

**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 I. BARON, Special Counsel,)	
Impeachment Task Force, Committee on)	
the Judiciary, United States House of)	
Representatives, et al.)	
)	
Defendants.)	

Civil Action No. 1:09-cv-2131(RJL)

**JUDGE G. THOMAS PORTEOUS, JR.’S REPLY
MEMORANDUM TO DEFENDANTS’ OPPOSITION TO HIS MOTION FOR A
TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**

NOW INTO COURT comes plaintiff, G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana (“Judge Porteous”), by and through counsel, and files this reply memorandum to the defendant’s opposition to his motion for a temporary restraining order and a preliminary injunction. In reply, Judge Porteous states as follows:

1. Judge Porteous’ Claim is Justiciable

In seeking to keep the Courthouse door tightly shut to Judge Porteous’ claim that using his immunized testimony violates the Fifth Amendment, the defendants argue that this suit is non-justiciable. On one hand, they argue that the suit is non-justiciable because judicial review of impeachments is barred by the political question doctrine. *See* Defendants’ Opposition Memorandum, at 8 (*citing Nixon v. United States*, 506 U.S. 224 (1993)). On the other, they

contend that Judge Porteous' claim is not ripe because he has not yet been impeached. *See* Defendants' Opposition Memorandum, at 9 (*citing Hastings v. United States Senate*, 887 F.2d 332, 1989 WL 122685 (D.C. Cir., Oct. 8, 1989)¹). In asserting these two arguments, the defendants set forth a Carrollian paradox. One that is reminiscent of the White Queen's explanation to Alice that "The rule is, jam to-morrow and jam yesterday-but never jam *to-day*." Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass*, at 204 (Barnes & Noble Classics 2003) (emphasis in original).² If defendants' justiciability arguments are correct then Judge Porteous will be left with no ability to seek redress for the violation of his right against compulsory self-incrimination at *any* point in these proceedings. Not only are the defendants' arguments incorrect, but it is appropriate for this Court to review Judge Porteous' claims, and to do so now.

Defendants' assert that Judge Porteous' claims are absolutely non-justiciable. In doing so, defendants' attempt to stretch the rulings in both *Nixon* and *Hastings I* beyond their holdings. In *Nixon*, the Supreme Court held that it could not review an impeached judge's claim that the

¹ In order to avoid confusion, references to the various *Hastings* decisions will conform to the references used in defendant's opposition and, as a result, this particular decision will be referred to as *Hastings I*.

² In Carroll's book, Alice tells the White Queen that she should have a maid and the Queen replies:

"I'm sure I will take you with pleasure!" the Queen said. "Twopence a week, and jam every other day."

Alice couldn't help laughing as she said, "I don't want you to hire *me* – and I don't care for jam."

"It's very good jam," said the Queen.

"Well, I don't want any *to-day*, at any rate."

"You couldn't have it if you *did* want it," the Queen said. "The rule is, jam to-morrow and jam yesterday-but never jam *to-day*"

"It *must* come sometimes to 'jam to-day,'" Alice objected.

"No it can't," said the Queen. "It's jam every *other* day: to-day isn't any *other* day, you know."

"I don't understand you," said Alice. "It's dreadfully confusing!"

Lewis Carroll, *Alice's Adventures in Wonderland*, at 203-04 (emphasis in original).

Senate's use of an impeachment trial committee, rather than the full Senate, violated the Constitution's provision that "The Senate shall have the sole Power to try all Impeachments." 506 U.S. at 226. The *Nixon* Court determined that because the power to "try" all impeachments was textually committed to the Senate, the issue of its trial procedures was a political question that the Court could not review. However, the Court did note that "[i]n the case before us, there is no separate provision of the Constitution that could be defeated by allowing the Senate the final authority to determine the meaning of the word 'try' in the Impeachment Trial Clause. We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits." *Id.* at 237-38. The Court went on to state: "As we have made clear, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Id.* at 238. In preserving the ability to review issues that involve the determination of whether the textual commitment of the impeachment clauses can be used to defeat other constitutional provisions, the Court left open the justiciability of cases in which the exercise of the impeachment power directly contravene constitutionally guaranteed protections, such as the right against self-incrimination.

Similarly, the ruling in *Hastings I* addressed challenges to the Senate's trial procedures and Judge Hastings' claim of Double Jeopardy in light of his previous acquittal. The D.C. Circuit held that the claims were not ripe and judicial intervention prior to the Senate trial was precluded. 887 F.2d 332, 1989 WL 122685, at 2. Notably, the *Hastings I* Court, reaching its decision prior to the Supreme Court's decision of *Nixon*, opined that "[s]hould appellees be

convicted, they will be positioned to reassess, without generating avoidable friction, the content of their complaints, the forum in which to lodge their cases, and the defendant's appropriately sued." *Id.* In making this statement, the *Hastings I* Court suggested its belief that some sort of judicial review of defendants' impeachment convictions would be available. However, this belief has been called into question by the subsequent decision in *Nixon*. So, where does this leave Judge Porteous given the ongoing violation of his constitutional rights? Clearly, he must assert his rights, as he has in the present suit, in order to be prevented from having them foreclosed by the impeachment itself.³ Moreover, unlike the claims in *Hastings I*, the violation of Judge Porteous' Fifth Amendment right against self-incrimination through the use of his immunized testimony is currently ongoing and has evidentiary significance, not unlike an issue relating to the suppression of evidence in a federal criminal prosecution; accordingly, his claim is ripe for review.

Moreover, contrary to defendants' assertions, Judge Porteous is not asking for an injunction of the impeachment investigation or seeking to prevent the fair consideration of the issues by the Impeachment Task Force in a constitutionally regular manner. Judge Porteous is simply seeking to ensure that he is not impeached based upon the unconstitutional use of his immunized, compelled testimony.

³ Defendants point out that in "an actual criminal case," a defendant asserting a Fifth Amendment violation through the use of immunized testimony cannot raise the issue during the investigation, but must await trial or appeal after conviction. While this is generally correct, it adds little to the analysis here. In cases such as the one cited by defendants, *see, e.g. United States v. North*, 920 F.2d 980 (D.C. Cir. 1990), the issue is whether the immunized testimony has been used by the prosecutors and, if so, whether the prosecution can demonstrate that it has independent sources for the evidence that they plan to use against the defendant. These cases do not involve situations, like the one here, where counsel acknowledges wholesale use of the immunized testimony and, apparently, undertook no safeguards designed to prevent the immunized testimony from tainting witnesses' interviews or otherwise making the ability to prove an independent source substantially more difficult.

2. The Speech and Debate Clause Does Not Bar This Action

Not surprisingly, defendants assert that the Speech and Debate Clause is an absolute bar to this lawsuit. The Supreme Court's ruling in *Powell v. McCormack*, 395 U.S. 486 (1969), suggests otherwise. The *Powell* Court stated that the Supreme Court has previously "been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicial review by the Speech and Debate Clause." *Id.* at 501. Noting that "[l]egislative immunity does not, of course, bar all judicial review of legislative acts," the Court went on to observe that where House employees are acting pursuant to the express orders of the House, "judicial review of the constitutionality of the underlying legislative decision" is not barred." *Id.* at 503 & 505. The purpose of the protection provided by the Clause is "not to forestall judicial review of legislative action" but, rather, to ensure that legislators are not distracted by being called into court. *Id.* at 505. "As was said in *Kilbourn*, in language which time has not dimmed" the *Powell* Court stated:

Especially is it competent and proper for this court to consider whether its (the legislature's) proceedings are in conformity with the Constitution and the laws, because, living under a written constitution, not branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

Powell, 395 U.S. at 506. The Supreme Court's subsequent decision in *Gravel v. United States*, 408 U.S. 618 (1972), followed *Powell* and noted that "no prior case has held that

Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances.” *Id.* at 621. Here, the activities of Impeachment Counsel amount to clear violations of Judge Porteous’ constitutional rights. Their activities, including the use of immunized testimony for improper purposes such as witness interviews, are not protected by the Speech and Debate Clause. Accordingly, this suit should be permitted to proceed.

3. Impeachment is quasi-criminal under the Self-Incrimination Clause

Defendants argue that Judge Porteous’ claim that impeachment is quasi-criminal is frivolous and baseless. *See* Defendants’ Opposition, at 16 & 17. Defendants, however, provide no response to Judge Porteous’ arguments based upon the citation of specific provisions of the Constitution that clearly support the view that impeachment is criminal in nature. Indeed, while the defendants rely heavily on the opinion in *Nixon*, *see* Defendants’ Opposition at 3, they fail to note the following passage from *Nixon* which suggests that impeachment is quasi-criminal:

Art. II, § 2, cl. 1, of the Constitution grants the President pardon authority except in Cases of Impeachment. *** But the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is [a]n executive action that mitigates or sets aside punishment for a crime. *** The exception from the President’s pardon authority of cases of impeachment was a separate determination by the Framers that executive clemency should not be available in such cases.

Nixon, at 232 (citations and internal quotations omitted).

Rather than confronting the clear constitutional basis for the assertion of impeachment as a quasi-criminal proceeding, or taking issue with the scholarly authority taking the same position,⁴ defendants argue that “[i]n 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.” *See* Defendants’ Opposition, at 18. Stated differently, no court in 123 years has been confronted with the facts presented by this case. This should not be surprising. There have only been ten impeachments since the decision in *Boyd*. Those impeachments have involved three acquittals, two resignations, and three impeachments following a full-blown criminal trial. There is simply no case that has involved an official being compelled to give testimony under an immunity order and the subsequent use of that immunized testimony in the impeachment process.

4. Defendants’ Laches Claim

Because laches is an affirmative defense, the burden of persuasion rests with the defendants. *See* Fed. R. Civ. P. 8(c); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 806 (8th Cir. 1979). Therefore, in order to succeed on these grounds the defendants must establish both that (1) Judge Porteous is guilty of unreasonable delay and (2) the delay has resulted in prejudice to the defendant. *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 31 (1951). The defendants fail on both grounds.

⁴ See, e.g., Akhil Reed Amar, *Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 307 (1999) and J. Hampden Dougherty, *Inherent Limitations Upon Impeachment*, 23 YALE L.J. 60, 87 (1913). *But Compare Hastings v. United States Senate Impeachment Trial Committee*, 716 F. Supp. 38, 41 (D.D.C. 1989)(the only judicial decision holding that for Double Jeopardy purposes an impeachment is not a criminal proceeding, but is sui generis).

First, the defendants' laches argument fails because Judge Porteous has been vigilant in filing this action. The determination of whether a delay in the filing of a suit is excusable is closely intertwined with the issue of whether a defendant suffered prejudice from the delay; thus, "[I]f only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice required before the suit should be barred is great..." *McDonnell Douglas*, 606 F.2d at 807. As outlined in the attached Supplemental Declaration, it is only within the last three months that Judge Porteous obtained reliable information indicating that the defendants were using his immunized testimony in a manner violating his constitutional rights. Immediately upon learning these facts, counsel for Judge Porteous began researching the issues in the Complaint in order to ensure that they are meritorious and justiciable. *See* Supplemental Declaration of Richard W. Westling, ¶¶ 7, 11 (Attached as Exhibit "1"). This prompt action hardly constitutes a delay in the filing of the Complaint, let alone an inexcusable one; as the D.C. Circuit has explained, a party should not be penalized for not filing suit before it has enough concrete facts to support its allegations. *Gull Airborne Instruments, Inc., v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982).

Further, laches does not depend solely on the time that has elapsed between the alleged wrong and the institution of suit. *Gull Airborne*, 694 F.2d at 843. Instead, "[A] court should focus upon the length of the delay, the reasons therefore, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim." *McDonnell Douglas*, 606 F.2d at 806. Here, the length of the delay (if any) from when Judge Porteous obtained reliable information that his immunized testimony was being used against him and the time this suit was filed is no more than three months. This is in stark contrast to the *eight year* (*See Pro-Football*,

Inc., v. Harjo, 567 F.Supp.2d 36 (D.D.C. 2008)) or *thirteen year* (See *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.*, 753 F.2d 131 (D.C. Cir. 1985)) delay that occurred in the cases cited by the defendants.

Nor have the defendants demonstrated that they have been unduly prejudiced by Judge Porteous' "delay" in filing this suit. In fact, the prejudice that the defendants have purportedly suffered is actually more akin to frustration that the Task Force's hearing schedule will be disrupted than true harm as a result of any lapse of time in filing this suit. While scheduling issues may be an inconvenience for the defendants, it is certainly not an undue prejudice or one that is recognized as supporting a defense of laches. "The prejudice normally contemplated in applying laches ... stems from such factors as loss of evidence and unavailability of witnesses." *McDonnell Douglas*, 606 F.2d at 809, citing *Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966). Similarly, defendants' argument that they are prejudiced because Congress will have to pass a new impeachment resolution is of little weight. As the defendants explain in this very same pleading, Congress has already extended the Committee's impeachment authority from the 110th to the 111th Congress. See Defendants' Opposition, at 6. For all these reasons, this Court should decline to extend the equitable doctrine of laches to this case.

WHEREFORE, for all the foregoing reasons, as well as those presented in Plaintiff's Memorandum of Points and Authorities in Support of the Motion for a Temporary Restraining Order and a Preliminary Injunction, Judge G. Thomas Porteous, Jr., asks this Court to grant injunctive relief in this matter..

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading was sent by electronic means using the Courts ECF/MC system on this 14th day of November 2009 to:

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