

## Expert Analysis

# Can Kavanaugh Be Impeached For Statements To Congress?

By **Barbara Radnofsky**

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Members of Congress, as well as a former congressional staffer, complain of lying, concealment and receipt of stolen information on the part of a D.C. Circuit Court of Appeals judge — misconduct which is alleged to have occurred both when he was a nominee for his current office, and since he has become a nominee for associate justice of the U.S. Supreme Court.

Is this member of the judicial branch potentially subject to impeachment — and if so, on what basis? The short answer: Yes, a sitting member of the federal judiciary is subject to impeachment for demonstrably harmful misconduct as he currently seeks to ascend to the Supreme Court, and for such misconduct in the past confirmation process for his current position.[1]



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Such an individual is subject to impeachment proceedings if the House finds sufficient evidence to charge harm or “manifest injury” to the country. Congress would typically charge misconduct such as lying or concealment of wrongdoing as corruption; corruption of the judicial process; undermining and betraying the trust of the people of the United States; bringing administration of justice into disrepute; undermining public confidence in the integrity and impartiality of the administration of justice and the judiciary; making material false statements about the nominee's past to the United States Senate and to the FBI in order to obtain office; impeding or obstruction of justice; and depriving the Senate and the public of information that would have had a material impact on the nominee's confirmation.

The modern House may charge strategically, in multiple articles, repeating, rewording and combining charges alleging a course of impeachable misconduct, relying on recent precedent involving an impeached and convicted federal judge, who was successfully prosecuted via multiple impeachment articles — with one article including misconduct prior to federal nomination.

If any article of impeachment is adopted by a majority of the House, the House members, serving as impeachment managers, present evidence to the Senate in the impeachment trial, and senators sit as judge and jury.

## The Facts

The facts are disputed. An impeachment investigation would necessarily involve testimony from multiple witnesses, and review of documents, some marked confidential.

Sitting U.S. senators and others, including the staffer who authored some allegedly confidential memos, accuse Judge Brett Kavanaugh of misconduct, including being untruthful in his nomination and confirmation processes for both the D.C. Circuit Court of Appeals and the U.S. Supreme Court.

Additionally, during his earlier work in the executive branch helping other judicial nominees navigate their confirmations, Kavanaugh allegedly received confidential documents not intended for him, including memos, letters and talking points of Democratic staffers, via a Republican source. Kavanaugh appears to have denied knowledge of documents that Sen. Patrick Leahy, D-Vt., says were stolen, and to have characterized such information as typically shared.

### ***Sen. Leahy's Allegations***

Sen. Leahy tweeted on Sept. 6, 2018, that "...Kavanaugh testified he never received any docs that even 'appeared to ... have been drafted or prepared by Democratic staff.' Well he got 8 pages of material taken VERBATIM from my files, obviously written by Dem staff, LABELED 'not [for] distribution.'"

Leahy, who showed images of documents in the Twitter thread, stated: "Here's more of that email stolen from Dem staff that was clearly marked 'not [for] distribution.'" The senator explained: "Kavanaugh was told that I received a sensitive letter 'in the strictest confidence' about a controversial nominee. He was asked to keep the information confidential and to take no action without further instruction. HE DIDN'T THINK THIS WAS 'untoward'? ... It is simply not 'normal' to get real-time insider intelligence from a Democratic 'mole' and marked 'spying.'"

During his first involvement in a judicial nomination process, did Kavanaugh feel a duty to keep confidential his alleged receipt of stolen information? Or did he feel he had true privilege to not disclose such information? If such privilege existed, was it waived for failure to assert?

House impeachment hearings could investigate whether Kavanaugh was honoring an illegal or corrupt request to conceal, even under oath before Congress, the alleged conduct of receiving stolen information. This could be pleaded in impeachment as perjury, lying, corruption, a betrayal of trust and a concealed conflict of interest.

A proper investigation can provide insight as to the scope of alleged harm. Sen. Leahy wrote that, with 102,000 documents still withheld, "mostly about judicial nom[ination]s, we can bet there's more." He opined regarding more than 100 questions answered in the nominee's past confirmations in 2004 and 2006: "His repeated denials that he didn't receive any stolen information and didn't suspect anything 'untoward' is SIMPLY NOT CREDIBLE."

### ***Sen. Feinstein's Allegations***

Similarly, Sen. Dianne Feinstein, D-Calif., alleged "Brett Kavanaugh used materials stolen from Democratic senators to advance President Bush's judicial nominees. He was asked about this in 2004, 2006 and this week. His answers were not true."

She noted that in 2004, Kavanaugh said he had not been involved in the nomination of federal appeals court judge Bill Pryor, but evidence suggests otherwise.

### ***Lisa Graves' Allegations***

Lisa Graves, the former chief counsel for nominations for the ranking member of the Senate Judiciary Committee, and the author of some of the allegedly stolen memos, wrote last week about recently revealed emails discussing and conveying several confidential memos from years ago, relating to alleged past misconduct. The emails reference spying, confidential documents and correspondence to counsel. Graves denies the memos were ever voluntarily shared or provided to Republicans as a routine matter, although others may argue that the materials were voluntarily shared.

Beyond the dispute about whether there was voluntary sharing of such materials, in “typical” fashion, Graves sums the gravamen of the particular complaint: lying. Nominee Kavanaugh, she says, was “repeatedly asked under oath as part of his 2004 and 2006 confirmation hearings for his position on the U.S. Court of Appeals for the D.C. Circuit about whether he had received such information from Miranda, and each time he falsely denied it.”

Graves cites two examples. Sen. Orrin Hatch, R-Utah, asked if he received “any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee.” Kavanaugh responded, unequivocally, “No.”

Sen. Ted Kennedy, D-Mass., asked him if he had any regrets about how he treated documents he had received from Miranda that he later learned were stolen. Kavanaugh rejected the premise of the question, restating that he never even saw one of those documents.

### **Legal Discussion**

A significant body of federal law, including debates and writings of the founders and participants at the Constitutional Convention and state ratifying conventions, and the 19 historical U.S. impeachment cases, teaches that high civil officers and aspirants to high federal office, are obliged — independent of criminal process — to not lie or otherwise undermine or betray public trust and confidence, regardless of whether such misconduct is job-related, under penalty of impeachment.

### ***Impeachment Conviction Requires Proof of Harm***

If high U.S. officers present a serious danger to the country, they are impeachable by the House and, if convicted in trial by the Senate, automatically removed from office. Impeachment is neither a criminal nor civil process; impeachment is a congressional process, carrying no criminal or civil penalty.

U.S. impeachment cases rely on the ancient term of art “high crimes and misdemeanors,” adapted by the framers of the Constitution to mean neither a “crime” nor “misdemeanor” as we now know those words. The phrase, at its core, serves to prevent further harm to the country, not to punish the officer other than by removing them from office or, in rare

instances, by barring them from holding future federal office.

In an impeachment proceeding, the House charges high officers with “manifest injury” or similar harm to the country. The House need not claim intent to harm; indeed, the first impeachment conviction in U.S. history — while the founders were alive — involved a senile federal judge, John Pickering, conceded to be incapable of forming intent. However, the founders and subsequent impeachment cases make it clear that impeachable offenses may include intentional conduct.

Such conduct may include lying, perfidy (faithlessness), treachery or betrayal of trust, obstruction of justice, perjury or subornation of perjury, and corruption of judicial process — all of which may underlie charges of bringing the administration of justice into disrepute. Historical impeachment charges focus on officers who “seriously undermined public confidence in their ability to perform” their official functions; much modern impeachment law involves lying.

### ***Lying by a Judge — Even Outside of Office — Is Impeachable***

Lying fits into the most basic category of judicial impeachment case law, used extensively in both the 1998-1999 impeachment of President Bill Clinton and in 21st century impeachments. The Clinton impeachment referred to the 1986 impeachment of federal district court judge Harry Claiborne, whose falsification of income tax returns was an act that “betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary.”

While it is “devastating” for the judiciary when judges are perceived as dishonest, the Clinton impeachment report argued, perjury by the president was “just as devastating to our system of government.” The report explained that both Claiborne and federal district court judge Walter Nixon, the subject of a 1989 impeachment, were impeached and convicted for perjury and false statements in matters distinct from their official duties. Likewise, the report noted the president’s perjurious conduct, though seemingly falling outside of his official duties, nonetheless constituted grounds for impeachment.

### ***Criminality Is Neither Required nor Sufficient for Impeachment***

Impeachable misconduct requires no crime — and mere proof of criminal conviction does not suffice to prove impeachable misconduct.

Judge Claiborne’s impeachment by the House for providing false information on federal income tax forms included the same facts that formed the basis of his earlier 1984 criminal conviction. The House impeached, and the Senate convicted, under impeachment articles 1 and 2, alleging that Claiborne engaged in misbehavior and “high crimes and misdemeanors,” and article 4, charging that the judge’s actions brought the “judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice.” The Senate did not, however, convict Claiborne on article 3, which claimed that asserting the fact of a criminal conviction (here, tax fraud) proved a U.S. “high crime” in office.

The Claiborne impeachment process demonstrates that the Constitution's mention of “high

crimes and misdemeanors” in regard to impeachment clearly does not refer to crimes or misdemeanors in modern parlance. The Claiborne case provides precedent: “undermining public confidence in the integrity and impartiality of the administration of justice” is clearly impeachable, while not in itself criminal. At the same time, proof of a criminal conviction is not in and of itself impeachable.

### ***Judges Lying to Obtain or Keep Their Positions***

Modern judicial impeachment convictions involving judges lying to obtain or keep federal judgeships reinforce the impeachment law concepts discussed above.

Lying to *keep* the job is clearly impeachable. Federal district court judge Samuel Kent repeatedly lied about his sexual misconduct, and abused his power to sexually assault his employees. After denying his abuses, Judge Kent finally admitted to lying and nonconsensual sexual conduct, and pled guilty to obstruction of justice.

The House's 2009 Kent impeachment proceedings were not based on his criminal conviction on obstruction of justice. The House performed its own investigation, meticulously proving Kent's underlying misconduct and his lies and coverups. After the House impeached, the Senate's declared readiness to try the case finally forced Kent's resignation from his high office, which he had retained in prison. (A criminally convicted federal judge — or president — retains his office, even if convicted and jailed.)

The lead House manager, Congressman Adam Schiff, D-Calif., explained to Lise Olsen of the **Houston Chronicle**: “Judge Kent's conduct undermined the institution of the judiciary and the public's confidence. ... Regrettably, impeachment was necessary to secure his removal from office, but I believe his resignation, when accepted will obviate the need to put his victims through any further ordeal.”

Likewise, lying to *get* the job is impeachable. This country's most recent impeachment conviction, that of federal district court judge G. Thomas Porteous Jr. in 2010, was built on historical impeachment law, including the 1912-13 impeachment and conviction of Robert Archbald for misconduct prior to his appointment to the United States Commerce Court.

Judge Archibald's misconduct was so immense that he was both removed from office and disqualified from holding any office of honor, trust or profit under the United States, the most extreme effect of impeachment conviction.

A century later, Congressman Schiff successfully handled the prosecution of Judge Porteous, impeached for current and past misconduct, including lies and coverups during his federal nomination process, with further lies and concealment of corrupt relationships predating any federal service.

In a May op-ed column for the New York Times, Schiff noted that Porteous was

accused of multiple acts of corruption, some of which preceded his appointment to the federal bench, and making false statements during his confirmation hearing. After a lengthy impeachment process in the House, the Senate convicted him on all

four charges and removed him from office....As we investigated and drafted his articles of impeachment, we faced the consequential decision of whether to charge Judge Porteous with conduct before he took office.

After much consideration, we decided to charge him not only for actions while he was on the federal bench, but also for a corrupt scheme he entered into with a bail bond company while a state court judge, and for the false statements he made during his Senate confirmation process. We had to go back nearly a century to the 1912 trial and conviction of Judge Robert Archibald to find a precedent.

Porteous was convicted on each impeachment article, including the fourth article charging that, prior to his appointment, and in connection with his nomination to be a U.S. district court judge, he “knowingly made material false statements about his past to both the United States Senate and to the FBI” in order to obtain his office; and that he had deprived the United States Senate and the public of information that would have had a material impact on his confirmation.

His lies, concealment and other misconduct as nominee clearly gave rise to independent impeachment liability. Upon impeachment conviction and removal from office, the Senate, in a rare decision, voted 94 to 2 to disqualify Porteous from holding any future federal office.

## **Conclusion**

In recent decades, Congress has made increasing use of the constitutional tool of impeachment. Half of all federal impeachment convictions in U.S. history — all concerning judges — have occurred from 1986 to the present. Impeachment’s purpose is not to punish, but to protect our country and system of government.

“A Brief Discussion of Impeachment,” a report to accompany the House resolution on impeachment of Judge Kent, noted that while that particular case involved criminal misconduct, criminality is not required for impeachment. The Kent report cited earlier House reports accompanying the impeachment resolutions against judges Walter Nixon and Alcee Hastings demonstrating that the “high crimes and misdemeanors” invoked in U.S. impeachments are “non-criminal,” and serve “simply to remove the offender from office” as “the ultimate means of preserving our constitutional form of government from the depredations of those who abuse or violate the public trust.”

Thus, U.S. impeachment law is clear: Misconduct, corruption, coverup and lying, in the process of a federal judge's nomination, vetting and confirmation, are independent impeachment grounds, per the Porteous impeachment and conviction; as is lying to keep the job, per the Kent impeachment and resignation; as is personal misconduct unrelated to the job, per the Claiborne impeachment conviction — in which the judge's actions were held to have “betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary.”

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[1] My book "A Citizen's Guide to Impeachment" offers background on the 19 cases of U.S. impeachment, including each case and the principles referenced herein. See particularly pages 28-31, 36-38, 52-54, 62, 65-70, 74-84 and accompanying endnotes.