Statement of

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House Committee on the Judiciary
Judiciary Task Force on Judicial Impeachment

Hearing on the
Possible Impeachment of
Samuel B. Kent of the Southern District of Texas

June 3, 2009

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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

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[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.

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[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

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[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.

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[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.
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> [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

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[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.
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> 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]

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[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

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[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

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[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.

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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."

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[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

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[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."

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[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 Woodeson in ascertaining the meaning of the Ex Post Facto clause.[37] The Court noted that Woodeson'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

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[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

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[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.

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[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

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[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

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[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."

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[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]

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[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

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[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” though 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[.]"

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[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

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[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.

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[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.