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"Impeachment: Holding Rogue Judges Accountable"

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Statement of Professor Robert Luther III

Chairman Cruz, Ranking Member Whitehouse, and Members of the Subcommittee:

Thank you for the opportunity to testify about the history of judicial impeachments with an eye towards whether recent conduct by federal judges warrants action from Congress.

Impeachment is an Article I response to misconduct, criminal or noncriminal, necessary to preserve the impartial administration of justice.

In Federalist 65 (1788), Alexander Hamilton defined impeachable offenses as those which "relate chiefly to injuries done immediately to the society itself" by "misconduct of public men."[1] Such conduct constitutes an "abuse or violation of some public trust."[2] Importantly, Hamilton stressed that Congress, as the impeaching body, must be given broad discretion to determine an impeachable offense.[3]

The later-ratified U.S. Constitution did not define impeachment expressly, but it contained three provisions outlining the process which drive today's discussion:

- Article I states: "The House of Representatives . . . shall have the sole Power of Impeachment"[4] and "the Senate shall have the sole Power to try all Impeachments . . . [but] no Person shall be convicted without the Concurrence of two-thirds of the Members present."[5]

- Article II states: "[A]ll 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."[6]

- And Article III states: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."[7]

We know that the House holds the power to impeach and the Senate holds the power to acquit, or with a two-thirds vote, to convict, but what standards should govern your votes? Once again, Hamilton provided the answer. He maintained that the Senate—rather than the Supreme Court—determines the controlling standards and that—unlike the courts—this civic forum "can never be tied down by strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges."[8] In other words, the strictures of jury service in civil or criminal proceedings do not constrain Senators, who rather remain free to make political judgments—because impeachment is a political proceeding.

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[1] THE FEDERALIST NO. 65 (Alexander Hamilton).
[2] *Id.*
[3] *See id.*
[4] U.S. CONST. art. I, § 2, cl. 6.
[5] U.S. CONST. art. I, § 3, cl. 6.
[6] U.S. CONST. art. II, § 4.
[7] U.S. CONST. art. III, § 1.
[8] THE FEDERALIST NO. 65, *supra* note 1.

When Hamilton explained that impeachment is a political tool, he did not mean a *partisan* tool. Politics—after all—is a word that comes from the Greek word for city-state and concerns how to best govern the polity—the nation—the state. But when judges, or other officials, undermine our laws, they harm the polity herself.

While the standards for impeachment are deliberately flexible and ultimately determined by the sensibilities of the day, the precedents where Members of Congress have applied them provide valuable historical context for those concerned with institutional integrity and consistency.

Of the thousands of federal judges confirmed by this body and appointed by the President, only fifteen have been impeached by the House—with only eight suffering convictions.

There is something of a modern misconception—perhaps drawn from Article II's "High Crimes and Misdemeanors" language—that Congress may only impeach a judge for extra-judicial conduct, such as perjury or tax evasion, but not for their conduct on the bench. It's easy to understand this modern misconception because the last seven judicial impeachments, dating back to 1933, have followed this trend.

But this trend is not the rule. To the contrary, the majority of impeachments from the Founding until the 1920s involved abuses of power flowing from judicial conduct on the bench. History thus confirms that abuse of judicial power constitutes an impeachable offense. In fact, the chart and graph attached as "Exhibit A" to this Statement establish that the most frequent offenses resulting in the impeachment of federal judges fall into three categories: (1) abuse of official power; (2) financial impropriety; and (3) perjury. The four abuse of official power precedents relevant today are summarized below:

Samuel Chase, Associate Justice, Supreme Court of the United States.

Justice Chase was impeached by the House in 1804. The eight articles of impeachment charged Justice Chase with misconduct related to grand jury proceedings and trials.[9] For example, during a trial for treason, Justice Chase interpreted the relevant law without hearing from defense counsel.[10] The articles of impeachment also charged that during a seditious libel trial, Justice Chase committed a host of wrongdoings, including failing to comply with state law governing the arrest and confinement of a defendant.[11] Justice Chase also improperly expressed inflammatory political opinions, including his objection to universal suffrage, during a grand jury proceeding.[12] A majority of Senators found Justice Chase guilty on three of the eight charges, but they did not secure the two-thirds vote required for conviction.[13]

James H. Peck, U.S. District Court for the District of Missouri.

Judge Peck was impeached by the House in 1830 on charges that he abused his official power by holding in contempt, imprisoning for a day, and disbarring for eighteen months an attorney because the lawyer had published a newspaper article criticizing Judge Peck's ruling in a case handled by the attorney.[14] At the time, a federal judge's power to hold a person in contempt for publishing

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[9] *Trial of Judge Chase*, 14 Annals of Cong. 85–88 (1804) (documenting the eight articles).
[10] Eleanore Bushnell, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 60–62 (1992).
[11] *Id.* at 60–61.
[12] *Id.* at 66.
[13] *Id.* at 85.
[14] Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 428–

public critiques was controversial, but Judge Peck argued that the common law supported his contempt order.[15] The Senate acquitted Judge Peck by one vote.[16]

Charles Swayne, U.S. District Court for the Northern District of Florida.

Judge Swayne was impeached by the House in 1904 on four charges including repeated abuse of his contempt power. First, he held in contempt, fined, jailed, and disbarred two attorneys whose client had claimed Judge Swayne was corrupt. Second, Judge Swayne held a bank president, who had been engaged in an out-of-court fistfight with a court-appointed receiver, in contempt and jailed him for sixty days. During the impeachment proceedings, Congressman Henry W. Palmer argued Judge Swayne regularly held individuals in contempt for actions that took place outside the presence of the court.[17] The Senate ultimately acquitted Judge Swayne of all charges.[18]

George W. English, U.S. District Court for the Eastern District of Illinois.

Judge English was impeached by the House in 1926 on charges of abuse of power and financial impropriety. First, it was alleged he arbitrarily disbarred two attorneys and threatened a journalist who planned to publish a story about one of the disbarred attorneys.[19] Second, he threatened to imprison a newspaper editor for publishing a "lawful editorial."[20] Third, Judge English summoned several government officials to appear before him in an "imaginary case" and berated them with profanity without having "any lawful or just cause" to do so.[21] Judge English also threatened to jail jurymen if they did not find a defendant guilty. Before his impeachment trial, Judge English resigned from the bench.[22]

These four cases establish that abuse of official power, including both clear violations of law and controversial use of a judge's official power, support the impeachment of federal judges. Chase and English clearly violated the law, whereas Peck and Swayne exercised their official power (contempt) in controversial ways; yet only English ended up leaving the bench.

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Turning to the recent conduct of Chief Judge James E. Boasberg of the U.S. District Court for the District of Columbia—when I read about Judge English resigning after summoning government officials in an "imaginary case" without "any lawful or just cause" to do so[23]—both Arctic Frost and Judge Boasberg's jurisdictionally-thirsty contempt proceedings against Department of Justice attorneys in *J.G.G. v. Trump* came to mind.

Six years ago, this bipartisan body passed a law—2 U.S.C. § 6628—that imposed an affirmative obligation on telecom service providers to notify Members of Congress when their records are

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29 (1928).

[15] *See id.* at 422 (noting that the Judiciary Act of 1789 provided federal courts to "punish by fine or imprisonment . . . all contempts of authority in any cause or hearing before the same").

[16] *Id.* 430.

[17] Bushnell, *supra* note 10, at 196–97.

[18] *Id.* at 212.

[19] H.R. Res. 195, 69th Cong., 1st Sess., S. Doc. No. 101, at 1–2 (1926).

[20] *Id.* at 3.

[21] *Id.* at 2.

[22] Jacobus TenBroek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, MINN. L. REV. 185, 194 (1939).

[23] *See* H.R. Res. 195, *supra* note 19, at 2.

subpoenaed. Inexplicably, § 6628 was ignored when Jack Smith sought your phone records and Judge Boasberg entered a secret, three-sentence, gag order that denied many of you the process required by law and chilled your ability to freely conduct business in violation of the Speech or Debate Clause of the U.S. Constitution.[24] A federal judge charged with enforcing the law should know when it applies to the highest officials within a coordinate branch of government. Unfortunately, Jack Smith went fishing and Judge Boasberg handed him a reel.

Judge Boasberg will surely dispute this characterization by citing Jack Smith's U.S. House Judiciary Committee testimony, where the former Special Counsel appears to confess his team did not notify Judge Boasberg that Congressional Republicans were the subjects of the gag order.[25] But even if true, one must ask the basis on which Judge Boasberg found, as he did, that "reasonable grounds" existed to find disclosure of the subpoenas would "result in destruction of or tampering with evidence, intimidation of potential witnesses, and serious jeopardy to the investigation."[26] Did Judge Boasberg merely rubber-stamp the requested gag order or was he willfully blind to the identities of those subpoenaed? Equally troubling is Judge Boasberg's failure to enter a show cause order against Smith for withholding your identities.[27] Smith had a duty not to ask for an order that violated § 6628; yet he did so. Judge Boasberg had a duty to make sure his gag order could be lawfully entered; yet he failed to do so. Both owe this Committee an explanation.

Judge Boasberg's failure to require Smith to show cause for the Special Counsel office's misconduct proves particularly troubling when contrasted with the judge's behavior in the second "imaginary case" he handled, *J.G.G. v. Trump*. That case involved petitioners who sought habeas relief from Judge Boasberg even though they were not physically within the court's jurisdiction. Nonetheless, Judge Boasberg unlawfully exercised jurisdiction over the case and on March 15, 2025, entered a temporary restraining order providing that the Trump Administration "shall not remove any of the individual plaintiffs from the United States . . . ."[28] But by the time Judge Boasberg entered that order, the government had already removed the named plaintiffs from the United States. The Supreme Court would later vacate Judge Boasberg's order holding that he lacked jurisdiction over the habeas petitioners.[29]

Undeterred, Judge Boasberg decided to pursue contempt proceedings against the Trump Administration, finding there was probable cause that the government had violated his March 15, 2025 temporary restraining order.[30] Here, the "imaginary case" language again resonates, as Judge Boasberg has continuously imagined he ordered the Trump Administration to do something that he had, in fact, not ordered. For example, Judge Boasberg wrote in his contempt opinion that: "On the evening of Saturday, March 15, 2025, this Court issued a written Temporary Restraining Order barring the Government from transferring certain individuals into foreign custody pursuant to the

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[24] U.S. CONST. art. I, § 6, cl. 1.
[25] Breanna Morello (@Breanna Morello), X (Dec. 31, 2025, 1:17 p.m.), https://x.com/BreannaMorello/status/2006474906050113838?s=20.
[26] Order, In re Application of USA for 2705(b) Nondisclosure Order for Grand Jury Subpoena #GJ20230524-E0361, No. 23-sc-1256 (D.D.C. May 25, 2023), https://www.grassley.senate.gov/imo/media/doc/verizon_subpoena_and_ndo_provided_to_chairman_grassley.pdf.
[27] Smith opaquely refers to some "departmental policy"—but obviously none trumps federal law. *See* Morello, *supra* note 25.
[28] Min. Order, J.G.G. v. Trump, No. 25-766, (D.D.C. Mar. 15, 2025).
[29] Trump v. J.G.G., 604 U.S. 670 (2025).
[30] J.G.G. v. Trump, 778 F. Supp.3d 24 (D.D.C. 2025), mandamus granted, order vacated, 147 F.4th 1044 (D.C. Cir. 2025).

Alien Enemies Act."[31] But Judge Boasberg did no such thing. Rather—again—he ordered the Trump Administration not to "remove any of the individual plaintiffs from the United States,"[32] however, they had already been removed by the time he entered that order. Most recently in his December 22 opinion ordering the return of 137 deported Venezuelans,[33] Judge Boasberg again falsely claimed that he had entered an "Order to not relinquish physical custody of the men . . . ."[34] Obviously, prohibiting the removal of individuals from the United States is not the same as barring the relinquishment of physical custody over the men. Under Judge Boasberg's revisionism, the latter always swallows the former but that is not what the text of his restraining order states.

The reason Judge Boasberg continues to misstate the substance of his temporary restraining order is clear—because the Trump Administration complied with the text of his March 15, 2025 order the only way for him to continue with his crusade against the Trump Administration is by spinning the substance of it.

Yet Judge Boasberg's abuse of power extends even further still. In late November, he entered an order demanding the unprecedented public disclosure of an Executive branch meeting between a Cabinet Secretary, a recently confirmed federal appellate judge, and the second highest-ranking official at the Justice Department.[35] The D.C. Circuit has not only stayed Judge Boasberg's order but also directed briefing to state the "legal basis" for Judge Boasberg's orders.[36]

Not only is Judge Boasberg seeking to interfere with the Executive Branch's operations through his contempt proceeding, mere days before Christmas, he also held that the Trump Administration must either facilitate the return of deported illegal alien gangsters or arrange to provide due process hearings in Venezuela.[37] These latest intrusions into a coordinate branch call to mind the old adage that "a mistake repeated more than once is a choice."

You, too, may have a choice. Judge Boasberg's contempt for the separation of powers not only fits comfortably within the impeachment standards described by Hamilton, Story,[38] and the abuse of power precedents discussed earlier—he deserves a unique category of his own. As Professor Jonathan Turley observes in relation to the secret subpoenas, "[i]t is difficult to overstate the gravity of this intrusion into the legislative branch."[39]

The cloak of judicial independence does not shroud a judge from accountability—before this body or the public. For facilitating violations of the U.S. Constitution and federal statutory law with respect to Members of this Congress and for pursuing a vengeful contempt expedition into the highest echelon of our national security officials, Judge Boasberg must be held accountable.

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[31] J.G.G., 778 F. Supp.3d at 30.
[32] Min. Order, J.G.G. v. Trump, No. 25-766 (D.D.C. Mar. 15, 2025).
[33] J.G.G. v. Trump, No. 25-766, 2025 WL 3706685 (D.D.C. Dec. 22, 2025).
[34] *Id.* at *2.
[35] J.G.G. v. Trump, No. 25-766, 2025 WL 3375370 (D.D.C. Nov. 28, 2025).
[36] In re: Donald J. Trump, No. 25-5452, 2025 WL 3628349 (D.C. Cir. Dec. 15, 2025).
[37] J.G.G., 2025 WL 3706685, at *19–20.
[38] In Justice Joseph Story's *Commentaries on the Constitution*, § 762 (1833), he cataloged impeachable judicial conduct as including "political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office."
[39] Jonathan Turley, *The Selective Outrage of Judge Boasberg,* THE HILL (Nov. 22, 2025) https://thehill.com/opinion/judiciary/5618336-the-selective-outrage-of-judge-james-boasberg/.

"Exhibit A"

Federal Judicial Impeachments by Offense and Year

Name of Judge	Jurisdiction	Offense	Year	Convicted?
John Pickering	D. N.H.	Intoxication	1803	Yes
Mark W. Delahay	D. Kan.	Intoxication	1873	No
Samuel Chase	U.S. Supreme Court	Abuse of Official Power	1804	No
James H. Peck	D. Mo.	Abuse of Official Power	1830	No
Charles Swayne	N.D. Fla.	Abuse of Official Power	1904	No
George W. English	E.D. Ill.	Abuse of Official Power	1926	No
West H. Humphreys	M.D., E.D., & W.D. Tenn.	Insurrection	1862	Yes
Robert W. Archbald	Comm. Ct. & 3d Cir.	Financial Impropriety	1912	Yes
Harold Louderback	N.D. Cal.	Financial Impropriety	1933	No
Halsted L. Ritter	S.D. Fla.	Financial Impropriety	1936	Yes
Harry E. Claiborne	D. Nev.	Financial Impropriety	1986	Yes
Alcee L. Hastings	S.D. Fla.	Financial Impropriety & Perjury	1988	Yes
G. Thomas Porteous, Jr.	E.D. La.	Financial Impropriety & Perjury	2010	Yes
Walter L. Nixon	S.D. Miss.	Perjury	1989	Yes
Samuel B. Kent	S.D. Tex.	Sexual Assault & Perjury	2009	No

Federal Judicial Impeachments by Offense