” and “abusive sexual contact.” These counts, like those in the initial indictment, involved conduct at the Galveston courthouse, but the victim was “Person B,” later identified as Donna Wilkerson. The final count alleged obstruction of justice – specifically, that Judge Kent made false statements to the Fifth Circuit special committee about the nature and extent of his “unwanted sexual contact with Person B.” Once again Judge Kent pleaded “not guilty” to all of the charges.

Three days after the grand jury handed down its superseding indictment, the Fifth Circuit Judicial Council issued a brief order granting Cathy McBroom’s motion for reconsideration of the September 2007 misconduct order. The Council explained that when that order was issued, the special committee and the Council were unaware of the “allegations of serious misconduct” added by the superseding indictment. The new order said that after the trial in the criminal prosecution, the

Council would investigate the new charges and, if necessary, impose further sanctions.

The criminal trial was scheduled to begin on Feb. 23, 2009. Instead, on that day Judge Kent appeared in court and pleaded guilty to obstruction of justice. As part of the guilty plea, Judge Kent signed a document captioned “Factual Basis for Plea.” In the latter document, Judge Kent admitted that had “engaged in non-consensual sexual contact” with both Person A and Person B “without their permission.” He also admitted that in his appearance before the special committee of the Fifth Circuit Judicial Council he “falsely testified regarding his unwanted sexual contact with Person B.” For its part, the Government agreed “to seek dismissal of Counts One through Five of the Superseding Indictment after sentencing.” The Government also agreed “that the maximum term of imprisonment that it may seek at sentencing is three years.”

Sentencing took place on May 11, 2009. Judge C. Roger Vinson ruled that Cathy McBroom and Donna Wilkerson would be recognized as “victims” for purposes of the sentencing hearing.¹⁶ This meant that both women would have an opportunity to speak, and both did. Each described a history of abuse, assaults, and lies by Judge Kent. Judge Kent spoke briefly. He apologized to his staff, to his colleagues, and “to all who seek redress in the federal system.” Judge Vinson then sentenced him to 33 months in prison.

On May 27, 2009, the Fifth Circuit Judicial Council issued an order “determin[ing]” that Judge Kent “has ... by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the

¹⁶ See 18 U.S.C. § 3771(a)(4). Under that statute, a “crime victim” has the right “to be reasonably heard at any public proceeding in the district court involving ... sentencing.”

Constitution.” The Council certified its determination to the Judicial Conference of the United States and urged the Conference to “take expeditious action” to certify the matter to the House of Representatives. On the same day, Chief Judge Jones rejected Judge Kent’s request that she certify him as disabled pursuant to 28 U.S.C. § 372(a).

Based on this record, it appears that the Task Force will be considering the possibility of drawing up articles of impeachment seeking Judge Kent’s conviction and removal from office on three grounds:

1. Judge Kent made false statements to a special committee of the Fifth Circuit Judicial Council that was investigating a complaint of judicial misconduct against him. These false statements betrayed his trust as a judicial officer and impeded an investigation that was being carried out pursuant to an Act of Congress.

2. Judge Kent abused his position as a federal judge by engaging in non-consensual sexual contact with Cathy McBroom, an employee of the court that he supervised, on court premises.¹⁷

3. Judge Kent abused his position as a federal judge by engaging in non-consensual sexual contact with Donna Wilkerson, an employee of the court that he supervised, on court premises.

The question for the House, and for the Task Force in the first instance, is whether this behavior falls within the category of “high crimes and misdemeanors” that warrant the impeachment of Judge Kent under Article II of the Constitution. The remainder of this statement addresses that question.

¹⁷ I have drawn here and in the next paragraph on the language used in the “Factual Basis for Plea” that Judge Kent and his counsel signed. Testimony at the Task Force hearing may support a stronger version of the sexual misconduct articles.

III. The Constitutional Framework

The starting point for consideration of the possible impeachment of an Article III judge is of course the Constitution of the United States. Four provisions of the Constitution are relevant.

The first is the judicial tenure provision of Article III. Section 1 of Article III provides:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.¹⁸

Implicitly, this language is supplemented by Article II section 4:

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 process of impeachment is governed by two sections of Article I. Section 2 provides: “The House of Representatives ... shall have the sole power of impeachment.” Section 3 adds:

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

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: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

¹⁸ In this statement I shall use the modern spelling of “behavior.”

The interpretation and interaction of these constitutional provisions has generated a voluminous body of scholarship and commentary. For present purposes, I take four propositions as established.

First, it has been accepted at least since the early 19th century that federal judges are included among the “civil Officers” who are subject to impeachment and removal under Article II. Justice Joseph Story wrote in his authoritative treatise:

All officers of the United States ... who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.¹⁹

As already noted, on May 27, 2009, Chief Judge Jones rejected Judge Kent’s request that she certify him as disabled pursuant to 28 U.S.C. § 372(a). This means that Judge Kent will not be permitted to retire on the basis of disability. But even if Judge Kent had been allowed to invoke § 372(a), that would not have affected these impeachment proceedings. A judge who retires under § 372(a) is no longer in “regular active service,” but he would still “hold [his] appointment[] under the national government.” And Justice Story’s language makes clear that he would still be a “civil officer[] within the meaning of the constitution, and liable to impeachment.”²⁰

¹⁹ 2 Joseph Story, Commentaries on the Constitution of the United States § 790 at 258 (1833) (citing Rawle).

²⁰ In addition, as Chief Judge Jones noted, a judge who retires under § 372(a) is still eligible to perform judicial work (although he could not do so unless designated and assigned by the chief judge).

Second, the impeachment process delineated in Articles I and II is the *sole* means of removing a federal judge from office. That is the view of most commentators; it was also the conclusion of the National Commission on Judicial Discipline and Removal established by Congress and chaired by former Congressman Robert W. Kastenmeier, the principal author of the 1980 Act. After extensive study and discussion, the Commission wrote:

The Commission believes that removal may be effected only through the impeachment process. By “removal,” the Commission means anything that relieves the judge of the aspects of office provided for in the Constitution--namely, the judge’s commission of office, with its accompanying eligibility to exercise the judicial power, and nonreducible compensation.²¹

I recognize that Professor Raoul Berger took a different view in his 1973 book on impeachment,²² but later scholars have persuasively rejected his arguments (and in particular his reliance on the common law writ of *scire facias*).²³

Third, when Congress acts under the impeachment powers of Article I, its actions are not subject to judicial review. In *Nixon v. United States*,²⁴ the Supreme Court held that the meaning of the word “try” in the Impeachment Trial Clause is nonjusticiable. More broadly, the Court found that “the Judiciary, and the Supreme Court in particular, were not chosen [by the Framers] to have *any* role in impeachments.”²⁵ This underscores the unique and solemn responsibility that

²¹ National Commission Report, *supra* note 1, at 287.

²² Raoul Berger, *Impeachment: The Constitutional Problems* 135-65 (1973).

²³ See, e.g., David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 Wash. U. L. Q. 1397, 1406-08 (2005).

²⁴ 506 U.S. 224 (1993).

²⁵ *Id.* at 234 (emphasis added).

devolves upon the House – and upon this Task Force as its agent – when it is considering a proposal to impeach a federal judge.

Finally, although the precise relationship between the “good behavior” clause of Article III and the impeachment provision of Article II will never be settled definitively, it is generally accepted that the power of Congress to impeach and remove a federal judge can be exercised only for the “gravest cause”²⁶ or for “*very serious* abuses.”²⁷ This follows from the Framers’ concern for protecting judicial independence. It can be seen in the emphatic rejection by the Constitutional Convention of John Dickinson’s proposal to add, after the “good behavior” provision in what is now Article III, the following qualification: “provided that [the Judges] may be removed by the Executive on the application [of] the Senate and House of Representatives.” One delegate after another objected to Dickinson’s motion. Said James Wilson: “The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our [Government].” Edmund Randolph “opposed the motion as weakening too much the independence of the Judges.” Only one state voted for the motion; seven voted against it.²⁸

Two conclusions follow from this analysis. First, if Judge Kent refuses to resign and is not impeached and convicted, he will remain an Article III judge and will draw his full salary.²⁹ When he reaches the age of 65, he would be able to

²⁶ John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *Fordham L. Rev.* 1, 30 (1970) (footnote omitted).

²⁷ Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for Federal Judges*, 87 *Mich. L. Rev.* 765, 777 (1989) (emphasis in original).

²⁸ The account in this paragraph is based on 2 Max Farrand, *The Records of the Federal Convention of 1787* at 428-29 (1911); and Feerick, *supra* note 26, at 21.

²⁹ It is likely that Judge Kent will be disbarred, but there is no requirement that a district judge be a member of the bar. Judge Harry Claiborne was never disbarred in Nevada, even

“retire from the office ... and ..., during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.”³⁰ Second, Judge Kent can be convicted and removed from office only if the accusations against him fall within the category of “very serious abuses” that justify impeachment. The next question, therefore, is whether the accusations do fall within that category.

IV. The Meaning of “Other High Crimes and Misdemeanors”

Under the Constitution, Judge Kent may be impeached and removed from office only for “Treason, Bribery, or other High Crimes and Misdemeanors.” No one argues that Judge Kent has committed acts of treason or bribery. The question, therefore, is whether his conduct falls within the constitutional category of “high crimes and misdemeanors.”

One way of approaching this question would be to look at each word separately. What are “high crimes”? What did the Framers mean by the word “misdemeanors”? Does the adjective “high” modify “misdemeanors” as well as “crimes”? However, based on my study of the relevant materials, I believe that this approach is misguided. The preferable approach is to interpret the phrase holistically and to ask: what kinds of behavior, other than treason and bribery, fall within the realm of “very serious abuses” that justify impeachment of a federal judge? In pursuing this course, I rely on evidence from the Founding Generation, writings by leading commentators, and prior impeachments.

though he was convicted of a felony by a federal criminal jury and also convicted and removed from office by the Senate in an impeachment proceeding.

³⁰ See 28 U.S.C. § 371(a). Conceivably he could seek to “retain the office but retire from regular active service.” See 28 U.S.C. § 371(b).

A. Evidence from the Founding Generation

Initially the impeachments clause provided for impeachment only on the basis of treason or bribery. George Mason argued that this was too limited: “Attempts to subvert the Constitution may not be Treason as above defined.” He therefore moved to add after “bribery”: “or maladministration.” James Madison objected that “maladministration” was too “vague.” Mason thereupon withdrew “maladministration” and substituted “other high crimes & misdemeanors.” With that alteration, his motion passed by a vote of 8 states to 3.³¹

What is striking here is that the phrase “other high crimes and misdemeanors” was added on the floor of the Convention without discussion, or at least without discussion that Madison thought it necessary to record. While we must be wary of putting too much weight on negative evidence, the most natural inference is that the delegates did not think that they were using a narrow and technical term. Rather, they were broadening the grounds for impeachment while avoiding (they hoped) the vagueness of the term “maladministration.”

In any event, the debates at the Convention are of only limited utility in the present context. When the delegates were considering the grounds for impeachment, the impeachment clause applied only to the President.³² The President would serve for a specified term of years, so there was no need to consider the relationship between impeachment and tenure during “good behavior.”

³¹ The account in this paragraph is based on 2 Farrand, *supra* note 28, at 550.

³² The decision to make the Vice President “and other civil Officers” subject to impeachment was made later on the same day that the words “other high Crimes and Misdemeanors” were added to the impeachments clause. See *id.* at 552.

For an analysis of the impeachment provisions that does focus on judges, we must look at the ratification debates, and in particular at the Federalist Papers. Alexander Hamilton addressed the point directly in Federalist No. 79. In an oft-quoted paragraph, he wrote:

The precautions for [federal judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.³³

Two points about this analysis deserve emphasis. First, in describing the behavior that will justify impeachment of a judge and removal from office, Hamilton does not use either of the phrases that are part of the constitutional text. He does not say that judges may be removed if they fail to meet the Article III standard of “good behavior,” nor does he quote the language of Article II referring to “Treason, Bribery, or other high Crimes and Misdemeanors.” Rather, he states that federal judges “are liable to be impeached for *malconduct*.”

Hamilton was a meticulous lawyer. He was also as familiar as any man then alive with the language of the proposed Constitution. The fact that he used the word “malconduct” strongly suggests that he did not interpret “Treason, Bribery, or other high Crimes and Misdemeanors” as embracing a particularized list of carefully defined offenses; rather, he read the language of Article II – at least when applied to judges – as including a broader category of misbehavior.

This interpretation is reinforced by the final sentence of the quoted passage. After summarizing “the article respecting impeachments,” Hamilton adds: “This is

³³ The Federalist at 532-33 (No. 79) (Jacob E. Cooke ed. 1961).

the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find *in our own Constitution in respect to our own judges.*” This last phrase is often cited as describing the United States Constitution.³⁴ However, I believe that the final clause is much more plausibly read to refer to the New York State Constitution. Hamilton speaks of “our own Constitution” and “our own judges,” and of course, the Federalist Papers are addressed to “the People of the State of New York.”

What then do we find in the New York Constitution as it stood at the time of the debates over ratification of the United States Constitution? The State of New York had adopted its Constitution in 1777. The tenure of judges was governed by Article XXIV. That Article provided:

... that the chancellor, the judges of the supreme court, and first judge of the county court in every county, [shall] hold their offices during good behavior or until they shall have respectively attained the age of sixty years.³⁵

The standard for impeachment was set forth in Article XXXIII. That article provided:

That the power of impeaching all officers of the State, for *mal and corrupt conduct* in their respective offices, [shall] be vested in the representatives of the people in assembly ...³⁶

It thus appears that Hamilton thought that “Treason, Bribery, or other high Crimes and Misdemeanors” was not all that different from “mal and corrupt conduct.”

³⁴ For example, in *Nixon v. United States*, 506 U.S. 224, 235 (1993), the Court, speaking through Chief Justice Rehnquist, said, “In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature.” The Court then quoted the passage set forth in the text above, emphasizing the entire last sentence.

³⁵ 5 Francis Newton Thorpe, *The Federal and State Constitutions* 2634 (1909).

³⁶ *Id.* at 2635 (emphasis added).

B. Evidence from the Commentators

The discussions in the Convention and the Federalist Papers suggest that a federal officer – particularly a federal judge – is subject to impeachment for “maladministration” or “mal conduct.” What kinds of offenses fall within that category? Three leading commentators offer guidance on this point. They are Richard Wooddeson, William Rawle, and Joseph Story.

Richard Wooddeson was an English historian who was a contemporary of the Framers. A few years ago, the United States Supreme Court relied heavily on Wooddeson in ascertaining the meaning of the Ex Post Facto clause.³⁷ The Court noted that Wooddeson’s treatise on the common law of England “was repeatedly cited in the years following the ratification by lawyers appearing before this Court and by the Court itself.” With that endorsement, Wooddeson’s treatise is a useful starting-point.

Wooddeson’s discussion is not lengthy, nor is it as analytical as one might hope. Nevertheless, two points emerge with some clarity. First, impeachable offenses do not necessarily correspond to ordinary crimes. Rather, impeachment lies for conduct that involves abuse of power by a government official to the detriment of the community. Wooddeson wrote:

It is certain that magistrates and officers intrusted [sic] with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community, and at the same time in a manner not properly cognizable before the ordinary tribunals. ... The commons, therefore, as the grand inquest of the nation, become suitors for penal justice ...

³⁷ *Carmell v. Texas*, 529 U.S. 513, 522-24 (2000); see also *Stogner v. California*, 539 U.S. 607, 613 (2003) (quoting Wooddeson).

Such kind of misdeeds ... as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution. ... ³⁸

Wooddeson then listed some examples of cases that might call for impeachment. Among them were “a lord chancellor ... guilty ... of acting grossly contrary to the duty of his office” and a magistrate who “attempt[s] to subvert the fundamental laws, or introduce arbitrary power.”

Second, Wooddeson makes clear that the impeachment process is forward-looking; it is designed not so much to punish as to safeguard the “general polity” against further misconduct. Thus, after listing examples of misconduct, Wooddeson emphasized “how little the ordinary tribunals are calculated to take cognizance of such offenses, or to *investigate and reform* the general polity of the state.”³⁹

This forward-looking perspective emerges even more strongly in the treatise published in the early 19th century by the prominent Philadelphia lawyer and historian William Rawle. Recently the Supreme Court described Rawle’s treatise as “influential,” and the Court relied on it in ascertaining the meaning of the Second Amendment.⁴⁰ Rawle began by asking why the United States had copied the “system” of impeachment from a “foreign nation” whose government was so different from ours. One answer, he said, is that

the sentence which [a court of impeachment] is authorized to impose cannot regularly be pronounced by the courts of law. [The courts of law] can neither remove nor disqualify the person convicted, and therefore the obnoxious officer might be continued in power, and the injury sustained

³⁸ Richard Wooddeson, 2 A Systematical View of the Laws of England 596-97, 601-02 (1792).

³⁹ Id. at 602.

⁴⁰ District of Columbia v. Heller, 128 S.Ct. 2783, 2805-06 (2008).

by the nation be renewed or increased, if the executive authority were perverse, tyrannical, or corrupt: but by the sentence which may be given by the senate, not only the appointment made by the executive is superseded and rendered void, but the same individual may be rendered incapable of again abusing an office to the injury of the public.⁴¹

Rawle then explained why the availability of impeachment is particularly valuable as a means of dealing with misconduct by members of the judiciary:

We may perceive in this scheme one useful mode of *removing from office him who is unworthy to fill it*, in cases where the people, and sometimes the president himself would be unable to accomplish that object. A commission granted during good behaviour can only be revoked by this mode of proceeding.

The premise, then, is that the purpose of impeachment is to remove from office “him who is unworthy to fill it.” It follows, I think, that it is a sufficient ground for impeachment of a civil officer – particularly an Article III judge – that he has engaged in behavior that makes him “unworthy to fill” that particular office.

Justice Joseph Story is probably the best known of the early commentators, in part because he was also a long-serving and influential member of the United States Supreme Court. His widely cited treatise on the Constitution contains relatively little that directly addresses the purposes of impeachment, but we can learn much from careful reading of his discussion of other issues. For example, in addressing the question “whether the party can be impeached ... after he has ceased to hold office,” Story takes note of the argument that “it would be a vain exercise of authority to try a delinquent for an impeachable offense, when *the most important object, for which the remedy was given*, was no longer necessary, or

⁴¹ William Rawle, *A View of the Constitution of the United States of America* 217-18 (2d ed. 1829) (1970 reprint).

attainable.”⁴² From this we may infer that Story, like Rawle, viewed impeachment as a process for removing from office “him who is unworthy to fill it.”

Similarly, in discussing the question whether impeachment is limited to “official acts,” Story asks: “Suppose a judge or other officer to receive a bribe not connected with his judicial office; *could he be entitled to any public confidence?* Would not these reasons for his removal be just as strong, as if it were a case of an official bribe?” The premise here seems to be that a judge or other officer warrants impeachment and removal if he has engaged in behavior that results in a total loss of public confidence in his ability to perform the functions of his office. This is not quite the same thing as saying that the officer is not worthy to fill the office, but it suggests a similar forward-looking perspective.

When Story does turn to the question of what constitutes an impeachable offense, he draws heavily upon Wooddeson. Story comments approvingly that “lord chancellors, and judges, and other magistrates” have been impeached for “attempts to subvert the fundamental laws, and introduce arbitrary power.”⁴³ He goes on to take note of other impeachments that “were founded in the most salutary public justice; such as impeachments for malversations and neglects in office ... for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad.” His discussion thus reflects the twin themes that run through the writings of Wooddeson and Rawle: abuse of power and unfitness for the particular office.

⁴² Story, *supra* note 19, § 800 at 271.

⁴³ *Id.* § 798 at 268.

C. The impeachment precedents

In the history of the United States, only 13 federal judges have been impeached by the House.⁴⁴ Four (Chase, Peck, Swayne, and Louderback) were acquitted by the Senate. Two (Delahay and English) resigned before the Senate held an impeachment trial.⁴⁵ Seven judges were convicted and removed from office (Pickering, Humphries, Archbald, Ritter, Claiborne, Hastings, and Nixon).

The two 19th century convictions – Pickering and Humphries – have little relevance in the present context.⁴⁶ As for the 20th-century convictions, each could be viewed as offering some guidance for the present proceeding, but the various statements made by House Managers, House Committees, and Senators all must be read in the context of the particular accusations and defenses. In Parts V and VI of this statement I shall consider the implications of the guilty verdicts (and acquittals) in some of those prosecutions.

D. Conclusion

As Justice Story observed more than 150 years ago, the constitutional category of “high crimes and misdemeanors” does not lend itself to “positive legislation” or other comprehensive definition. But that does not mean that there are no points of reference to guide the House in its inquiry. For example, no one can doubt that quid-pro-quo corruption – closely akin to the “bribery” specified in Article II – is an impeachable offense. Beyond that, I believe that the historical materials discussed here suggest two broad (and overlapping) categories of

⁴⁴ For a comprehensive account of the various impeachment proceedings, see Emily Field Van Tassel & Paul Finkelman, *Impeachable Offenses: A Documentary History from 1787 to the Present* (1999).

⁴⁵ In fact, Judge Delahay resigned after the House had agreed to a resolution of impeachment but before articles of impeachment were actually drafted. See *id.* at 119-20.

⁴⁶ Pickering was accused, in substance, of drunkenness and insanity. See *id.* at 91-100. Humphries was removed from office because he supported the Confederacy. See *id.* at 114-19.

conduct that may justify impeachment. The first is serious abuse of power. The second is conduct that demonstrates that an official is “unworthy to fill” the office that he holds.

Do Judge Kent’s actions, as revealed in the public record, fit within either of these categories? Before turning to that question, one preliminary matter requires attention: what weight should the House (and this Task Force in the first instance) give to determinations made in the prior proceedings growing out of the misconduct complaint against Judge Kent?

V. The Relevance of Prior Proceedings

As already noted, Judge Kent’s conduct has been the subject of a criminal prosecution by the Department of Justice and a misconduct investigation by the Fifth Circuit Judicial Council. In the criminal prosecution, Judge Kent pled guilty to obstruction of justice and was convicted and sentenced for that offense. In reliance on that guilty plea, the Fifth Circuit Judicial Council certified its determination that Judge Kent “by his own admission engaged in conduct which constitutes one or more grounds for impeachment under Article II of the Constitution.” What is the relevance of these proceedings to this impeachment inquiry?

The short answer is that the House must exercise an independent judgment; it is not bound by determinations of other actors in other proceedings. The longer answer is fourfold.

Consider first the dismissal, at the request of the prosecution, of the five counts of aggravated sexual abuse and abusive sexual contact.⁴⁷ It is plain that these dismissals do not preclude the House from impeaching Judge Kent on the

⁴⁷ See Sentencing Transcript, *supra* note 12, at 77.

basis of the conduct underlying these five counts. This follows a fortiori from the fact that the House impeached Judge Alcee Hastings for engaging in “a corrupt conspiracy” to solicit a bribe after Hastings was *acquitted* of the same offense by a jury in a criminal trial.⁴⁸

At the other end of the spectrum, the history of prior impeachments suggests that the House should not rely on Judge Kent’s criminal conviction as constituting a high crime or misdemeanor. Particularly relevant here is the impeachment proceeding against Judge Harry Claiborne in 1986. Judge Claiborne had been convicted of filing false tax returns. Three of the articles voted by the House (I, II, and IV) described conduct by Judge Claiborne and said that by reason of that conduct, Judge Claiborne warranted impeachment.⁴⁹ In contrast, Article III relied solely on the guilty verdict rendered by the jury in the criminal prosecution and the ensuing judgment of conviction. The Senate convicted Claiborne by large margins on Articles I, II, and IV, but acquitted him on Article III. Three years later, when the House impeached Judge Walter Nixon, the articles of impeachment described false and misleading statements Judge Nixon had made, but they made no mention of the fact that Judge Nixon had been convicted of perjury in a criminal prosecution.

So I believe that the House should not rely on the criminal *conviction* as a basis for impeachment in and of itself. At the same time, however, the House can legitimately rely on the *facts* admitted by Judge Kent when he signed the plea

⁴⁸ See Alan I. Baron, *The Curious Case of Alcee Hastings*, 19 *Nova L. Rev.* 873 (1995).

⁴⁹ The Articles alleged that Claiborne knowingly and willfully falsified his income on federal tax returns. Articles I and II did say that the facts set forth in the articles “were found beyond a reasonable doubt by a twelve-person jury.” For further discussion of the Claiborne impeachment, see Part VI *infra*.

agreement as well as the “factual basis for [the] plea.” As part of the plea agreement, Judge Kent “knowingly, voluntarily and truthfully admit[ted] the facts set forth in the Factual Basis.” It is hard to see how Judge Kent could now repudiate that solemn stipulation or dispute the facts he admitted. The House can thus take all of the facts set forth in that “Factual Basis” as conclusively established for purposes of this impeachment proceeding. And if the House decides to vote articles of impeachment, the House can rely on those facts as elements of impeachable offenses.

Finally, there are the various statements and determinations made by the judiciary in the course of the misconduct proceedings. I have already quoted the order issued by the Fifth Circuit Judicial Council. By the time the House considers the Task Force report, the Judicial Conference of the United States will probably have certified its determination that consideration of impeachment of Judge Kent may be warranted. These determinations can appropriately be given considerable weight. Nevertheless, at the end of the day the House must make its own independent judgment as to whether Judge Kent’s conduct constitutes one or more impeachable offenses. Under Article I of the Constitution, the House has “the *sole* power of impeachment.” Only the House can decide when that power should be exercised.

VI. Judge Kent’s High Crimes and Misdemeanors

The final step in the analysis is to examine the record of Judge Kent’s behavior and to ask whether that behavior falls within the constitutional category of “high crimes and misdemeanors.” I believe that it does, for two independent reasons. First, Judge Kent has admitted to making false statements in a judicial proceeding – specifically, to a special committee that was investigating a

complaint that he had engaged in sexual harassment. This false testimony makes him unfit to hold judicial office. Second, there is evidence of sexual misconduct that constitutes abuse of official power and that provides further evidence of Judge Kent's unfitness to retain his judicial position.

A. False Statements in a Judicial Misconduct Proceeding

Judge Kent has admitted that when he appeared before the special committee of the Fifth Circuit Judicial Council that was investigating a judicial misconduct complaint filed against him, he “falsely testified regarding his unwanted sexual contact with” Donna Wilkerson. False testimony by a federal judge in a judicial misconduct proceeding falls easily within the realm of “high crimes and misdemeanors” that warrant impeachment.

Judge Kent's admitted conduct can be usefully compared to the conduct that led to the conviction and removal from office of Judge Claiborne. The articles of impeachment stated that Judge Claiborne “willfully and knowingly” filed federal income tax returns in which he failed to report substantial income. Article IV explained why this behavior constituted an impeachable offense:

[Judge] Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Judge Claiborne's dishonest behavior was totally unrelated to his role as a federal district judge. But the Senate convicted him on Article IV (as well on the two specific articles) by large margins. If Judge Claiborne's actions in submitting false information on a tax return was an impeachable offense, it would seem to follow a fortiori that making false statements in a federal judicial misconduct proceeding is also an impeachable offense.

In any event, quite apart from the Claiborne precedent, two aspects of Judge Kent's false statements aggravate the seriousness of his transgression and make clear his unfitness for judicial office. The first is the context: a special committee investigation under the Judicial Conduct and Disability Act of 1980. That Act was the product of careful and lengthy consideration.⁵⁰ In it, Congress made a considered decision to give the judiciary itself the primary responsibility for investigating and remedying misconduct by federal judges. Congress made this choice in the belief that such a system would provide greater accountability while fully preserving the independence of the judiciary. If that system is to operate effectively, chief judges and special committees must be able to rely on getting truthful answers from judges who are accused of misconduct. By testifying falsely before the special committee, Judge Kent impeded the council's performance of its Congressionally mandated task.

And the mischief goes even deeper. As already noted, one purpose of the 1980 Act was to allow the judiciary "to isolate the most serious instances of misconduct and [to] set before the House of Representatives a record of proceedings revealing misconduct which might constitute an impeachable offense."⁵¹ When Judge Kent testified falsely before the special committee, he interfered with the judiciary's ability to carry out that function. Judge Kent's conduct thus falls within Wooddeson's description (echoed by Story) of behavior that has warranted impeachment: an "attempt[] to subvert the fundamental laws."

⁵⁰ For a brief account of the legislative history of the 1980 Act, with citations to relevant materials, see Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. Pitt. L. Rev. 189, 207 (2007).

⁵¹ See *supra* text at note 3 (quoting Sen. Thurmond in Senate debate on the Act).

The second aggravating factor is the purpose of the falsehoods – to impede an official investigation of acts of sexual misconduct that may have constituted abuses of Judge Kent’s position as a judge. As shown in Part IV above, abuse of power virtually defines the impeachable offense. A public official who testifies falsely in order to cover up his abuse of power is doubly “unworthy to fill” his office. And when the official is a judge, the unfitness is inescapable.

For these reasons, I believe that Judge Kent’s false statements to the special committee of the Fifth Circuit Judicial Council constitute high crimes and misdemeanors that warrant impeachment.

B. Coercive Sexual Misconduct

In the “Factual Basis for [the] Plea,” Judge Kent admitted that he “engaged in non-consensual sexual contact” with Cathy McBroom and Donna Wilkerson “without [their] permission.” The “Factual Basis” further establishes that Judge Kent was a United States District Judge with his chambers at the federal courthouse in Galveston; that Ms. McBroom was an employee of the Clerk’s Office who was assigned to Judge Kent’s courtroom; and that Ms. Wilkerson was a District Court employee who served as secretary to Judge Kent. From these established facts, we may infer that Judge Kent exercised supervisory authority over both women – that he was their boss.⁵²

A federal judge who “engage[s] in non-consensual sexual contact” with court employees who are his subordinates may well be abusing his power as a federal judge in a way that justifies impeachment. However, I would be reluctant to conclude that the admitted facts, without more, satisfy the constitutional standard of “high crimes and misdemeanors.” Fortunately, it is unlikely that the House – or

⁵² Evidence to that effect will undoubtedly be forthcoming.

the Task Force in the first instance – will have to confront that question. Ms. McBroom and Ms. Wilkerson spoke at the sentencing hearing on May 11. Both women will be testifying at this Task Force hearing. If they describe their experiences in the way they did at the sentencing hearing, and if the House credits their testimony, the record will make a strong case for serious abuse of power that does warrant Judge Kent’s impeachment. Particularly compelling is this account by Ms. McBroom:

Judge Kent ... attacked me in a small room that was not 10 feet from the command center where the court security officers worked. He tried to undress me and force himself upon me while I begged him to stop. He told me he didn’t care if the officers could hear him because he knew everyone was afraid of him. I later found out just how true that was. He had the power to end careers and affect everyone's livelihood ...

The last assault I had was more terrifying and threatening than ever before. After forcing himself upon me and asking me to do unspeakable things, he told me that pleasuring him was something I owed him. That was it for me. He had finally won. He had broken me and forced me out. I could handle no more of his abuse.⁵³

The evidence would then point to the conclusion that Judge Kent relied on his position of authority and control in the Galveston Division of the District Court to coerce employees of that court to engage in sexual acts for his personal gratification – and to remain silent rather than to report his attacks to a higher authority. Such behavior is, in Wooddeson’s words, “official oppression” that “introduce[s] arbitrary power.” It is a high crime and misdemeanor.⁵⁴

⁵³ Sentencing Transcript, supra note 12, at 46-47.

⁵⁴ Counts One through Five of the indictment allege extremely serious acts of “aggravated sexual abuse” and “abusive sexual contact” by Judge Kent. To the extent that these allegations are supported by evidence presented to the Task Force, they would reinforce this conclusion.

It is true that none of the judicial impeachments that resulted in conviction in the 19th and 20th centuries involved similar transgressions.⁵⁵ But that is no barrier to impeachment of Judge Kent. Justice Story emphasized that impeachable offenses “are of so various and complex a character” that “[t]he only safe guide” is the method of the common law. The common law looks to principle, and the principle is the one already set forth: that impeachment is appropriate when a public official has misused his power in a way that makes him unfit to fill the office he holds. If Judge Kent had demanded that court employees give him 10 percent of their salaries as a condition of holding their jobs, no one would doubt that he committed an impeachable offense. The sexual coercion described at the sentencing hearing is no less “obnoxious,”⁵⁶ and the result should be the same.

VII. Conclusion

When Justice Story delineated the impeachments that “were founded in the most salutary public justice,” he alluded “especially” to cases where public officials were impeached “for putting good magistrates out of office, and advancing bad.” The record presented to the Task Force depicts conduct that closely resembles this paradigm. Judge Kent was a “bad” magistrate. The evidence indicates that he used his position of authority and control at the federal court in Galveston to coerce employees into engaging in non-consensual sexual acts over a period of years. Although there is no evidence that he attempted to “put[] good magistrates out of office,” he did something equally pernicious: he made false statements to his fellow judges in order to retain his position as a judge and avoid

⁵⁵ An argument can be made that one of the articles on which Judge Robert W. Archbald was convicted involved abuse of power that was far less “oppressive” than the conduct described at Judge Kent’s sentencing hearing. For a detailed account, see the Appendix.

⁵⁶ See *supra* text at note 41 (quoting Rawle).

punishment for his sexual misconduct. He is “unworthy to fill” the office he holds, and his “commission [should be] revoked” through the impeachment process.

Appendix

The Archbald Impeachment: Article 4

Judge Robert Archbald was a member of the short-lived Commerce Court. Thirteen articles of impeachment were voted against him by the House. Overall, the articles accused Archbald of corrupt behavior – behavior that plainly falls within the core of impeachable conduct. The House Committee Report recommending impeachment said:

[Judge Archbald] has prostituted his high office for personal profit. He has attempted by various transactions to commercialize his potentiality as judge. He has shown an overweening desire to make gainful bargains with parties having cases before him or likely to have cases before him. To accomplish this purpose he has not hesitated to use his official power and influence.⁵⁷

Judge Archbald was convicted on five of the thirteen articles. Four of these (including the thirteenth, a catchall article) alleged specific acts of corruption. However, Article 4 did not. Article 4 involved a case that was decided by the Commerce Court in 1912. In that case, the Louisville & Nashville Railroad Co. challenged a ruling by the Interstate Commerce Commission.⁵⁸ Here are the allegations in Article 4:

- While the suit was pending before the Commerce Court, Archbald “secretly, wrongfully, and unlawfully [wrote] a letter to the attorney for [the railroad] requesting said attorney to see one of the witnesses who had testified in said suit on behalf of said company and to get his explanation and interpretation of certain testimony that the said witness had given in said suit, and communicate the same to ... Archbald, which request was complied with by said attorney[.]”

⁵⁷ House Report No. 946, 62d Cong. 2nd Sess., at 23.

⁵⁸ See *Louisville & Nashville R. Co. v. ICC*, 195 Fed. 541 (Com. Ct. 1912). The Commerce Court’s decision was reversed by the United States Supreme Court. See *ICC v. Louisville & Nashville Ro. Co.*, 227 U.S. 88 (1913).

- Later, while the suit was still pending, Archbald “secretly, wrongfully, and unlawfully again did write to the [attorney saying] that other members of [the court] had discovered evidence on file in said suit detrimental to the said railroad company and contrary to the statements and contentions made by the [attorney].” Archbald requested the attorney “to make to him ... an explanation and an answer thereto[.] “
- “[Archbald] did then and there request and solicit [the attorney] to make and deliver to ... Archbald a further argument in support of the contentions of the said attorney so representing the railroad company, which request was complied with by said attorney, all of which on the part of said Robert W. Archbald was done secretly, wrongfully, and unlawfully, and which was without the knowledge or consent of the said Interstate Commerce Commission or its attorneys.”⁵⁹

Note what is and what is not in this article. The article alleges that Judge Archbald sought and received ex parte communications from the railroad’s lawyer about a case pending before Judge Archbald’s court. It does not say that Judge Archbald sought or received any quid pro quo for helping the railroad to support its position. It does not even say what happened in the case.

Some of that information is provided earlier in the Committee Report, in the narrative account. The Report explains that the Commerce Court decided the case in favor of the railroad, with Judge Archbald writing for the majority (which included three other judges) and Judge Mack dissenting. The Report adds: “In the opinion of your committee, this conduct on the part of Judge Archbald was a misbehavior in office [sic], and unfair and unjust to the parties defendant in this case.”⁶⁰

The Senate convicted Archbald on Article 4 by a vote of 52 to 20. It did so even though the Article asserted, at most, an abuse of power that benefited one

⁵⁹ House Report No. 946, supra note 57, at 26-27.

⁶⁰ Id. at 8.

side in the case and injured the opposing parties.⁶¹ The conviction on Article 4 thus supports the proposition that a judge’s use of his power or position to injure an individual can constitute a high crime or misdemeanor within the meaning of Article II of the Constitution.

In my statement at the hearing on the resolution to impeach Judge Manuel Real, I noted that there was also a precedent that might be viewed as pointing in the other direction, although not with much force. In 1830, the House impeached Judge James H. Peck on a single article. The allegation was that Judge Peck “unjustly, oppressively, and arbitrarily” punished a lawyer for contempt of court.⁶² In the Senate, there was not even a majority for conviction; the vote was 21 to 22.

The impeachment article describes what sounds like an abuse of power that was neither criminal nor corrupt. In that respect it resembles the accusations against Judge Real – but not the accusations against Judge Kent. Moreover, Judge Peck’s counsel, William Wirt, acknowledged that “if [Judge Peck] knew that [the lawyer’s behavior] was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offense.”⁶³ But Wirt also argued that “a mere mistake of law is no crime or misdemeanor in a judge.” Senators may have voted for acquittal on the ground that the House managers had not shown more than “a mere mistake of law” without bad intent. Judge Kent’s guilty plea and his admission of facts in the “Factual Basis” foreclose any argument that his case resembles Peck’s.

⁶¹ In fact, it is by no means clear that Judge Archbald’s actions caused any harm to the defendants. Four judges joined the opinion of the Commerce Court, and nothing in the House Committee report indicates that the other three judges saw or were influenced by the material that Judge Archbald obtained through his ex parte communications with the railroad counsel.

⁶² See Van Tassel & Finkelman, *supra* note 44, at 113.

⁶³ See *id.* at 109.

Appendix

1. Transcript of the oral statement of Arthur D. Hellman at the hearing of the Task Force on Judicial Impeachment of the House Committee on the Judiciary, June 3, 2009 (pp. 176-178).
2. Transcript of colloquies at the hearing of the Task Force on Judicial Impeachment of the House Committee on the Judiciary, June 3, 2009 (pp. 215-230).

**TO CONSIDER POSSIBLE IMPEACHMENT OF
UNITED STATES DISTRICT JUDGE SAMUEL B.
KENT OF THE SOUTHERN DISTRICT OF TEXAS**

HEARING
BEFORE THE
TASK FORCE ON JUDICIAL IMPEACHMENT
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS
FIRST SESSION

—————
JUNE 3, 2009
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Mr. SCHIFF. Professor Hellman.

TESTIMONY OF ARTHUR D. HELLMAN, PROFESSOR, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, PITTSBURGH, PA

Mr. HELLMAN. Thank you, Mr. Chairman. The testimony that you have just heard makes all too clear the importance and, indeed, the urgency of this hearing today. The question before the Task Force is whether Judge Kent's conduct falls within the constitutional category of high crimes and misdemeanors that warrant impeachment.

I have submitted a statement in which I analyze this question in some detail. Here, I will just briefly summarize my conclusions.

In my view, based on the public record, Judge Kent's behavior does fall within the constitutional category, high crimes and misdemeanors. I reach this conclusion for two independent reasons. First, Judge Kent has admitted to making false statements in a judicial proceeding, specifically to a judicial—a special committee that was investigating a complaint that he engaged in sexual harassment. This false testimony makes him unfit to hold judicial office.

Second, there is evidence, now ample evidence, of sexual misconduct that constitutes an abuse of official power and that it provides further evidence of Judge Kent's unfitness to retain his judicial position.

I will start with the false statements. Judge Kent has admitted that when he appeared before the Special Committee of the Fifth Circuit Judicial Council that was investigating a judicial misconduct complaint filed against him, he falsely testified regarding his unwanted sexual contact with Donna Wilkerson. False testimony by a Federal judge in a judicial misconduct proceeding falls easily within the realm of high crimes and misdemeanors that warrant impeachment.

This is so, in part, because of the context. This Fifth Circuit Special Committee was part of the mechanism that Congress itself established in the Judicial Conduct and Disability Act of 1980. In that act, Congress made a considered decision to give the judiciary itself the primary responsibility for investigating and remedying misconduct by Federal judges. If that system is to operate effectively, chief judges and special committees must be able to rely on getting truthful answers from judges who are accused of misconduct. By testifying falsely before the special committee, Judge Kent impeded the committee's performance of this congressionally mandated task.

And the mischief goes even deeper. A second purpose of the 1980 Act was to allow the judiciary, as one sponsor said, to isolate the most serious instances of misconduct and to set before the House of Representatives a record of proceedings revealing misconduct which might constitute an impeachable offense. So when Judge Kent testified falsely before that special committee he interfered with the judiciary's ability to carry out that function, a function with constitutional underpinnings.

As if that were not enough, there is another aggravating factor. The purpose of Judge Kent's falsehoods was to impede an investigation of acts of sexual misconduct that even then we knew may have constituted abuses of Judge Kent's position as a judge. As I develop more fully in my statement, abuse of official power virtually defines the impeachable offense. A public official who testifies falsely in order to cover up his abuse of power is doubly unworthy to fill his office. And when the official is a judge, the unfitness is inescapable.

The record also points to a second ground for impeachment, the acts of sexual misconduct. On this point, Judge Kent's admissions established that he engaged in repeated non-sex—non-consensual sexual contact with two court employees who were his subordinates. Now, if all you had was the admissions, I think that I would be reluctant to conclude that the admitted facts, without anything more, satisfy the constitutional standard.

But, of course, there is more, a great deal more, the testimony you have heard today from Cathy McBroom and Donna Wilkerson. Based on that testimony and other evidence, you may well find that Judge Kent relied on his position of authority and control in the Galveston Division of the district court to coerce employees of that court to engage in sexual acts for his personal gratification and to coerce and intimidate them into remaining silent rather than to report his attacks to a higher authority.

If the record shows that, there can be no question that it is impeachable behavior. It is, in the words of the authoritative com-

mentator, Richard Wooddeson, it is official oppression that introduces arbitrary power. It is a high crime and misdemeanor.

To sum up, there is at least one ground, and probably more, for impeaching Judge Kent. He has proved himself to be unworthy to fill the office he holds, and I urge the Task Force to take the next steps in the process that will enable the Senate to convict him and remove him from office. Thank you.

Mr. SCHIFF. Thank you, Professor.

[The prepared statement of Mr. Hellman follows:]

Ms. Wilkerson, I wanted to ask you—Ms. McBroom went through some of the chronology of how she filed the complaint around how the disciplinary proceeding was begun. Can you tell us a little bit about how you came to be involved in the legal proceedings, whether it was through the grand jury or otherwise, and what the course of the legal process was?

Ms. WILKERSON. Yes, sir. I was questioned by the—initially I was questioned by the Fifth Circuit panel, and then I was called for grand jury testimony. I did not elaborate, I did not tell the whole story from the beginning.

I became involved about a year and a half later. I did not want to come forward from the beginning, but I was sought out to tell the truth, and realized at a point that I had to tell the truth and come forward and do the right thing. And some people close to me also helped me make that decision that this had to be done. And so that's how I got involved.

Mr. SCHIFF. Thank you.

Professor, I want to ask you a couple of questions. First Mr. Baron related the part of the transcripts of the sentencing proceeding in which the prosecutor made reference to the same false statements that were the subject of the Fifth Circuit proceeding. The judge had also made to the FBI the same false denials. He also made reference to those same false denials being made later to the Justice Department. False statements to the FBI, false statements to the Justice Department in connection with the same conduct, in view—in your view, would those constitute impeachable offenses as well?

Mr. HELLMAN. Yes, I think they would. And I rely here in part on the impeachment and conviction of Judge Harry Claiborne, who was convicted of tax fraud unrelated to his duties as a Federal judge. I think that if that is an impeachable offense, this kind of falsehood is an easy case after that.

Mr. SCHIFF. In terms of the testimony we heard today, can you elaborate a little bit on whether it's necessary to show a nexus between the sexual assaults that were described and his position of authority or his responsibilities as a judge. Is there—and the necessity of there being a nexus—in other words, if the two women who testified today, let's say they didn't even work in the courthouse but were assaulted in the manner they described, would that be impeachment because it also constitutes criminal conduct, or would you need to show a nexus with his position of authority as a district judge, his position as employer? Is a nexus required for impeachment and has a sufficient nexus, in your view, been laid here?

Mr. HELLMAN. Let me take the first part of that question. It is interesting that the question you pose was actually posed in a slightly different context more than 150 years ago by Justice Joseph Story, who was not only a Supreme Court Justice but one of our most authoritative constitutional commentators. And he posed that question: Suppose you had the misconduct—he talked about bribery rather than sexual misconduct—and it was totally outside the official capacity. He didn't quite answer it, but he put the question: Would we have any less confidence in that person's ability to hold his office simply because the misconduct occurred in a private

capacity? The answer obviously to that question is no, you would not have confidence in the ability to hold that office.

It seems to me, though, that you don't have to get to that here. Based on the testimony here, you have ample evidence of the nexus that this—that Judge Kent was able to engage in this behavior repeatedly and over a period of time because of the position of power he had as a Federal judge, and particularly as the only Article III judge in that Galveston courthouse. That's abuse of power, and abuse of power is quintessentially what makes for an impeachable offense.

Mr. SCHIFF. Last question. The Constitution makes mention of judges serving during good behavior, which has been interpreted as meaning a life term. But I wonder whether those words "good behavior" also add context to what the framers meant by high crimes and misdemeanors. And the reason I ask is this: Unlike other Federal officials, Members of Congress, the President, who serve for a term of years and then are up before the voters, the judges are never up before the voters. There is only one method to be removed from judicial office, and that is by impeachment.

Does that fact of there being no other remedy, no other mechanism for removal, and the discussion or the mention of good behavior mean that the framers had in mind either a different view of what constitute a high crime and misdemeanor in the case of judicial officer, or that good behavior should inform that in some way? Is there any discussion of whether, in the cases of someone appointed for life, that the same definition of high crimes and misdemeanors is nonetheless viewed in a different way?

Mr. HELLMAN. Unfortunately for us today, the sequence in which the framers at the convention in Philadelphia considered these questions doesn't enable us to give a confident answer to that question. What is reasonably clear from the commentators over a period of time is that the concept of high crimes and misdemeanors does relate to the particular office because of this emphasis on unfitness or unworthiness to hold the office. And so I think in that sense you do look at judges a little bit differently, partly because of the particular responsibilities that they have, and partly because, as one of the commentators did say, you cannot remove them from office otherwise. So that does—that does put the context of the particular office, it does make it important in that sense.

Mr. SCHIFF. Thank you, Professor. I now recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. I just want to make sure that the record is absolutely clear. And I would like to ask both you, Ms. Wilkerson, and you, Ms. McBroom, in your respective written testimonies you go into some detail on exactly what the nature of the misconduct of Judge Kent was against you. I'm not going to ask you to repeat this in public, but I would like each of you to say whether or not your detailed explanation is the truth and that is exactly what happened. You can just say yes or no.

Ms. WILKERSON. Yes, sir, absolutely.

Ms. MCBROOM. Yes, it's the truth.

Mr. SENSENBRENNER. Now, all of the instances that you described in your oral testimony, as well as in the written testimony

which has been included in the record, took place while you were working, and during working hours; is that correct or not?

Ms. WILKERSON. That's true.

Ms. MCBROOM. That's correct.

Mr. SENSENBRENNER. So this was all harassment that occurred on the job while the clock was running for both of your jobs, correct?

Ms. WILKERSON. Yes, none of these incidents occurred outside of the courthouse, ever.

Ms. MCBROOM. Same with me.

Mr. SENSENBRENNER. I have no further questions, Mr. Chairman.

Mr. SCHIFF. I thank the gentleman. Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I feel compelled to apologize to both Ms. Wilkerson and Ms. McBroom for the treatment that you have detailed to us today, and hopefully you will accept the knowledge that your Federal Government, the system of the judiciary, is one overall that you can be proud of.

This is a difficult position for you to be in. And I believe it is very important for you to know of the many jurists and Members of Congress who stand away from the details that you have offered here today. So thank you for your coverage, for being here today, and accept this as an apology for, again, what you have represented to us today.

Let me just try to find out from Ms. McBroom and from Ms. Wilkerson, did you overlap in tenure in Judge Kent's court? What were the years of service, again, Ms. Wilkerson? Can you give me the year to year—I think you said something like 2001 to 2007; is that accurate?

Ms. WILKERSON. Thank you very much for your kind words. Yes, our tenure did overlap. I came to the court in December of 2001. And, if I may speak for Cathy, I believe she came in July or so.

Ms. MCBROOM. It was September of 2002.

Ms. WILKERSON. So I was there for almost a year before Cathy came.

Ms. JACKSON LEE. Thank you.

And I think what you said, Ms. Wilkerson—and I will ask both of you. You indicated that when the judicial panel came forward, you were still at a point of intimidation and concern about your employment. So tell me just what you did when that panel came forward and asked you to speak to them?

Ms. WILKERSON. Yes, ma'am, absolutely. At the time of the Fifth Circuit interviews, Judge Kent earlier—I believe my interview was in June, June sometime—Judge Kent had already been interviewed.

Prior to that time, in between the time when Ms. McBroom filed her complaint and the time that I was interviewed, Judge Kent told me and told everyone that I knew of, including his lawyer, that he had been inappropriate with me on several occasions, kisses and hugs, a couple of times. The first few times, in his words, were that I was sweet about it, I was nice about it, but after the second or third time I made it very clear to him that I wanted no part of that. He told me from the beginning that that was his story, that was what he told his lawyer, that is what he told the Fifth Circuit.

And then, ultimately, that is what he said that he told the FBI when the criminal investigation began.

So that was the story that he told everyone. That is what he told me. That is what he told his law clerks. That is what he told even his colleagues, even the chief judge, I believe. But, in fact, that is not what he said at all in his interview with the Fifth Circuit and the FBI.

Ms. JACKSON LEE. So he said less than that.

Ms. WILKERSON. He said less than the story he even told me.

Ms. JACKSON LEE. And when you went—did you go before the panel?

Ms. WILKERSON. Yes, ma'am, I did.

Ms. JACKSON LEE. And how did you feel the necessity—what testimony did you offer?

Ms. WILKERSON. My testimony was that that was the story, that I had been approached two or three times, a few times. I made it very clear that it was unwanted and it was more than a few times.

Ms. JACKSON LEE. And that was on record, and—

Ms. WILKERSON. Yes, ma'am.

Ms. JACKSON LEE [continuing]. Then you still were in his employ as a personal secretary?

Ms. WILKERSON. Yes, ma'am. I let them know that the—with that story.

Ms. JACKSON LEE. You went forward with that. Well, that is good. I just wanted to make sure that you were at that panel and provided that information.

Ms. WILKERSON. Yes, ma'am, I did.

Ms. JACKSON LEE. Ms. McBroom, so it was 2002 that you started, and your complaint was filed when?

Ms. MCBROOM. I believe it was filed toward the end of May 2007.

Ms. JACKSON LEE. Right. And you went before that panel, as well?

Ms. MCBROOM. Yes, I did.

Ms. JACKSON LEE. Okay. And likewise gave your almost complete testimony?

Ms. MCBROOM. I gave them every piece of information I had.

Ms. JACKSON LEE. Okay. Let me thank you. And because my time—Professor, let me ask you—

Mr. SCHIFF. Will the gentlewoman yield for just one moment? I want to make sure we have a clear record on this, Ms. Wilkerson.

Ms. JACKSON LEE. I would be happy to yield.

Mr. SCHIFF. I thank you.

In your comments to the judicial panel, there are many things that you did not tell them that you only disclosed later. Is that correct?

Ms. WILKERSON. That is correct.

Mr. SCHIFF. Okay. I just wanted to make sure we were clear about that.

Ms. JACKSON LEE. And I thank you for clarifying. I am understanding that Ms. Wilkerson framed her testimony at least with the items that the judge said, but, more importantly, that she was against these—or she refused these sexual assaults or advances—I don't want to characterize your testimony. But you made it clear on the record at that time.

Ms. WILKERSON. Yes, ma'am, I made it clear there had been more than one incident of sexual misconduct and that it was against my wishes.

Ms. JACKSON LEE. Thank you. I think that is clear.

Mr. Chairman, if you would indulge me, I was just in the middle of finishing very quickly with Professor Hellman.

Professor, it does seem quite clear in the law about the idea of the impeachment standard. Where do you place the representations about alcohol abuse and mental health concerns?

I would like you to—I am not sure what you have read or the materials that you have read, but I do know that there is a letter in the record from Judge Edith Jones, where they made the determination that, I guess, obviously you are upset and have some mental issues because you are in the midst of this crisis.

Does there have any impact if this person represents or proves that they had a mental health issue throughout the period of these actions, as it relates to the impeachment proceeding?

Mr. HELLMAN. Well, I suppose it has a view as an impact—you know, you can feel perhaps a little bit more sympathetic toward Judge Kent as an individual. The question, though, for this Task Force in the first instance and then for the House is, is he worthy of the position he holds?

And if he is not worthy of that position, as much of this evidence indicates very strongly, then that background, it seems to me, should not affect that determination. Because without removal from office, he will continue to sit as a Federal—not to sit as a Federal judge—to hold the title of Federal judge, to receive the salary of a Federal judge, and also to occupy a position that otherwise could be filled by a new judge appointed by the President.

So that, it seems to me, is what is primarily relevant at the impeachment stage.

Ms. JACKSON LEE. Could you just—I will conclude on this question. Could you just restate the premise? Is that constitutional or case law on “worthy to be”? Could you—

Mr. HELLMAN. Well, there is not—I mean, one of the other points—

Ms. JACKSON LEE. I want you to help us with the right question, so that is why I am asking you.

Mr. HELLMAN. Right. Yeah, no, I think the—we don't have case law on this for the simple reason that the Constitution vests the impeachment responsibility in the House and the trial responsibility in the Senate. Neither of those are judicially reviewable.

For that reason, we rely heavily on the commentators. And one of the most authoritative commentators uses the standard of “worthiness for office,” that a public official should be removed if he has shown himself to be unworthy of the office he holds. And so that is, I believe, the question here. And obviously there is very ample evidence on that, at this point.

Ms. JACKSON LEE. I thank the Chairman.

I thank all the witnesses very much for your testimony.

I yield back.

Ms. MCBROOM. Mr. Chairman, may I add something to my statement?

Mr. SCHIFF. Of course.

Ms. MCBROOM. There were several incidents of sexual misconduct that were not alcohol-related. There were incidents where I was called up to his chambers in the morning and he tried similar things, tried to grab me, kiss me, fondle, when he had not been drinking. It was not always alcohol-related.

As a matter of fact, he would go months at a time without drinking. I can't say that each incident was because of being intoxicated. It was not.

Ms. JACKSON LEE. That is an important clarification. I thank you for your testimony.

Mr. SCHIFF. I thank the gentlewoman. Her time has expired.

Mr. Goodlatte of Virginia?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Ms. McBroom, can you describe generally the power that Judge Kent exercised in the Galveston courthouse? Is it basically true that it was a one-judge courthouse and he basically ran everything and supervised everybody?

Ms. MCBROOM. Yes, it was a one-judge courthouse. I think all of the employees were afraid to get out of line. I know when I began my employment there, my own manager, the deputy in charge for Galveston, sat down and talked to me and told me that I needed to be very careful to stay under his radar, that anything could set him off.

Mr. GOODLATTE. So there was nobody in the courthouse that you or anybody else really would feel like you could go to complain—

Ms. MCBROOM. Not anyone who was not afraid of him.

Mr. GOODLATTE. Right. Did Judge Kent do or say anything that communicated to you that he felt he could get away with his misconduct toward you because he was a Federal judge?

Ms. MCBROOM. Well, at the time I told you about in the wait room, whenever I told him the security officers were right outside, he didn't say it was because he was a Federal judge, he just said, "I don't care. I don't care who hears me." I just understood that it was because he was in that position of power.

Mr. GOODLATTE. What did it take, because of this environment, for you to be able to get the assistance or support from somebody else? How did you follow through on this to—

Ms. MCBROOM. Do you mean when I decided to request the transfer?

Mr. GOODLATTE. Well, yes. When did you first seek some help in terms of dealing with the problems that you were having?

Ms. MCBROOM. Oh, I sought help from the very beginning, from the very first incident by making my manager aware of what is going on. And she even agreed that if there were times when I felt threatened I could leave. She said, if you need to leave, you just go ahead and go, take off.

But there were certain times when I actually had a lot of work to do and he might have been in the building and may have been looking for me, and I thought if I could temporarily just escape until he left the office then I could stay and continue to do my work. I know that sounds crazy, but I really did want to perform my responsibilities. Sometimes I would just go hide in an empty office until I knew that he had gone for the day.

Mr. GOODLATTE. Thank you.

Ms. Wilkerson, how did the fact that Judge Kent was a Federal judge affect you in your initial response to his actions?

Ms. WILKERSON. Well, as I said in my statement, I—what could I do? He had made it very clear that he was the sole person in our staff, the two law clerks and myself, he was the sole person responsible for every decision there. And I literally, when I came there, there was no training, there was no—in fact, several times throughout the 7 years that I was with him, I had asked to go to several training seminars and such, and he declined those. There was no training. I was like, who am I supposed to go to with this? Who am I supposed to tell this to? How am I supposed to handle this?

Mr. GOODLATTE. So you didn't even have the resource of a supervisor—

Ms. WILKERSON. I did not have a manager. He was my manager. He was the manager.

Mr. GOODLATTE. And how did you ultimately bring this to the attention of others, that you had been subjected to this treatment?

Ms. WILKERSON. Initially, I told the Fifth Circuit panel when they asked me in the investigation of Ms. McBroom's complaint. That was the first time.

Well, let me back up. I had told two of our law clerks. One was a career law clerk, and one was a term law clerk that had left. And they've remained—she remains a co-worker and a dear friend, and he remains a dear friend. And I had told them back when. I had not told them the severity of it because it was too humiliating. I had told no one, no one, the details because it was too embarrassing and humiliating. Who could I tell these things to? I hadn't told my husband. I couldn't tell anyone. I personally felt I couldn't tell anyone.

So I told them, but—and they were in agreement, that's awful. And one even went so far as to say, yeah, I think he is a predator. What are you to do? Everyone, even—and this guy, this friend of mine that was the former law clerk, of course he was intimidated and afraid of him also.

Mr. GOODLATTE. Mr. Chairman, I know my time has expired. I wonder if I might have leave to ask one question of Professor Hellman.

Mr. SCHIFF. Of course, without objection.

Mr. GOODLATTE. It seems there are various views as to what sort of conduct would be sufficient to justify impeachment. Can you discuss for the Task Force how the concept of abuse of trust or abuse of position fits within the concept of high crimes and misdemeanors?

Mr. HELLMAN. Yes. Abuse of trust, abuse of a position really is the heart of high crimes and misdemeanors.

Mr. GOODLATTE. You may want to hit your speaker button there.

Mr. HELLMAN. I think it is—I'll bring it closer there.

What is striking to me as I listen to the very courageous testimony of Ms. McBroom and Ms. Wilkerson, this context is new—sexual abuse, sexual assault, sexual harassment—but it fits so closely to the description in one of the classic works by the commentator Wooddeson, “a magistrate who introduces arbitrary

power.” Those were the words he used. And that is what we are hearing about here today.

Judge Kent introduced arbitrary power into the Galveston courthouse for his own personal gratification and satisfaction. It is a sad thing for me to hear, as somebody both to listen to the personal ordeals but also, as somebody who generally admires the Federal judiciary, that there was a judge who introduced arbitrary power, abused his power in this way. That is the essence of an impeachable offense, in my view.

Mr. GOODLATTE. Thank you. And I think it is a sad thing for all of us to hear.

And I want to especially thank Ms. McBroom and Ms. Wilkerson for being willing to step forward and testify here today. It is no—I don’t think any of us can in any way underestimate the stress that this must put you under. But we thank you very much. You are providing a great service to your country.

Thank you, Mr. Chairman.

Mr. SCHIFF. Thank you. The time of the gentleman has expired.

Mr. Pierluisi of Puerto Rico?

Mr. PIERLUISI. Thank you, Mr. Chairman.

I want to extend my heartfelt thanks to both of you, Ms. McBroom and Ms. Wilkerson, for appearing before us. Few individuals will ever experience the depth of pain and humiliation you have felt because of Judge Kent’s conduct. You’re both brave women for bringing his inexcusable behavior to light.

As I see it at this point in this proceeding, Judge Kent’s refusal to resign immediately from his office adds insult to injury. He already insulted you; he insulted all of us who believe in the American justice system. He insulted everybody. But now he injured everybody. Now he is insulting us.

One thing is to cause the damage he caused to you, and now it is quite another and it is really flabbergasting that he wants to keep earning a Federal salary while even incarcerated. It makes no sense. He is forcing this Congress to take action. And that’s what this is all about.

Having said that, I imagine that no action that Congress takes can make you whole for the unspeakable harm Judge Kent caused you. Both of you mentioned the devastating impact that he has caused in your personal and professional lives. So on a human—on a personal basis, I just want to make sure, does this process help you in healing? Does it help you in moving on? I just want to hear from you on that.

Ms. MCBROOM. I find it extremely helpful, and it is helping me to have closure, first of all, to know that I live in a country where it does matter. In America, sexual assault is a crime. Sexual assault in a workplace is even more of a crime, in my opinion.

And it is—I just feel—I feel good about myself for coming forward, and I am so grateful that everyone is taking notice and that there is going to be action taken. It is very healing. Thank you very much.

Mr. PIERLUISI. You’re welcome.

Ms. WILKERSON. Thank you for your kind words, as well.

Yes, this process, although very intimidating and out of my comfort zone for sure, I do feel that this process will help. I have kept

thinking over this time, you know, the next step, the next step, the next step of trying to move forward and heal, and it seems like it couldn't get any crazier. This whole thing has been surreal.

But all I can say is that, with each step forward, as painful as it is and as painful as the past has been, I am moving closer and closer to, you know, some sunshine in my days and to a healing process that, like Cathy says, people are taking notice and must take notice that this cannot and should not ever be acceptable or tolerated and that the system will maybe eventually, maybe not when we think it needs to be done, but will take care of situations such as this. So thank you very much.

Mr. PIERLUISI. You're welcome.

I have no further questions.

Mr. SCHIFF. The gentleman yields back.

Mr. LUNGREN of California?

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Professor Hellman, your testimony is very helpful in terms of establishing the parameters within which we work. And you made it very clear that it is the Congress, both the House in terms of impeachment and the Senate in terms of trial, who make the final determination. And while precedent is important and commentators are important, it is the collective judgment of the House and the Senate that prevails and is not appealable.

You were asked a question about good behavior because of the reference to the Constitution. I think as we try and understand that, you go back to the Founding Fathers and you look at the commentary, which I think is pretty important, called the Federalist Papers, where I think it was Madison who said that "the Constitution is established for a virtuous people. It would be insufficient for any other." And he was talking generally about the public. But I think it is also guidance in terms of those who are in official office.

He also went on to say, "If men were angels, we wouldn't need a government." But obviously we aren't and we need a government. But he also said, "Once you have selected the people who are to govern, you have to watch those who are governing." And that is our requirement here. We're supposed to watch those who are governing. And, in this case, we are given the responsibility to make judgments with respect to the conduct of those who have lifetime appointments.

And I don't think it is a close question as to whether or not what was related by these two witnesses here needs to have a nexus to employment. If one, while being a Federal judge, conducts himself in the way they have described, which in my estimation are prima facie cases of sexual assault or in some cases rape, there need not be a direct nexus to the job. That makes it even worse. So I think that is a separate and appropriate basis upon which we can impeach.

Secondly, it seems to me, what they have described here is a case in which someone abused his power not only with respect to these two women, but if you look at the conduct in its entirety, it is obvious to me that he has used his influence to corrupt the process in which other employees look the other way. And that, to me, is one of the worst acts that someone with authority can have. They essentially corrupt the actions of others so that they either—they are

aiding and abetting or, in the least, they are looking the other way. And when you have a Federal institution in a particular community which is the Federal court, to have the power to corrupt that entire workplace and the people who work within it is sufficient to find within the definition of high crimes and misdemeanors, in my judgment.

To the ladies who testified here, what you have described is a reign of judicial terror. And if we do not act here, we not only do not do justice to you, but we send a message loud and clear to the rest of the country that, when one gets a lifetime appointment as a Federal judge, they are above the law.

And if we allow him to sit in his incarcerated state and continue to draw his salary and then get his pension, what we have said is we are not serious about the fact that no person is above the law; that, along with the tremendous authority you get to be a Federal judge with lifetime tenure, the question of good behavior really doesn't mean anything.

It either means something or it doesn't mean something. You don't have to be, with all due respect, Professor, a professor or a Member of Congress or a lawyer to look at two words, "good behavior," and kind of figure out what they mean. And what you two ladies have described here is the absence of good behavior.

I happen to have a 91-year-old mother, I've got four sisters, I have a wife, I have two daughters. What you have described here is so unacceptable that Members of Congress have got to act. This cannot be allowed to go forward without an official response by this Congress.

And to let someone, first, try and get off on some sort of dodge of his own physical disability or mental disability or, secondly, to resign a year from now so that he can retain his salary is totally unacceptable. And I want to thank the two of you for the courage that you have displayed, because God knows it is not easy for you to come forward and what it's done to your families.

But we have to act based on the information you gave us. This is not a difficult case. It is a clear-cut case. This man should not be on the bench now; he shouldn't have been on the bench. And we have the obligation to act to make sure that not only he is on the bench but anybody else who would seek to be on the bench or serve on the bench would never give a thought toward acting the way he acted toward you and others.

So you have done a great service to this country by coming forward. I know it's not easy, but there are a lot of people in this country who respect you for what you've done and thank you for what you've done. And now it is our obligation to do the job that must be done based on the information that you have given us.

Thank you very much for being here.

Ms. MCBROOM. Thank you.

Ms. WILKERSON. Thank you very much.

Mr. SCHIFF. The time of the gentleman has expired.

The gentleman from Texas, Mr. Gonzalez?

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

I'm going to piggyback a little bit on what Mr. Lungren said. And what is the amazing thing, Ms. Wilkerson and Ms. McBroom, is both of you all have, in responding to my good friend from Puerto

Rico's question about how you're finding this experience and you're saying, "Well, it has been painful, but it is gratifying that the system is working." But I hope you realize the system is only working because you came forward. The system would not have worked. And so, when we talk about courage and bravery, that's what we are all discussing here.

The second thought that I have is, look, sexual assault is a violent act. Had the judge struck you, it would have been a simple case. And we need to be reminded of that. Unfortunately, in today's society, things are taken in context and such in a way that we don't treat violent acts the same. But this was a violent act, first and foremost. But your contribution is making sure that people are held accountable.

And the last thought is, tremendous adversity, that you come out of this stronger, that the family comes out stronger. And that would be all of our wish for you. And I think that is where you're headed. If you don't get there soon, I think you will get there.

Professor Hellman, let me ask you quickly—because I do want to take the sensitivity, sensibilities of the witnesses, of the victims into account. I want them fully vested in the process to the extent necessary, because to continue different forums and different hearings does take its toll. It's just human nature.

But in your paper, in your written statement, you have—let me start off. "The short answer is the House must exercise independent judgment. It is not bound to determinations of other actors in other proceedings. The longer answer is fourfold," and then you go into examples. And you have, "So I believe that the House should not rely on the criminal conviction as a basis for impeachment in and of itself. At the same time, however, the House can legitimately rely on the facts admitted by Judge Kent when he signed the plea agreement as well as the factual basis for the plea."

Preceding that paragraph, though, you allude to two instances, one where a judge pled not guilty and was acquitted, but nevertheless we use what was in the charging instrument as a basis to impeach him. The second example you use is where a judge—this is Judge Clayburn, in essence, where he was found guilty, but that wasn't the basis for impeachment; it was the underlying facts.

But in this case—in those two cases, these judges pled not guilty. Isn't there some significance here in that we may be able to get to A to B if, in fact, we recommend to the full Committee that articles of impeachment be filed and they accept our recommendation? Can't we get from A to B in the simplest form possible? And that is relying on the plea—everything that was encompassed, the finding of guilty to a felony, a Federal felony, and the underlying facts that are encompassed in the statement, as you suggest, the factual basis for the plea?

Mr. HELLMAN. Well, on the false statements, I do think that the facts he has admitted to, without more, state an impeachable offense on the false statements. It is on the sexual misconduct that I think the admitted facts, without more, don't quite get you from A to B. On the obstruction, false statements count, yes.

And, of course, all you need is one article that the Senate convicts by two-thirds and he is removed from office. That's all you need.

Mr. GONZALEZ. The reason that I state my question is simply, if the full Committee moves forward with the impeachment, then you know the role of the House of Representatives. It is still up to the House of Representatives to return, basically, like, an indictment. We are a big grand jury; that's the way I always think of us, anyway. Then it goes for trial before the Senate.

And to have to put witnesses to any extent or degree back under the microscope at a national level, at this point, is something, if at all possible—this is my own personal opinion; it is definitely not anything I have shared with any of the Members of the Task Force—that if we don't have to do it, we shouldn't have to do it. And we can still, if, in fact, impeachment is appropriate and the finding is appropriate, then we move forward.

Can't we do that with what we have here, without fully engaging the witnesses and having them being part and parcel of that process?

Mr. HELLMAN. I appreciate and understand exactly the point you make. And it is my view that, if all—if all you want is to assure that Judge Kent will be—I suppose I should not say “assure.” It requires a two-thirds vote of the Senate, and each Senator will use his or her independent judgment. But it does seem to me that the admitted facts on the obstruction count that Judge Kent pleaded guilty to are sufficient to impeach him and convict him on that without the need to get into the details, the witnesses on the sexual misconduct.

Now, you may have other reasons for wanting to impeach him, as some of these comments here suggest. But if the simple question is, can he be removed from office, should he be removed from office solely on the basis of these false statements which he has admitted, I do believe that is sufficient.

Mr. GONZALEZ. Thank you.

Mr. Chairman, without objection, just 1 minute. I wanted to ask the witnesses—

Mr. SCHIFF. Without objection.

Mr. GONZALEZ. Thank you very much.

You're aware of the letter this Committee has received from Judge Kent. I think you all have alluded to it, and you've been able to read it.

I'm going to ask you, since you're familiar with Judge Kent, his demeanor and the manner in which he treated individuals that came before his court, if a party came before him, did Judge Kent hold that party accountable for their acts?

And let me go further than that. And if someone came before him, a party or a defendant, and said, “Oh, if you rule against me or if you find me guilty, it will render me penniless and without the health insurance I desperately need to continue treating my diabetes and related complications as well as my continuing mental health problem; please take these realities into consideration to the extent that you may,” would it have altered his judgment? What would he have done?

Ms. MCBROOM. He would have dealt with them severely. He wouldn't have appreciated the fact that they were trying to play on his sympathies.

Ms. WILKERSON. That's true.

Mr. GONZALEZ. Thank you very much.

Ms. WILKERSON. He would have thrown some expletives in there. There would be no question whatsoever.

Mr. GONZALEZ. I appreciate it.

I yield back, Mr. Chairman.

Mr. SCHIFF. The time of the gentleman has expired.

Mr. Gohmert of Texas?

Mr. GOHMERT. Thank you, Mr. Chairman.

And I do thank the witnesses for being here.

I did want to ask, we received a June 2, 2009, letter addressed to the President from Judge Kent. It says “personal and confidential,” but apparently he didn’t just send it to the President; it was provided for all of us. I don’t know what he means, “personal and confidential,” if he expected us to consider this.

But I don’t know, Professor, if you know, or perhaps the Chairman knows, what the effect would be if we did nothing and allowed him to resign effective a year from now on June 1, 2010?

Mr. SCHIFF. If the gentleman will yield?

Mr. GOHMERT. Sure.

Mr. SCHIFF. He would remain a Federal judge for the course of the year. He would draw his salary while incarcerated for the year. And my understanding, although we would have to get further analysis, he could change his mind a year from now and decide to un-resign.

Mr. GOHMERT. But if he resigned, would that end his ability to get a pension?

Mr. SCHIFF. I believe—and counsel can correct me if I’m wrong—that if he resigns from the bench or is impeached from the bench, he would not collect his pension. Under the circumstances of his years of service and his current age, my understanding is that he would not collect—

Mr. GOHMERT. He wouldn’t get his pension.

Mr. SCHIFF. If he resigned prior to a certain age, which he has not attained, or is impeached.

Mr. GOHMERT. So if he did resign effective a year from now, he does not get a pension, correct?

Mr. SCHIFF. I think that is correct.

Mr. GOHMERT. Counsel was nodding. Is that correct?

Okay. All right. Thank you.

Well, as a former judge, I go into a hearing like this understanding, first of all, you’ve had a Federal judge plead to obstruction of justice, which indicates a great deal of injustice from the judge. But since we are supposed to take this up as a separate body and look at a separate punishment, basically, of removing him, impeaching him, actually charging him and pursuing elimination, which means no pension, no salary, yet we have to take a fresh look.

So I’m constantly looking for issues of credibility. And you’ve come in here today; you haven’t been examined toughly. I’m sure that that kind of stuff has happened, as you’ve been questioned by the FBI and people all through this time. But he pled guilty to obstruction of justice, and one might normally think, well, that is sufficient unless we were to find that there was an obstruction—I

mean, there was some type of miscarriage of justice in the obstruction plea.

But examining the plea transcript, I don't find anything that indicates a miscarriage of justice. And in looking for other issues, perhaps of credibility, of mental culpability, mens rea, or contriteness which a judge likes to consider—and is it true contriteness, or is this a manipulative type of contriteness? Are there issues that indicate true rehabilitation? You have both indicated that this is a manipulative judge. So what indications do we have that that may be the case even today or that he is contrite truly and he is no longer being manipulative if the evidence is there?

Well, it certainly appears that when you have a judge who lied to the judicial counsel, as we heard, who voluntarily sought to make appearances in which he could lie, that that is clear indication of great manipulation. And, as we have seen in the transcript, you know, he again repeated the same lies. He said he had been honest with the FBI in December of 2007 and that—he went on to say that Person A—you know, acting with Person A is nonconsensual is absolute nonsense, which we later know he has admitted was actually not absolute nonsense but actually was a fact. So, again, misrepresenting. Person B, he said the defendant falsely—the transcript said falsely stated that he attempted to kiss her on two separate occasions, when, in fact, it was over a much longer period.

So, again, he is still trying to manipulate through this process up to the actual sentencing hearing through this transcript. But other indications, too—you know, we know this is an articulate guy. We can take judicial notice of his opinions and the things that he has said in court. He's got a good vocabulary. He is articulate enough. But then we know he also—because I want to know, is he really contrite? Is he really feeling—has he been rehabilitated after what he has been through?

We know he forced the Fifth Circuit to act upon his request to retire with a disability, knowing what he had done, already admitting to obstruction of justice. Boy, that is real manipulation. And then you come in here and we have this letter of resignation, June 2nd, addressed to the President, to retire a year from now, which he could withdraw at any time. If we took this and said, "Oh, well, great, he is going to retire, he is going to resign, and so we don't have to deal with it anymore"—but he could withdraw that at any time within the next year? That is real manipulation, not making it final, not making it clear that he is resigned to the fact that he needs to resign.

And then you compare that to the letter that's dated June 1 to this Committee, which the Chair and counsel have already indicated comes not under oath, so should not carry the credibility of someone who came in and took the oath. But in that letter, he ends up saying that—as my friend from Texas said, that removal from office "will render me penniless and without the health insurance I desperately need to continue treatment." Well, that is contradictory to his resignation. He completely contradicts himself. On one, he says he's got to have this. And then the next day sends a letter saying, "I'll resign next year," which gives us a clear indication he

has no intention to resign next year. This is further manipulation, and it is rather insulting.

So, last, we come to the issue—and I appreciate so much the insights my friend from Texas had into this, Mr. Gonzalez. But this not only has gone on beyond contriteness, but it is further manipulation such that I don't think we should stop even if we get a letter of resignation. I think this man needs to be impeached. Because when you have a Federal judge who would do all he can to get paid for doing the job of a Federal judge while he is in prison for committing a crime while he is a Federal judge, this is somebody who needs to be impeached. And a message needs to go out to others that you're not going to play games with this panel, you're not going to play games with this Congress. You try to manipulate us like you have others, then we are going forward. You want to resign, you do it before you try to manipulate this body, or otherwise we are taking it to the wall.

Thank you, Mr. Chairman. I yield back.

Mr. SCHIFF. Thank you.

The gentleman yields back.

I just want to conclude by thanking you, Ms. McBroom and Ms. Wilkerson, again, for your courage in coming forward. I was a law clerk for a Federal judge in Los Angeles, a judge of great integrity. And it grieves me enormously to hear what you suffered in your courtroom and the courthouse. It is unimaginable.

And I want to echo the comments of my colleagues, that it is a tremendous public service that you came forward. Had you not come forward, Judge Kent would be sitting on the bench right now and, very conceivably, mistreating or assaulting other people in the courthouse. You've put an end to that. So you've done a great public service in coming forward. We are very grateful. We know how hard it must be, and I wanted to thank you again.

We will be scheduling a fall meeting of the Task Force very promptly to discuss whether to recommend articles of impeachment to the full Committee for its consideration.

And I want to thank my colleague, the Ranking Member of the Task Force, Bob Goodlatte, for his work.

I want to thank you, Professor Hellman.

And, with that—

Ms. JACKSON LEE. Mr. Chairman?

Mr. SCHIFF. Yes, the gentlewoman from Texas?

Ms. JACKSON LEE. Is there a time frame for both our discussions and then the procedure moving to the Senate? Obviously, it has to go to the full Committee. Do we have a range of time? I'm making an inquiry.

Mr. SCHIFF. Yes, it is my intention to move very quickly to reconvene this Task Force to discuss what recommendation we want to make to the full Committee. It will then be up to the full Committee to schedule a full Committee meeting to act upon the recommendations of the Task Force.

If the Task Force recommends articles of impeachment and the full Committee then votes to approve those articles, it would then be up to the floor schedule to schedule floor action. But it would be my intention, not in the least of which because I don't think we want this to drag on and further prevent our witnesses from

achieving some form of closure but also for the reasons that my colleagues have explained, that we move promptly and expeditiously.

Ms. JACKSON LEE. A further inquiry is on the full Committee proceedings. Are all parties invited, or do they act upon our Task Force recommendations? Are parties invited again to the full Committee procedurally?

Mr. SCHIFF. No. My understanding would be that the Task Force will make a recommendation to the full Committee. We will deliberate as in a legislative markup, but we will not have witnesses at the full Committee hearing.

Ms. JACKSON LEE. If I just may have a moment of personal privilege, if you would, let me just—these are constituents that live in and around the Houston area, and, obviously, the story saddens me.

But thank you again for being such good people and willing to expose yourselves. And thank you for also understanding that there are good people around you who care about you. And you have allowed us to clear the air for other workers, not only in our area, in the Houston-Galveston area, but around the Nation. So thank you so very much for your contributions.

I yield back, Mr. Chairman.

Mr. SCHIFF. I thank the gentlewoman.

This hearing of the Task Force on Judicial Impeachment is adjourned.

[Whereupon, at 3:07 p.m., the Task Force was adjourned.]

