United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 111th CONGRESS, SECOND SESSION

Vol. 156 WASHINGTON, MONDAY, APRIL 12, 2010 No. 50

House of Representatives

The House was not in session today. Its next meeting will be held on Tuesday, April 13, 2010, at 2 p.m.

Senate

MONDAY, APRIL 12, 2010

The Senate met at 2 p.m. and was called to order by the Honorable MARK R. WARNER, a Senator from the Commonwealth of Virginia.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Almighty and everlasting God, You have revealed Your glory among the nations. Increase in our Senators the gifts of faith, hope, and perseverance, enabling them to obtain what You promise. Lord, infuse them with a passion to do Your will so that this Nation will fulfill Your purposes in our world. Deliver our lawmakers from discouraged thoughts, as they remember Your mighty acts in our Nation's history.

Pour eternity into these brief lives of ours, and open to us the gates of a new and deeper fellowship with You. Today, we lift our prayers for those who mourn in West Virginia and Poland. We pray in Your merciful Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable MARK R. WARNER led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. BYRD).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, April 12, 2010.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable MARK R. WARNER, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. WARNER thereupon assumed the chair as Acting President pro tempore.

The ACTING PRESIDENT pro tempore. The majority leader.

Mr. REID. I suggest the absence of a quorum.

The legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

COURT OF IMPEACHMENT

Mr. REID. Mr. President, I ask unanimous consent the Senate convene as a Court of Impeachment to process the answer of Judge G. Thomas Porteous, Jr.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Pursuant to rule IX of the Rules and Procedures in the Senate when sitting on impeachment trials, the Secretary of the Senate will now swear the Sergeant at Arms.

The SECRETARY of the SENATE. Do you, Drew Willison, solemnly swear that the return made by you upon the process issued on the 19th of March, 2010, by the Senate of the United States against G. Thomas Porteous, Jr., is truly made and that you have performed such service as therein described, so help you God?

The DEPUTY SERGEANT at ARMS. I do.

Mr. President, I send to the desk the return of service I executed upon service of the summons upon Judge G. Thomas Porteous, Jr., Friday, March 19, 2010, at 8:55 a.m.

The ACTING PRESIDENT pro tempore. The return of service will be spread upon the Journal and printed in the RECORD.

The return of service is as follows:

The foregoing writ of summons, addressed to G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana and the foregoing precept, addressed to me, were duly served upon the said G. Thomas Porteous, Jr. by my delivering true and attested copies of the same to G. Thomas Porteous, Jr., at his home, 4801 Neyrey Drive, Metairie, LA, on the 19th day of March 2010, at 8:55 a.m.

TERRANCE W. GAINER,
Sergeant at Arms.

Witness: ANDREW B. WILLISON,
Deputy Sergeant at Arms.

Dated 23 March 2010.

Mr. REID. Mr. President, I ask that the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, to the articles of impeachment.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Printed on recycled paper.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. REID. I further ask that the answer be referred to the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr., established by the Senate on March 17, 2010; and that the answer of the respondent, G. Thomas Porteous, Jr., to the Articles of Impeachment exhibited against him by the House of Representatives be printed for the use of the Senate sitting in the trial of said impeachment.

The ACTING PRESIDENT pro tempore. It is so ordered.

The Answer to the Articles of Impeachment is as follows:

IN THE SENATE OF THE UNITED STATES
SITTING FOR THE TRIAL OF AN IMPEACHMENT

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

ANSWER OF JUDGE G. THOMAS PORTEOUS, JR. TO THE ARTICLES OF IMPEACHMENT

The Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, as commanded by the summons of the Senate of the United States, answers the accusations made by the House of Representatives of the United States in the four Articles of Impeachment it has exhibited to the Senate as follows:

PREAMBLE

THE HOUSE OF REPRESENTATIVES' IMPEACHMENT OF JUDGE PORTEOUS IS UNPRECEDENTED AND UNJUSTIFIED

For the first time in modern history, the House of Representatives has impeached a sitting Article III Judge who has never been charged with a crime. Indeed, it has been more than 74 years since the House of Representatives has brought Articles of Impeachment against a judge that were not preceded by that judge's indictment in the criminal courts. The Articles of Impeachment brought against Judge Porteous are also unprecedented in two additional ways. First, this is the only time since the ratification of the Constitution that the House of Representatives has brought Articles of Impeachment against a judge after the Executive Branch, having conducted a thorough investigation, has declined to prosecute. Second, it is the only time in the same period that the House of Representatives has based an Article of Impeachment against a judge, or any other officer, upon allegations that pre-date his or her entry into federal office.

These actions are unprecedented and they are also unjustified by the facts of this case. The four Articles of Impeachment do not allege a single offense that supports the conviction and removal of a sitting Article III Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon ''Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.'' The charges in the articles against Judge Porteous do not rise to the constitutionally required level of ''high Crimes and Misdemeanors.'' Indeed, in some instances, the Articles allege violations of the canons of judicial ethics or criticize Judge Porteous' handling of matters before the Court. While Judge Porteous vehemently denies violating those canons or mishandling matters, noncriminal ethical violations or incorrect decisions have never been found to be a sufficient basis for conviction and removal from office. Such issues simply do not rise to the level of ''high Crimes and Misdemeanors'' as contemplated by the Framers. To the extent that a trial on the Articles in this case is permitted to convert—in contravention of both the Constitution and impeachment precedent—such acts into grounds for removal of an Article III Judge, it will set a new standard. A standard that treads deeply and dangerously into the realm of an independent judiciary that was at the very core of the Framers' vision of three coequal branches of government.

In devising the three branches, the Framers divided the ability to impeach and remove Executive and Judicial Branch officers between the House of Representatives and the Senate. By doing so, the Framers, through the Constitution, empowered the House to allege the standard for impeachment based upon the language of the impeachment clause. But history has shown the power to impeach is not the power to remove. The power to try impeachments and remove officers upon conviction was vested solely in the Senate. It is the Senate—a uniquely deliberative body, free from the passions and prejudices of the majority—that sits in judgment and determines whether a given Article of Impeachment is sufficient, both legally and factually, to justify the removal of an Article III Judge.

In striking this careful balance, the Framers made clear that the trial and removal process is not one that should embrace unprecedented or novel impeachments. In vesting the power in the Senate, the Framers' intent was that the process would not be exercised easily or quickly, but carefully and deliberately. The Framers, through the Constitution, positioned the Senate along the path between the possibility of ill-considered and novel uses of the power to impeach and the decision to remove, confident that the Senate would stand as a safeguard against removal when constitutional standards had not been met. The Articles of Impeachment returned by the House are unprecedented, unjustified, and fail to meet the constitutionally required standard. Accordingly, Judge Porteous, in answer, asks the Senate to fulfill its constitutionally mandated role by dismissing the articles or, alternatively, acquitting him of the charges.

GENERAL DENIAL OF FACTS NOT ADMITTED

Judge Porteous denies each and every material allegation of the four Articles of Impeachment not specifically admitted in this ANSWER.

ARTICLE I

ANSWER TO ARTICLE I

Without waiving his affirmative defenses, Judge Porteous admits that he presided as a United States District Judge over the Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises litigation and that on October 17, 1996 he denied a motion seeking to recuse him from presiding over the case. Judge Porteous denies that he engaged in any corrupt conduct in connection with his handling of the litigation or in denying the motion for recusal. Judge Porteous denies that he intentionally made any misleading statements during the recusal hearing. Judge Porteous also denies engaging in a corrupt scheme of any sort with Jacob Amato, Jr. and Robert Creely and that he, at any time, deprived the parties or the public of the right to the honest services of his office. Judge Porteous further denies that he engaged in any corrupt conduct after the bench trial in Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises or at any time while the case was under advisement.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE I

Article I does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon ''Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.'' The charges in the articles against Judge Porteous do not rise to the constitutionally required level of ''high Crimes and Misdemeanors.'' Because Article I does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of ''high Crimes and Misdemeanors'' as required by the Constitution. In essence, Article I alleges that Judge Porteous took several judicial actions while presiding as a United States District Judge in Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises, including failing to grant a recusal motion and failing to disclose certain facts. In doing so, the Article alleges that Judge Porteous ''deprived the parties and the public of the right to the honest services of his office.'' This ''deprivation of the right to honest services'' language is borrowed from Title 18, United States Code, Section 1346, a statute that is fraught with vagueness concerns. Indeed, its constitutional viability is currently pending before the United States Supreme Court in a series of cases. See Weyhrauch v. United States, No. 08–1196; Black v. United States, No. 08–876; and Skilling v. United States, No. 08–1394. The inclusion of this standard, as well as the nonspecific allegations regarding the allegedly improper judicial actions taken by Judge Porteous, render Article I unconstitutionally vague.

It is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific ''high Crime and Misdemeanor'' upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article I fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE I

Article I is fatally flawed because it charges multiple instances of allegedly corrupt conduct in a single article. The Constitution provides that ''no person shall be convicted without the Concurrence of two thirds of the Members present.'' Senate Rule XXIII provides that ''an article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial.''

Despite these clear pronouncements, the House of Representatives, in Article I, has alleged a series of allegedly wrongful acts. In doing so, the House of Representatives has returned an Article of Impeachment which might permit a Senator to vote for impeachment if he or she finds that Judge Porteous committed even a single allegedly wrongful act, even where two-thirds of the Senators do not agree on which wrongful act was committed. This creates the very real possibility

that conviction could occur even though Senators were in wide disagreement as to the alleged wrong committed. The structure of Article I presents the possibility that Judge Porteous could be convicted even though he would have been acquitted if separate votes were taken on each allegedly wrongful acts included in the article. As written, Article I does not require the constitutionally required number of Senators to agree on the specific conduct forming the basis for conviction and removal. By charging multiple wrongs in one article, the House of Representatives has made it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of two-thirds of the members. Accordingly, Article I should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I

Article I was returned by the House of Representatives in violation of Judge Porteous' constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony, Article I must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

ARTICLE II

ANSWER TO ARTICLE II

Without waiving his affirmative defenses, Judge Porteous denies that he engaged in a longstanding pattern of corrupt conduct demonstrating his unfitness to serve as a United States District Court Judge as alleged in Article II. Judge Porteous further denies that he improperly set aside or expunged felony convictions for two Marcotte employees. Judge Porteous also denies that he at any time took any action in his capacity as a United States District Judge that related in any way to the Marcottes or their business interests.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE II

Article II does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon ''Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.'' The charges in the articles against Judge Porteous do not rise to the constitutionally required level of ''high Crimes and Misdemeanors.'' Because Article II does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE II

Article II is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of ''high Crimes and Misdemeanors'' as required by the Constitution. Article II alleges that Judge Porteous engaged in certain corrupt actions prior to his appointment and confirmation to the position of Untied States District Judge. Article II makes no specific allegations concerning actions taken by Judge Porteous while on the federal bench. Indeed, the only allegations concerning Judge Porteous tenure on the federal bench is that he in some unidentified way ''used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business.'' The vagueness problem here cannot be overstated. It is simply not possible to begin to defend against this type of allegation. It is wholly lacking in any factual basis and clearly fails to frame a set of facts that amount to ''high Crimes and Misdemeanors.''

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific ''high Crime and Misdemeanor'' upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article II fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE II

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article II is constitutionally defective because it charges multiple alleged wrongs in a single article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article II should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE II

Article II cannot support the conviction and removal of an Article III United States District Judge because the alleged conduct preceded Judge Porteous' service as a United States District Judge. The constitutional impeachment mechanism provides a procedure to remove a judge for the commission of ''high Crimes and Misdemeanors'' while in federal office. The impeachment precedents do not provide a single example of an Article of Impeachment that has ever been based upon conduct that allegedly occurred prior to the impeached officer's entry into federal office. In contrast, the precedents suggest that while the House of Representatives may have investigated such allegations, that such conduct has never provided the basis for an impeachment and, significantly, the House has, on occasion, refused to take action because the allegations preceded the officer's entry into federal service. Moreover, while Judge Porteous contends that any attempt to use Article III's ''good behaviour'' clause to lower the standard necessary to impeach a federal judge is unsupported by the Constitution's impeachment clause, the House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the ''good behaviour'' clause, that clause states that judges ''shall hold their offices during good behaviour'' and clearly relates to a judge's conduct while in federal judicial office. Because the allegations of Article II relate to a period prior to Judge Porteous taking the federal bench, Article II must be dismissed.

ARTICLE III

ANSWER TO ARTICLE III

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly and intentionally made material false statements and representatives in connection with his personal bankruptcy or that he knowingly and intentionally repeatedly violated a court order in his bankruptcy case.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE III

Article III does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon ''Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.'' The charges in the articles against Judge Porteous do not rise to the constitutionally required level of ''high Crimes and Misdemeanors.'' Because Article III does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE III

Article III is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of ''high Crimes and Misdemeanors'' as required by the Constitution. In essence, Article III alleges a number of actions taken by Judge Porteous in connection with his personal bankruptcy, but it unclear as to the specific acts are claimed to violate the constitutional standard. Moreover, it is also does not clearly state the specific allegations regarding what transaction Judge Porteous concealed during the bankruptcy process or what new debts he allegedly incurred.

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific ''high Crime and Misdemeanor'' upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article III fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article II is constitutionally defective because it charges multiple alleged wrongs in a single article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article II should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE III

For the reasons set forth in the FOURTH AFFIRMATIVE DEFENSE TO ARTICLE I, Article III was returned by the House of Representatives in violation of Judge Porteous' constitutional rights in that it is based, in part, upon his compelled testimony provided under a grant of immunity. Because the process of impeachment, conviction and removal is a quasi-criminal one and under the circumstances here, Judge Porteous has constitutional rights that are violated by the use of his prior compelled, immunized testimony, Article 1 must be dismissed. Further, because the immunity grant by Judge Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals and Chair of the Special Committee of the Judicial Conference of the Fifth Circuit, was not proper under the immunity statute, the compelled testimony

was wrongly procured and any Article of Impeachment based upon that testimony must be dismissed.

FIFTH AFFIRMATIVE DEFENSE TO ARTICLE III

The allegations in Article III do not rise to the level of ''high Crimes and Misdemeanors'' because they address purely personal conduct that is not criminal. Prior impeachment precedent has never before sought to convict and remove a judge from office based upon personal non-criminal conduct. The very nature of the impeachment process is focused first and foremost upon the official actions of judges. Where allegations in the Articles of Impeachment address non-official personal acts by judges, longstanding precedent has limited ''high Crimes and Misdemeanors'' to those personal acts that are also indictable offenses. Article III ignores this precedent in seeking to convict and remove Judge Porteous from office for non-official, non-criminal acts. While it is possible that the House of Representatives would claim that the actions taken in relation to the personal bankruptcy were indictable offenses, this claim would conflict with the multi-year investigation of the United States Department of Justice which concluded that prosecution was not warranted in light of the concern that the issues related to the bankruptcy were not material. It would also conflict with the criminal bankruptcy statutes, which require that any alleged false statement not be made simply knowingly or willfully, but fraudulently, before criminal liability may attach to such conduct. In framing Article III, the House of Representatives is seeking to convict and remove a sitting United States District Judge based upon a lowered standard, one that does not constitute ''high Crimes and Misdemeanors,'' and one that has never before provided a basis for impeachment, much less conviction and removal from office. Article III of the Articles of Impeachment should be dismissed.

ARTICLE IV

ANSWER TO ARTICLE IV

Without waiving his affirmative defenses, Judge Porteous denies that he knowingly made material false statements in order to obtain the office of United States District Court Judge.

FIRST AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV does not allege an offense that supports the conviction and removal of a sitting Article III United States District Judge under the impeachment clause of the Constitution. Article II, Section 4 of the Constitution provides that the civil officers shall be removed from office only upon ''Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanors.'' The charges in the articles against Judge Porteous do not rise to the constitutionally required level of ''high Crimes and Misdemeanors.'' Because Article IV does not meet the rigorous constitutional standard for conviction and removal, it should be dismissed.

SECOND AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV is unconstitutionally vague. No reasonable person could know what specific charges are being leveled against Judge Porteous or what allegations rise to the level of ''high Crimes and Misdemeanors'' as required by the Constitution. In essence, Article IV alleges that Judge Porteous gave false answers on various forms that were presented in connection with the background investigation that was used to evaluate his appointment and confirmation as a United States District Judge. However, it is not clear whether Article IV contends that simply providing a single one of the alleged false statements is a ''high Crime or Misdemeanor'' or whether the ''high Crime or Misdemeanor'' is based upon all of the acts alleged, i.e., several alleged false statements and other conduct alleged. Moreover, the nature of the questions on the forms that are the focus of this Article themselves add to the vagueness problem.

As we set forth in the SECOND AFFIRMATIVE DEFENSE TO ARTICLE I, it is a fundamental principle of our law and the Constitution that a person has a right to know what specific charges he is facing. Without such notice, no one can prepare the defense to which every person is entitled. The law and the Constitution also require that the charges provide adequate notice to jurors so they may know the basis for the vote they must make. Without a definite and specific identification of specific ''high Crime and Misdemeanor'' upon which the Article of Impeachment is grounded, a trial becomes a moving target for the accused.

Article IV fails to provide the required definite and specific identification. As an article of impeachment, it is constitutionally defective and should be dismissed.

THIRD AFFIRMATIVE DEFENSE TO ARTICLE IV

For the reasons set forth in the THIRD AFFIRMATIVE DEFENSE TO ARTICLE I, Article IV is constitutionally defective because it charges multiple instances of alleged acts of making false statements in one article, which makes it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of the two-thirds of the members. Accordingly, Article IV should fail.

FOURTH AFFIRMATIVE DEFENSE TO ARTICLE IV

Article IV cannot support the conviction and removal of an Article III United States District Judge because the alleged conduct preceded Judge Porteous' service as a United States District Judge. The constitutional impeachment mechanism provides a procedure to remove a judge for the commission of ''high Crimes and Misdemeanors'' while in federal office. The impeachment precedents do not provide a single example of an Article of Impeachment that has ever been based upon conduct that allegedly occurred prior to the impeached officer's entry into federal office. In contrast, the precedents suggest that while the House of Representatives may have investigated such allegations, that such conduct has never provided the basis for an impeachment and, significantly, the House has, on occasion, refused to take action because the allegations preceded the officer's entry into federal service. Moreover, while Judge Porteous contends that any attempt to use Article III's ''good behaviour'' clause to lower the standard necessary to impeach a federal judge is unsupported by the Constitution's impeachment clause, the House has clearly applied that lower standard in returning the four Articles of Impeachment. To the extent that the House has relied on the ''good behaviour'' clause, that clause states that judges ''shall hold their offices during good behaviour'' and clearly relates to a judge's conduct while in federal judicial office. Because the allegations of Article IV relate to a period prior to Judge Porteous taking the federal bench, Article IV must be dismissed.

Respectfully submitted,

RICHARD W. WESTLING,
CHELSEA S. RICE,
JACKSON B. BOYD,
ANTHONY J BURBA,
Ober, Kaler, Grimes & Shriver, P.C.
SAMUEL S. DALTON,
Attorney at Law.
RÉMY VOISIN STARNS,
Attorney At Law PLLC.

Counsel for G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana.

Submitted: April 7, 2010.

The ACTING PRESIDENT pro tempore. The Court of Impeachment is adjourned.

SCHEDULE

Mr. REID. Mr. President, today, the Senate convened at 2 p.m. and will be in a period of morning business until 3 p.m., with the time equally divided and controlled between the two leaders or their designees.

At 3 p.m., the Senate will resume the motion to proceed to H.R. 4851. The Republican leader will control the time between 5 p.m. and 5:15 p.m. and the majority leader will control the time from 5:15 p.m. until 5:30 p.m.

At 5:30 p.m., the Senate will proceed to a rollcall vote on the motion to invoke cloture on the motion to proceed to H.R. 4851. That will be the first vote of the day.

At 3:30 p.m., we will interrupt debate for a moment of silence to honor the coal miners killed in last week's explosion at Upper Big Branch Mine in West Virginia.

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that we proceed to morning business as previously outlined and that Senators be permitted to speak for up to 10 minutes each.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER FOR MOMENT OF SILENCE

Mr. REID. Mr. President, I ask unanimous consent that at 3:30 p.m., the Senate observe a moment of silence in solidarity with the people of West Virginia regarding the mining accident.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

RECENT TRAGEDIES

Mr. REID. Mr. President, I wish to extend my personal condolences to those who suffered the two tragedies while we were back home—one here in America and one halfway around the world.

The mining tragedy in West Virginia hit home for me. It brought back a lot of memories. When I was less than 1 week old, my dad was working in a mine in a place called Chloride, AZ, which was just over the Colorado River from Searchlight. He and another man were sinking a shaft, and in those days you didn't have all the protections you have today. They had drilled some holes—seven to be exact—and always, when the holes are lit, both miners