IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

G. THOMAS PORTEOUS, JR., United States District Judge for the Eastern District of Louisiana, *Plaintiff*, v. ALAN BARON, Special Counsel, Impeachment Task Force, Committee on the Judiciary, United States House of Representatives, *et al*., *Defendants*.	**Case No. 1:09-cv-2131 (RJL)**

DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS

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This action is brought by a suspended federal judge, G. Thomas Porteous, Jr. to derail and disrupt an on-going impeachment investigation being conducted by the U.S. House of Representatives at the initiative of the U.S. Judicial Conference, chaired by the Chief Justice of the United States. The suit is brought against three aides to the House Committee on the Judiciary ("Judiciary Committee" or "Committee")[1] and seeks to bar the Committee from considering or using the sworn testimony Judge Porteous provided to a Special Investigative Committee of the United States Court of Appeals for the Fifth Circuit ("Special Committee") under an Immunity Order, issued under 18 U.S.C. § 6002, that expressly limited immunity to use "in any criminal case." Filed two business days before the first scheduled public hearings in the impeachment investigation, which has been underway for many months, the suit is patently without merit, and should be summarily dismissed for four, independent reasons.

First, any suit against Congress to interrupt an impeachment investigation is non-justiciable. This case is governed by the Supreme Court's decision in *Nixon v. United States*, 506 U.S. 224 (1993), which held non-justiciable an action by a federal judge challenging his impeachment conviction based on allegedly improper procedures, and specifically concluded

[1] *See* Declaration of the Honorable Adam Schiff at ¶ 17 (Nov. 13, 2009) (Exhibit 1). Judge Porteous sues only the three aides – Alan Baron, Mark Dubester, and Harry Damelin – even though it is clear that the real defendant in interest is the House Judiciary Committee. The proposed injunction will have only a disruptive effect if the Committee, through other aides, can continue using the immunized testimony, and the injunction will only be effective if the House and the Committee are enjoined as entities "in concert" with the defendants. Such an order would contravene the sovereign immunity of the Congress and its entities, which has not been waived for a suit such as the present one. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Keener v. Congress of the United States*, 467 F.2d 952, 953 (5th Cir. 1972). Indeed, even these aides, sued only in their official capacity, are protected by sovereign immunity, which like all of the other grounds cited, requires prompt dismissal of the suit. *See Hawaii v Gordon*, 373 U.S. 57, 58 (1963) ("[R]elief sought nominally against [a government] officer is in fact against the sovereign if the decree would operate against the latter."); *see also Travelers Ins. Co. v. SCM, Corp.*, 600 F. Supp. 493, 497 (D.D.C. 1984). There has been no waiver of sovereign immunity here.

that because the U.S. Constitution gives the "sole" power of impeachment to the Congress, U.S. Const. art. I, § 2, cl. 5, the judiciary has no role in the impeachment process and may not intervene. That decision was presaged by the 1989 decision of the United States Court of Appeals for the D.C. Circuit, *Hastings v. U.S. Senat*e, in which a panel consisting of Judge (now Justice) Ruth Bader Ginsburg, Judge Silberman, and Judge (now Chief Judge) Sentelle, dismissed as non-justiciable challenges by two federal judges to on-going impeachment proceedings, noting that "appellants have not identified and we have not found any case in which the judiciary has issued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch . . . [and] considerations of ripeness and vital comity concerns, fundamental to our federalist system and the balance of power our Constitution establishes, preclude judicial intervention [while impeachment proceedings are on-going in the Congress]"). Nos. 89-5188, 89-5191, 1989 WL 122685, *1-2 (D.C. Cir. Oct. 18, 1989) ("*Hastings I*"). And indeed, there is no example in the history of the country of a court finding justiciable a legal challenge to Congress' impeachment proceedings. In short, the courts may not constrain or limit Congress as to the evidence it may consider in carrying out its impeachment responsibilities, and Judge Porteous cannot litigate what are, in substance, evidentiary objections to the impeachment process.

Second, defendants are constitutionally immune from suit under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1 ("for any Speech or Debate in either House, they [Representatives and Senators] shall not be questioned in any other Place"), because, in using Judge Porteous' testimony in furtherance of the Committee's impeachment inquiry, they are carrying out functions specifically assigned by the Constitution to the House. U.S. Const. art. I, § 2, cl. 5 (the House "shall have the sole Power of Impeachment"); s*ee, e.g.*, *Eastland v. United*

States Servicemen's Fund, 421 U.S. 491, 507 (1975) (suit against Members of and aides to Senate committee which sought to enjoin implementation of committee subpoena on grounds it violated plaintiffs' First Amendment rights absolutely barred by Speech or Debate Clause); *United States v. Gravel*, 408 U.S. 606, 616, 625 (1972) (Members and aides "to be 'treated as one'" for purposes of Speech or Debate Clause (citing *United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972)); Clause protects all activities that are "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to [legislative and] . . . other matters which the Constitution places within the jurisdiction of either House"); *see also Hastings v. U.S. Senate*, 716 F. Supp. 38, 42 (D.D.C. 1989) ("*Hastings II*") (Gesell, J.) (impeachment proceedings are "fully protected by the Speech or Debate Clause").

Third, the Immunity Order and the statute pursuant to which it was granted (18 U.S.C. § 6002) make absolutely clear that the immunity provided extends only to, as the Immunity Order states, use "in any criminal case," and the law is well established that an impeachment proceeding is not a criminal matter. Indeed, the Supreme Court in *Nixon* specifically ruled that impeachment is entirely distinct from the criminal process. 506 U.S. at 234. Chief Justice Rehnquist's opinion for the Court stated: "The Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses – the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings." *Id.*; s*ee also Hastings II, supra*, at 41 ("impeachment is not a criminal proceeding"). An impeachment conviction results in a removal from office or and/or disqualification from future office; it does not involve the possibility of incarceration or fine as does a criminal conviction. No court has ever held or suggested that impeachment is "quasi-

criminal" whatever that may mean, and neither the Constitution nor the immunity statute speaks of any matter criminal in nature other than a "criminal case."

Finally, this action is barred by the laches doctrine. Judge Porteous and his counsel have had reason to know, at least since September 2008, that the House had commenced an impeachment inquiry and that Judge Porteous' testimony before the Special Committee of the Fifth Circuit ("Special Committee") was among the materials transmitted to the House in connection with the requested impeachment proceedings. *See* Schiff Declaration at ¶ 10. Needless to say, the Committee staff and counsel have already made extensive use of Judge Porteous' testimony in the course of interviewing witnesses, seeking documents and otherwise pursuing leads for the investigation. The Committee and staff have justifiably relied on the materials, including Judge Porteous' testimony, provided to it by the U.S. Judicial Conference during which no objection has been made to the use of these materials by the Judge or his counsel.

An injunction against the three aides will irreparably injure the Judiciary Committee and contravene the public interest. The Committee must finish its work before the Congress expires in early January, 2011, thirteen months from now. That work will be severely impaired if it cannot use either the sworn testimony of the Judge or the services of the three staff members who have devoted themselves diligently to this investigation for many months. Further, the public will be ill-served by a delay in the adjudication of charges of gross improprieties against a sitting federal judge that a distinguished panel of his judicial colleagues concluded warranted his discipline and consideration for impeachment and removal from office by the Congress.

Under these circumstances, we urge the Court to dismiss summarily this suit with prejudice, deny any equitable relief, and order such other relief as may be appropriate.

BACKGROUND

1. Department of Justice Investigation. Beginning in the early 2000's, the Department of Justice conducted a criminal investigation of Judge Porteous for several years, ultimately concluding that there was "evidence that might warrant charging Judge Porteous with violations of criminal law relating to judicial corruption." DOJ Complaint at 1 (May 18, 2007) (Exhibit 3). The Department ultimately did not seek criminal charges, noting that many of the underlying incidents "would be precluded by the relevant statutes of limitations." *Id*.

On May 18, 2007, the Department submitted to the Chief Judge of the Fifth Circuit a Complaint describing numerous instances of alleged misconduct that, it determined, may relate to Judge Porteous' fitness as a judge, including soliciting and accepting things of value from litigants, attorneys, bail bondsmen, and other interested parties with matters before him, and making false statements on financial disclosure forms and in connection with his personal bankruptcy. *Id*. at 3-21. The misconduct was alleged to have commenced while Judge Porteous was a judge of the 24th Judicial District Court for Jefferson Parish (1984-1994), and to have continued when he served as a federal district judge (1994-present). *Id*. at 2.

2. Proceedings Before Judicial Disciplinary Bodies. The Fifth Circuit then appointed the Special Committee to investigate the allegations in the Department's Complaint. The Special Committee received from the Department various grand jury records and conducted an adversarial evidentiary proceeding in October 2007 in which Judge Porteous took an active part, including testifying on October 29 and October 30, 2007, after the Fifth Circuit entered the Immunity Order (Exhibit 4). The Special Committee issued to the Fifth Circuit Judicial Council a report that concluded that Judge Porteous committed misconduct that "might constitute one or

more grounds for impeachment." Report by the Special Investigatory Committee to the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit at 65 (Nov. 20, 2007) (Exhibit 5).

The Judicial Council endorsed the Report, *see* Memorandum Order and Certification at 4-5 (Dec. 20, 2007) (Exhibit 6), which was then sent to the U.S. Judicial Conference, which in turn certified the matter to the Speaker of the House (Exhibit 2).[2]

3. Proceedings in the House of Representatives. The House opened its impeachment inquiry on September 17, 2008, at the behest of the Judicial Conference of the United States (with Chief Justice Roberts presiding), and referred the matter to the Judiciary Committee. On January 13, 2009, the House voted to continue the Committee's impeachment authority in the 111th Congress.[3] The Committee appointed a bi-partisan Impeachment Task Force composed of twelve Committee Members, and chaired by the Honorable Adam Schiff to conduct the investigation, and the Task Force, after many months of investigation, has now scheduled public hearings regarding impeachment to commence on November 17, 2009.[4] The Impeachment Task Force obtained from the Fifth Circuit Special Committee the documents the Special Committee had relied on in investigating Judge Porteous, including the transcript of Judge Porteous' testimony before the Special Committee. The Task Force in its investigation of this matter has used, and continues to use, the transcript of Judge Porteous' testimony to the Special Committee.

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[2] Subsequently, the Fifth Circuit Judicial Council ordered that no new cases be assigned to Judge Porteous and suspended his authority to employ staff for two years or "until Congress takes final action on the impeachment proceedings, whichever occurs earlier." Order and Public Reprimand, Judicial Council of the Fifth Circuit, at 4 (Sept. 10, 2008) (Exhibit 7).

[3] *See* H.R. Res. 1448, 110th Cong. (2008) (Exhibit 2); H.R. Res. 15, 111th Cong. (2009) (Exhibit 3).

[4] *See* Comm. Res., 110th Cong., 2nd Sess. (2008) (adopted unanimously by voice vote on Sept. 18, 2008), Comm. Res., 111th Cong., 1st Sess. (2009) (attached collectively as Exhibit 4); Letter from the Honorable Adam Schiff and the Honorable Bob Goodlatte to Richard Westling, Esq. (Nov. 6, 2009) (Exhibit 5).

ARGUMENT

"The same standards apply for both temporary restraining orders and preliminary injunctions. To obtain preliminary injunctive relief, a plaintiff has the burden of demonstrating: '1) a substantial likelihood of success on the merits, 2) that [plaintiff] would suffer irreparable injury if the injunction is not granted, 3) that any injunction would not substantially injure other interested parties, and 4) that the public interest would be served by the injunction.'" *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (citing *Katz v. Georgetown Univ.*, 246 F.3d 685, 687-88 (D.C. Cir. 2001) and *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)) (denying motion for temporary restraining order and/or preliminary injunction). Here, where Judge Porteous seeks to enjoin a House of Representatives proceeding in which the Committee is carrying out a core constitutional responsibility, the burden is particularly high. *See, e.g., Adams v. Vance*, 570 F.2d 950, 954-56 (D.C. Cir. 1978) ("exceptionally strong showing" required for preliminary injunctive relief that would interfere with "core concerns" of a co-equal federal branch).

As we now show, Judge Porteous has absolutely no likelihood of success on the merits or otherwise, let alone a "substantial" likelihood. For this reason alone, his motion for temporary restraining order must be denied and, for the very same reason, his Complaint should be dismissed. *See* Fed. R. Civ. P. 12(b)(6); 12(b)(1); *Whitacre v. Davey*, 890 F.2d 1168, 1168 n.1 (D.C. Cir. 1989); *Marcelus v. Corr. Corp. of Am./Corr. Treatment Facility*, 540 F. Supp. 2d 231, 325 (D.D.C. 2008); *Madeoy v. Am. Arbitration Ass'n.*, 534 F. Supp. 2d 138 (D.D.C. 2008). In addition, the order Judge Porteous seeks would cause irreparable injury to the Committee and be contrary to the public interest, which requires a prompt determination of the status of a federal

judge whose conduct his peers in the judiciary have concluded warrants impeachment consideration by the Congress.

I. JUDGE PORTEOUS' ACTION HAS NO LIKELIHOOD OF SUCCESS.

A. A Suit to Enjoin an Impeachment Investigation Is Not Justiciable.

Under well-established law, Judge Porteous' claim is foreclosed by the non-justiciability doctrine, which "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)); *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (courts lack jurisdiction over matters that are "'committed to the political branches to the exclusion of the judiciary'") (quoting *Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989)).

Judge Porteous' claim – that the Judiciary Committee in its on-going impeachment inquiry may not use testimony he gave to the Fifth Circuit Special Committee under a grant of use immunity – challenges a decision squarely within the class of those matters textually committed by the Constitution to the House of Representatives, which is assigned "the sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. His claim is foreclosed by dispositive, directly on-point decisions of the Supreme Court and the D.C. Circuit, under which it is clear that a claim attacking the legality or procedures of an ongoing impeachment proceeding impinges on this constitutional commitment of authority to the legislative branch and may not be entertained by the courts. *See, e.g., Nixon,* 506 U.S. at 228-38 (affirming dismissal as non-justiciable claim by federal judge who sought judicial review of Senate's impeachment trial procedures; constitutional language giving Senate "sole" power to try impeachments is a "textual

commitment" to a coordinate branch of government and judicial review of such claim would upset allocation of power set up by Framers); *Hastings I, supra,* at *1-2 (affirming dismissal of claims by two federal judges challenging legality of ongoing impeachment proceedings in Senate; "we have not found any case in which the judiciary has issued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch."); *Hastings v. United v. States*, 837 F. Supp. 3 (D.D.C. 1993) ("*Hastings III*") (dismissing claim by former judge that his impeachment trial violated Fifth Amendment and other constitutional requirements on ground that Senate's procedures for trying impeachments presented nonjusticiable issue).

Another feature of non-justiciability is lack of ripeness. As the D.C. Circuit noted in *Hastings I, supra,* it is at the very least premature for a court to consider a challenge to impeachment procedures before a judge has been impeached and convicted. Unless and until he has been impeached, convicted and removed from office, a court cannot evaluate whether the judge has sustained any cognizable injury or is entitled to relief. As the Court of Appeals stated in dismissing the injunctive actions of two federal judges seeking to interrupt their impeachment proceedings, "Should appellants be convicted [of their impeachments], they will be positioned to reassess, without generating avoidable friction, the content of their complaints, the forum to lodge their cases, and the defendants appropriately sued." *Hastings I, supra,* at *2. The Court specifically cited the consideration of "ripeness" as one of the concerns that "preclude[d] judicial intervention at this juncture." *Id.*

Judge Porteous seeks to save his claim from dismissal under *Nixon* and *Hastings* by arguing that his claim arises under the Fifth Amendment rather than the impeachment clause. This is a specious argument. The real issue here is the interference with the impeachment process and there is no suggestion in either the Supreme Court or the D.C. Circuit decision that

the lack of justiciablity depends upon the nature of the alleged irregularity. Indeed, the *Hastings* case itself was a Fifth Amendment challenge to the validity of the impeachment trial;[5] after the *Nixon* case was decided, the district court in *Hastings* dismissed the action, noting that "the Nixon decision compels that Judge Hastings' decision be dismissed, *Hastings III*, *supra*, at 5. These decisions clearly stand for the proposition that impeachment is granted exclusively to the Congress and courts will not interfere in the on-going process.[6] Indeed, even in an actual criminal case, the issue of whether immunized testimony has been used in violation of the statute and the Fifth Amendment is addressed not during the investigation but at trial or on appeal after conviction. *See, e.g. United States v. North*, 920 F.2d 980 (D.C. Cir. 1990). As demonstrated below, there is absolutely no merit to Judge Porteous' Fifth Amendment claim, but in any event he is free to raise that and other defenses to the Senate if he is impeached and tried there. This claim to this court at this stage, however, is plainly foreclosed.[7]

B. The Speech or Debate Clause Bars Judge Porteous' Action.

The Speech or Debate Clause was designed "to insure that the legislative function the Constitution allocates to Congress may be performed independently. . . . [T]he 'central role' of

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[5] *Hastings v. United States*, 802 F. Supp. 490, 504-05 (D.D.C. 1992) ("Hastings IV"), *vacated* 988 F.2d 1280 (D.C. Cir. 1993).

[6] Indeed, it would be a strange system that would provide that the Judicial Conference can consider immunized testimony in sending the matter to Congress for possible impeachment, and then provide for judicial review, which could bar Congress from using that same testimony to consider whether to impeach.

[7] Moreover, Judge Porteous' claims, if accepted would have far-reaching consequences. Consider, for example, a scenario where a sitting federal judge testified pursuant to an immunity order that he had committed treason or homicide, or accepted bribes while a federal judge to influence his handling of cases. Judge Porteous' position is that Congress could not consider those statements in deciding whether that Judge should be removed from the bench. There is, not surprisingly, simply no support for such a position.

the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. . . .'" *Eastland*, 421 U.S. at 502 (quoting *Gravel*, 408 U.S. at 617).[8]

Because "the guarantees of th[e Speech or Debate] Clause are vitally important to our system of government," they "are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979) ("*Helstoski II*"). Accordingly, the Supreme Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501.[9]

The protections afforded to Members by the Speech or Debate Clause apply to all activities "within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), defined to include all activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House*." *Eastland*, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625) (emphasis added). The cases "have plainly not taken a literalistic approach in applying the privilege." *Gravel*, 408 U.S. at 617. Committee investigations and hearings are within the protected sphere, *Eastland*, 421 U.S. 491, as is information-gathering in furtherance of Congress' constitutional responsibilities. *Id*. at 504.

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[8] "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966). *See also United States v. Helstoski*, 442 U.S. 477, 491 (1979) ("*Helstoski I*"); *Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980).

[9] *See also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 179; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880).

Importantly, the protections of the Clause also apply "not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618. Accordingly, the three defendants – correctly described in the Complaint as "counsel" to the Judiciary Committee, each of whom is sued "in his official capacity," Complaint at ¶¶ 6-8 – are "congressional aides" for purposes of *Gravel*. All three defendants are thus protected by the Speech or Debate Clause.[10]

In this case, as Judge Porteous acknowledges, Complaint for Declaratory and Injunctive Relief at ¶ 10, the Judiciary Committee is engaged in "proceedings with respect to . . . *other matters* which the Constitution places within the jurisdiction of either House," *Gravel*, 408 U.S. at 625 (emphasis added), *i.e*., the exercise of the House's Article I impeachment authority. And the courts have unanimously concluded that Congress' authority under the impeachment clauses of the Constitution is an "other [constitutional] matter . . . place[d] within the jurisdiction of either House" to which the protections of the Speech or Debate Clause apply. *See, e.g., In re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1446 (11th Cir. 1987); *Hastings II*, 716 F. Supp. at 42; Order, *Pietrangelo v. U.S. Senate*, No. 00-323 (N.D. Ohio Mar. 17, 1999), *aff'd*, No. 99-3415 (6th Cir. Mar. 31, 2000) (Exhibit 12); Order Adopting Findings, Conclusions and Recommendations of U.S. Magistrate Judge in *Carnessale*

[10] *See also Eastland*, 421 U.S. at 507; *Webster v. Sun Co.*, 561 F. Supp. 1184, 1189-90 (D.D.C. 1983), *vacated and remanded on other grounds*, 731 F.2d 1 (D.C. Cir. 1984) (extending protections of Clause to employees of Congressional Research Service who are not employees of any Member or committee of Congress, but are employees of Library of Congress who provide assistance as needed to Members and committees); *Chapman v. Space Qualified Sys. Corp.*, 647 F. Supp. 551, 553-54 (N.D. Fla. 1986) (same with respect to employees of Government Accounting Office [now Government Accountability Office]); *Benford v. American Broadcasting Companies, Inc*., 102 F.R.D. 208, 209 (D. Md. 1984) ("[C]ases appear to be adopting a functional approach, that focuses not on the outward trappings of the office occupied by the aide, but, rather, on the function performed by him or her. This is consistent with the ratio decidendi of *Gravel* . . . .").

v. U.S. Senators Alan Cranston and Pete Wilson, No. 90-5245 (C.D. Cal. Jan. 25, 1991) (Exhibit 13).

The Speech or Debate Clause provides three broad protections, two of which are implicated here. First, the Clause provides an immunity from suit for all actions "within the 'legislative sphere,' even though the[] conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13 (quoting *Gravel*, 408 U.S. at 624-25). As the Complaint makes clear, the activity which Judge Porteous seeks to have the Court enjoin – the use, in the course of the Committee's impeachment inquiry - of information provided to the House by the Judicial Conference – is plainly an integral part of the Committee's constitutional impeachment responsibilities. Accordingly, the three defendants are immune from suit.

McMillan disposes of Judge Porteous' argument that the Clause does not apply here because he (Judge Porteous) has *alleged* that the defendants' use of his immunized testimony is not within the "legitimate" sphere of the Committee's impeachment activities. Memorandum of Points and Authorities in Support of Judge G. Thomas Porteous, Jr.'s Motion for Temporary Restraining Order and a Preliminary Relief ("Porteous Memo") at 10. If that were the law, the Speech or Debate Clause would mean nothing because a plaintiff seeking to avoid the constraints of the Clause could always *allege* some sort of wrongdoing on a Member or aide. But that is not the law, as *McMillan* makes clear. Accordingly, the Court is obliged to evaluate the activity in question – here the use, in the course of an impeachment inquiry, of a transcript supplied to the House by the Judiciary Conference – in a value neutral manner. So evaluated, the defendants' use of Judge Porteous' testimony plainly is protected. *See also Eastland*, 421 U.S. 491 (suit which sought to enjoin implementation of committee subpoena absolutely barred by Speech or

Debate Clause, notwithstanding plaintiffs' allegation that subpoena violated their First Amendment rights); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416-17 (D.C. Cir. 1995) ("use of the [allegedly stolen] documents by the committee staff in the course of official business is privileged legislative activity") (citation and internal quotation omitted).

Second, the Clause provides a non-disclosure privilege which protects against compelled testimony as to privileged matters and compelled production of privileged documents. *See Helstoski I*, 442 U.S. at 484-86; *Gravel*, 408 U.S. at 615-16; *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C., 20515*, 497 F.3d 654, 660 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008); *Brown & Williamson*, 62 F.3d at 420-21; *MINPECO, S.A. v. Conticommodity Servs.*, 844 F.2d 856, 859-61 (D.C. Cir. 1988). This aspect of the Speech or Debate Clause bars Judge Porteous from taking discovery from the three defendants – or from the Members or other aides to the Committee for that matter – "in aid of preliminary injunction proceedings before the Court." Porteous Motion for a Temporary Restraining Order at ¶ 4.[11]

The courts draw no distinctions among these protections. Rather, and contrary to Judge Porteous' demonstrably incorrect suggestion, Porteous Memo at 10, the Supreme Court has stated unequivocally that when the Speech or Debate applies, it is "absolute." *Eastland*, 421 U.S. at 501 (emphasis added). *See also id*. at 503, 507, 509-10, 510 n.16; *Gravel*, 408 U.S. at 624 n.14.

[11] The Clause also bars prosecutors in a criminal case – and parties to a civil suit – against a Member of Congress from using "information as to a legislative act" to advance their case. *Helstoski I*, 442 U.S. at 490. This third aspect of the Clause's protection is not implicated here.

C. Impeachment Is Not A Criminal Proceeding And The Committee's Use of Immunized Testimony Does Not Constitute Use in a Criminal Case.

The Fifth Circuit's Immunity Order compelled Judge Porteous to testify before the Special Committee, and it provided that "no testimony or other information that he provides under this order and no information directly or indirectly derived from such testimony or other information shall be used against him in any *criminal case*." Immunity Order at 1 (emphasis added) (Exhibit 6). The order is pursuant to and specifically tracks the language of 18 U.S.C. § 6002, which provides use immunity to compel testimony in response to a witness's Fifth Amendment claim. The Immunity Order in no way limits the Judiciary Committee's use of Judge Porteous' testimony because the Committee is not using the testimony in a "criminal case."

An impeachment proceeding is not a criminal case and, indeed, impeachment proceedings are not criminal in nature. Impeachment proceedings are separate and distinct from criminal proceedings. *See, e.g., Nixon*, 506 U.S. at 234 ("There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses–the impeachment trial and a *separate criminal trial*. In fact, the Constitution explicitly provides for *two separate proceedings*. . . . The Framers deliberately *separated the two forums* to avoid raising the specter of bias and to ensure independent judgments . . .") (emphasis added).

In *Hastings II*, this Court held explicitly that, and explained at length why, impeachment proceedings do not constitute any sort of "criminal case."

> [I]mpeachment is not a criminal proceeding. Impeachment trials are sui generis: in several instances in the Constitution, impeachment is distinguished from criminal proceedings. The

> accused has no right to a jury, and the President may not pardon a person convicted by impeachment. The Framers understood that impeachment trials were fundamentally political, which seems to indicate that impartiality–however much it has been present and is to be desired–is not guaranteed. It is clear that the federal rules of evidence do not apply in impeachment trials, and the Constitution itself does not require unanimity among the Senators sitting in judgment. Senators determine their own burdens of proof: they need not be persuaded beyond a reasonable doubt that the defendant committed each and every element of every Article.

716 F. Supp. at 41.[12]

The frivolousness of Judge Porteous' position is underscored by the fact that the Judiciary Committee, if it wished, could compel Judge Porteous to testify directly in the impeachment proceeding by itself obtaining an immunity order which would, like the Fifth Circuit's Immunity Order, immunize the testimony from use in a *criminal case*. *See* 18 U.S.C. § 6005 (providing use immunity for witnesses in any "proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses"); *United States v. North*, 920 F.2d at 943 & 945 ("We must assume that any American could be compelled to testify in return for use immunity under 18 U.S.C. § 6005 (1988), which authorizes Congress to grant that immunity, even over protests of the prosecutor, independent or otherwise . . . . The decision as to whether the national interest

[12] *See also Larsen v. Senate of the Commonwealth of Pa.*, 955 F. Supp. 1549, 1575 (M.D. Pa. 1997) ("Larsen claims that the Senate impeachment proceedings violated his rights to an impartial fact-finder, confront witnesses, and assistance of counsel and other 'process due' pursuant to the Sixth Amendment. The Senate Defendants have moved to dismiss Larsen's Sixth Amendment claims on the basis that the Sixth Amendment does not apply to impeachment proceedings. The court agrees. The Sixth Amendment by its terms applies only to 'criminal prosecutions.' U.S. Const. amend. 6. The proceedings against Larsen cannot under any circumstances be classified as criminal proceedings, therefore, his Sixth Amendment claims must fail.") (referencing *Nixon*, 506 U.S. at 229-31).

justifies that institutional cost in the enforcement of the criminal laws is, of course, a political one to be made by Congress.").

Finally, Judge Porteous' argument that impeachment proceedings are "quasi-criminal," and therefore covered by the Immunity Order, is baseless. He relies solely on three inapposite cases, none of which remotely involves impeachment proceedings: *Boyd v. United States*, 116 U.S. 616, 633-34 (1886); *Lees v. United States*, 150 U.S. 476, 480-81 (1893); and *United States v. U.S. Coin and Currency*, 401 U.S. 715, 718 (1971). He also relies on *United States v. Ward*, 448 U.S. 242, 251-54 (1980), which makes abundantly clear that the *Boyd* case and its limited progeny have no applicability to impeachment. In *Boyd*, the Supreme Court was dealing with a customs fraud statute that included among its sanctions, imprisonment, fines and forfeitures. In the information before the Court, the U.S. prosecutor was seeking fines and forfeitures of private property. Not surprisingly, the Court found that the protections of the Fourth Amendment against unreasonable searches and seizures applied. Similarly, in *Lees* and *U.S. Coin and Currency*, the Court was dealing with efforts by the Executive branch to obtain forfeiture of private property for violations of laws that carried with them criminal penalties.

These cases were easily distinguished by the Court in *Ward*. There, Chief Justice Rehnquist's opinion for the Court noted that "[t]his Court has declined . . . to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that '[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time.'" *Ward*, 448 U.S. at 253 (quoting *Fisher v. United States*, 425 U.S. 391, 407 (1976)). *Ward* also noted that the forfeiture of private property sought by the prosecutor in *Boyd* was under a statute that "listed forfeiture along with fine and imprisonment as one possible punishment for customs fraud, a fact of some significance to the *Boyd* Court." *Id.* at 254.

In the 123 years since *Boyd*, no court has even suggested, much less held, that an impeachment proceeding is quasi-criminal or that the Fifth Amendment privilege against self-incrimination applies to impeachment. Indeed, Chief Justice Rehnquist again wrote for the Court in *Nixon*, thirteen years after *Ward*, and made clear that criminal proceedings and impeachment proceedings in the Congress were on two entirely separate tracks and that Double Jeopardy did not preclude impeachment and removal from office following a criminal conviction. The argument that an impeachment implicates the Fifth Amendment is frivolous. There is no incarceration, fine, or forfeiture of private property in an impeachment. No judge has a private property interest in his office. Removal from office is not a fine, forfeiture of private property or any other kind of criminal sanction.

D. Judge Porteous' Complaint Is Barred by the Doctrine of Laches.

Finally, Judge Porteous' suit is barred by the doctrine of laches inasmuch as he has inexcusably delayed, until the very eve of the Committee's first public hearing, asserting his Fifth Amendment claim, and the Committee would be unduly prejudiced by this delay. *See, e.g., Pro-Football, Inc., v. Harjo,* 567 F. Supp. 2d 46, 53 (D.D.C. 2008); *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.,* 753 F.2d 131, 137 (D.C. Cir. 1985).

The Immunity Order was entered October 5, 2007, and Judge Porteous testified before the Special Committee on October 29 and October 30. That testimony provided much of the basis for the Fifth Circuit Judicial Council's November 20, 2007 report, which recommended that the matter be referred to the Judicial Conference of the United States, and stated (at page 65) that Judge Porteous' conduct might "constitute grounds for impeachment pursuant to Article III." (Exhibit 9).

That report was made available to Judge Porteous pursuant to Rule 15 of the Rules for Judicial Conduct and Judicial Disability Proceedings, Judicial Council of the Fifth Circuit, *available on-line at* http://www.ca5.uscourts.gov/clerk/LocalJudicialMisconductRules.pdf, and he was given an opportunity to respond to it. *See also* Judicial Council Memorandum Order and Certification at 2 (Exhibit 10) ("On November 20, 2007, the Judicial Council informed Judge Porteous that he could examine the Report and re-examine the evidence on which it is based . . . and could file a written reply on or before December 4, 2007.") We understand that Judge Porteous filed a written reply to the Report on or about December 4, 2007. *Id.* Judge Porteous has thus been aware for nearly two years that his immunized testimony is at the heart of a matter that the Judicial Conference subsequently referred to the Speaker on June 17, 2008, certifying that "consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted." Certificate at 1 (Exhibit 7). As his Complaint itself reveals, Judge Porteous had knowledge of the Judicial Council's use of his immunized testimony for its report and recommendations and the possibility that the Council's findings could form the basis for an impeachment inquiry. Complaint ¶¶ 14, 15. And Judge Porteous has indicated that he has been aware for over a year that the House is conducting an impeachment inquiry in response to that referral and using materials provided to it, including the Special Committee Report and hearing testimony. *See* Complaint ¶¶ 20, 21; *see also* Declaration of Richard W. Westling at ¶ 13; Press Release, Committee on the Judiciary, U.S. House of Representatives, *Conyers and Smith Announce Vote on Task Force for Judge Porteous Impeachment Inquiry* (Sept. 16, 2008) (Exhibit 14) (referencing the referral by Judicial Conference). Notwithstanding, Judge Porteous has raised no objections to the Committee's use of his testimony until now, two working days prior to the first public hearing.

The Court should not reward this inexcusable delay. The Committee would be significantly prejudiced if a restraining order were entered at this late date. A restraining order would delay the Committee's obtaining important information that it has determined it needs to complete its impeachment inquiry. The Committee currently intends to hold an additional hearing in December 2009. A delay of the November 17-18 hearings would inevitably delay the December hearings. Moreover, the Judiciary Committee, which as part of the 111th Congress will expire in early January 2011, has a limited time frame within which to conclude its investigation and determine whether or not impeachment is warranted. If the Porteous impeachment inquiry is not completed by that time, the as yet unconstituted 112th Congress would have to pass a new resolution in order to continue the inquiry, something that may or may not happen. Therefore, a restraining order would effectively prejudice the Judiciary Committee of the 111th Congress – which is effectively the party now before this Court and has been working on the investigation for many months, building on the work of the 110th Congress – from its ability to conclude its constitutional responsibilities during the current Congress. This type of outcome is exactly what the doctrine of laches is designed to preclude: "'laches serve[s] other purposes . . . including minimization of the disruption and expense caused by affording certain relief." *Pete v. United Mine Workers of Am. Welfare and Ret. Fund of 1950*, 352 F. Supp. 1294, 1299 (D.D.C. 1973) (quoting *Powell v. Zuckert*, 366 F.2d 634, 638 (1966)).

II. ADDITIONAL FACTORS GOVERNING PRELIMINARY RELIEF CUT DECISIVELY AGAINST JUDGE PORTEOUS.

For substantially the reasons addressed in the laches discussion, the Committee would be irreparably harmed by the requested injunction. The Committee and staff have justifiably relied for months on the materials, including Judge Porteous' testimony, provided to it by the U.S. Judicial Conference during which no objection has been made to the use of these materials by the

Judge or his counsel. The Judiciary Committee must finish its work before the Congress expires in early January 2011. That work will be severely impaired if it cannot use either the sworn testimony of the Judge or the services of the three staff members – who are the principle Committee aides on the impeachment inquiry and have worked diligently on this investigation for months. On the other side of the scale, Judge Porteous' claim of any actual harm from the use of the immunized testimony is speculative since no decision has been made with regards to impeachment, and is undermined by his failure to attempt to raise the issue for over a year. This suggests the true goal of this Action is simply to disrupt Congress's inquiry into whether Judge Porteous should be impeached, tried, and removed from office.

Beyond causing the Committee irreparable harm, an injunction would contravene the public interest. The public will be ill-served by a delay in the adjudication of charges of improprieties against a sitting federal judge whose conduct colleagues on the federal bench have already concluded warrant his discipline and consideration for impeachment by Congress.

CONCLUSION

Judge Porteous' motion for temporary restraining order and preliminary injunction must be denied, and Defendants' motion to dismiss should be granted, with prejudice, costs, and reasonable attorneys' fees.

Respectfully submitted,

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November 13, 2009

CERTIFICATE OF SERVICE

I certify that I served one copy of the foregoing Defendants' Opposition to Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum of Points and Authorities in Support of Their Motion to Dismiss by email (.pdf format) on November 13, 2009, and by first-class mail on November 14, 2009, postage prepaid on the following:

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